



Education
Funding
Agency

~~7 November 2012~~
~~DRAFT FOR CONSULTATION~~
~~SUBJECT TO REVIEW AND APPROVAL BY HMT~~
ISSUED: JUNE 2013

DATED []

(1) THE SECRETARY OF STATE FOR EDUCATION

(2) [CONTRACTOR] LIMITED

DRAFT PSBP ~~PFI~~PF2

PROJECT AGREEMENT

PRIORITY SCHOOL BUILDING PROGRAMME (PSBP)

Standard Form Project Agreement

IMPORTANT NOTICE

This is the PSBP standard form Project Agreement (PA). The terms of the PA have been drafted to deal with programme-level issues and with the intention of minimising the time and costs of dealing with legal issues relating to PSBP. Each PA will be customised prior to issue to reflect local circumstances. The customisation will be done by the Education Funding Agency (EFA), which is the agency chosen by the Department for Education (DfE) to implement PSBP.

The private sector should note that any proposed amendments to the standard form PA will be one of the criteria taken into account by EFA in evaluating a bid response to an Invitation to Participate in Dialogue. Any proposed amendments to the standard form PA, save for when such proposed amendments (1) are scheme-specific changes supported by strong scheme-specific reasoning or (2) highlight genuine drafting errors, are likely to be negatively evaluated.

The PA has been based on the BSF standard form project agreement. It contains changes arising out of the issue of the SoPC4 Refinancing Addendum issued in April 2009 and other updates required by ~~UK/HMT up to 7 November 2012, along with~~ [HMT up to 30 May 2013, including its draft Standardisation of PF2 Contracts.](#) It also contains changes in legislation and good practice developed on BSF schemes. It is to be used on all PSBP projects.

The standard form PA will need to be analysed and reviewed in detail [by bidders](#) to ensure that its terms (and their impact) are clearly understood ~~by the relevant parties~~. The footnotes ~~should~~ [will](#) be removed ~~as appropriate~~ [by the Authority's lawyers](#) before finalisation of the document for execution.

Note that ~~HMT is carrying a review of PFI and that the outcome of that review may result in changes being made to this Project Agreement. In particular note that (i) new funding structures may be developed in consultation with HMT and these may be applied to PSBP and (ii) sharing mechanism for equity gains may be developed following the HMT review of PFI and applied to PSBP.~~ [An aggregator finance model has been developed and a separate set of amendments will be made available when that model is launched.](#)

Should you have any questions on the standard form PA you are asked to email your query to Dan Rudley at:

Daniel.Rudley@education.gsi.gov.uk

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Abstract	

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THIS AGREEMENT is made on []

BETWEEN

- (1) **THE SECRETARY OF STATE FOR EDUCATION** of Sanctuary Buildings, Great Smith Street, London SW1P 3BT (the **Authority**); and
- (2) **[CONTRACTOR] LIMITED** (company registered number []), whose registered office is at [] (the **Contractor**),

each one a **Party** and together the **Parties**.

BACKGROUND

- A The United Kingdom Government desires to have the private sector invest and participate in the design, construction, finance, and maintenance of [] secondary and [] primary schools, the details of which are set out in Schedule 4 (the **Schools**) pursuant to ~~the Private Finance Initiative⁺~~PF2.
- B By an advertisement dated [] ~~2012~~2013 in the Supplement to the Official Journal of the European Union, the Authority sought proposals pursuant to The Public Contracts Regulations 2006 (SI 2006 No.5) competitive dialogue procedure for the provision of the Schools and their subsequent operation and maintenance.
- C Following a selection process and subsequent ~~negotiations~~clarifications, the Authority has selected the Contractor and the Contractor has agreed to deliver the Works and the Services in accordance with the terms of this Agreement.
- D Each School Entity has entered into a Governing Body Agreement with the Authority to govern the arrangements and liabilities between them. Where a School Entity ~~does not own the relevant Site or~~ does not employ affected staff, the ~~Landowner and the~~ employer of the affected staff has entered into arrangements with the Authority. In addition, where a Site has Landowners other than the relevant School Entity, Landowners have entered into Landowner Agreements with the Authority.

⁺Use of term "PFI" subject to HMT review.

PART 1 - PRELIMINARY

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement and in the Background unless the context otherwise requires the following terms shall have the meanings given to them below:

1999 Act

the Local Government Act 1999;

Abandon

not to carry out any Works contemplated by the Construction Programme at a Site for twenty (20) consecutive Business Days or during sixty (60) Business Days (whether consecutive or not) in any Contract Year;

Academic Year

that period beginning on 1 September in any year and ending on 31 August in the following year^{2,1};

Academy

is a school in respect of which an agreement pursuant to Section 482 of the Education Act 1996 is in force or a school to which Academy arrangements pursuant to Section 1 of the Academies Act 2010 are in force;

Academy Trust

a legal entity with whom the Secretary of State has entered into:

- (a) an agreement pursuant to Section 482 of the Education Act 1996; or
- (b) Academy arrangements pursuant to Section 1 of the Academies Act 2010;

Acceptance Certificate

a certificate issued by the Independent Certifier confirming the Services Availability Requirements have been met;

Access to Work Permit

a permit agreed pursuant to the Access to Work Protocol allowing the Contractor or any Contractor Related Party to carry out repairs and/or maintenance at a School;

Access to Work Protocol

the protocol for applying for and agreeing Access to Work Permits set out in Schedule 23 (Access to Work Protocol);²

Active ICT Infrastructure

~~[]~~;

the infrastructure described as such in the Facilities Output Specification and the Contractor's Proposals;

^{2,1} Authority to consider whether these are the most appropriate start and end dates for the School Entities' Academic Years. This definition will be amended where Schools have different Academic Years.

² Protocol to be agreed post-bid.

Active ICT Infrastructure Tests³

the tests for Active ICT Infrastructure set out in [[4](#)];

Actual Relevant Insurance Cost

the aggregate of the [annual]^{4,5} insurance premiums reasonably incurred by the Contractor to maintain the Relevant Insurance during the Insurance Review Period but excluding insurance premium tax and all broker's fees and commissions;

Additional Permitted Borrowing

on any date, the amount equal to any amount of principal outstanding under the Senior Financing 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 Financing Agreements at Financial Close to be outstanding at that date, but only to the extent that:

- [\(a\)](#) ~~(a)~~ this amount is less than or equal to the Additional Permitted Borrowings Limit; and
- [\(b\)](#) ~~(b)~~ in respect of any Additional Permitted Borrowing the Agent is not in material breach of its obligations under clause [\[11.4.3\]](#) of the Direct Agreement as it applies to such Additional Permitted Borrowing,

and provided further that any such excess amount of principal which is (i) invested as part of any Qualifying Variation or (ii) outstanding from time to time as a result of any drawing under the Senior Financing Agreements as entered into at the date of this Agreement, disregarding any subsequent amendment or (iii) outstanding from time to time as a result of any amendment to the Senior Financing Agreements in respect of which the Authority has agreed that its liabilities on a termination may be increased pursuant to clause 54.2.1 shall not be counted as Additional Permitted Borrowing;

Additional Permitted Borrowings Limit

an amount equal to:

- [\(a\)](#) ~~(a)~~ ten percent (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 Financing Agreements is reduced to fifty percent (50%) or less of the Original Senior Commitment; and thereafter
- [\(b\)](#) ~~(b)~~ the higher of:
 - [\(i\)](#) ~~(i)~~ five percent (5%) of the Original Senior Commitment; and
 - [\(ii\)](#) ~~(ii)~~ the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in (a);

Additional School Period

such additional hours outside the School Day in respect of which the Services must be provided at each School as may from time to time be notified to the

³ Active ICT Infrastructure includes switches, wifi and associated equipment, which will be easy to install and test. An example of a test is one to show that each data point can 'see' every other data point on the network. The tests will be done at ICT Handover, i.e. at the same time as build completion and testing of passive ICT infrastructure.

⁴ [These will be worked up on a solution-specific basis and will be kept as simple as possible.](#)

⁴⁻⁵ This will depend on the frequency of payment of insurance premiums.

Contractor by the Authority in accordance with clause 29.2 (Additional School Periods);

Adjoining Property

any land and/or property adjoining or in the neighbourhood of the Sites and each and every part thereof including all conduits, roads, footpaths, walls, fences, buildings and other erections and all service media and other apparatus on, under or within such land and/or property;

Adjudicator

has the meaning given to it in clause 68.3 (Adjudication);

Adjusted Amount

has the meaning given to it in clause 67.5.4 (Unavailability of Terms or Conditions);

Adjusted Estimated Fair Value of the Contract

the Estimated Fair Value of the Contract, less an amount equal to the aggregate of:

- (a) ~~(a)~~ where relevant any Post Termination ~~Service~~Services Amounts paid to the Contractor (if a positive number);
- (b) ~~(b)~~ the Tender Costs; and
- (c) ~~(e)~~ amounts that the Authority is entitled to set off or deduct under clause 37.9 (Rights of Set Off),

plus an amount equal to the aggregate of:

- (i) ~~(i)~~ 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 Contract is calculated;
- (ii) ~~(ii)~~ any insurance proceeds and other amounts owing to the Contractor (and which the Contractor is entitled to retain) to the extent not included in (i) above; and
- (iii) ~~(iii)~~ the Post Termination ~~Service~~Services Amounts (if a negative number),

to the extent that:

- 1 (i), (ii) and (iii) above have not been directly taken into account in calculating the Estimated Fair Value of the Contract; and
- 2 the Authority has received such amounts in accordance with this Agreement or such amounts are standing to the credit of the Joint Insurance Account;

Adjusted Highest Compliant Tender Price

the Highest Compliant Tender Price less the aggregate of:

- (a) ~~(a)~~ any Post Termination ~~Service~~Services Amounts paid to the Contractor to date;
- (b) ~~(b)~~ the Tender Costs; and

~~(c)~~ ~~(e)~~ amounts that the Authority is entitled to set off ~~or deduct~~ under clause 37.9 (Rights of Set Off),

plus an amount equal to the aggregate of:

~~(i)~~ ~~(i)~~ 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;

~~(ii)~~ ~~(ii)~~ any insurance proceeds and other amounts owing to the Contractor, to the extent not included in (i) above; and

~~(iii)~~ ~~(iii)~~ the Post Termination ~~Service~~Services Amounts (if a negative number),

to the extent that:

1 (i), (ii) and (iii) above have not been directly taken into account in that Compliant Tender; and

2 the Authority has received such amounts in accordance with this Agreement;

Adverse Rights

any interests, rights, covenants, restrictions, stipulations, easements, customary or public rights, local land charges, mining or mineral rights, ~~franchise~~franchises, manorial rights and any other rights or interests in or over land, in each case whether or not registered that would, if exercised, prevent or disrupt the carrying out of the Works and/or the provision of the Services;

Affected Party

has the meaning given to it in the definition of Force Majeure Event in this clause 1.1 (Definitions);

Affiliate

in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company, and "holding company" and "subsidiary" shall have the meaning given to them in Section 1159 of the Companies Act 2006, save that for the purposes of determining whether one entity is an Affiliate of another any transfer of shares by way of security or to a nominee of the transferor shall be disregarded;

[Agent

[] in its capacity as agent for the Senior Lenders under the Senior Financing Agreements];

Agreed Form

in relation to any document, the form of the document agreed between the Parties and initialled by or on behalf of the Parties for the purpose of identification;

Agreement

this agreement (including its Schedules);

Alterations

any alteration, demolition, extension or, addition to any School in each case of a structural nature;

Amended Reinstatement Outline

has the meaning given to it in clause 66.3.3 (Obligations);

Ancillary Documents

the Building Contract, the FM Agreement, the Management Services Agreement and the guarantees under which the obligations of the Building Contractor under the Building Contract and the FM Contractor under the FM Agreement are respectively guaranteed (in each case to the Contractor) and any other documents to which the Authority is not a party and which are listed in Part 2 of Schedule 17 (Project Documents and Ancillary Documents)⁵⁶, copies of which have been initialled by the Parties for the purposes of identification, as they may be amended or replaced from time to time;

Ancillary Rights

- (a) ~~(a)~~ a non-exclusive licence to enter and remain upon those parts of the Sites that the Contractor and/or any Contractor Related Party requires access to in order to carry out the Works or provide the Services;
- (b) ~~(b)~~ such rights of access to and egress from the Sites as are necessary for the Contractor and any Contractor Related Party to perform their obligations and exercise their rights under this Agreement and in particular for the purposes of implementing the Works and providing the Services including those highlighted [] on the Site Plans, provided that such rights may be varied by the Authority and such variation will be deemed to be a Medium Value Change;
- (c) ~~(c)~~ rights of free and uninterrupted passage and running of water soil gas electricity telephone and other services including those highlighted [] on the Site Plans provided that such rights of passage may be varied by the Authority to such alternative routes as the Authority may reasonably specify from time to time; and
- (d) ~~(d)~~ the right where necessary to inspect repair maintain or renew the Services Media and the right (at the cost of the Contractor) to connect into the Services Media and to construct such new Services Media as may from time to time be necessary to serve the Sites provided that the prior written consent of the Authority is obtained (such consent not to be unreasonably withheld or delayed),

provided that:

- (i) ~~(i)~~ such rights are subject to the Specific Title Matters;
- (ii) ~~(ii)~~ the rights shall not in any circumstances entitle the Contractor or any Contractor Related Party to exclusive occupancy or exclusive possession of any part of the Sites (save as may be required by the Contractor and approved by the Authority (such approval not to be unreasonably withheld or delayed) in order to comply with relevant health and safety legislation) on a temporary basis; and
- (iii) ~~(iii)~~ such rights are exercised in accordance with the [PermitAccess](#) to Work Protocol;

Annual Contract Review

the review referred to in clause 39.1.1 (Annual Contract Reviews):

⁵⁻⁶ These will not include Financing Agreements.

Annual Review Reports

has the meaning set out in clause 39.1.2 (Annual Contract Reviews):

Annual Services Plan

a report prepared by the Contractor each year identifying and setting out a plan for improvement in the delivery of the Services to be implemented during the forthcoming year;

APB Distribution

for the period during which the Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first day of that period;

Approved Contractor Equipment

Contractor Equipment ~~which~~that has been returned or deemed to have been returned marked "no comment" under the Review Procedure;

Approved Purposes

has the meaning given to it in clause 70.1 (Project Data);

Approved RDD Item

an item of Reviewable Design Data which has been returned or deemed to have been returned marked "no comment" or "proceed subject to amendment" under the Review Procedure;

Area

has the meaning set out in Schedule 6 (Payment Mechanism);

Area Data Sheet

has the meaning set out in Schedule 6 (Payment Mechanism);

Asbestos

has the meaning given to it in the Control of Asbestos Regulations ~~2006~~2012 SI ~~2006/2739~~2012/632;

Asbestos Survey

the [insert references to surveys]^{6z};

[Asbo

an anti-social behaviour order as defined in the Crime and Disorder Act 1998;^{7a}]

As-built Drawings

drawings, technical information, models, operation and maintenance manuals and technical information of a like nature to encompass the method of construction, manufacture, operation and maintenance of each element of each School in sufficient detail to allow a competent person to understand all material elements of the construction of each School and to maintain, dismantle,

⁶ ~~The School Entity (or EFA) must~~⁷ The public sector will procure an Asbestos Management Survey of each Site forming part of the project prior to OBC to enable the Contractor to assess the risk profile of the Project. These surveys must form part of the information issued with the IPDSB (or be available in the Project data room at that time). The surveyor will be engaged ~~by the School Entity (or Local Authority)~~ on approved terms and will provide a warranty to each of the Contractor, its Building Contractor and the Senior Lenders. The Contractor is unlikely to be able to carry out Asbestos surveys prior to close unless an existing school is vacant at that time.

⁷ ~~Following the publication of the White Paper, Putting victims first: more effective responses to anti-social behaviour, the Government will legislate in due course~~⁸ The Anti-social Behaviour, Crime and Policing Bill contains measures to reform the anti-social behaviour regime. This definition will need to be ~~revised~~updated as and when that legislation is enacted.

reassemble, adjust and operate all plant, equipment, fixtures, structures and construction elements thereof;

Assets

all assets and rights to enable the Authority, the ~~relevant Local Authority~~ Relevant LEA, the relevant School Entity or a successor contractor to own, operate and maintain each School in accordance with this Agreement including:

- (a) ~~(a)~~ any land or buildings;
- (b) ~~(b)~~ any equipment;
- (c) ~~(c)~~ any books and records (including operating and maintenance manuals, health and safety manuals and other know how);
- (d) ~~(d)~~ any spare parts, tools and other assets (together with any warranties in respect of assets being transferred);
- (e) ~~(e)~~ any revenues and any other contractual rights; and
- (f) ~~(f)~~ any Intellectual Property Rights subject to and in accordance with clause 70 (Intellectual Property),

but excluding any assets and rights in respect of which the Authority, the Relevant LEA or the relevant School Entity is full legal and beneficial owner;

Assigned Employees

has the meaning given to it in clause 30.4.1.1 (Retendering);

Associated Company

in respect of a relevant company, a company which is a subsidiary, a Holding Company or a company that is a subsidiary of the ultimate Holding Company of that relevant company, and in the case of the Contractor shall include [Holdco and] each of the Shareholders^{8,9}, save that for the purposes of determining whether one entity is an Associated Company of another any transfer of shares by way of security or to a nominee of the transferor shall be disregarded;

Authorities' Policies

the policies of relevant Local Authorities^{9,10} referred to in Schedule 15 (Authorities' Policies), together with the policies listed in Annex 21 to each School-specific Brief in the Facilities Output Specification;

{Authority Change

has the meaning given to it in Part 1 of Schedule 24 (Change Protocol);}

⁸⁻⁹ If a fund or limited partnership or "50:50" owned vehicle (which is not a "subsidiary") or similar is in the relevant ownership chain of the Contractor, this definition will need to be expanded to cover it. If any of the holders of equity in the Contractor are limited partnerships or other funds, particular attention will need to be given to the Change of Ownership provisions during any lock-in period. To ensure that the intention of any lock-in is achieved, provisions should be considered requiring that the fund/limited partnership is at all times during the lock-in managed and advised by a member of the relevant bank's or Sub-Contractor's group (if they are a part of a bank or Sub-Contractor group and if the identity of this group is important to the Authority).

⁹⁻¹⁰ Note: there are no DfE policies set out in this document (but see the Facilities Output Spec). Authorities' Policies will be policies particular to the local authorities in whose area each School is. As a result, different Authorities' Policies may apply to different Schools in a project and this must be clarified in the schedule.

Authority Damage

any damage to any Site, the cost of which is the responsibility of the Authority pursuant to clause 64 (Damage to the Facilities);

Authority Default

one of the following events:

- (a) ~~(a)~~ an expropriation, sequestration or requisition of a material part of the Assets and/or shares of the Contractor [or Holdco]⁴⁹ by the Authority or other Relevant Authority;
- (b) ~~(b)~~ a failure by the Authority to make payment(s) of an amount of money exceeding (in aggregate) one month's Unitary Charge (from time to time) before deductions that is due and payable by the Authority under this Agreement within twenty (20) Business Days of service of a formal written demand by the Contractor, where the amount fell due and payable one (1) (or more) months prior to the date of service of the written demand;
- (c) ~~(c)~~ a breach by the Authority of its obligations under this Agreement which substantially frustrates or renders it impossible for the Contractor to perform its obligations under this Agreement for a continuous period of [two (2)] months; or
- (d) ~~(d)~~ a breach by the Authority of clause 71.1 (Restrictions on Transfer of this Agreement by the Authority);

Authority Default Termination Sum

the amount payable in accordance with clause 49 (Compensation on Termination for Authority Default/Voluntary Termination);

Authority Equipment

- (a) Initial Authority Equipment;
- (b) Approved Contractor Equipment transferred to the Authority pursuant to clause 11.7.10 (Equipment);
- (c) the replacements of the items described at paragraphs (a) and (b) provided by the Authority or the relevant School Entity pursuant to clause 11.7 (Equipment); and
- (d) other items of equipment (that do not fall into any of paragraphs (a) to (c)) supplied by the Authority or ~~the~~ School Entity during the Services Period,

⁴⁹11 Include reference to Holdco if relevant

[Authority Necessary Consents^{44_12}

[•] and [any Necessary Consents [other than Utilities Agreements] that as a matter of law the Contractor is not eligible to obtain];

Authority Notice of Change

has the meaning given to it in Part 1 of Schedule 24 (Change Protocol);

[Authority Planning Conditions^{42_13}

those conditions identified as Authority Planning Conditions in Schedule 18 (Authority Planning Conditions);]

Authority Related Party

(a) ~~(a)~~ an officer, agent, contractor, employee or sub-contractor (of any tier) of the Authority or School Entity acting in the course of his office or employment or appointment (as appropriate);

(b) ~~a School Entity;~~

(c) ~~(b)~~ in relation to any School Entity, any governor or member of that School Entity acting as such, or any teacher employed by that School Entity acting in the course of their employment;

(d) ~~(e)~~ in relation to any School, any Pupil at that School or any person visiting a School at the invitation (whether express or implied) of the Authority or the School Entity^{43_14}; and

(e)

(f) ~~(d)~~ [_____]^{44_17};

(g) [_____]¹⁵

^{44_12} Here should be listed all the consents/agreements other than Utilities Agreements that the Contractor cannot obtain or any other consents/agreements that the Authority has agreed to obtain or procure. It is envisaged that Authority Necessary Consents will primarily consist of consents/agreements that only the relevant landowner can obtain/enter into. While the Authority will not be the landowner it will have separate agreements with the landowners to back off this risk where appropriate. The Authority will not accept an obligation to obtain a consent/agreement where that consent/agreement is to be given/entered into by another public body (such as the Local Authority or relevant Highways Authority). The Authority must not be put in a position where a breach of its obligations to obtain an Authority Necessary Consent is due to an act or omission on the part of the Contractor and/or Contractor Related Party leading to a Compensation Event and possibly Authority Default. The Authority will consider whether the Contractor and/or Contractor Related Party's input is required in order for the Authority to comply with its obligation to obtain an Authority Necessary Consent, in which case the Contractor may also be required to accept obligations to assist in the obtaining of Authority Necessary Consents.

^{42_13} Here should be listed all of the conditions which the Contractor cannot discharge or any other conditions that the Authority has agreed to discharge. It is envisaged that Authority Planning Conditions will primarily consist of non-construction related conditions relating to the use and management of the property and other matters such as the preparation of Green Travel Plans. The Authority will have separate agreements with the landowners/occupiers of the Site, which will be used to back off this risk as appropriate. The preferred approach is to set out a schedule containing the division of responsibilities in respect of the discharge of planning conditions: in such circumstances the schedule must make it clear which conditions are Authority Planning Conditions. The Authority must not be put in a position where a breach of its obligations to discharge an Authority Planning Condition is due to an act or omission on the part of the Contractor and/or Contractor Related Party, leading to a Compensation Event and possibly Authority Default. The Authority must carefully consider the extent to which the Contractor and/or a Contractor Related Party's input is required in order for the Authority to comply with its obligation to discharge an Authority Planning Condition, in which case the Contractor may also be required to accept obligations to assist in the discharge of each Authority Planning Conditions; see clause **18.3A.3**.

^{43_14} This limb should be repeated for each School.

~~^{44_17} Where on a project specific basis there are particular reasons to do so (for example, where the School Entity shares the use of the Site or where the owner of the Site is not the School Entity), other persons for whom the~~

but excluding in each case the Contractor and any Contractor Related Parties;

Authority's Representative

the representative appointed by the Authority pursuant to clause 12 (Representatives);

Authority's Requirements

the requirements of the Authority in respect of the Project set out in Schedule 1 (Authority's Requirements);

[Authority Warranted Data

the information set out or described in Part 1 of Schedule 11 (Warranted Data);]^{45,16}

Available

as defined in Schedule 6 (Payment Mechanism), and "Unavailable", "Availability" and "Unavailability" construed accordingly;

Barred List

the barred lists provided for under the Safeguarding Vulnerable Groups Act 2006 as amended by the Protection of Freedoms Act 2012;

Base Case

the financial model agreed between the Parties prior to the date of this Agreement (as updated from time to time in accordance with the terms of this Agreement) for the purpose of, amongst other things, calculating the Unitary Charge;

Base Case Equity IRR

[INSERT NUMBER] per cent;^{46,17}

Base Cost

[£] being the amount as agreed at the Bid Date and set out in the Base Case which represents the insurance cost (which excludes amounts in respect of insurance premium tax and all broker's fees and commissions) which are proposed to be incurred to maintain the Relevant Insurance in each year following the final Services Availability Date, expressed in real terms as at the Bid Date;

Base Relevant Insurance Cost

the aggregate of the Base Costs which were (at the Bid Date) projected to be incurred to maintain the Relevant Insurance during the Insurance Review Period indexed by actual RPIX from the Bid Date up to the dates on which the Relevant Insurance was placed or renewed either immediately before or during the Insurance Review Period (as applicable in respect of the year in question) less any Base Relevant Insurance Reduction;

~~school is responsible should be added here. This footnote needs to be considered in the context of the whole life of the Project.~~

¹⁵ Where on a project-specific basis there are particular reasons to do so (for example, where the School Entity shares the use of the Site or where the owner of the Site is not the School Entity), other persons for whom the school is responsible should be added here. This footnote needs to be considered in the context of the whole life of the Project.

⁴⁵₁₆ This definition should only be used if data is included in Schedule 11.

⁴⁶₁₇ This is the real pre-tax (i.e. pre-tax with respect to Shareholders, post-tax with respect to the Contractor) blended rate of return for equity or amounts advanced under the Subordinated Financing Agreements (as appropriate) shown in the Base Case.

Base Relevant Insurance Reduction

the reduction to be made to the Base Relevant Insurance Cost in respect of a risk which has become Uninsurable or a term or condition which is no longer available and shall be an amount that is either:

- (a) ~~(a)~~ the amount by which the Base Relevant Insurance Cost would have been a lesser amount had such a risk been Uninsurable [or such a term or condition been unavailable]^{17,18} at the Bid Date (which amount, for the avoidance of doubt, can be £0); or
- (b) ~~(b)~~ if it is impossible to determine an amount pursuant to paragraph (a) above, an amount that is reasonable to be deducted from the Base Relevant Insurance Cost having due regard to:
 - (i) ~~(i)~~ the amount by which the Actual Relevant Insurance Cost is less than it would have been as a result of the risk becoming Uninsurable [or the term or condition becoming unavailable] (the Actual Reduction);
 - (ii) ~~(ii)~~ the size of the Actual Reduction as a percentage of the Actual Relevant Insurance Cost immediately prior to the risk becoming Uninsurable [or the term or condition becoming unavailable]; and
 - (iii) ~~(iii)~~ the effects of RPIX since the Bid Date;

Base Senior Debt Termination Amount

subject to clause 54.2 (Changes to Financing Agreements and Ancillary Documents):

- (a) ~~(a)~~ all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the Contractor to the Senior Lenders in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing); and
- (b) ~~(b)~~ all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Contractor to the Senior Lenders as a result of a prepayment in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing), or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement, subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible,

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below):

- (i) ~~(i)~~ all credit balances^{18,19} on any bank accounts (but excluding the Joint Insurance Account^{19,20} [and the [Distribution Account]^{20,21}]) held by or on behalf of the Contractor^{21,22} on the Termination Date;

^{17,18} Words in brackets to be deleted where the Authority agrees that clauses 67.5.4 and 67.5.5 can be deleted; please see footnote to those clauses for discussion.

^{18,19} Such references should also cover such credit balances whether they are held as cash (as with revenue accounts) or in the form of investments (as with reserve accounts).

^{19,20} Any proceeds standing to the credit of the Joint Insurance Account will continue to be used for reinstatement after the Termination Date. See clause 66 (Reinstatement and Change of Requirement after Insured Event).

- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Contractor as a result of prepayment of amounts outstanding in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing), or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement; and
- (iv) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have;

Bid Date

means []²²;
[]²³.

Building

any building or other erection at any of the Sites;

Building Contract

subject to clause 7.1 (Ancillary Documents) the building contract in the Agreed Form between the Contractor and the Building Contractor relating to the Works;

Building Contract Dispute

has the meaning given to it in clause 68.16.1 (Similar Disputes);

²⁰⁻²¹ This reference should only be included where the Senior Lenders do not have security or other rights to apply balances standing to the credit of the Distribution Account in discharge of amounts outstanding in respect of a Permitted Borrowing.

²⁴⁻²² This recognises that these balances will, in the ordinary course, be charged to the Senior Lenders as security and so on a termination can be set off by them against outstandings. It is sensible, therefore, not to pay such amounts, rather than to pay and subsequently recover such amounts. To the extent any accounts are not charged to Senior Lenders, they should be excluded from (i).

~~²² The Bid Date is the date on which the Contractor has fixed its price prior to appointment as the winning bidder. This will be the date of its response to the ITSFB. The Base Cost in bidders' models should be set at a long run median level such that the probabilities of the outturn costs being higher or lower in the future (after adjusting for RPI inflation) are the same. This is to ensure that the approach is consistent with the symmetrical sharing of Insurance Cost Differentials (i.e. +/- 30% thresholds etc.). Furthermore, the median level should be held constant in real terms (year on year) and not profiled, as this will help to ensure that the symmetrical cost sharing band works as intended. The Authority must take care to avoid accepting artificially depressed Base Cost figures which will underestimate the outturn unitary charge payment profile and simply lead to the Authority paying compensation above the upper 30% threshold during the Contract term. Conversely, they should not rely on the sharing of future cost reductions, below the lower 30% threshold, as justification for an overestimated Base Cost still representing value for money.~~

²³ The Bid Date is the date on which the Contractor has fixed its price prior to appointment as the winning bidder. This will be the date of its response to the ITSFB. The Base Cost in bidders' models should be set at a long run median level such that the probabilities of the outturn costs being higher or lower in the future (after adjusting for RPI inflation) are the same. This is to ensure that the approach is consistent with the symmetrical sharing of Insurance Cost Differentials (i.e. +/- 30% thresholds etc.). Furthermore, the median level should be held constant in real terms (year on year) and not profiled, as this will help to ensure that the symmetrical cost sharing band works as intended. The Authority must take care to avoid accepting artificially depressed Base Cost figures which will underestimate the outturn unitary charge payment profile and simply lead to the Authority paying compensation above the upper 30% threshold during the Contract term. Conversely, they should not rely on the sharing of future cost reductions, below the lower 30% threshold, as justification for an overestimated Base Cost still representing value for money.

Building Contractor

[INSERT NAME AND COMPANY REGISTERED NUMBER], or such other building contractor as the Contractor may, subject to clause 7 (Documents and Co-Operation), appoint to carry out the Works;

Building Contractor's Site Manager

the manager to be appointed by the Building Contractor for the purposes of supervision of all day to day activities on the Sites;

Building Contractor's Site Rules

the Building Contractor's rules, applicable on the Sites to the Authority, the relevant School Entity, the Contractor, the Building Contractor and their respective sub-contractors and suppliers of every tier during the construction of the Schools;

Building Manual

the manual for the Works containing:

Part 1

a copy of the health and safety file pursuant to the CDM Regulations (excluding those aspects of the same as fall within Part 2); and

Part 2

(a) ~~(a)~~ all As-built Drawings;

(b) ~~(b)~~ copies of all guarantees, warranties and maintenance agreements relating to the Works;

(c) ~~(c)~~ copies of all test certificates relating to the Works;

(d) ~~(d)~~ copies of all manufacturers' technical literature relating to the Works; and

(e) ~~(e)~~ copies of all operating and maintenance manuals relating to the Works;

[Buildings Survey

~~_____];²³ _____];²⁴~~

Business Day

a day (other than a Saturday or Sunday) on which banks are open for domestic business in the City of London;

Business Interruption Cover

the insurance specified in paragraph 2 of Part 2 of Schedule 14 (Insurances);

^{23, 24} A Buildings Survey of each Site must be provided where buildings are being retained and refurbished at an early stage in the procurement process to enable the Contractor to assess the risk profile of the Project. These surveys, which will be procured by EFA where the School Entity/Local Authority (or other owner or occupier) does not already have a suitable survey, must form part of the information issued with the IPDSB (or be available in the Project data room at that time). The surveyor will be engaged by EFA/the School Entity/Local Authority (or other owner or occupier) on approved terms and will provide a warranty to each of the Contractor, its Building Contractor and the Senior Lenders. These surveys, along with any additional such surveys carried out by the Contractor prior to close (see footnotes against clause 18.7.1) must be listed also.

Capital Expenditure

any expenditure which falls to be treated as capital expenditure in accordance with generally accepted accounting principles in the United Kingdom from time to time ~~or International Financial Reporting Standards from time to time~~;

Catering Equipment

~~means~~ those items of catering equipment included in the list of Group 1 equipment contained in paragraph 3 of the Facilities Output Specification and further detailed in the Area Data Sheets;

CDM Regulations

~~means~~ the Construction (Design & Management) Regulations 2007, together with the guidance set out in the most recently published approved code of practice thereto;

CGU

the Central Government Unit set up within HM Treasury to invest equity in PF2 projects;

Chairman

has the meaning given to it in paragraph 1.1 of Schedule 10 (Liaison Procedure);

Change

has the meaning given to it in Part 1 of Schedule 24 (Change Protocol);

Change in Costs

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 any Key Sub-contractors (without double counting), including, as relevant, the following:

- (a) ~~(a)~~ the reasonable costs of complying with the requirements of clauses 16 (Extensions of Time), 59 (Change in Law), 61.4 (Step-In without Contractor Breach), 73 (Financial Adjustments) and/or ~~Parts~~Part 2 to Part 4 of Schedule 24 (Change Protocol), including the reasonable costs of preparation of design and estimates;
- (b) ~~(b)~~ the costs of continued employment of, or making redundant, staff who are no longer required;
- (c) ~~(c)~~ the costs of employing additional staff;
- (d) ~~(d)~~ reasonable professional fees;
- (e) ~~(e)~~ 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 Unitary Charge;
- (f) ~~(f)~~ the effects of costs on implementation of any insurance reinstatement in accordance with this Agreement, including any adverse effect on the insurance proceeds payable to 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;

- ~~(g)~~ operating costs, or life cycle, maintenance or replacement costs;
- ~~(h)~~ Capital Expenditure (or, in the case of a Relevant Event which is a Qualifying Change in Law, Capital Expenditure for which the Authority is responsible);
- ~~(i)~~ the costs required to ensure continued compliance with the Financing Agreements;
- ~~(j)~~ any deductible or increase in the level of deductible, or any increase in premium under or in respect of any insurance policy; and
- ~~(k)~~ Direct Losses or Indirect Losses, including reasonable legal expenses on an indemnity basis;

Change in Law

the coming into effect after the date of this Agreement of:

- ~~(a)~~—Legislation, other than any Legislation which on the date of this Agreement has been published:
 - ~~(i)~~ in a draft Bill as part of a Government Departmental Consultation Paper;
 - ~~(ii)~~ in a Bill;
 - ~~(iii)~~ in a draft statutory instrument; or
 - ~~(iv)~~ as a proposal in the Official Journal of the European Communities;
- ~~(b)~~ any Guidance; or
- ~~(c)~~ any applicable judgment of a relevant court of law which changes a binding precedent;

Change in~~of~~ Ownership

- ~~(a)~~ any sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the shares in the Contractor and/or Holdco [and/or []^{24,25} (including the control over the exercise of voting rights conferred on those shares, control over the right to appoint or remove directors or the rights to dividends); and/or
- ~~(b)~~ any other arrangements that have or may have or which result in the same effect as paragraph (a);

Change in Revenue

in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated income of the Contractor and/or any Key Sub-contractors from income committed from third parties (without double counting);

^{24,25} To be considered carefully in light of each project's particular ownership structure, including how far up the ownership chain the Authority would require the change of ownership provisions to extend and whether limited partnerships or other non-corporate entities are used in the Contractor's ownership structure.

Collateral Warranty

a collateral warranty executed as a deed between the Authority and (as the case may be):

- (a) ~~(a)~~ the Building Contractor or the FM Contractor(s) in the relevant form set out in Schedule 7 (Collateral Warranties); or
- (b) ~~(b)~~ a Principal Building Sub-Contractor or a member of the Professional Team, in the relevant form set out in Schedule 7 (Collateral Warranties)²⁵~~26~~₂₇;

Commencement Date

the date of this Agreement;

Commercially Sensitive Information

the subset of Confidential Information listed in column 1 of Part 1 (Commercially Sensitive Contractual Provisions) and column 1 of Part 2 (Commercially Sensitive Material) of Schedule 21 (Commercially Sensitive Information) in each case for the period specified in the respective columns 2 of Parts 1 and 2 of Schedule 21;

Committed Stand-by Facility

a standby facility committed by the Senior Lenders at or at a date later than the date of this Agreement or, without prejudice to clause 54.2.1, as the same may be amended as allowed by clause 54 (Changes to Financing Agreements and Ancillary Documents) for the purposes of funding any unforeseen cost overrun, increased expenses or loss of revenues to be incurred by the Contractor²⁶~~27~~;

Compensation Date

either:

- (a) ~~(a)~~ if clause 51.2 (Retendering Procedure) applies, the earlier of:
 - (i) ~~(i)~~ the date that the New Contract is entered into; and
 - (ii) ~~(ii)~~ the date on which the Authority pays the Adjusted Highest Compliant Tender Price to the Contractor; or
- (b) ~~(b)~~ if clause 51.3 (No Retendering Procedure) applies, the date on which the Adjusted Estimated Fair Value of the Contract has been agreed or determined;

Compensation Event

a breach by the Authority of any of its obligations or of any warranty under this Agreement;

Compliant Tender

any tender submitted by a Compliant Tenderer that meets the Qualification Criteria notified under clause 51.2.3 (Retendering Procedure);

²⁵~~²⁶~~ If an alternative form of Collateral Warranty is agreed in a form compliant with clause ~~5.1.12~~5.1.13 this form will be included as a new part of Schedule 7. See footnote to clause ~~5.1.12~~5.1.13.

²⁶ ~~This definition is to be used in all project agreements, whether there is a Committed Standby Facility at financial close or not.~~

²⁷ ~~This definition is to be used in all project agreements, whether there is a Committed Standby Facility at financial close or not.~~

Compliant Tenderer

a tenderer who is a Suitable Substitute Contractor;

Confidential Information

(a) ~~(a)~~ information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either Party and all personal data and sensitive personal data within the meaning of the DPA; and

(b) ~~(b)~~ Commercially Sensitive Information;²⁷⁻²⁸

Construction Panel

has the meaning given to it in clause 68.4.1 (Identity of Adjudicator);

Construction Period Insurance

the Required Insurances in respect of the period from the date of this Agreement to the Services Availability Date for each School;

Construction Programme

the programme for the carrying out of the Works as contained in Part 3 of Schedule 2 (Contractor's Proposals) as updated from time to time in accordance with clause 11 (Construction Programme) or Schedule 8 (Review Procedure);

Construction Proposals

the proposals for the [provision/refurbishment] of the Schools to satisfy the Facilities Output Specification, as set out in Schedule 2 (Contractor's Proposals) Part 1 and as amended pursuant to the terms of this Agreement;

Contamination

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);

Contingent Funding Liabilities

the contingent or future liabilities to subscribe for equity or subordinated debt (if any) at the relevant time of:

- (a) the Shareholders; and/or
- (b) the Subordinated Lenders; and/or
- (c) any other parties providing equity or subordinated debt,

owed under any of the Financing Agreements to the Contractor, Holdco and/or the Senior Lenders together with, without double counting, any security (by way of letter of credit, guarantee or otherwise) for those liabilities²⁸⁻²⁹;

Continuation Notice

has the meaning given to it in clause 45.7 (Notice to Continue);

²⁷⁻²⁸ Any information or classes of information that the Parties agree should be treated as Commercially Sensitive Information should be included in Schedule 21 (Commercially Sensitive Information). The Authority ~~should~~will be mindful of guidance on this issue when agreeing which information should be categorised as commercially sensitive. This can cover specific bid information (for specific periods) or other types of generic information but broad blanket categorisations are not appropriate.

²⁸⁻²⁹ This definition is to be used in all project agreements whether the Contractor believes there is a Committed Standby Facility at financial close or not.

Contract Efficiency Review

the contract efficiency review referred to in clause 39.2.2 (Efficiency Reviews);

Contract Efficiency Review Date

has the meaning given to it in clause 39.2.2 (Efficiency Reviews);

~~**Continuous Contract Improvement Plan Report**~~

~~the plan set out at section [] of the Service Delivery Proposals²⁹;
the report referred to in clause 39.2.4 (Efficiency Reviews);~~

Contract Period

the period from and including the Commencement Date to the Expiry Date, or if earlier, the Termination Date;

Contract Review Date

each contract review date as referred to in clause 39.2.2 (Efficiency Reviews);

Contract Year

a period of twelve (12) months commencing on 1 April, provided that:

- (a) ~~(a)~~ the first Contract Year shall be the period commencing on the Commencement Date and ending on the immediately following 31 March; and
- (b) ~~(b)~~ the final Contract Year shall be the period commencing on 1 April immediately preceding the last day of the Contract Period and ending on that day;

Contractor Change

has the meaning given to it in Part 1 of Schedule 24 (Change Protocol);

Contractor Default

any one or more of the following:

- (a) following the Services Availability Date for a School a breach by the Contractor of any of its warranties or obligations under this Agreement which materially and adversely affects the performance of the Educational Services at that School;
- (b) a Persistent Breach occurs;
- (c) a court makes an order that the Contractor [or Holdco] be wound up or a resolution for a voluntary winding-up of the Contractor [or Holdco] is passed;
- (d) any receiver or manager in respect of the Contractor [or Holdco] is appointed or possession is taken by or on behalf of any creditor of any property of the Contractor [or Holdco] that is the subject of a charge;
- (e) any voluntary arrangement is made for a composition of debts or a scheme of arrangement is approved under the Insolvency Act 1986 or the Companies Act 2006 in respect of the Contractor [or Holdco];
- (f) an administration order is made or an administrator is appointed in respect of the Contractor [or Holdco];

²⁹ ~~See requirements set in Services Output Specification as to continuous improvement requirements. It needs to include clear, identifiable targets and a process for its review and revision on a regular basis. This is a bid-back item.~~

- (g) a (i) failure by the Contractor to comply with clause 71.2 (Restriction on the Contractor) or (ii) breach of clause 72 (Change ~~in~~of Ownership) occurs;
- (h) the Contractor Abandons the Works at any time;
- (i) the Contractor has not commenced the Works ~~{at each Site}~~ by the Start on Site Date ~~{for that Site}~~;
- (j) the Acceptance Certificate for each School has not been issued by the Longstop Date;
- (k) in any three (3) month period the Authority has been entitled to make aggregate Monthly Unitary Payments of less than seventy-five per cent (75%) of the aggregate Monthly Unitary Charge for that period as a result of Unavailability Deductions;
- (l) in each and every month of any six (6) month period the Authority has been entitled to make a Monthly Unitary Payment of less than ninety per cent (90%) of the Monthly Unitary Charge as a result of Service Failure Deductions;
- (m) the School Unavailability Threshold occurs in relation to the same School in any three (3) consecutive months or any four (4) months during any twelve (12) month period;
- (n) in any three (3) month period an individual School has been Unavailable for twenty (20) days or more;
- (o) subject to clause 67 (Risks that become Uninsurable) a breach by the Contractor of its obligations to take out and maintain any of the Required Insurances; or
- (p) 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 Related Party or the Authority under the Health and Safety Regime (an **H&S Conviction**) provided that an H&S Conviction of a Contractor Related Party or the Authority shall not constitute a Contractor 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 of each relevant Contractor Related Party (which in the case of an individual director, officer or employee shall be deemed to include the Contractor Related 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 71.2 (Restriction on the Contractor) provided always that in determining whether to exercise any right of termination or right to require the termination of the engagement of a Contractor Related Party under this limb (o), the Authority shall:
 - (i) ~~(i)~~ 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
 - (ii) ~~(ii)~~ give all due consideration, where appropriate, to action other than termination of this Agreement;

Contractor Equipment

those items of furniture, fixtures and equipment identified on the room data sheets contained in Part 1 of the Authority's Requirements;

Contractor Equipment Provisional Sum

[**NOTE: Authority will specify**];

Contractor ICT Handover Period Activities

has the meaning given to it in clause 11.11.1;

Contractor Notice of Change

has the meaning given to it in Part 1 of Schedule 24 (Change Protocol);

Contractor Related Party

(a) ~~(a)~~—an officer, servant or agent of the Contractor, or any Affiliate of the Contractor and any officer, servant or agent of such a person;

(b) ~~(b)~~—any Sub-Contractor or sub-contractor of the Contractor of any tier and any of their officers, servants or agents; and

(c) ~~(c)~~—any person on or at any of the Schools at the express or implied invitation of the Contractor (other than an Authority Related Party);

Contractor's Annual Services Report

the report to be prepared by the Contractor each year by no later than [³⁰] reporting on the matters set out in the table in Part XVII of Schedule 6 (Payment Mechanism) for the previous year;

Contractor's Proposals

the proposals of the Contractor to deliver the Project to satisfy the Authority's Requirements, as set out in Schedule 2 (Contractor's Proposals) and as amended pursuant to the terms of this Agreement;

Contractor's Representative

the person to be appointed by the Contractor pursuant to clause 12 (Representatives);

Contractor Termination Notice

has the meaning given to it in clause 41.2.1 (Termination on Authority Default);

Contractor Warranted Data

the information relating to the Contractor and its Affiliates contained in Part [2] of Schedule 11 (Warranted Data);

Contribution

has the meaning given to it in clause 21A.1 (Authority Capital Contribution);

Convictions

other than in relation to any minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding overs (including any spent convictions as contemplated by section 1(1) of the Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order);

COSHH

the Control of Substances Hazardous to Health Regulations 2002;

³⁰ Insert date by which the report is to be produced each year.

Current Employer

the Relevant LEA and/or the School Entity or any existing third party contractor to the Relevant LEA and/or the School Entity;

Customer Satisfaction Survey

~~has the meaning given to it in clause 37.13.1 (Customer Satisfaction Survey);~~

Customer Satisfaction Survey Date

~~[INSERT DATE OF FIRST SURVEY] and each anniversary thereof during the Contract Period;~~

Damage Funding

has the meaning given to it in clause 64.7 (Damage to the Facilities);

Decant Protocol

the protocol set out in Schedule 22 (Decant Protocol) identifying the obligations and the responsibilities of the Parties in relation to the removal of items from the Existing Schools and their relocation to and installation in the Schools;

Deductions

any or all (as the case may be) of Unavailability Deductions, [Unavailable but Used Deductions](#), Service Failure Deductions or Reporting Deductions;

Deemed New Contract

an agreement on the same terms and conditions as this Agreement as at the Termination Date, but with the following amendments:

- ~~(a)~~ (a) if this Agreement is terminated during the Works Period, then the relevant Planned ICT Handover Date and the relevant Planned Services Availability Dates shall be extended by such period as would have been granted to allow a New Contractor to achieve completion of the Works at the Schools in question;
- ~~(b)~~ (b) [if this Agreement is terminated after a Services Availability Date at a School but before the Post Completion Works Acceptance Date at that School, then the relevant Planned Post Completion Works Acceptance Date shall be extended by such period as would have been granted to allow a New Contractor to achieve completion of the Post Completion Works at the affected School;]
- ~~(c)~~ (c) ~~(e)~~—any accrued warning notices issued pursuant to clause 42 (Termination for Persistent Breach by the Contractor) or Deductions or Unavailability shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled;
- ~~(d)~~ (d) ~~(d)~~—if the Ratchet is being applied pursuant to paragraph ~~56~~ of Schedule 6 (Payment Mechanism), the Ratchet shall be reset for the purposes of termination only; and
- ~~(e)~~ (e) ~~(e)~~—the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date;

Default Interest

any increased margin that is payable to the Senior Lenders or which accrues as a result of any payment due to the Senior Lenders not being made on the date on which it is due;

Defects

any defect in any of the Buildings, or any part of them, or anything installed in any of the Buildings or any defect that is attributable to:

- (a) ~~(a)~~ defective design;
- (b) ~~(b)~~ defective workmanship or defective materials (which shall exclude Asbestos), plant or machinery having regard to Good Industry Practice and to appropriate British or European Union standards and codes of practice current at the date of construction of the Buildings;
- (c) ~~(c)~~ the use of materials in the construction of any Building which (whether or not defective in themselves) prove to be defective in the use to which they are put;
- (d) ~~(d)~~ defective installation of anything in or on any Building;
- (e) ~~(e)~~ defective preparation of the Site on which any Building is constructed; or
- (f) ~~(f)~~ defects brought about by adverse ground conditions or by reason of subsidence, water table change or any other change to ground conditions;

Design Data

all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the Schools in each case that is used by or on behalf of the Contractor and/or its sub-contractors in connection with the provision of the Works or Services or the performance of the Contractor's obligations under this Agreement;

Direct Agreement

the direct agreement dated on or about the date of this Agreement and made between the Authority, the Contractor, the Agent [and the Trustee];

Directive

EC Council Directive 2001/23/EC;

Direct Losses

all damages, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an indemnity basis), proceedings, demands and charges whether arising under statute, contract or at common law but excluding Indirect Losses;

Disclosed Data

information relating to the Project disclosed to the Contractor and/or the Shareholders and/or any advisers to the Contractor or the Shareholders before the date of this Agreement including:

- (a) ~~(a)~~ the procurement documents (including but not limited to the Invitation to Participate in Dialogue and Submit Bids dated []);
- (b) ~~(b)~~ the descriptive document issued by the Authority on [date] in relation to the Project;

- (c) ~~(e)~~ the data room located at [**insert details**]^{30_31};
- (d) ~~(d)~~ the results of any investigations and surveys carried out at the Sites or any Buildings (whether carried out by or on behalf of the Contractor or the Authority); and
- (e) ~~(e)~~ [others];

Disclosure and Barring Scheme

the disclosure and barring scheme operated by the Disclosure and Barring Service;

Disclosure and Barring Service

the non-departmental public body established pursuant to the Protection of Freedoms Act 2012;

Discriminatory Change in Law

a Change in Law, the terms of which apply expressly to:

- (a) ~~(a)~~ the Project and not to similar projects ~~procured under the PFI~~;
- (b) ~~(b)~~ the Contractor and not to other persons; and/or
- (c) ~~(c)~~ ~~persons who have contracted with the Government, a Local Authority or other public or statutory body to provide services under the PFI~~ PPP contractors and not to other persons;

Disputed Amount

has the meaning given to it in clause 37.5.2 (Disputed Amounts);

Dispute Resolution Procedure

the procedure for the resolution of disputes set out in clause 68 (Dispute Resolution);

Disruption Event

a failure by the Contractor to carry out the Works in accordance with this Agreement the result of which is that an Existing School (or part thereof) cannot reasonably continue to be used for the provision of Educational Services;

Distribution

- (a) ~~(a)~~ whether in cash or in kind any:
 - (i) ~~(i)~~ dividend or other distribution in respect of share capital;
 - (ii) ~~(ii)~~ reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
 - (iii) ~~(iii)~~ payments under the Subordinated Financing Agreements (whether of principal, interest, breakage costs or otherwise);
 - (iv) ~~(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; or

^{30_31} If documents are issued on a CD instead, this must be amended.

- (v) ~~(v)~~—the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms; or
- (b) ~~(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;

DPA

the Data Protection Act 1998;

Educational Services

the provision of teaching and pastoral support for school age children, the provision of careers advice, liaison with parents and guardians of Pupils and the carrying on of extra-curricular activities for Pupils and the use of school accommodation by the local community;

EEA

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;

Elective Services

those services listed in Appendix 3 to Schedule 24, any of which under the terms of this Agreement, the Authority or a School may elect from time to time that the Contractor performs as part of the Services;

Emergency

an event causing or, in the reasonable opinion of ~~a Party~~ the Authority, 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~~ which prevents:

(a) the normal operation of a School; and/or

(b) the Services operating under normal circumstances ~~and requiring~~.

and, in each case, requires the mobilisation ~~and organisation~~ of the emergency services;

Employee Costs

(a) the costs incurred by the Contractor (or any relevant sub-contractor) associated with employing the Transferring Staff from the Service Transfer Date to the earlier of (i) the date of dismissal by the Contractor (or relevant sub-contractor) under clause 30.1.2.3 (No Employee Transfer), or (ii) two (2) months from the Decision Date; and

(b) any redundancy payment, enhanced pension payable on early retirement or redundancy, notice pay or payment in lieu of notice, and any accrued by untaken holiday entitlements due to any Transferring Staff and which are required by Legislation or by contract to be made to clause 30.1.2.3 (No Employee Transfer) where notice is given within two (2) months of the Decision Date.

Employee Liability Information

the employee liability information to be provided pursuant to Regulation 11 of TUPE;

Employment and Skills Method Statement

the method statement produced by the Contractor and forming part of the Construction Proposals and which sets out in detail how the Contractor shall implement the Employment and Skills Plan;

Employment and Skills Plan

the employment and skills plan produced by the Contractor and forming part of the Construction Proposals to be complied with and implemented by the Contractor in order to execute the Employment and Skills Strategy;

Employment and Skills Strategy

the Authority's Employment and Skills Strategy as set out in ~~section []~~ of [Annex 2 to](#) the Facilities Output Specification;

Environmental Information Regulations

the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such regulations;

EPB Regulations

The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 together with any guidance from time to time published by any Government Department, body or agency in relation to such regulations;

Equalities Legislation

the Racial and Religious Hatred Act 2006, the Civil Partnership Act 2004, the Sex Discrimination (Gender Reassignment) Regulations 1999; the Gender Recognition Act 2004; the Employment Equality (Sex Discrimination) Regulations 2005; the Employment Equality (Age) Regulations 2006, the Equality Act 2006; and the Equality Act 2010;

Equality Requirements

the requirements set out in Schedule 20 (Equality Requirements);

Equity IRR

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;

Estimate

has the meaning given to it in Schedule 24 (Change Protocol);

Estimated Change in Project Costs

in respect of any Relevant Event the aggregate of any Change in Costs and/or (without double counting) Change in Revenue (as relevant);

Estimated Fair Value of the Contract

the amount determined in accordance with clause 51.3 (No Retendering Procedure) that a third party would pay to the Authority as the market value of the Deemed New Contract;

Estimated Increased or Decreased Maintenance Costs

has the meaning given to it in clause 23.4.7 (Schedule of Programmed Maintenance);

Examination Period

the external examination periods for the Schools published by the Relevant LEA or the School Entity for each Academic Year and notified by the Authority to the Contractor in accordance with clause 11.2 (Examination Periods);

Exceptional Cost

for an Insurance Review Period, the extent to which there is an Insurance Cost Increase which exceeds in amount 30% of the Base Relevant Insurance Cost for that Insurance Review Period;³²

Exceptional Saving

for an Insurance Review Period, the extent to which there is an Insurance Cost Decrease which exceeds in amount 30% of the Base Relevant Insurance Cost for that Insurance Review Period;³³

Excluded Equipment

those items of furniture, fixtures and equipment identified by the Authority to the Contractor not less than ten (10) Business Days prior to the relevant Services Availability Date as available neither for use in the Schools nor for the Contractor to use for any other purpose;

Excluded Pupil

~~any former pupil of a School who has been permanently excluded from that School pursuant to the Education Act 2002;~~

Exempt Refinancing

- (a) ~~(a)~~ any Refinancing that was fully taken into account in the calculation of the Unitary Charge;
- (b) ~~(b)~~ a change in taxation or change in accounting treatment;
- (c) ~~(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) ~~(i)~~ breach of representations and warranties or undertakings;
 - (ii) ~~(ii)~~ movement of monies between the Project Accounts in accordance with the terms of the Senior Financing Agreements;
 - (iii) ~~(iii)~~—late or non-provision of information, consents or licences;
 - (iv) ~~(iv)~~—amendments to Sub-Contracts;
 - (v) ~~(v)~~—approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Senior Financing Agreements);
 - (vi) ~~(vi)~~—restrictions imposed by the Senior Lenders on the dates at which the Senior Debt can be advanced to the Contractor under the Senior Financing Agreements and/or amounts released from the [Escrow Account] during the [Initial Availability Period], each as defined in the Senior Financing Agreements³⁴ and which are given

³² [The Authority will retain the insurance cost increase level at 30% and expects bidders to price on this basis.](#)

³³ [The Authority will retain the insurance cost saving level at 30% and expects bidders to price on this basis.](#)

³⁴ ³⁴ These definitions should follow those contained in the Senior Financing Agreements, the Initial Availability Period being the construction phase drawdown period. These will need to be checked.

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 are notified in writing by the Contractor or the Senior Lenders to the Authority prior to being given;

- (vii) ~~(vii)~~—changes to milestones for drawdown and/or amounts released from the [Escrow Account] during the [Initial Availability Period] set out in the Senior Financing 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 are notified in writing by the Contractor or the Senior Lenders to the Authority prior to being given;
- (viii) ~~(viii)~~—failure by the Contractor to obtain any consent by statutory bodies required by the Senior Financing Agreements; or
- (ix) ~~(ix)~~—voting by the Senior Lenders and the voting arrangements between the Senior Lenders in respect of the levels of approval required by them under the Senior Financing Agreements;
- (d) ~~(d)~~ any amendment, variation or supplement of any agreement approved by the Authority as part of any Qualifying Variation under this Agreement;
- (e) ~~(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 capital of the Contractor³²];
- (f) ~~(f)~~—any sale or transfer of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements or securitisation of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements; or
- (g) ~~(g)~~ any Qualifying Bank Transaction;

Existing School

a School listed in Schedule 4 (Schools) but excluding any new facilities comprising the Works;

Expiry Date

[31 August 20__];

Facilities Output Specification

the requirements of the Authority in relation to the provision of the Schools set out in Part 1 of Schedule 1 (Authority's Requirements);

Fair Value

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 liquidation sale;

³²35 This clause therefore means that any grant of new rights over the Contractor's assets, cashflows or contracts in conjunction with this transfer would not be exempt.

Fees Regulations

the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;

Final Survey Date

the date that the final survey takes place pursuant to clause 47 (Surveys on Expiry and Retention Fund);

Final Warning Notice

has the meaning given to it in clause 42.2 (Final Notice);

Financial Close

has the meaning given to it in the Senior Credit Agreement³³₃₆, as at the date of this Agreement;

Financing Agreements

all or any of the agreements or instruments entered into or to be entered into by the Contractor or any of its Associated Companies relating to the financing of the Project (including the Initial Financing Agreements and any agreements or instruments to be entered into by the Contractor or any of its Associated Companies relating to the re-scheduling of their indebtedness or any Refinancing);

Financing Default³⁴₃₇

[];

First Insurance Review Date

the first Business Day following the first anniversary of the Relevant Insurance Inception Date;

Five Year Maintenance Plan

the maintenance plan provided by the Contractor to the Authority in accordance with clause 23.4.9 (Schedule of Programmed Maintenance);

FM Agreement

subject to clause 7.1 (Ancillary Documents) the agreement in the Agreed Form between the Contractor and the FM Contractor relating to the Services;

FM Agreement Dispute

has the meaning given to it in clause 68.16.2 (Similar Disputes);

FM Contractor

[INSERT NAME AND COMPANY NUMBER], or such other facilities management contractor as the Contractor may, subject to clause 7 (Documents and Co-operation), appoint to provide the Services;

FOIA

the Freedom of Information Act 2000 and any subordinate legislation (as defined in Section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such Act;

FOIA Code

has the meaning given to it in clause 62.10.8 (Freedom of Information);

³³₃₆ To be checked against final version of Senior Credit Agreement.

³⁴₃₇ This should be defined by reference to the borrower defaults under the Senior Financing Agreements (and applies whether or not the Senior Lenders choose to accelerate their loan). Please see clause 82.7.

Force Majeure Event

the occurrence after the date of this Agreement of:

- (a) ~~(a)~~ war, civil war, armed conflict or terrorism;
- (b) ~~(b)~~ nuclear, chemical or biological contamination unless the source or cause of the contamination is as a result of any act by the Contractor or its sub-contractors or any breach by the Contractor of the terms of this Agreement; or
- (c) ~~(c)~~ pressure waves caused by devices travelling at supersonic speeds,

which directly causes either Party (the **Affected Party**) to be unable to comply with all or a material part of its obligations under this Agreement;

Future Service Provider

shall have the meaning given in clause 30.3.1 (Indemnities);

General Change in Law

a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law;

Good Industry Practice

that degree of skill, care, prudence and foresight and operating practice which would reasonably and ordinarily be expected from time to time of a skilled and experienced operator (engaged in the same type of undertaking as that of the Contractor or, in the case of the Soft Services, the relevant Authority Related Party) or facilities management contractor or building contractor or any sub-contractor under the same or similar circumstances;

Governing Body

a governing body constituted in accordance with Section 19 of the Education Act 2002 or established under agreement by virtue of Section 482 of the Education Act 1996 or established pursuant to ~~academy~~Academy arrangements under Section 1 of the Academies Act 2010 or constituted in accordance with Schedule 6 (governing bodies consisting of interim executive members) of the Education Inspections Act 2006;

Governing Body Agreements

the agreements dated on or before the date of this Agreement made between the Authority and each School Entity;

Ground Investigation Surveys

[³⁸];

Guidance

any applicable guidance or directions with which the Contractor is bound to comply;

³⁸ A Ground Investigation Survey of each Site must be provided at an early stage in the procurement process to enable the Contractor to assess the risk profile of the Project. These surveys, which will be procured by FFA where the School Entity/Local Authority (or other owner or occupier) does not already have a suitable survey, must form part of the information issued with the IPDSB (or be available in the Project data room at that time). The surveyor will be engaged by FFA/the School Entity/Local Authority (or other owner or occupier) on approved terms and will provide a warranty to each of the Contractor, its Building Contractor and the Senior Lenders.

Handback Requirements

the requirements relating to the condition of the Schools set out in paragraphs 1.4.4.6 ~~to and~~ 1.4.4.7 of the Facilities Output Specification and ~~paragraphs 2.7.33 to 2.7.36~~ paragraph 2.6.11.1 of the Services Output Specification;

Health and Safety Regime

the Food Safety Act 1990 (and associated regulations), the Health & Safety at Work etc Act 1974 (and associated regulations), the Regulatory Reform (Fire Safety) Order 2005, the Environmental Protection Act 1990, the Water Industry Act 1991, the Water Resources Act 1991 and any similar or analogous health, safety or environmental legislation in force from time to time;

Highest Compliant Tender Price

the price offered by the Compliant Tenderer (if any) with the highest tender price and, if no Compliant Tenders are received, zero;

[Holdco

~~f~~insert details of the Contractor's 100% ³⁵₃₉ holding company];

Holding Company

has the meaning given to it in Section 1159 of the Companies Act 2006, save that for the purposes of determining whether one entity is a Holding Company of another any transfer of shares by way of security or to a nominee of the transferor shall be disregarded;

ICT Access Protocol ³⁶₄₀

the protocol set out in Part 1 of Schedule 12 (ICT Handover Period Requirements) setting out how the Contractor and the ICT Installer work together during the ICT Handover Period;

ICT Assets

the hardware, software, networks, telecommunications, systems, projectors, screens, whiteboards, peripherals, manuals, documentation and related ICT products and materials provided at the Schools by or on behalf of the ICT Service Provider, the Authority or the School Entity;

ICT Handover

in relation to a School, satisfaction of the ICT Handover Requirements;

ICT Handover Acceptance Certificate

a certificate issued by the Independent Certifier confirming the ICT Handover Requirements have been met;

ICT Handover Date

in relation to a School the date determined in accordance with clause 20.2 (Dates on which ICT Handover may occur);

ICT Handover Period

the period commencing on the ICT Handover Date and ending on the Services Availability Date;

ICT Handover Requirements

the requirements set out in Part 1 of Schedule 5 (Completion Requirements);

³⁵₃₉ If there is no 100% holding company used as part of the project structure then this definition should not be used and reference to Holdco should be deleted. References to "Holding Company" however must remain.

³⁶₄₀ To be proposed by the preferred bidder.

ICT Installer

has the meaning given to it in clause 11.9 (ICT Handover Period Access);

ICT Services Contract(s)

~~the~~any agreement(s) ~~dated~~ ~~[[INSERT DATE] OR [on or about the date of this Agreement]]~~ and made between ~~the~~any School ~~Entities~~Entity or the Relevant LEA and any ICT Service Provider relating to the provision of ICT to ~~the~~a School(s);^{37,41}

ICT Service Provider

the party appointed by the School Entity or the Relevant LEA pursuant to the ICT Services Contract;

Indemnified Party

has the meaning given to it in clause 63.4 (Notification of Claims);

Indemnifying Party

has the meaning given to it in clause 63.4 (Notification of Claims);

Independent Certifier

the person appointed jointly by the Authority, the Contractor [and the Senior Lenders] to act as independent certifier to the Project in accordance with the Independent Certifier's Deed of Appointment;

Independent Certifier's Deed of Appointment

the deed of appointment of the Independent Certifier in the Agreed Form;

Independent Surveyor

the person appointed by the Authority to carry out a survey of information relating to any Lifecycle Asset and Lifecycle Spend pursuant to clauses 23.6.2 or 23.6.9.1;

Index

has the meaning given to it in the definition of RPIX in this clause 1.1 (Definitions);

Indexation Base Month

has the meaning given to it in Schedule 6 (Payment Mechanism);

Indexation Review Date

has the meaning given to it in Schedule 6 (Payment Mechanism);

Indirect Losses

loss of profits, loss of use, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature but excluding any of the same that relate to loss of revenue under this Agreement;

Information

has the meaning given under Section 84 of the FOIA;

Information Breach

a breach of any of the provisions of clause 82 (Contractor's Records) or clause 83 (Data Protection);

^{37,41} To be used where the School Entities or the relevant LEA procure ICT contracts for the Schools.

Initial Amount

in relation to a School the amount shown in the column so headed in Schedule 4 (Schools) against that School;

Initial Authority Equipment

together Initial Legacy Authority Equipment and Initial New Authority Equipment;

Initial Financing Agreements

the Financing Agreements put in place upon signature of this Agreement as follows:

[],

copies of which have been initialled by the Parties for the purposes of identification;

Initial Legacy Authority Equipment

those items of legacy loose furniture, teaching resources, equipment, consumables and personal effects (excluding any ICT equipment) to be identified by the Authority to the Contractor in accordance with paragraph 6 of the Decant Protocol;^{38,42}

Initial New Authority Equipment

those items of new loose furniture and equipment (excluding any ICT equipment) to be identified by the Authority to the Contractor in accordance with paragraph 6 of the Decant Protocol;^{39,43}

Instalment Dates

has the meaning given to it in clause 56.2.1.1-~~(Instalments)~~;

Insurance Cost Decrease

the Insurance Cost Differential if the value is less than zero, multiplied by minus one;

Insurance Cost Differential

shall, subject to the Insurance Review Procedure, be determined as follows:

$$\text{Insurance Cost Differential} = (\text{ARIC} - \text{BRIC}) - \text{PIC} - \text{VIC},$$

where:

ARIC is the Actual Relevant Insurance Cost;

BRIC is the Base Relevant Insurance Cost; and

PIC is any Project Insurance Change; and

VIC is any Vandalism Insurance Change;

^{38,42} This is the legacy F&E to be moved into the new school by the Contractor prior to Services Availability. The parties need to consider decant of legacy loose furniture and equipment early on in the ICT Handover Period to allow for decant of loose ICT equipment (which will need to be placed in situ on furniture) by the Contractor as well as any new equipment being installed by the ICT Installer.

^{39,43} This is the new loose furniture and equipment being provided by the School, which is (along with legacy loose furniture and equipment) to be moved into the new school by the Contractor prior to Services Availability. The parties need to consider decant of legacy loose furniture and equipment early on in the ICT Handover Period to allow for decant of loose ICT equipment by the Contractor as well as any new equipment being installed by the ICT Installer.

Insurance Cost Increase

the Insurance Cost Differential if the value thereof is greater than zero;

Insurance Cost Index

any index introduced by the United Kingdom Government or the Office of National Statistics after the date of this Agreement and which is anticipated to be published annually to provide an independent and objective measure of changes in prevailing market insurance costs;

Insurance Review Date

the First Insurance Review Date and, thereafter, each date falling on the second anniversary of the previous Insurance Review Date,⁴⁰₄₄ except where such date lies beyond the end of the Contract Period, in which case the Insurance Review Date shall be the last renewal date of the Relevant Insurances prior to the end of the Contract Period;

Insurance Review Period

a two year period from the Relevant Insurance Inception Date and each subsequent two year period commencing on the second anniversary of the Relevant Insurance Inception Date except where the end of such period lies beyond the end of the Contract Period, in which case the Insurance Review Period shall be the period from the end of the penultimate Insurance Review Period to the last day of the Contract Period;

Insurance Review Procedure

the procedure set out in clause 65.15 (Insurance Review Procedure);

Insurance Summary Sheet

has the meaning given in clause 65.15.2.3;

Insurance Term

~~means~~ any terms and/or conditions required to be in a policy of insurance by clause 65 (Insurance) and/or Schedule 14 (Insurances) but excluding any risk;

Insurance Undertaking

has the meaning given to it in the rules from time to time of the Financial Services Authority;

Intellectual Property Rights

any and all patents, trade marks, service marks, copyright, database rights, moral rights, rights in a design, know-how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attached thereto which is created, brought into existence, acquired, used or intended to be used by the Contractor or any Contractor Related Party for the purposes of carrying out the Works and/or providing the Services and/or otherwise for the purposes of this Agreement;

Interim Project Report

a report to be produced by the Contractor covering all matters necessary to enable the Authority to understand the circumstances resulting in a Financing Default and the actions taken or proposed to be taken in order to resolve the Financing Default and detailing as a minimum:

⁴⁰₄₄ Additionally, at IPDSB, the Authority may wish to invite variant bids, based on a triennial Review Period, to assist in determining which Review Period is likely to deliver best value for money. Accordingly, the Relevant Insurance Cost would be at three year intervals.

- (a) the circumstances that led to the relevant Financing Default (including, where applicable, relevant financial information);
- (b) the steps being taken by the Contractor to mitigate or rectify the relevant Financing Default;
- (c) the Contractor's estimated timescale and estimated costs for mitigation or rectification;
- (d) any additional information which the Authority should reasonably be made aware of or may reasonably request;
- (e) any rights exercised by the Senior Lenders under the Senior Financing Agreements in respect of the Financing Default; and
- (f) ~~_____~~⁴⁴ _____⁴⁵

Joint Insurance Account

the joint bank account (in accordance with clause 66.2 (Joint Account)) in the names of both the Authority and the Contractor, having account number [INSERT NUMBER] and held with [INSERT NAME];

Joint Insurance Cost Report

has the meaning given to it in clause 65.15.2 (Insurance Review Procedure);

Junior Debt

all amounts outstanding at the Termination Date under the Subordinated Financing Agreements;

[Judicial Proceedings

the grant of permission for an application and any subsequent application for judicial review or related process under Part 54 of the Civil Procedure Rules in respect of the [planning permission(s)]^{42,46};

Judicial Proceedings Action

any court order or declaration made by a relevant court (including without limitation the granting of an injunction) arising out of or in connection with any Judicial Proceedings that renders unlawful and/or prevents the performance of all or part of the Contractor's obligations under this Agreement;]

Key Sub-contractor

the Building Contractor and/or the FM Contractor;

Landowner

~~the [a long leasehold/ or freehold]~~ owner of a Site who enters into a Landowner Agreement with the Authority to deal with title matters amongst other things;

Landowner Agreements

the agreements dated on or before the date of this Agreement made between the Authority and each Landowner, where a Landowner is not party to a Governing Body Agreement;

⁴⁴ ~~Other items for Interim Project Report to be added.~~

⁴⁵ Other items for Interim Project Report to be added.

⁴²⁻⁴⁶ _____ Planning permission(s) to be defined on a project-specific basis by reference to the specific detailed/full planning permission(s) only, excluding any revised or replacement planning permissions.

Legacy ICT Equipment

the legacy ICT equipment identified by the Authority in accordance with paragraph 7 of the Decant Protocol ;

Legislation

any one or more of the following:

- (a) ~~(a)~~ any Act of Parliament;
- (b) ~~(b)~~ any subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978;
- (c) ~~(c)~~ any exercise of the Royal Prerogative; and
- (d) ~~(d)~~ any enforceable EU right within the meaning of Section 2 of the European Communities Act 1972,

in each case in the United Kingdom;

LGPS

the Local Government Pension Scheme established pursuant to regulations made by the Secretary of State in exercise of powers under Sections 7 and 12 of the Superannuation Act 1972;

Lifecycle Assets

each item of building fabric, plant and machinery, furniture, fittings and equipment (but excluding the Authority Equipment) to be renewed or replaced during the Services Period at each School as identified in the Lifecycle Schedule ~~or as may be identified by the Parties applying Good Industry Practice;~~

Lifecycle Efficiencies Plan

the plan for ~~Lifecycle Efficiencies~~lifecycle efficiencies set out in the Contractor's Proposals^{43,47};

Lifecycle Period

the period between Lifecycle Review Dates;

Lifecycle Profile

the amounts profiled to be spent ~~by the Contractor~~ on the replacement or renewal of Lifecycle Assets at each School as shown in the Base Case [in row []] as at the Commencement Date;

Lifecycle Report

the report prepared by the Contractor pursuant to clause 23.6.3;

Lifecycle Review Date

the 5th, 10th, 15th ~~and~~ 20th and 25th anniversaries of the ~~Commencement~~first Services Availability Date and the Final Survey Date;

Lifecycle Schedule

the detailed annual lifecycle schedule showing when the Lifecycle Assets will be renewed or replaced, and forming part of the Schedule of Programmed Maintenance;

^{43,47} Plan to be bid. Bidders will be evaluated on the efficiencies they expect to be able to generate as a result of portfolio savings, group purchasing and aggregation.

Lifecycle Spend

the actual amount spent by the Contractor on the replacement or renewal of Lifecycle Assets;

Lifecycle Surplus

the Lifecycle Profile less the Lifecycle Spend to the extent that the result is a positive number (if the result is a negative number, the Lifecycle Surplus shall be deemed to be zero);

Liquid Market

there are sufficient willing parties (being at least two (2) parties, each of whom is capable of being a Suitable Substitute Contractor) in the market for PFI/[PF2](#) contracts or similar contracts for the provision of services (in each case the same as or similar to the Agreement) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value provided always that any vehicle controlled and established by the Senior Lenders specifically for the purposes of this Project and to which this Agreement may be novated shall be discounted in assessing whether there are sufficient willing parties in the market for such purposes;

Local Authority

a principal council (as defined in Section 270 of the Local Government Act 1972) or any body of government in England established as a successor to principal councils in relation to Educational Services;

Lock-In Period

the period expiring on the date that is one (1) year after the [final Services Availability Date/Post Completion Works Acceptance Date]^{44,48};

Longstop Date

the date nine (9) months after the last Planned Services Availability Date or such later date as may be allowed in accordance with the terms of this Agreement, provided that where in respect of any of the Schools, but for the terms of clause 20.3.2 (Dates on which Services Availability may occur) the Acceptance Certificate for any School could have been issued prior to the date specified above, the Longstop Date shall be extended to the next date on which an Acceptance Certificate may be issued pursuant to clause 20.3.2 (Dates on which Services Availability may occur)^{45,49};

Loose Equipment Purchase Protocol

the loose equipment purchase protocol ~~set out~~ [referred to](#) in paragraph ~~[]~~ [1.1](#) of the Facilities Output Specification;

Losses

all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses) and charges whether arising under statute, contract or at common law, or in connection with judgments, proceedings, internal costs or demands;

Maintained School

has the same meaning as in Section 20 of the School Standards and Framework Act 1998, being a community school, foundation school, voluntary aided school,

^{44,48} The period of lock-in is to be one year after the end of the construction period (including demolition and landscaping). Therefore, where demolition and/or landscaping are to occur after the final Services Availability Date, the definition should refer to the Post Completion Works Acceptance Date.

^{45,49} This extends the longstop in circumstances where, because completion can only occur at term dates, the longstop would otherwise be passed, leading to a potential Contractor Default.

voluntary controlled school, community special school or a foundation special school;

Management Services Agreement

the management services agreement between the Contractor and [] in relation to the management of the Project;⁴⁶₅₀

Margin

has the meaning given to it in the Senior Financing Agreements as at the date immediately prior to the relevant Qualifying Refinancing⁵¹; ~~47~~;

Margin Gain

~~means~~ an amount equal to the lower of:

- (a) the Refinancing Gain; and
- (b) the higher of (i) zero and (ii) D – E,

where:

D = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the change to the Margin only in relation to the Refinancing and the senior debt repayment profile immediately prior to the Qualifying Refinancing and using the Base Case 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 save that, where the replacement finance is a bond, for the purpose of calculating the effect of the change to the Margin, the margin on the bond shall be the rate of interest on the bond less the yield on the relevant reference gilt in place on issue of the bond;

E = 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 Base Case 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;

Market Value Availability Deduction Amount

for any month or part of a month, an amount equal to the Unavailability Deductions that were made from the Monthly Unitary Charge under Schedule 6 (Payment Mechanism) in the month immediately preceding the Termination Date, less an amount equal to any Unavailability Deductions that were made for an Area which was Unavailable at the Termination Date but which has subsequently become Available whether as a result of the Authority incurring Rectification Costs or otherwise;

Medium Value Change

has the meaning given to it in Part 1 of Schedule 24 (Change Protocol);

Migration Manager

the person appointed by the Contractor pursuant to paragraph 11.1 of Schedule 22 (Decant Protocol);

⁴⁶₅₀ Details of any proposed management services agreement to be inserted.

⁵¹ [Check that this is the defined term used in the Senior Financing Agreements.](#)

~~⁴⁷ Check that this is the defined term used in the Senior Financing Agreements.~~

Monthly Unitary Charge

has the meaning given to it in Schedule 6 (Payment Mechanism);

Monthly Unitary Payment

has the meaning given to it in Schedule 6 (Payment Mechanism);

Named Employee

has the meaning given to it in clause 32.1.1 (Disclosure and Barring);

Necessary Consents

all permits, licences, permissions, consents, approvals, certificates and authorisations (whether statutory or otherwise) which are required for the performance of any of the Contractor's obligations under this Agreement, whether required in order to comply with Legislation or as a result of the rights of any third party;⁴⁸₅₂

Net Present Value

the aggregate of the discounted values, calculated as of the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;

New Buildings

any Buildings constructed pursuant to the terms of this Agreement;

New Contract

an agreement on the same terms and conditions as this Agreement at the Termination Date, but with the following amendments:

- (a) ~~(a)~~ if this Agreement is terminated during the Works Period, then the relevant Planned ICT Handover Date and the Planned Services Availability Dates shall be extended by a period to allow a New Contractor to achieve completion of the Works at the Schools in question;
- (b) ~~(b)~~ [if this Agreement is terminated after a Services Availability Date at a School but before the Post Completion Works Acceptance Date at that School, then the relevant Planned Post Completion Works Acceptance Date shall be extended by a period to allow a New Contractor to achieve completion of the Post Completion Works at the affected School;]⁴⁹₅₃
- (c) ~~(c)~~ any accrued Deductions, and/or Unavailability, and/or warning notices issued pursuant to clause 42 (Termination for Persistent Breach by the Contractor) shall, for the purposes of termination only and without prejudice to the rights of the Authority to make financial deductions, be cancelled;
- (d) ~~(d)~~ the term of such agreement shall be equal to the term from the Termination Date to the Expiry Date;
- (e) ~~(e)~~ if the Ratchet is being applied pursuant to paragraph 56 of Schedule 6 (Payment Mechanism), the Ratchet shall be reset for the purposes of termination only; and
- (f) ~~(f)~~ any other amendments which do not adversely affect the Contractor;

⁴⁸₅₂ There may be some Necessary Consents that only the Authority can obtain, via the Local Authority. Where this is the case, the Authority should be obliged to obtain such Necessary Consents.

⁴⁹₅₃ To be inserted where Post Completion Works are programmed.

New Contractor

the person who has entered or who will enter into the New Contract with the Authority;

Notice Date

the later of the Termination Date and (if applicable) the date that the Adjusted Estimated Fair Value is agreed between the Parties pursuant to clause 51.3 (No Retendering Procedure);

Notice of Adjudication

has the meaning given to it in clause 68.3 (Adjudication);

Notice of Non Completion

a notice issued pursuant to clause ~~20.5.2~~20.6.2 (Issue of Acceptance Certificate or notice of Non Completion);

Notifiable Financings

~~means~~ any Refinancing described in paragraph (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 Contractor's Associated Company's ability to carry out any such refinancing or other arrangements that would have a similar effect;

Operating Manual

has the meaning given to it in clause 33.1 (Maintenance of Manual);

Operational Panel

has the meaning given to it in clause 68.4.1 (Identity of Adjudicator);

Original Senior Commitment

the amount committed under the Senior Financing Agreements as at Financial Close (as adjusted to take into account any Qualifying Variation);

Original Transfer

has the meaning given to it in clause 72.1.4 (Restricted Share Transfer);

Out of Hours Shutdown

has the meaning given to it in clause 11.10.2.2;

Outstanding Principal

the principal amount outstanding at the Termination Date of each borrowing (other than any borrowing under any equity bridge facility) under the Senior Credit Agreement;

Outstanding Work

has the meaning given to it in clause 47.4 (Maintenance Work);

Partial Termination Authority Notice of Change

has the meaning given to it in paragraph 1 of Part 6 of Schedule 24 (Change Protocol);

Partial Termination Event

any of the following:

- (a) the affected School is to transfer from its current site to a new site and a school will no longer operate from the current site; or
- (b) the affected School is to be discontinued and a school will no longer operate from the current site;

Payment Period

each calendar month or (in the case of the first and final Payment Periods) part thereof during the Services Period;

Periodic Rate

in relation to a School, the amount shown in the column headed "Periodic Rate" in Schedule 4 (Schools);

Permitted Borrowing

without double counting, any:

- (a) ~~(a)~~ advance to the Contractor under the Senior Financing Agreements⁵⁰ (disregarding any amendments that have not been approved for the purposes of clause 54.2.1 (Changes to Financing Agreements and Ancillary Documents), provided that such advance is not made under any Committed Stand-by Facility;
- (b) ~~(b)~~ Additional Permitted Borrowing;
- (c) ~~(c)~~ advance to the Contractor under any Committed Standby Facility which is made solely for the purpose of funding any cost overruns, increased expenses or loss of revenue which the Contractor incurs, provided that such funds are not used in substitution for other sources of committed funding designated for those purposes⁵⁴; and
- (d) ~~(d)~~ interest on the above amounts and (disregarding any amendments that have not been approved for the purposes of clause 54.2.1) other amounts accrued or payable under the terms of the Senior Financing Agreements,

except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing;

Permit to Work

~~a permit agreed pursuant to the Permit to Work Protocol allowing the Contractor or any Contractor Related Party to carry out repairs and/or maintenance at a School;~~

Permit to Work Protocol

~~the protocol for applying for and agreeing Permits to Works set out in Schedule 23 (Permit to Work Protocol);⁵²~~

Persistent Breach

a breach for which a Final Warning Notice has been issued, which has continued for more than fourteen (14) days or recurred in three (3) or more months

⁵⁰54 If the Senior Lenders are not committing a Committed Stand-by Facility at financial close, the Authority should conduct due diligence over the sizing of the facilities that are committed, so as to ensure that they have not been inflated in such a way that the effect is to create a facility which by its very nature, also acts as a "Committed Stand-by Facility".

⁵⁴55 This will be any standby facility that is committed by the Senior Lenders at financial close for the purposes of funding any unforeseen cost overruns, increased expenses or loss of revenues incurred by the Contractor, and the Authority will conduct due diligence over the size and terms of the facility prior to Financial Close to evaluate its potential liability. The protection given to the Contractor under clause 54.2 (Changes to Financing Agreements and Ancillary Documents) should only take effect if the purpose of the advance under the Committed Standby Facility is to fund genuine unforeseen costs and not, for example, to prepay amounts owned by the Contractor under the Subordinated Financing Agreements.

⁵²~~Protocol to be agreed in dialogue.~~

within the six (6) month period after the date on which such Final Warning Notice is served on the Contractor;

Personal Data

personal data as defined in the DPA which is supplied to the Contractor by the Authority or obtained by the Contractor in the course of performing the Services;

PF2

the Government's successor policy to the PFI for the delivery of infrastructure and services through public private partnerships;

PFI

the Government's Private Finance Initiative ~~or any similar or replacement initiative~~programme;

Physical Damage Policies

has the meaning given to it in clause 66.1 (Reinstatement and Change of Requirement after Insured Event);

PI Insurance

has the meaning given to it in clause 65.13 (Professional Indemnity Insurance);

Planned ICT Handover Date

in relation to a School, the date shown as the Planned ICT Handover Date in Schedule 4 (Schools) or such later date as may be allowed in accordance with the terms of this Agreement;

[Planned Post Completion Works Acceptance Date⁵³₅₆

in relation to each Site, the date shown as the corresponding Planned Post Completion Works Acceptance Date in Schedule 4 (Schools) or such other later date as may be allowed in accordance with the terms of this Agreement;]

Planned Services Availability Date

in relation to each School, the date shown as the Planned Services Availability Date in Schedule 4 (Schools) or such later date as may be allowed in accordance with the terms of this Agreement;⁵⁴₅₇

Portfolio Cost Saving

any insurance cost saving which arises from the Contractor changing the placement of the Required Insurances from being on a stand alone project-specific basis assumed at Financial Close and reflected in the Base Cost, to being on the basis of a policy (or policies) also covering risks on other projects or other matters which are outside the scope of the Project so as to benefit from portfolio savings. A Portfolio Cost Saving is defined to be a positive sum and cannot be less than zero;

[Post Completion Works

in relation to each Site, those parts of the Works to be completed after the Services Availability Date in accordance with the Construction Programme;⁵⁵₅₈]

⁵³₅₆ To be used where there are post-Services Availability works eg. pitches and demolition. The date may be fixed by reference to the Services Availability Date. This will only be appropriate in cases where Post Completion Works must necessarily commence following completion of the main Works.

⁵⁴₅₇ Ideally, this should be in advance of the start of the relevant Term or ~~Half Term~~half term and must be sufficiently in advance of such date to allow for the ICT Installer to deliver the ICT requirements prior to the School opening. How far in advance this needs to be will therefore depend upon the extent to which the School Entity is looking to the ICT Installer to supply hardware.

[Post Completion Works Acceptance Certificate

in respect of a Site, a certificate issued by the Independent Certifier confirming that the Post Completion Works Acceptance Requirements in respect of that Site have been met;]

[Post Completion Works Acceptance Date

in relation to any Post Completion Works in respect of a Site, the date on which a Post Completion Works Acceptance Certificate is issued;]

[Post Completion Works Acceptance Requirements

in relation to a Site, the satisfaction of the relevant tests set out in Part 2 of Schedule 5 (Completion Requirements);]

Post Termination ~~Service~~Services Amount

for the purposes of clause 51.2 (Retendering Procedure), 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 Monthly Unitary Charge which would have been payable in that month under this Agreement had this Agreement not been terminated, less an amount equal to the aggregate of:

- (a) ~~(a)~~ the Market Value Availability Deduction Amount for that month;
- (b) ~~(b)~~ the Rectification Costs incurred by the Authority in that month; and
- (c) ~~(c)~~ (where relevant) the amount by which the Post Termination ~~Service~~Services Amount for the previous month was less than zero;

PPP
PF1, PF2 or any similar public-private partnership scheme;

Prescribed Rate
~~{one percent (1%)}~~ above the Senior Debt Rate;

Pre-Refinancing Equity IRR
the nominal post-tax (i.e. post Contractor tax pre Shareholder tax for the Contractor but pre-tax for the Shareholders) Equity IRR calculated immediately prior to the Refinancing;

Principal Building Sub-Contractor
any sub-contractor appointed by the Building Contractor to undertake the design and/or construction of any of the following parts of the Works [insert list of works packages]⁵⁶⁻⁵⁹;

Professional Team
the architects, structural engineers, mechanical and electrical engineers, acoustic engineers, CDM Co-ordinator [SPECIFY OTHER RELEVANT CONSULTANTS⁵⁷⁻⁶⁰] employed by the Building Contractor in connection with the Works and any employer's agent employed by the Contractor;

⁵⁵⁻⁵⁸ Specify the extent to which the Authority is prepared to accept a phased handover of a particular School, including in relation to pitches and demolition. If this concept is followed then this defined term will need to be used. Note though that the concept of Post Completion Works will only apply to those phases of the Works other than that which constitutes Services Availability. For Services Availability, the Acceptance Certificate regime will apply.

⁵⁶⁻⁵⁹ A list of sub-contracted design packages for which a collateral warranty is required will need to be inserted.

⁵⁷⁻⁶⁰ Preferred bidder to confirm that there are no other collateral warranties are being offered by consultants to the Contractor or Senior Lenders in addition to those offered to the Authority by the members of the Professional Team.

Programmed Maintenance

the maintenance work which the Contractor is to carry out in accordance with the Schedule of Programmed Maintenance;

Programmed Maintenance Information

has the meaning given to it in clause 23.4.3 (Schedule of Programmed Maintenance);

Prohibited Act

(a) ~~(a)~~ offering, giving or agreeing to give to any servant of the Authority or School Entity any gift or consideration of any kind as an inducement or reward:

(i) ~~(i)~~ for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with the Authority or School Entity; or

(ii) ~~(ii)~~ for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Authority or School Entity;

(b) ~~(b)~~ entering into this Agreement or any other contract with the Authority or School Entity 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 contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Authority;

(c) ~~(c)~~ committing any offence:

(i) ~~(i)~~ under the Bribery Act 2010;

(ii) ~~(ii)~~ under Legislation creating offences in respect of fraudulent acts; or

(iii) ~~(iii)~~ at common law in respect of fraudulent acts in relation to this Agreement or any other contract with the Authority or School Entity; or

(d) ~~(d)~~ defrauding or attempting to defraud or conspiring to defraud the Authority or School Entity;

Prohibited Activity⁵⁸₆₁

(a) activities which are prohibited by Legislation;

(b) activities which may be likely to expose persons to a significant risk to their health, safety or welfare (whether or not present at the Sites at the relevant time);

(c) use of a School by individuals, organisations or firms a material part of whose business consists of the manufacture, wholesaling, promotion or retailing of tobacco, alcohol or other injurious substances, pornography or gambling or gaming;

⁵⁸₆₁ The Authority may wish to include activities of a political or religious nature other than use of the School as a polling station.

- (d) activities which involve livestock;
- (e) activities which might expose children to the risk of high pressure sales or marketing campaigns; and
- (f) gambling or gaming;

Prohibited Employment Grounds
the grounds of:

- ~~(a) colour, race, nationality, or ethnic or national origins contrary to the Equality Act 2010;~~
- ~~(b) sex or marital status contrary to the Equality Act 2010;~~
- ~~(c) disability contrary to the Equality Act 2010;~~
- ~~(d) religion or belief contrary to the Equality Act 2010;~~
- ~~(e) sexual orientation contrary to the Equality Act 2010; and/or~~
- ~~(f) age contrary to the Equality Act 2010;~~

Prohibited Grounds
the grounds of:

- ~~(a) colour, race, nationality, or ethnic or national origins contrary to the Equality Act 2010;~~
- ~~(b) sex or marital status contrary to the Equality Act 2010;~~
- ~~(c) disability contrary to the Equality Act 2010;~~
- ~~(d) religion or belief contrary to the Equality Act 2010;~~
- ~~(e) sexual orientation contrary to the Equality Act 2010; and/or~~
- ~~(f) age contrary to the Equality Act 2010;~~

Project

the provision of serviced accommodation to the Authority at each and every School by the Contractor as contemplated by this Agreement including the carrying out of the Works and the provision of the Services^{59,62};

Project Accounts

the accounts referred to in and required to be established under the Senior Financing Agreements;

Project Data

- (a) ~~(a)~~ all Design Data; and
- (b) ~~(b)~~ any other materials, documents or data acquired or brought into existence or used in relation to the Works, the Services or this Agreement,

^{59,62} This definition may need to be amended on a case-by-case basis.

in each case that is used by or on behalf of the Contractor and/or its sub-contractors in connection with the provision of the Works or Services or the performance of the Contractor's obligations under this Agreement;

Project Documents

this Agreement, the Direct Agreement, the Independent Certifier's Deed of Appointment and the Collateral Warranties and ~~any~~the other agreements entered into by the Contractor and the Authority which are listed in Part 1 of Schedule 17 (Project Documents and Ancillary Documents);

Project Insurance Change

any net increase (which shall be expressed as a positive number) or net decrease (which shall be expressed as a negative number) in the Actual Relevant Insurance Cost relative to the Base Relevant Insurance Cost, arising from:

- (a) ~~(a)~~ the claims history or re-rating of the Contractor or any Contractor Related Party;
- (b) ~~(b)~~ the effect of any change in deductibles unless the following applies:
 - (i) ~~(i)~~ such change is attributable to circumstances generally prevailing in the Relevant Insurance Market; and
 - (ii) ~~(ii)~~ the deductible further to such change is either greater than or equal to the maximum in Schedule 14 (Insurances); or
- (c) ~~(c)~~ any other issue or factor other than circumstances generally prevailing in the Relevant Insurance Market, except for any Portfolio Cost Saving~~s~~.

but excluding any net increase or decrease arising from the vandalism claims history at the Schools.

For the purpose of determining the Insurance Cost Differential, in the event that there is a net increase, the Project Insurance Change shall have a positive value. In the event that there is a net decrease the Project Insurance Change shall have a negative value;

Project Liaison Group

has the meaning given to it in paragraph 1.1 of Schedule 10 (Liaison Procedure);

PSBP

the Priority School Building Programme;

Pupil

any pupil ~~or Excluded Pupil~~ of a School;

Qualification Criteria

the criteria that the Authority requires tenderers to meet as part of the Tender Process, which (subject to compliance with the procurement regulations) shall be:

- (a) ~~(a)~~ the New Contract terms;

- (b) ~~(b)~~—tenderers should have the financial ability to pay the capital sum tendered for the New Contract and the financial ability to deliver the Works and/or the Services (as appropriate) for the price tendered;
- (c) ~~(c)~~ the tenderers may only bid on the basis of a single capital payment to be made on the date of the New Contract;
- (d) ~~(d)~~ the tenderer is experienced in providing the Services or similar services;
- (e) ~~(e)~~ the technical solution proposed by the tenderers is capable of delivery and the tenderer is technically capable of delivery of the Services; and
- (f) ~~(f)~~ any other tender criteria agreed by the Authority and the Contractor;

Qualifying Bank Transaction

- (a) ~~(a)~~ the syndication by a Senior Lender, in the ordinary course of its business, of any of its rights or interests in the Senior Financing Agreements;
- (b) ~~(b)~~ the grant by a Senior Lender of any rights of participation, or the disposition by a Senior Lender of any of its rights or interests (other than as specified in paragraph (a) above), in respect of the Senior Financing Agreements in favour of:
 - (i) ~~(i)~~ any other Senior Lender;
 - (ii) ~~(ii)~~ any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EEA member state;
 - (iii) ~~(iii)~~ a local authority or public authority;
 - (iv) ~~(iv)~~ a trustee of a charitable trust which has (or has had at any time during the previous two (2) years) assets of at least ten million pounds (£10,000,000) (or its equivalent in any other currency at the relevant time);
 - (v) ~~(v)~~ a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two (2) years) at least fifty (50) members and assets under management of at least ten million pounds (£10,000,000) (or its equivalent in any other currency at the relevant time);
 - (vi) ~~(vi)~~ an EEA or Swiss Insurance Undertaking;
 - (vii) ~~(vii)~~ a Regulated Collective Investment Scheme;
 - (viii) ~~(viii)~~ [any Qualifying Institution;]⁶⁹ or

⁶⁹₆₃ To be deleted if there are no Qualifying Institutions.

- ~~(ix)~~ ~~(ix)~~ any other institution in respect of which the prior written consent of the Authority has been given; or
- ~~(c)~~ ~~(e)~~ the grant by a Senior Lender of any other form of benefit or interest in either the Senior Financing Agreements or the revenues or assets of the Contractor [or Holdco], whether by way of security or otherwise, in favour of:
 - ~~(i)~~ ~~(i)~~ any other Senior Lender;
 - ~~(ii)~~ ~~(ii)~~ any institution specified in paragraphs (b)(ii) to (vii) above;
 - ~~(iii)~~ [~~(iii)~~—any Qualifying Institution;] or
 - ~~(iv)~~ ~~(iv)~~ any other institution in respect of which the prior written consent of the Authority has been given⁶⁴;

Qualifying Change in Law

- ~~(a)~~ ~~(a)~~ a Discriminatory Change in Law;
- ~~(b)~~ ~~(b)~~ a Specific Change in Law; or
- ~~(c)~~ ~~(c)~~ a General Change in Law, which comes into effect after the final Services Availability Date⁶² and which involves Capital Expenditure, which was not foreseeable at the date of this Agreement;

Qualifying Institution

~~[-]⁶³;~~
~~[-]⁶⁶~~

⁶⁴~~64~~ Any attempt by banks to attempt to conceal refinancings behind elaborate avoidance structures will be regarded as a serious breach of these provisions and dealt with accordingly.

⁶²~~65~~ In grouped schools projects with exceptionally long construction phases this may not be value for money. Authority to decide on a project-specific basis if in such Projects the Contractor should bear the risk on a School-by-School basis.

⁶³~~63~~ ~~If there are particular institutions which for particular reasons do not come within the other heads of Qualifying Bank Transaction, bidders may propose to the Authority that such institutions be included as Qualifying Institutions. In the light of the broad drafting of the other provisions in the definition of Qualifying Bank Transaction, the Authority would expect any such proposal to be specific and limited. Broad group definitions will not be entertained and proposals will be reviewed by Infrastructure UK (IUK). **Note any use of this defined term will need to be included in IUK derogations tables.**~~

For listed bond transactions the following may be inserted:

- ~~(a)~~ any holder in due course of any security arising under or constituted by the Senior Financing Agreements in respect of which an application has been made for such security to be admitted to listing, either:
 - ~~(i)~~ on the Official List of the Financial Services Authority in its capacity as competent authority for the purposes of Part IV of the Financial Services and Markets Act 2000 (and to trading on the London Stock Exchange); or
 - ~~(ii)~~ to the competent authority in any other EEA state; or
- ~~(b)~~ in a situation where any security arising under or constituted by the Senior Financing Agreements is no longer admitted to listing as described in paragraph (a) above, any person whose ordinary activities involve them in acquiring, holding or disposing of investments (as principal or agent) for the purposes of their business where the acquisition of the rights of a Senior Lender in the Senior Financing Agreements takes place in accordance with all applicable securities legislation other than where such acquisition, grant or disposition is made in concert with the Shareholders and/or the Junior Debt holders for the purpose of giving rise to a Refinancing Gain; or
- ~~(c)~~ a trustee for any other entity listed in paragraph (b) (ii) to (viii) or (c) (ii) or (iii) of the definition of Qualifying Bank Transaction other than a trustee whose acquisition, grant or disposition is made in concert with the Shareholders and/or the Junior Debt holders for the purpose of giving rise to a Refinancing Gain."

⁶⁶~~66~~ If there are particular institutions which for particular reasons do not come within the other heads of Qualifying

Qualifying Refinancing

any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing;

Qualifying Variation

either:

(a) ~~(a)~~—a change in the Works and/or the Services in respect of which either an Authority Notice of Change or a Contractor Notice of Change has been served and, in the case of:

(i) ~~(i)~~—an Authority Notice of Change, the Authority has confirmed the Estimate and, where the Contractor is not funding all or part of the required Capital Expenditure, the Authority has agreed to meet all or the remaining part (as appropriate) of such Capital Expenditure; or

(ii) ~~(ii)~~—a Contractor Notice of Change, has been accepted by the Authority; or

(b) ~~(b)~~—a Qualifying Change in Law,

and in respect of which any documents or amendments to the Project Documents which are required to give effect to such change in the Works and/or the Services have become unconditional in all respects;

Ratchet

the multiple applied to the Unavailability Deduction, Service Failure Deduction or Unavailable but Used Deduction in accordance with paragraphs ~~5.1, 5.26.1, 6.2~~ and ~~5.36.3~~ of Schedule 6 (Payment Mechanism), being a factor of 1.5 or 1.0;

Recipient

has the meaning given to it in clause 37.11.2 (VAT on Payments);

Bank Transaction, bidders may propose to the Authority that such institutions be included as Qualifying Institutions. In the light of the broad drafting of the other provisions in the definition of Qualifying Bank Transaction, the Authority would expect any such proposal to be specific and limited. Broad group definitions will not be entertained and proposals will be reviewed by Infrastructure UK (IUK). Note any use of this defined term will need to be included in IUK derogations tables.

For listed bond transactions the following may be inserted:

"(a) any holder in due course of any security arising under or constituted by the Senior Financing Agreements in respect of which an application has been made for such security to be admitted to listing, either:

(i) on the Official List of the Financial Services Authority in its capacity as competent authority for the purposes of Part IV of the Financial Services and Markets Act 2000 (and to trading on the London Stock Exchange); or

(ii) to the competent authority in any other EEA state; or

(b) in a situation where any security arising under or constituted by the Senior Financing Agreements is no longer admitted to listing as described in paragraph (a) above, any person whose ordinary activities involve them in acquiring, holding or disposing of investments (as principal or agent) for the purposes of their business where the acquisition of the rights of a Senior Lender in the Senior Financing Agreements takes place in accordance with all applicable securities legislation other than where such acquisition, grant or disposition is made in concert with the Shareholders and/or the Junior Debt holders for the purpose of giving rise to a Refinancing Gain; or

(c) a trustee for any other entity listed in paragraph (b) (ii) to (viii) or (c) (ii) or (iii) of the definition of Qualifying Bank Transaction other than a trustee whose acquisition, grant or disposition is made in concert with the Shareholders and/or the Junior Debt holders for the purpose of giving rise to a Refinancing Gain."

Rectification Costs

for the purposes of any Termination Date that occurs during the Services Period, 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;

Rectification Period

has the meaning given to it in Schedule 6 (Payment Mechanism);

Referral Notice

has the meaning given to it in clause 68.5 (Referral of the Dispute);

Referring Party

has the meaning given to it in clause 68.3 (Adjudication);

Refinancing

(a) ~~(a)~~ any amendment, variation, novation, supplement or replacement of any Financing Agreement (other than any Subordinated Financing Agreement);

(b) ~~(b)~~ the exercise of any right, or the grant of any waiver or consent, under any Financing Agreement (other than any Subordinated Financing Agreement);

(c) ~~(c)~~ the disposition of any rights or interests in, or the creation of any rights of participation in respect of, any Financing Agreement (other than any Subordinated Financing Agreement) or the creation or granting of any other form of benefit or interest in either the Financing Agreements (other than the Subordinated Financing Agreements) or the contracts, revenues or assets of the Contractor whether by way of security or otherwise; or

(d) ~~(d)~~ any other arrangement put in place by the Contractor or another person which has an effect which is similar to any of (a) to (c) above or which has the effect of limiting the Contractor's or any Associated Company's ability to carry out any of (a) to (c) above;

Refinancing Gain

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 and using the Base Case 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 (without double counting) 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 Base Case 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 (without double counting) 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;

Refinancing Notice

has the meaning given to it in clause 38.9.1 (Authority Right to request Refinancing);

[Refurbished Buildings]⁶⁴

~~t~~to be defined on a project-specific basis];

Regulated Collective Investment Scheme

has the meaning given to it in the rules from time to time of the Financial Services Authority;

Reinstatement Outline

has the meaning given to it in clause 66.3.1 (Obligations);

Reinstatement Plan

has the meaning given to it in clause 66.3.5 (Obligations);

Reinstatement Works

has the meaning given to it in clause 66.3.1 (Obligations);

Relevant Assumptions

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, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of the Contractor and the Project is taken into account;

Relevant Authority

any court with the relevant jurisdiction and any local, national or supra-national agency, authority, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom or of the European Union;

Relevant Event

any:

- (a) ~~(a)~~ Authority Change;
- (b) ~~(b)~~ Qualifying Change in Law;
- (c) ~~(c)~~ Required Action taken by the Authority pursuant to clause 61.4 (Step-In without Contractor Breach) that affects the carrying out of any Works;
- (d) ~~(d)~~ Compensation Event; or
- (e) ~~(e)~~ other matter as a result of which there may be an adjustment to the Unitary Charge, in accordance with clause 73 (Financial Adjustments);

Relevant Incident

has the meaning given to it in clause 66.3 (Obligations);

⁶⁴67 Where there are Refurbished Buildings, i.e. existing buildings where, while some works are being done but the remainder of the building remains as it was, the Contractor should not take responsibility for, for example, latent defects in the remainder of the building where it will not have the benefit of collateral warranties from the original builder. In such a case the Authority will provide drafting on a project-specific basis.

Relevant Insurance

the Required Insurance and any other insurances as may be required by law other than:

- (a) ~~(a)~~ Construction Period Insurance⁶⁵₆₈;
- (b) ~~(b)~~ Business Interruption Cover except to the extent that it relates to Unavoidable Fixed Costs; and
- (c) ~~(c)~~ any PI Insurance⁶⁶₆₉;

Relevant Insurance Inception Date

the date on which the Relevant Insurances are first providing active insurance cover to the Contractor, being a date no earlier than the relevant Services Availability Date;

Relevant Insurance Market

the insurance market which insures the majority of all PFI/PF2 projects across all of the PFI/PF2 sectors (as determined by the number of PFI/PF2 projects). At the date of this Agreement the Relevant Insurance Market is in the United Kingdom;

Relevant LEA

in relation to a Maintained School, the local authority with duties and powers to provide primary and secondary education under the Education Act 1996 and the School Standards and Framework Act 1998;

Relevant Person

a Shareholder and any of its Affiliates;

Relevant Proceeds

any amounts standing to the credit of the Joint Insurance Account in accordance with clause 66.3.6.2 (Obligations);

Relevant Transfer

a relevant transfer for the purposes of TUPE;

Relief Event

any of the following:

- (a) ~~(a)~~—fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, riot and civil commotion;
- (b) ~~(b)~~—failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;
- (c) ~~(c)~~—any accidental loss or damage to the Sites or any roads servicing them;
- (d) ~~(d)~~—any failure or shortage of power, fuel or transport;
- (e) ~~(e)~~ any blockade or embargo which does not constitute a Force Majeure Event; [or]

⁶⁵₆₈ This is assumed to be covered under fixed price arrangements and so not subject to variation.

⁶⁶₆₉ To the extent that the Authority elects to take out this or other ancillary insurances.

- (f) ~~(f)~~ any:
- (i) ~~(i)~~ official or unofficial strike;
- (ii) ~~(ii)~~ lockout;
- (iii) ~~(iii)~~ go-slow; or
- (iv) ~~(iv)~~ other dispute,

generally affecting the construction or facilities management industry or a significant sector of it; [or

- (g) ~~(g)~~ the discovery of fossils, antiquities or human remains requiring action in accordance with clause 18.8 (Fossils and Antiquities)⁶⁷~~70~~,

unless any of the events listed in paragraphs (a) to ([g]) inclusive arises (directly or indirectly) as a result of any wilful default or wilful act of the Contractor or any Contractor Related Party;

Repair Cost

the cost of any repair or replacement needed to ensure that following any incident of damage ~~the~~a School is returned to the original standard (or equivalent) required in accordance with this Agreement;

Reporting Deduction or RD

the deductions calculated in accordance with Part IX of Schedule 6 (Payment Mechanism);

Request for Information

shall have the meaning set out in the FOIA or the Environmental Information Regulations as relevant (where the meaning set out for the term "request" shall apply);

Required Action

has the meaning given to it in clause 61.3 (Action by Authority);

Required Insurances

the insurances specified in Schedule 14 (Insurances);

Required Period

School Days and Additional School Periods;

Required Standard

has the meaning given to it in clause 47.3.1 (Results of Survey);

Responding Party

has the meaning given to it in clause 68.5 (Referral of the Dispute);

Response

has the meaning given to it in clause 68.6 (Response to the Referral);

Restricted Share Transfer

a transfer of any shares to an Unsuitable Third Party;

⁶⁷~~70~~ Where a Site is known to be in a region of archaeological or historic interest and it may be difficult for the Building Contractor to accept flow down of the risk on a cost effective basis then the Authority should consider whether the discovery of fossils and antiquities should be a Relief Event.

Retendering Information

has the meaning given to it in clause 30.4.1.1 (Retendering);

Retention Fund Account

has the meaning given to it in clause 47.5[.1] (Retention Fund);

Return Date

has the meaning given to it in clause 30.5.2 (Expiry, Termination or a Transfer Change);

Returning Employees

has the meaning given to it in clause 30.5.2 (Expiry, Termination or a Transfer Change);

Reviewable Design Data

the plans, drawings, documents and information relating to the Works listed in paragraph 7 of Schedule 8 (Review Procedure);

Review Procedure

the procedure set out in Schedule 8 (Review Procedure);

Revised Senior Debt Termination Amount

subject to clause 54.2 (Changes to Financing Agreements and Ancillary Documents):

(a) ~~(a)~~ all amounts outstanding at the Termination Date, including interest and (other than in respect of Additional Permitted Borrowing) Default Interest accrued as at that date, from the Contractor to the Senior Lenders in respect of Permitted Borrowing; and

(b) ~~(b)~~—all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Contractor to the Senior Lenders as a result of a prepayment in respect of Permitted Borrowing, or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement, subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible,

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Revised Senior Debt Termination Amount or the amounts below):

(i) ~~(i)~~—all credit balances on any bank accounts (but excluding the Joint Insurance Account [or the [Distribution Account⁶⁸]] held by or on behalf of the Contractor) on the Termination Date;

(ii) ~~(ii)~~—any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;

(iii) ~~(iii)~~—all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Contractor as a result of a prepayment of amounts outstanding in respect of Permitted Borrowing, or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement;

⁶⁸71 This reference should only be included where the Senior Lenders do not have security or other rights to apply balances standing to the credit of the Distribution Account in discharge of amounts outstanding in respect of a Permitted Borrowing.

~~(iv)~~ ~~(iv)~~—all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have; and

~~(v)~~ ~~(v)~~—all APB Distributions;

RPIX

the index published as Table RPO5 (excluding mortgage interest payments) of Business Monitor (MM23) published by the Office for National Statistics (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 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;

Schedule of Programmed Maintenance

the Contractor's annual programme for the maintenance of each School to satisfy the Services Output Specification;

School

a school listed in Schedule 4 (Schools) being the buildings and other facilities to be provided, maintained and serviced in accordance with this Agreement located on and consisting of the relevant Site or as the context so requires shall mean the institution;

School Day

[~~0800~~0700] to [~~1800~~1700] each Monday to Friday during a Term (excluding any ~~Half-Term~~half-term holidays);

School Entity

in relation to a school listed in Schedule 4 (Schools) any of the following:

- (a) in the case of a Maintained School, the Governing Body;
- (b) in the case of an Academy⁶⁹⁻⁷², the Governing Body or the Academy Trust; and
- (c) in the case of a Sixth Form College, the Sixth Form Corporation;

Schools' Representatives

the representatives appointed by the School Entities pursuant to clause 12 (Representatives);

School Unavailability Threshold

in any month, the Total Unavailability Deductions relating to any School exceed 25% in the case of a Secondary School, or exceed 30% in the case of a Primary School, of the Monthly Unitary Charge attributable to that School in accordance with paragraph 2.2 of Schedule 6 (Payment Mechanism) provided that for the purpose of making such a calculation where a month has between 6 and 20 (inclusive) School Days such Monthly Unitary Charge shall be multiplied by the number of School Days in that month divided by 20;

School User(s)

any person who works in, attends or uses the School or grounds;

⁶⁹⁻⁷² A Free School is classed as an Academy.

Senior Credit Agreement

[] as at the date of this Agreement or as amended with the prior written approval of the Authority pursuant to clause 54.2 (Changes to Financing Agreements and Ancillary Documents);

Senior Debt

the financing provided by the Senior Lenders under the Senior Financing Agreements;

Senior Debt Rate

[the non-default interest rate as defined in the Senior Financing Agreements] or such lower rate as the Parties may agree;

Senior Debt Service Costs

shall mean interest and debt service costs incurred in respect of the Senior Financing Agreements less:

- (a) ~~(a)~~ sums which are in arrears; and
- (b) ~~(b)~~ all sums reserved by the Contractor and which the Contractor is entitled to use to make such payments, without breaching the Senior Financing Agreements (disregarding any changes to such amounts or dates that have not been approved by the Authority other than changes giving rise to an Additional Permitted Borrowing);

Senior Financing Agreements

those of the Financing Agreements listed in Part 2 of Schedule 16 (Financing Agreements) as at the date of this Agreement or, without prejudice to clause 54.2 (Changes to Financing Agreements and Ancillary Documents), as the same may be amended as allowed by clause 54.1 (Changes to Financing Agreements and Ancillary Documents);

Senior Lenders

a person providing finance to the Contractor under the Senior Financing Agreements;

Senior Lenders' Financial Model

[]^{70, 73}

Service Delivery Proposals

the proposals for the method of providing the Services to satisfy the Services Output Specification and as set out in Part 2 of Schedule 2 (Service Delivery Proposals);

Service Failure Deduction

has the meaning given to it in Schedule 6 (Payment Mechanism);

Services

the services required to satisfy the Services Output Specification and any Elective Services that the Contractor is required to provide under this Agreement;

Services Availability

in relation to any School, satisfaction of the Services Availability Requirements;

⁷⁰₇₃ To be defined by reference to the Senior Financing Agreements as appropriate. See clause 82.7.1.3.

Services Availability Date

in relation to any School the date determined in accordance with clause 20.3 (Dates on which Services Availability may occur);

Services Availability Requirements

the requirements set out in Part 2 of Schedule 5 (Completion Requirements);

Services Media

all pipes, sewers, drains, mains, ducts, conduits, gutters, water courses, wires, cables, meters, switches, channels, flues and all other conducting media appliances and apparatus including any fixtures, louvres, cowls and other ancillary apparatus;

Services Output Specification

the specification contained in Part 2 of Schedule 1 (Authority's Requirements);

Services Period

in relation to a School, the period from and including the Services Availability Date for that School until and including the last day of the Contract Period;

Service Transfer Date

the transfer on a date agreed by the Parties to the Contractor of responsibility for provision of (or procuring the provision by Sub-Contractors of) the Services in accordance with this Agreement [NOTE – if likely to be more than one transfer date – define "Relevant Service Transfer Date" – "the transfer on one or more dates agreed by the Parties (each a "Relevant Service Transfer Date") to the Contractor of responsibility for provision of (or procuring the provision by Sub-Contractors of) the Services in accordance with this Agreement];

Shareholder

any person from time to time holding share capital in the Contractor or Holdco;

Site Conditions

the conditions of the Sites including (but not limited to) climatic, hydrological, hydrogeological, ecological, environmental, geotechnical and archaeological conditions;

Site Plans

the plans of the Sites set out in the Agreed Form;

Sites

the area edged [red] on the relevant Site Plan⁷⁴ for each School together with the Buildings and the Services Media for all utilities and services serving the Buildings;

Sixth Form Corporation

the body corporate designated a sixth form college corporation pursuant to orders made under Section 33A or Section 33B of the Further and Higher Education Act 1992 or established by orders made under Section 33C of the Further and Higher Education Act 1992;

Sixth Form College

an institution conducted by a Sixth Form Corporation;

Snagging Items

minor defects, deficiencies or omissions which do not prevent the Independent Certifier from issuing an ICT Handover Acceptance Certificate or an Acceptance

⁷⁴ [We would expect to see multiple site plans for each School to deal with phased works.](#)

Certificate [or a Post Completion Works Acceptance Certificate (as the case may be)] in relation to a School;

Snagging List

the list to be prepared by the Independent Certifier in accordance with clause 20.8.1 (Snagging Items) containing Snagging Items;

Snagging Programme

has the meaning given to it in clause 20.8.1 (Snagging Items);

Soft Services⁷⁵

the services as defined in paragraph 1.1 of the Services Output Specification;

Soft Services Interface Protocol^{74,76}

the protocol ~~agreed between the Authority, the Soft Services Provider and the Contractor and/or a Contractor Related Party from time to time~~ regarding co-operation, liaison and access between the Soft Services Provider and the Contractor and/or Contractor Related Parties, ~~such protocol to deal with as a minimum the issues~~ set out in Part 2 of Schedule 3 (Soft Services Interface Protocol);

Soft Services Provider

the Authority Related Party appointed by or on behalf of a School Entity or Relevant LEA from time to time to undertake all or any part of the Soft Services;

Soft Services Training Plan^{72,77}

the plan set out in Part 2 of Schedule 12 (ICT Handover Period Requirements);

Specific Change in Law

any Change in Law which specifically refers to the construction, operation and maintenance of premises for the provision of any Educational Service or to the holding of shares in companies whose main business is the construction, operation and maintenance of premises for the provision of any Educational Service;

Specific Title Matters

the matters set out in Part 2 of Schedule 13 (Title Matters);

Start on Site Date

~~[]~~ the date set out in respect of each School in Schedule 4 (Schools) or such later date as may be allowed in accordance with the terms of this Agreement;

Stop Notice

has the meaning given to it in clause 11.3.1 (Stop Notices);

⁷⁵ While the substantial majority of these will be "soft" services, the caretaker might for example do an initial emergency reactive repair on behalf of the Contractor; this will be dealt with in the interface protocol.

^{74,76} This schedule will be worked up during the dialogue phase following discussions with the Schools and each bidder.

^{72,77} To be provided by the preferred bidder and to set out training needed for the Schools or their Soft Services Provider(s) during the ICT Handover Period to have a 'soft landing' in the new Schools as regards Soft Services provision. For example, training to understand the security, alarm, utilities and building management systems. It will be developed in accordance with the requirements set out in paragraph ~~2.44~~2.12.4.2.3 of the Facilities Output Specification. Note that the Services Output Specification contains, as part of the Interface Services, separate, ongoing obligations regarding training – these are set out in paras ~~4.6.24~~1.16 and ~~2.52.4~~ of the Services Output Specification.

Sub-Contractor

each of [the Building Contractor and the FM Contractor] 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 Works and/or the Services (or any of them). References to sub-contractors ~~means~~mean sub-contractors (of any tier) of the Contractor;

Sub-Contractor Breakage Costs

Losses that have been or will be reasonably and properly incurred by the Contractor as a direct result of the termination of this Agreement, but only to the extent that:

- (a) ~~(a)~~ the Losses are incurred in connection with the Project and in respect of the provision of services or completion of works, including:
 - (i) ~~(i)~~ any materials or goods ordered or Sub-Contracts placed that cannot be cancelled without such Losses being incurred;
 - (ii) ~~(ii)~~ any expenditure incurred in anticipation of the provision of services or the completion of works in the future;
 - (iii) ~~(iii)~~ the cost of demobilisation including the cost of any relocation of equipment used in connection with the Project; and
 - (iv) ~~(iv)~~ redundancy payments;
- (b) ~~(b)~~ the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms and []⁷³₂₈; and
- (c) ~~(c)~~ the Contractor and the relevant Sub-Contractor has each used its reasonable endeavours to mitigate the Losses;

Sub-Contracts

the contracts entered into between the Contractor and the Sub-Contractors;

Submitted Item

has the meaning given to it in paragraph 1.2 of Schedule 8 (Review Procedure);

Subordinated Financing Agreements

[]⁷⁴₂₉ as at the date of this Agreement or as amended with the prior written approval of the Authority;

Subordinated Lenders

a person who is providing finance under a Subordinated Financing Agreement;

Suitable Substitute Contractor

a person approved by the Authority (such approval not to be unreasonably withheld or delayed) as:

- (a) ~~(a)~~ having the legal capacity, power and authority to become a party to and perform the obligations of the Contractor under this Agreement;

⁷³₂₈ Bidders to bid a Sub-Contractor loss of profit cap. See section ~~21.1.3.7~~23.1.3.7 and footnote 15 of SoPC4.PF2. Where an FM Sub-Contractor's loss of profit is capped the Authority should include a maximum monetary figure that cannot be exceeded together with a cap by reference to a time period.

⁷⁴₂₉ These are the debt financing documents signed at Financial Close, through which the early investors will often invest "equity" in the Project in the form of subordinated debt.

(b) ~~(b)~~ employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of the Contractor under this Agreement; and

(c) ~~(e)~~ being a Suitable Third Party;

Suitable Third Party

any person who is not an Unsuitable Third Party;

Supplier

has the meaning given to it in clause 37.11.2 (VAT on Payments);

SWMP Regulations

the Site Waste Management Plans Regulations 2008 and any modification or replacement of the same together with any guidance from time to time published by any Government Department, body or agency in relation to such regulations;

Tax

any kind of tax, duty, levy or other charge (other than VAT) whether or not similar to any in force at the date of this Agreement and imposed by a Relevant Authority;

Technical Adviser

any adviser appointed by the Senior Lenders for the purposes of providing technical support or reports;

Tender Costs

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 Contract;

Tender Process

the process by which the Authority requests tenders from any parties interested in entering into a New Contract, evaluates the responses from those interested parties and enters into a New Contract with a new service provider, in accordance with clause 51.2 (Retendering Procedure);

Tender Process Monitor

a third party appointed by the Contractor pursuant to clause 51.2.5 (Retendering Procedure);

Term

the terms published by the Authority for each Academic Year and notified by the Authority to the Contractor in accordance with clause 29.1 (Notification of Terms) and ~~Half Term~~half term shall be construed accordingly;⁷⁶₈₀

Termination Date

the date of early termination of this Agreement in accordance with its terms;

Termination Date Discount Rate

a discount rate expressed as:

$$[(1 + R + B - A) \times (1 + i) - 1]$$

⁷⁶₈₀ This is drafted on the basis of a three-term year and accordingly where there are more than three terms may have to change.

where:

- R = the real pre-tax Project IRR as set out in the Base Case;
- i = the agreed assumed forecast rate of increase in RPIX (as set out in the Base Case) for the remaining term of the Agreement;
- A = the real yield to maturity as at Financial Close on a benchmark government Gilt instrument of the same maturity as the average life, as determined from the Base Case as at Financial Close, of the Senior Debt; and
- B = the real yield to maturity as at the Termination Date on a benchmark government Gilt instrument of the same maturity as the average life, as determined from the Base Case as at the Termination Date, of the Senior Debt outstanding on that date;

Termination Notice

a notice of termination issued in accordance with this Agreement;

Termination Sum

any compensation payable by the Authority to the Contractor on an early termination of this Agreement under clauses 52 (Compensation on Termination for Force Majeure), 51 (Compensation on Termination for Contractor Default) 49 (Compensation on Termination for Authority Default/Voluntary Termination) and 50 (Compensation on Corrupt Gifts, Fraud and Refinancing Breaches) (excluding the Adjusted Highest Compliant Tender Price) and any compensation payable as a result of a termination under clause 41.2 (Termination on Authority Default));

Third Party Claim

has the meaning given to it in clause 63.4 (Notification of Claims);

Threshold Equity IRR

[INSERT NUMBER⁷⁶₈₁] per cent;

Topographical Surveys

[⁸²].

Transfer Change

a Change in accordance with Schedule 24 (Change Protocol) that results in or may give rise to a Relevant Transfer;

Transferring Staff

has the meaning given to it in clause 30.1.2;

[Trustee

[] in its capacity as security trustee for the Senior Lenders under the Senior Financing Agreements];

⁷⁶₈₁ The Contractor must, in accordance with SoPC4_{PF2}, confirm prior to financial close that this is the nominal (not real) post-tax equity IRR set out in the Base Case.

⁸² A Topographical Survey of each Site must be provided at an early stage in the procurement process to enable the Contractor to assess the risk profile of the Project. These surveys, which will be procured by FFA where the School Entity/Local Authority (or other owner or occupier) does not already have a suitable survey, must form part of the information issued with the IPDSB (or be available in the Project data room at that time). The surveyor will be engaged by FFA/the School Entity/Local Authority (or other owner or occupier) on approved terms and will provide a warranty to each of the Contractor, its Building Contractor and the Senior Lenders.

TUPE

the Transfer of Undertaking (Protection of Employment) Regulations 2006 (SI No. 246);

Unavailability Deductions

has the meaning given to it in Schedule 6 (Payment Mechanism);

Unavailable but Used

has the meaning given to it in Schedule 6 (Payment Mechanism);

Unavoidable Fixed Costs

should mean the fixed costs incurred by the Contractor which first fall due for payment by the Contractor during the period of indemnity but excluding:

- (a) ~~(a)~~ costs which could have reasonably been mitigated or avoided by the Contractor;
- (b) ~~(b)~~ payments to the Contractor's Associated Companies;
- (c) ~~(c)~~ payments which are not entirely at arm's length;
- (d) ~~(d)~~ payments to holders of equity in the Contractor, Subordinated Lenders and any other financing costs other than Senior Debt Service Costs;
- (e) ~~(e)~~ Indirect Losses suffered or allegedly suffered by any person;
- (f) ~~(f)~~ fines, penalties or damages for unlawful acts, breaches of contract or other legal obligations;
- (g) ~~(g)~~ payments the Contractor can recover under contract or in respect of which the Contractor has a remedy against another person in respect of the same liability;
- (h) ~~(h)~~ payments to the extent that the Contractor has available to it
 - (i) ~~(i)~~ reserves which the Contractor can draw upon without breaching the Senior Financing Agreements;
 - (ii) ~~(ii)~~—standby or contingent facilities or funds of Senior Debt or equity which the Contractor is entitled to have available; and
- (i) ~~(i)~~ payments representing any profits of the Project (to the extent not already excluded in (e) above);

Uninsurable

in relation to a risk, either that:

- (a) ~~(a)~~ 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
- (b) ~~(b)~~ the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom;

Uninsured Losses

losses arising from any risks against which the Contractor or any Contractor Related Party does not maintain insurance (where not required to maintain insurance for such risk under this Agreement or by law), provided that:

- (a) ~~(a)~~ the amount of any losses that would otherwise be recoverable under any Required Insurance but for the applicable uninsured deductible in respect of such insurance; and
- (b) ~~(b)~~ any exclusion of loss of insurance proceeds caused by or contributed to by any act or omission of the Contractor or any Contractor Related Party,

shall not be treated as Uninsured Loss;

Unitary Charge

the fee payable by the Authority in consideration of the obligations performed by the Contractor under this Agreement calculated in accordance with Schedule 6 (Payment Mechanism);

Unsuitable Third Party

any of:

- (a) ~~(a)~~—any person who has a material interest in the production, distribution or sale of tobacco products, alcoholic drinks and/or pornography;
- (b) ~~(b)~~—any person whose activities are, in the reasonable opinion of the Authority, incompatible with the provision of Educational Services in the area; or
- (c) ~~(c)~~—any person whose activities, in the reasonable opinion of the Authority, pose or could pose a threat to national security;

User Satisfaction Surveys

[the annual customer satisfaction surveys undertaken pursuant to paragraph 2.3.29.4 of the Services Output Specification;](#)

[Utilities Agreements

each of:

- (a) those agreements listed in Schedule 25 (Utilities Agreements); and
- (b) any other agreements with, or consents, releases, notices or variations properly required for the purposes of carrying out the Works to be obtained from and/or served on, any public or private utility, drainage, sewage, water, electricity, gas or telecommunications undertaker, authority or company or any service provider or company, body or authority for the requisitioning, design, commissioning, installation, laying, relaying, construction, repair, maintenance, use or diversion or disconnection and/or connection to any services and/or Services Media of any kind including without prejudice to the generality thereof gas, water, electricity, signals and pulses, telecommunications, drainage, sewers, wires, cables, conduits and apparatus;

Utilities Third Party

a third party on whom a Utilities Agreement is to be served or from whom a Utilities Agreement is required to be given or executed;^{77_83}

Vandalism Insurance Change

any net increase or net decrease in the Actual Relevant Insurance Cost relative to the Base Relevant Insurance Cost, arising from the vandalism claims history at the Schools. For the purpose of determining the Insurance Cost Differential, in the event that there is a net increase, the Vandalism Insurance Change shall have a positive value. In the event that there is a net decrease the Vandalism Insurance Change shall have a negative value;

VAT

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;

Works^{78_84}

all of the works (including design and works necessary for obtaining access to the Sites) to be undertaken in accordance with this Agreement to satisfy the Facilities Output Specification [including the works involved in the Post Completion Works]; and

Works Period

the period from the Commencement Date to the later of the:

(a) ~~(a)~~—last Services Availability Date [; and

(b) ~~(b)~~—last Post Completion Works Acceptance Date]^{79_85}.

1.2 Interpretation

In this Agreement except where the context otherwise requires:

1.2.1 the masculine includes the feminine and vice-versa;

1.2.2 the singular includes the plural and vice versa;

1.2.3 a reference to any clause, sub-clause, paragraph, Schedule, recital or annex is, except where expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, schedule, recital or annex of and to this Agreement;

1.2.4 save where otherwise provided in this Agreement, any reference to this Agreement or to any other document shall include any permitted variation, amendment or supplement to such document;

1.2.5 any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument as amended, replaced, consolidated or re-enacted;

^{77_83} See footnote to clause ~~10.3.1-10.3.3~~.

^{78_84} This should also include, where appropriate, demolition and landscaping and any other works to be carried on following the Services Availability Date. The optional inclusion of the reference to "Post Completion Works" is intended to pick this up.

^{79_85} Where there are Post Completion Works, then consideration needs to be given to incorporating these within the Works Period if relevant.

- 1.2.6** a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
- 1.2.7** headings are for convenience of reference only;
- 1.2.8** words preceding "include", "includes", "including" and "included" shall be construed without limitation by the words which follow those words;
- 1.2.9** any obligation on a Party to do any act matter or thing includes, unless expressly stated otherwise, an obligation to procure that it is done; and
- 1.2.10** subject to any express provisions of this Agreement to the contrary, the obligations of either Party are to be performed at that Party's own cost and expense.

1.3 Schedules

The Schedules to this Agreement form part of this Agreement.

1.4 Indexation

In this Agreement, save where otherwise provided, references to amounts expressed to be "indexed" are references to such amounts at Indexation Base Month prices multiplied by:

$$\frac{I_1}{I_2}$$

where I_1 is the value of RPIX most recently published prior to the relevant calculation date, and I_2 is the value of RPIX for the Indexation Base Month.

1.5 Precedence of Documentation

In the event of any inconsistency between the provisions of the body of this Agreement and the Schedules, the body of this Agreement shall take precedence. In the event of any inconsistency between Schedules, the conflict should be resolved according to the following descending order of priority:

- 1.5.1** Schedule 6 (Payment Mechanism);
- 1.5.2** Schedule 1 (Authority's Requirements);
- 1.5.3** the Schedules other than Schedule 1 (Authority's Requirements), Schedule 2 (Contractor's Proposals) and Schedule 6 (Payment Mechanism); and
- 1.5.4** Schedule 2 (Contractor's Proposals).

1.6 Responsibility for Related Parties

Subject to the provisions of this Agreement, the Contractor shall be responsible as against the Authority for the acts and omissions of the Contractor Related Parties as if they were the acts and omissions of the Contractor and the Authority shall be responsible as against the Contractor for the acts and

omissions of the Authority Related Parties as if they were the acts and omissions of the Authority provided that no acts or omissions of the ICT Installer shall be capable of giving rise to an Authority Default. The Contractor shall, as between itself and the Authority, be responsible for the selection of and pricing by any Contractor Related Party.

1.7 Approval

Neither the giving of any approval, consent, examination, acknowledgement, knowledge of the terms of any agreement or document nor the review of any document or course of action by or on behalf of the Authority, nor the failure of the same, shall unless otherwise expressly stated in this Agreement, relieve the Contractor of any of its obligations under the Project Documents or of any duty which it may have hereunder to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the approval, consent, examination, acknowledgement or knowledge.

1.8 Succession

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 functions and responsibilities of such public organisation. References to other persons (other than the Authority) shall include their successors and assignees.

2 EXCLUSION OF LEGISLATION

2.1 Housing Grants, Construction and Regeneration Act

This Agreement is entered into under ~~the~~ [a project applying similar principles to PFI](#). This Agreement is excluded from Part II of the Housing Grants, Construction and Regeneration Act 1996 by operation of paragraph 4 of the Construction Contracts (England and Wales) Exclusion Order 1998. The Contractor acknowledges that the operation of the Housing Grants, Construction and Regeneration Act 1996 upon any Project Document shall not affect the Parties' rights or obligations under this Agreement.

2.2 Third Party Rights

~~No~~ [Save in respect of HM Treasury's rights pursuant to clause 82.7.1.3 \(Financing Information\) no](#) term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement. [This clause does not affect any right or remedy of any person that exists or is available otherwise than pursuant to the Contracts \(Rights of Third Parties\) Act 1999.](#)

3 COMMENCEMENT AND DURATION

This Agreement and the rights and obligations of the Parties shall take effect on the Commencement Date and (subject to the provisions for early termination set out in this Agreement) shall continue until the Expiry Date.

4 COLLATERAL WARRANTIES AND SURVEYS

4.1 Collateral Warranties and delivery of other documents

The Contractor shall:

4.1.1 [deliver the Collateral Warranties from the Building Contractor^{80_86}, the Principal Building Sub-Contractors, each member of the Professional Team and the FM Contractor(s) to the Authority on the date of this Agreement^{84_87};

4.1.2 not engage any new Building Contractor or any new FM Contractor(s) (and shall procure that the Building Contractor shall not engage any new Principal Building Sub-Contractor or any new member of the Professional Team) in connection with the Project unless such person has delivered to the Authority a duly executed agreement substantially in the form of the relevant Collateral Warranty set out in Schedule 7 to this Agreement duly executed as a deed and in each case such Collateral Warranty must be delivered to the Authority before such entity enters onto any Site; ~~and~~

4.1.3 deliver to the Authority certified copies of:

4.1.3.1 the appointment of each member of the Professional Team; and

4.1.3.2 the contracts entered into between the Building Contractor and each Principal Building Sub-Contractor^{82_88},

in each case on or prior to the date of this Agreement; ~~and~~

~~**4.1.4** on the date of this Agreement make a payment of £[] to the Authority's lawyers, Ashurst LLP, in respect of title due diligence work.~~

4.2 Surveys

The Authority shall:

~~**4.2.1** deliver the Ground Investigation Surveys and Topographical Surveys to the Contractor prior to the date of this Agreement;~~

~~**4.2.2** ~~4.2.1~~⁸³ deliver the Buildings ~~Survey~~⁸⁹ Surveys to the Contractor prior to the date of this Agreement; ~~and~~~~

^{80_86} The collateral warranty obligations of the first tier sub-contractors, which must in the form set out in Schedule 7, ought to be guaranteed by a suitable parent company, also to be a party to such collateral warranties. These must be in place at close.

^{84_87} See footnote to definition of Collateral Warranties as to options for their form for parties other than first tier sub-contractors. In the event that there are Principal Building Sub-Contractors providing warranties whose sub-contracts have not been finalised at the date of close, this may be amended so that warranties from those parties will be provided within 10 Business Days of their sub-contracts being entered into. [Clause 4.1.1 can be amended on a case by-case basis to reflect a reduced requirement for Collateral Warranties if the Contractor/Senior Funders have agreed that they do not require Collateral Warranties from all of the Professional Team and Principal Building Sub-Contractors. The Authority intends to accept the same position \(in terms of the identity of the entities providing Collateral Warranties and the terms of those Collateral Warranties themselves\) as the Contractor/Senior Funders provided that it is able to give the position a final check prior to financial close.](#)

^{82_88} In the event that there are Principal Building Sub-Contractors providing warranties whose sub-contracts have not been finalised at the date of close, this may be amended so that copies of sub-contracts of those parties will be provided within 10 Business Days of their sub-contracts being entered into.

⁸³ ~~See clause 18.7 (Defects and Asbestos) for the required approach to the risk allocation in respect of defects and Asbestos. These surveys will only be necessary where buildings are being demolished and/or refurbished.~~

⁸⁹ [See clause 18.7 \(Defects and Asbestos\) for the required approach to the risk allocation in respect of defects and](#)

~~4.2.3~~ ~~4.2.2~~ [deliver the Asbestos ~~Survey~~Surveys to the Contractor prior to the date of this Agreement.]^{84_90}

5 ~~GENERAL CONTRACTOR WARRANTIES AND INDEMNITIES~~UNDERTAKINGS

5.1 Contractor Warranties

The Contractor warrants and represents to the Authority that on the date hereof:

5.1.1 it is properly constituted and incorporated under the laws of England and Wales and has the corporate power to own its assets and to carry on its business as it is now being conducted;

~~5.1.2~~ that it has complied with all its obligations regarding declaration and payment of Tax;

~~5.1.3~~ ~~5.1.2~~ it has the corporate power to enter into and to exercise its rights and perform its obligations under the Project Documents;

~~5.1.4~~ ~~5.1.3~~ all action necessary on the part of the Contractor to authorise the execution of and the performance of its obligations under the Project Documents has been taken or, in the case of any Project Document executed after the date of this Agreement, will be taken before such execution;

~~5.1.5~~ ~~5.1.4~~ the obligations expressed to be assumed by the Contractor under the Project Documents are, or in the case of any Project Document executed after the date of this Agreement will be, legal, valid, binding and enforceable to the extent permitted by law and each Project Document is or will be in the proper form for enforcement in England;

~~5.1.6~~ ~~5.1.5~~ the execution, delivery and performance by it of the Project Documents does not contravene any provision of:

~~5.1.6.1~~ ~~5.1.5.1~~ any existing Legislation either in force, or enacted but not yet in force binding on the Contractor;

~~5.1.6.2~~ ~~5.1.5.2~~ the Memorandum and Articles of Association of the Contractor;

~~5.1.6.3~~ ~~5.1.5.3~~ any order or decree of any court or arbitrator which is binding on the Contractor; or

~~5.1.6.4~~ ~~5.1.5.4~~ any obligation which is binding upon the Contractor or upon any of its assets or revenues;

~~5.1.7~~ ~~5.1.6~~ the Contractor Warranted Data is true and accurate in all respects;

Asbestos. These surveys will only be necessary where buildings are being demolished and/or refurbished.

^{84_90} In the event that any soil survey or similar is commissioned by the Authority, the Authority will need to ensure that warranties will be available for the Contractor and Sub-Contractors.

- 5.1.8** ~~5.1.7~~ the Contractor has not, other than in connection with the Project, traded at any time since its incorporation as a company pursuant to the Companies Act 2006;
- 5.1.9** ~~5.1.8~~ no claim is presently being assessed and no litigation, arbitration or administrative proceedings are presently in progress or, to the best of the knowledge of the Contractor, pending or threatened against it or any of its assets which will or might have a material adverse effect on the ability of the Contractor to perform its obligations under any Project Document;
- 5.1.10** ~~5.1.9~~ it is not the subject of any other obligation, compliance with which will or is likely to have a material adverse effect on the ability of the Contractor to perform its obligations under any Project Document;
- 5.1.11** ~~5.1.10~~ no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Contractor, threatened) for its winding-up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator, trustee or similar officer in relation to any of its assets or revenues;
- 5.1.12** ~~5.1.11~~ each of the Ancillary Documents is or, when executed, will be in full force and effect and constitutes or, when executed, will to the extent permitted by law constitute the valid, binding and enforceable obligations of the parties thereto;
- 5.1.13** ~~5.1.12~~ [that there are no members of the Professional Team or Principal Building Sub-Contractors who will provide collateral warranties to the Contractor and/or Senior Lenders but not also provide Collateral Warranties to the Authority and that, with the exception of provisions relating to priorities of step in, the Collateral Warranties given to the Authority by the Principal Building Sub-Contractors and the members of the Professional Team contain equivalent provisions to the collateral warranties provided by these parties to the Contractor and/or the Senior Lenders]^{85_91}; and
- 5.1.14** ~~5.1.13~~ the copies of the Project Documents which the Contractor has delivered or, when executed, will deliver to the Authority are or, as the case may be, will be true and complete copies of such documents and there are not in existence any other agreements or documents replacing or relating to any of the Project Documents which would materially affect the interpretation or application of any of the Project Documents,

and the Authority relies upon such warranties and representations.

^{85_91} The Contractor has two options. It can ask members of the Professional Team and subcontractors (other than first tier) to produce warranties in accordance with those currently contained in Schedule 7 (in which case this clause will be deleted) or it can ask them to replicate the warranties given to the Contractor/Senior Lenders, with changes made only to reflect the difference in parties and step-in priorities; note that we will expect deltaviews comparing the Authority warranties with the Contractor/Senior Lender warranties to be provided prior to close for the Authority's review and the form of any such agreed collateral warranties will be included in ~~schedule~~Schedule 7. Different PBSCs or consultants may choose different approaches, in which case the definition of Collateral Warranties and this clause will need to reflect that some warranties are in line with those currently in Schedule 7 and others are in line with the warranties given to the Contractor/Senior Lenders and agreed by the Authority and included in Schedule 7 prior to Financial Close.

5.2 Contractor Undertakings

The Contractor undertakes with the Authority that for so long as this Agreement remains in full force:

5.2.1 it will upon becoming aware that any litigation, arbitration, administrative or adjudication or mediation proceedings before or of any court, arbitrator or Relevant Authority may be threatened or pending and immediately after the commencement thereof (or within twenty (20) Business Days of becoming aware the same may be threatened or pending or with twenty (20) Business Days after the commencement thereof where the litigation or arbitration or administrative or adjudication or mediation proceedings is against a Sub-Contractor) give the Authority notice of such litigation, arbitration, administrative or adjudication or mediation proceedings which would adversely affect, to an extent which is material in the context of the Project, the Contractor's ability to perform its obligations under this Agreement;

5.2.2 it will not without the prior written consent of the Authority (and whether by a single transaction or by a series of transactions whether related or not) sell, transfer, lend or otherwise dispose of (other than by way of security) the whole or any part of its business or assets which would materially affect the ability of the Contractor to perform its obligations under this Agreement;

5.2.3 it will not cease to be resident in the United Kingdom or transfer in whole or in part its undertaking, business or trade outside the United Kingdom;

5.2.4 it will not undertake the performance of its obligations under this Agreement for the provision of the Services otherwise than through itself or a Sub-Contractor;

5.2.5 it will comply with all its obligations as to declaration and payment of Tax;

5.2.6 ~~5.2.5~~ it shall not without the written consent of the Authority (such consent not to be unreasonably withheld or delayed) incorporate any company or purchase or acquire or subscribe for any shares in any company save where such company is involved in the provision of the Services or Works;

5.2.7 ~~5.2.6~~ it shall not without the written consent of the Authority (such consent not to be unreasonably withheld or delayed) make any loans or grant any credit or give any guarantee or indemnity to or for the benefit of any person or otherwise voluntarily or for consideration assume any liability (whether actual or contingent) in respect of any obligation of any other person except in the ordinary course of business and/or as contemplated by the Project Documents, Ancillary Documents and/or Financing Agreements; and

5.2.8 ~~5.2.7~~ it shall not change or cease its business or start any other business which is materially different from that to be carried on by it under this Agreement.

5.3 Status of Warranties and Undertakings

All warranties, representations, undertakings, indemnities and other obligations made, given or undertaken by the Contractor in this Agreement are cumulative and none shall be given a limited construction by reference to any other.

6 AUTHORITY WARRANTIES

6.1 No Warranty by Authority

Subject to clause 6.3 (Fraudulent Statements), clause 6.5 (Authority Title Warranty) [and clause 6.9 (Authority Warranted Data)], the Authority does not give any warranty or undertaking as to the relevance, completeness, accuracy or fitness for any purpose of any of the Disclosed Data.

6.2 No Liability to Contractor

Subject to clause 6.3 (Fraudulent Statements), clause 6.5 (Authority Title Warranty) [and clause 6.9 (Authority Warranted Data)], neither the Authority nor any of its agents or employees shall be liable to the Contractor in contract, tort (including negligence or breach of statutory duty), statute or otherwise as a result of:

6.2.1 any inaccuracy, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Disclosed Data; or

6.2.2 any failure to make available to the Contractor any materials, documents, drawings, plans or other information relating to the Project.

6.3 Fraudulent Statements

Nothing in this clause 6 (Authority Warranties) shall exclude any liability which the Authority or any of its agents or employees would otherwise have to the Contractor in respect of any statements made fraudulently prior to the date of this Agreement.

6.4 Rights and Remedies

The provisions of this clause 6 are without prejudice to the Contractor's express rights and remedies under or pursuant to this Agreement.

6.5 Authority Title Warranty⁸⁶92

The Authority warrants to the Contractor on the terms set out in Part 1 of Schedule 13 (Title Matters), provided that no inaccuracies or omissions in such information shall be capable of giving rise to an Authority Default.

⁸⁶92 The Authority warrants that the title to the Sites has no impediments which will prevent hinder or delay the Works or the carrying out of the Services. The onus is on the Authority to prepare and provide to the Contractor at IPDSB stage the Specific Title Matters, which will be disclosed against these warranties and of which the Contractor will be deemed to have knowledge. The Authority intends to carry out title due diligence on each of the Sites with its own legal advisers and to only disclose a limited number of very specific title matters to the Contractor. Where title to a Site is unregistered the Authority will recommend that the landowner voluntarily registers title to the Site at Land Registry at the earliest opportunity. No certificates of title should be needed as a result of the warranty approach and only a very limited amount of title due diligence (by reference to the Specific Title Matters) should be required by bidders/funders.

6.6 Contractor's Due Diligence

The Contractor shall, subject to the terms of this Agreement, be deemed to have:

- 6.6.1 satisfied itself as to the assets to which it will acquire rights and the nature and extent of the risks assumed by it under this Agreement; and
- 6.6.2 gathered all information necessary to perform its obligations under this Agreement and other obligations assumed including:⁸⁷
 - 6.6.2.1 information as to the nature, location and condition of the land (including hydrological, geological, geotechnical and sub-surface conditions);
 - 6.6.2.2 information relating to archaeological finds, areas of archaeological scientific or natural interest, local conditions and facilities and the quality of existing structures; and
 - 6.6.2.3 [other relevant information].⁸⁸₉₄

6.7 No Relief

Subject to clause 6.3 (Fraudulent Statements), clause 6.5 (Authority Title Warranty) [and clause 6.9 (Authority Warranted Data)], the Contractor shall not in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against the Authority on grounds that any information, whether obtained from the Authority or otherwise (including information made available by the Authority), is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.

6.8 Contractor acknowledgement

The Contractor hereby acknowledges and agrees that it has been provided with copies of all of the Specific Title Matters listed in Part 2 of Schedule 13 (Title Matters) and that all such matters that are disclosed within the Specific Title Matters are disclosed against the warranties set out in Part 1 of Schedule 13 (Title Matters).

6.9 [Authority Warranted Data

The Authority warrants to the Contractor that the Authority Warranted Data has been prepared after due and careful enquiry and is reasonably believed to be true, accurate and complete as at the date of this Agreement, provided that no inaccuracies or omissions in such information shall be capable of giving rise to an Authority Default⁸⁹₉₅.]

⁸⁷₉₃ The value of environmental warranties/indemnities will need to be reviewed on a project-specific basis.

⁸⁸₉₄ This will depend on project-specific requirements. The Authority should conduct surveys in advance (see footnote to clause 18.7). If subsurface conditions cannot be investigated below an existing footprint, it may be value for money for the Authority to retain that particular risk.

⁸⁹₉₅ This clause will be deleted where there is no Authority Warranted Data set out in Schedule 11. Title information is covered separately so we anticipate that this clause will be used only in limited circumstances.

7 DOCUMENTS AND CO-OPERATION

7.1 Ancillary Documents

The Contractor shall perform its obligations under, and observe all of the provisions of, the Ancillary Documents and shall not:

- 7.1.1** terminate or agree to the termination of all or part of any Ancillary Document;
- 7.1.2** make or agree to any material variation of any Ancillary Document;
- 7.1.3** 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
- 7.1.4** 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 the Review Procedure and there has been no objection in accordance with paragraph 3 of the 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, and, in the circumstances specified in clause 7.1.1 (Ancillary Documents), the Contractor has complied with clauses 71 (Assignment and Sub-Contracting) and 72 (Change ~~in~~of Ownership).

7.2 Delivery of Initial and Changed Ancillary Documents and Financing Agreements

- 7.2.1** The Contractor has provided to the Authority copies of the Ancillary Documents (as listed in Part 2 of Schedule 17 (Project Documents and Ancillary Documents)) and of the Initial Financing Agreements (as listed in Part 1 of Schedule 16 (Financing Agreements)).
- 7.2.2** Without prejudice to the provisions of clauses 7.1 (Ancillary Documents) or 54.1 (Changes to Financing Agreements and Ancillary Documents), or to the definition of Senior Financing Agreements in clause 1.1 (Definitions), if at any time an amendment is made to any Ancillary Document or Financing Agreement, or the Contractor enters into a new Ancillary Document or Financing Agreement (or any agreement which affects the interpretation or application of any Ancillary Document or Financing Agreement), 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 (as the case may be), certified as a true copy by an officer of the Contractor.

7.3 Interface Obligations

- 7.3.1** The Authority undertakes to the Contractor that it shall not, and shall procure that the School Entity shall 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/or the School Entity and of the Contractor and to the use of the Schools to provide the Educational Services and any other operations or activities carried out by ~~the~~ School Entity on or at ~~the Sites~~ a Site for the purposes contemplated by this Agreement or any statutory duties or functions of a Relevant Authority/LEA that affect ~~the~~ a School).

7.3.2 ~~The Contractor acknowledges that the Authority and the relevant School Entities require access to the Sites for the purpose of providing the Educational Services and any other operations or activities carried out by a School Entity on or at a Site for the purposes contemplated by this Agreement or any statutory duties or functions of a Relevant LEA that affect the School and the Contractor undertakes to the Authority that it shall not impede the Authority and the relevant School Entity in the provision of the Educational Services and any other operations or activities carried out by a School Entity on or at a Site for the purposes contemplated by this Agreement or any statutory duties or functions of a Relevant LEA that affect a School).~~

7.3.3 ~~7.3.2~~ The Contractor acknowledges that during the Service Period the Authority/Relevant LEA and/or the relevant School Entity and/or the ICT Service Provider shall require access to the ~~School~~ Schools for the purposes of operating and maintaining the ICT Assets during the Required Periods and the Contractor undertakes to the Authority that it shall not impede the Authority/Relevant LEA and/or the relevant School Entity and/or the ICT Service Provider in the ~~performance of its obligations under the ICT Services Contract~~ course of operating and maintaining the ICT Assets during the Required Periods.

7.3.4 ~~7.3.3~~ The Contractor acknowledges that the Soft Services Provider will be providing Soft Services on or at the Sites and ~~shall~~ the Contractor undertakes to co-operate with and not impede the Soft Services Provider ~~and comply~~ in accordance with the Soft Services Interface Protocol.

7.3.5 ~~The Authority will procure that the Soft Services Provider will co-operate with and not impede the Contractor in accordance with the Soft Services Interface Protocol.~~

7.4 Co-operation

Each Party agrees to co-operate, at its own expense (but without being compelled to incur material expenditure), with the other Party in the fulfilment of the purposes and intent of this Agreement. Neither Party shall be under any obligation to perform any of the other's obligations under this Agreement.

8 NATURE OF LAND INTERESTS

8.1 Access to the Sites

From the Commencement Date until the Expiry Date (or if earlier the Termination Date), the Authority will afford the Ancillary Rights to the Contractor and the Contractor Related Parties for the purpose of implementing the Works and providing the Services.

8.2 Compliance with Specific Title Matters

The Contractor shall without prejudice to clause 6.5 (Authority Title Warranty) procure that:

8.2.1 the carrying out of the Works and the provision of the Services at each 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 provisions of the Specific Title Matters relating to that Site or that School;

8.2.2 in carrying out the Works and providing the Services at each Site, there shall be no action, or omission to act by the Contractor or any Contractor Related Party, which shall give rise to a right for any person to obtain title to or any right or interest over a Site or any part of it (save in accordance with the terms of this Agreement); and

8.2.3 in exercising the Ancillary Rights (other than in respect of the Works), the Contractor and each Contractor Related Party do not cause any material disruption to the provision of the Educational Services. Nothing in this clause 8.2.3 shall relieve the Contractor from its obligations under clause 11.1 (Contractor's Obligations).

8.3 [Title Compensation Events^{9094_9697}

8.3.1 The exercise of any [interest or rights (including any easement) or the enforcement of any restriction, stipulation or covenant]^{92_98} listed in Schedule 13 Part 3 (Title Compensation Events) shall to the extent that the exercise of such [interest or rights (including any

~~⁹⁰ Title compensation events may be appropriate in cases where there are particular title issues with the Site that cannot be dealt with by any other value-for-money means. The Authority also will need to be clear that, for each title compensation event proposed by a bidder, that (i) the rights subsist (ii) the rights would, if enforced, affect the Works (iii) the bidder couldn't reasonably have taken account of the problems in designing its solution and (iv) that insurance cover was not appropriate or available. An example would be where a School had to be sited in such a way (or the Authority, with knowledge of the title issue, requested that the School be sited in a particular way) that the title issue could result in a problem during construction or operation.~~

⁹⁶ Title compensation events may be appropriate in cases where there are particular title issues with the Site that cannot be dealt with by any other value-for-money means. The Authority also will need to be clear that, for each title compensation event proposed by a bidder, that (i) the rights subsist (ii) the rights would, if enforced, affect the Works (iii) the bidder couldn't reasonably have taken account of the problems in designing its solution and (iv) that insurance cover was not appropriate or available. An example would be where a School had to be sited in such a way (or the Authority, with knowledge of the title issue, requested that the School be sited in a particular way) that the title issue could result in a problem during construction or operation.

^{94_97} Note that, if there are title compensation events, this drafting must be used. No changes to the definition of clause 16 or to the definition of Compensation Event are necessary or will be agreed.

^{92_98} Amend as appropriate to cover the title compensation events listed in Part 3 of Schedule 13 and likewise with the second set of bracketed drafting in this paragraph.

easement) or the enforcement of any restriction, stipulation or covenant] has an adverse impact on the Works ~~or the Services~~:

8.3.1.1 ~~8.3.1~~ prior to the Services Availability Date for a School constitute a Compensation Event subject to and in accordance with clause 16 (Extensions of Time); and

8.3.1.2 ~~8.3.2~~ [in respect of Post Completion Works at a School prior to the relevant Post Completion Works Acceptance Date constitute a Compensation Event subject to and in accordance with clause 16 (Extensions of Time);] ~~and~~.

8.3.2 ~~8.3.3~~ The exercise of any [interest or rights (including any easement) or the enforcement of any restriction, stipulation or covenant]⁹⁹ listed in Schedule 13 Part 3 (Title Compensation Events) shall to the extent that the exercise of such [interest or rights (including any easement) or the enforcement of any restriction, stipulation or covenant] has an adverse impact on the Services after the Services Availability Date for a School be deemed to be a Relief Event and no Deductions may be made in respect of the relevant Area pursuant to Schedule 6 (Payment Mechanism) for a reasonable period (to be agreed between the Parties acting reasonably) and any works or change to the Services required or instructed to be done in consequence of it, shall constitute an Authority Change.]

⁹⁹ Amend as appropriate to cover the title compensation events listed in Part 3 of Schedule 13 and likewise with the second set of bracketed drafting in this paragraph.

PART 3 - TRANSITIONAL ARRANGEMENTS

9 EMPLOYMENT AND SKILLS

- 9.1** During the carrying out of the Works the Contractor shall comply with and implement the Employment and Skills Plan and the Employment and Skills Method Statement in accordance with the Employment and Skills Strategy.
- 9.2** The Contractor shall nominate an individual to liaise with the Authority and provide the Authority with information as reasonably required in order to demonstrate the Contractor's compliance with the Employment and Skills Plan and the Employment and Skills Method Statement.
- 9.3** The Authority shall provide to the Contractor information it has available to enable the Contractor to comply with and implement the Employment and Skills Plan and the Employment and Skills Method Statement, including the details listed in the Employment and Skills Strategy.
- 9.4** During the carrying out of the Works the Contractor shall provide to the Authority on a monthly basis in accordance with the relevant dates set out in Employment and Skills Strategy a report outlining the achievements during the previous month against the Employment and Skills Plan and the Employment and Skills Method Statement and provide details of the various employment and skills activities delivered in that month.
- 9.5** By no later than six (6) months after the final Services Availability Date the Parties shall meet to review the Contractor's compliance with and implementation of the Employment and Skills Plan and the Employment and Skills Method Statement.

10 THE WORKS

10.1 Obligation to Carry Out

The Contractor shall or shall procure that the Building Contractor (and its sub-contractors and/or consultants) shall carry out the design (including the preparation of Design Data) and the construction, completion, commissioning and testing of the Works so that:

10.1.1 ~~each School shall achieve~~ ICT Handover shall be achieved at each School on or before the Planned ICT Handover Date and (without prejudice to clause 11.11) Services Availability on or before the Planned Services Availability Date for that School provided that a breach of this clause 10.1.1 shall not, of itself, be capable of giving rise to a Contractor Default under either of limbs (a) or (b) of that definition;

10.1.2 [the Post Completion Works Acceptance Requirements are satisfied at each Site on or before the relevant Planned Post Completion Works Acceptance Date, provided that a breach of this clause 10.1.2 or clause 20.4 (Post Completion Works/Site Clearance) shall not, of itself, be capable of giving rise to a Contractor Default under either of limbs (a) or (b) of that definition;]

- 10.1.3** the Works fully comply with and meet all the requirements of this Agreement, the Facilities Output Specification, the Construction Proposals, Good Industry Practice, Guidance, all Necessary Consents, all applicable Authorities' Policies^{93,100} ~~and~~ Legislation and any applicable judgment of a relevant court of law which is a binding precedent.
- 10.1.4** new materials only will be used in carrying out the Works (unless the Authority agrees otherwise in writing or the contrary is set out in the Facilities Output Specification)⁹⁴ and all goods used or included in the Works will be of satisfactory quality, and there will be used or included in the Works none of those products and materials listed in Schedule 9 (Prohibited Materials) nor any products or materials not in conformity with relevant British or European Union Standards or codes of practice which at the time of use are widely known to building contractors or members of the relevant design profession within the European Union to be deleterious to health or safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used;
- 10.1.5** all persons employed in connection with the performance of the Works will be skilled and experienced in their several professions, trades and callings or adequately supervised;
- 10.1.6** all aspects of the Works will be supervised by sufficient numbers of persons having adequate knowledge of such matters for the satisfactory and safe performance of the Works in accordance with this Agreement and having regard to the activities which are carried on at the Sites and to the age of the Pupils occupying the Sites;
- 10.1.7** the Works are maintained in good order, kept in a safe condition and protected from damage, and working areas of the Sites are secure against trespassers and clean and tidy so far as practicable having regard to the nature of the Works;
- 10.1.8** adequate retaining and supporting walls are provided to support any Adjoining Property and, where appropriate, the buildings at the Existing Schools during the carrying out of the Works; and
- 10.1.9** the Works are carried out in compliance with the Equality Requirements.

10.2 Overall Responsibility

The obligations in clause 10.1 (Obligation to Carry Out) are independent obligations. In particular:

- 10.2.1** the fact that the Contractor has complied with the Facilities Output Specification but not the Construction Proposals shall not be a defence to an allegation that the Contractor has not satisfied the Construction Proposals provided that the Facilities Output Specification shall take priority over the Construction Proposals in the event of any discrepancy or inconsistency between them; and

^{93,100} Authority to determine what policies are to be included in Schedule 15.

⁹⁴ ~~Set out in the Facilities Output Specification any requirements as to use of recycled materials.~~

10.2.2 the fact that the Contractor has complied with the Construction Proposals but not the Facilities Output Specification shall not be a defence to an allegation that the Contractor has not satisfied the Facilities Output Specification.

10.3 Utilities

10.3.1 The Contractor shall in relation to the services and utilities required or affected as a result of the carrying out of the Works:

10.3.1.1 be responsible for determining the location of such services and utilities as may be at ~~the~~each Site and for the maintenance of access to such services and utilities at ~~the~~a Site;

10.3.1.2 make and rely upon all necessary investigations and surveys as to such services and utilities at ~~the~~a Site;

10.3.1.3 make provision for lawfully diverting, disconnecting or otherwise dealing as may be necessary with any services and utilities not within ~~the~~a Site;

10.3.1.4 pay to all Relevant Authorities or undertakings all costs and expenses incurred in diverting, disconnecting or otherwise carrying out works in respect of such services and utilities within ~~the~~a Site;

10.3.1.5 make connection into services and utilities outside ~~the~~a Site; and

10.3.1.6 otherwise do all that is required in relation to the services and utilities required for the purpose of the carrying out of the Works [including but not limited to (i) using all reasonable endeavours to conclude with each Utilities Third Party the terms of the relevant Utilities Agreement and gaining the execution of such Utilities Agreement by the relevant Utilities Third Party (ii) keeping the Authority updated at reasonable intervals as to the content and progress of discussions with any Utilities Third Party (including any difficulty or reasonably anticipated difficulty in obtaining any Utilities Agreement along with reasons for such difficulty) (iii) giving due regard to any comments made by the Authority in relation to each Utilities Agreement (iv) being party to any Utilities Agreement when properly required for the purpose of the Works (v) executing such agreed Utilities Agreement within [ten (10) Business Days] of receipt and (vi) complying with its obligations as party to such Utilities Agreement.

10.3.2 Provided that the Contractor has complied with clause 10.3.1.6 the Authority shall procure that the ~~owner of the affected Site~~relevant Landowner:

10.3.2.1 be party to any Utilities Agreement when properly required for the purpose of the Works (including as grantor, grantee or consentor);

10.3.2.2 within [ten (10)] Business Days of receipt of a Utilities Agreement agreed pursuant to clause 10.3.1.6 execute such Utilities Agreement; and

10.3.2.3 complies with its obligations as party to any Utilities Agreement.

10.3.3 Any delay in the obtaining of a Utilities Agreement not due to the Authority's breach of clause 10.3.2 shall be deemed to be a Relief Event subject to and in accordance with clause 58 (Relief Events) unless any such delay arises (directly or indirectly) as a result of any wilful default or wilful act of the Contractor or any Contractor Related Party.^{95_101}]

11 CONSTRUCTION PROGRAMME

11.1 Contractor's Obligation

Insofar as the carrying out of the Works affects or may affect the provision of Educational Services at any Existing School [or a School (as the case may be)]^{96_102}, the Contractor shall procure that (subject to the terms of this Agreement) the Works are carried out:

11.1.1 so as to minimise any disruption to the provision of Educational Services; and

11.1.2 so as to ensure that no disruption is caused during the carrying out of examinations at any Existing School or School ([as the case may be](#)) during an Examination Period,

and in compliance to the extent reasonably practicable with the Construction Programme.

11.2 Examination Periods

11.2.1 The Examination Periods for the [current and] subsequent^{97_103} Academic Year[s] following the date of this Agreement have been notified by the Authority to the Contractor.

11.2.2 Where such dates have not already been notified pursuant to clause 11.2.1, then no later than [31st August]^{98_104} in each Academic Year prior to the Services Availability Date for each School, the Authority shall notify the Contractor of the dates of the Examination Periods for the next Academic Year.

11.3 Stop Notices

11.3.1 If, in the opinion of the Authority or the relevant School Entity, the Contractor or a Contractor Related Party is not at any time during

^{95_101} For use where there is a need for agreements to be concluded with utility companies for, eg. diverting a sewer.

^{96_102} Appropriate to phased Schools.

^{97_103} Depending on when in the Academic Year the date of financial close falls.

^{98_104} The Authority should notify the Contractor as soon as it can but this should be the latest date.

an Examination Period complying with its obligations under clause 11.1 (Contractor's Obligation) and the performance of the Works is causing interference with or otherwise disrupting examinations at an [Existing School or School as the case may be], the Authority or the relevant School Entity may give a written instruction to the Contractor (a Stop Notice) to cease such parts of the Works and/or take or refrain from taking such other steps as are necessary to cease interference with the examinations until the end of the Examination Period in question (or such other time as reasonably decided by the Authority or the relevant School Entity).

11.3.2 The Contractor shall comply immediately with any Stop Notice issued pursuant to clause 11.3.1.

11.3.3 If the Authority or the relevant School Entity issues a Stop Notice, the Authority ~~or shall or shall procure that~~ the relevant School Entity shall, not later than the next Business Day following the day on which such Stop Notice was given, confirm in writing to the Contractor:

11.3.3.1 the fact that the Stop Notice was given and the time at which it was given;

11.3.3.2 the nature and extent of the Stop Notice;

11.3.3.3 what was, in the opinion of the Authority or the relevant School Entity, the disruption to or interference with the examinations; and

11.3.3.4 any other relevant information.

11.3.4 The Authority may, at its absolute discretion and at any time after the issue of a Stop Notice by a School's ~~Representative Entity~~, cancel such Stop Notice by notice to the Contractor's ~~Representative~~ and the relevant School's ~~Representative Entity~~.

11.3.5 If it is subsequently discovered that the Contractor was not in breach of its obligations under clause 11.1 (Contractor's Obligation), the giving of a Stop Notice shall constitute a Compensation Event and the provisions of clause 16 (Extensions of Time) shall apply, provided always that this shall not absolve the Contractor from its obligation immediately to comply with any such Stop Notice.

11.3.6 The Contractor shall take all reasonable steps to mitigate the consequences of service of a Stop Notice on its ability to perform its obligations under this Agreement.

11.3.7 Any dispute in relation to or arising out of this clause 11.3 may be referred by either Party for resolution under the Dispute Resolution Procedure, provided always that any such reference shall not absolve the Contractor from its obligation immediately to comply with any Stop Notice in accordance with this clause 11.3.

11.4 Notification of Delays in Progress of the Works

Without prejudice to the requirement of the Contractor to notify the Authority pursuant to clause 16 (Extensions of Time), if either:

11.4.1 the Contractor becomes aware at any time that the actual progress of the Works may become or has been significantly delayed or has fallen behind the Construction Programme; or

11.4.2 it appears to the Authority's Representative at any time that the actual progress of the Works has been significantly delayed or has fallen behind the Construction Programme (and the Authority's Representative requests the Contractor's Representative to do so),

the Contractor's Representative shall submit to the Authority's Representative a report identifying the reasons for the delay and (where the Authority's Representative requires the Contractor's Representative to do so) the Contractor's Representative shall produce and submit to the Authority's Representative a revised Construction Programme showing the manner and the periods in which the Works will be carried out to achieve the relevant Planned Services Availability Date(s) and/or showing the steps which are to be taken to eliminate or reduce the delay.

11.5 Authority's Obligation

The Authority shall ensure that Educational Services provided at any Existing School prior to Services Availability are provided in such a way and in such locations as will not prevent the Contractor from carrying out the relevant part of the Works at each such Site at the times shown in the Construction Programme and in the areas shown on the Site Plans.

11.6 Decanting

11.6.1 The Parties shall each comply with their respective obligations set out in the Decant Protocol (and shall not be in breach of such obligations to the extent any failure to do so arises directly from any default of the other Party).

11.6.2 In the event the Construction Programme is amended in accordance with this Agreement the Parties shall agree (acting reasonably) any necessary changes to the Decant Protocol with the aims of minimising disruption to the Educational Services and delay to the relevant Services Availability Date.

11.7 Equipment

11.7.1 The Authority does not guarantee, warrant or give any assurances as to the age, condition or state of repair of any item of Authority Equipment.

11.7.2 The Contractor has (exercising the level of skill and care reasonably to be expected from an appropriately qualified and competent operator providing services in relation to a project of a similar size and scope to the Project) (i) carried out its own inspections and made its own assessment of the proposed Initial Legacy Authority Equipment and (ii) carried out an assessment of the proposed Initial New Authority Equipment, ~~and~~ and has determined that, in order to provide the Services and comply with the Area Data Sheets, the Contractor Equipment is necessary in addition to the proposed Initial Legacy Authority Equipment and the proposed Initial New Authority Equipment. The Contractor has projected that the cost of the Contractor Equipment is equal to the Contractor Equipment Provisional Sum and the Base Case includes an

allowance for the Contractor to purchase Contractor Equipment up to the value of the Contractor Equipment Provisional Sum.

- 11.7.3** The Contractor shall purchase, provide and install Contractor Equipment in accordance with the provisions of paragraph 3 of the Facilities Output Specification.
- 11.7.4** The Contractor shall only purchase or provide and install Contractor Equipment that is Approved Contractor Equipment that has been purchased or provided in accordance with the Loose Equipment Purchase Protocol.
- 11.7.5** The Contractor shall submit to the Authority pursuant to Schedule 8 (Review Procedure) its proposals for Approved Contractor Equipment and shall set out any difference in cost between the actual cost of the Approved Contractor Equipment and the Contractor Equipment Provisional Sum.
- 11.7.6** To the extent that the actual cost of the Approved Contractor Equipment exceeds the Contractor Equipment Provisional Sum, the Authority shall pay the difference to the Contractor within twenty Business Days of receipt of the Contractor's invoice.¹⁰⁵
- 11.7.7** To the extent that the actual cost of the Approved Contractor Equipment is less than the Contractor Equipment Provisional Sum, the Contractor shall pay such difference to the Authority within twenty (20) Business Days of written request by the Authority.
- 11.7.8** The Contractor shall:
- 11.7.8.1** provide and install the Approved Contractor Equipment at the Schools; and
 - 11.7.8.2** relocate any Initial Authority Equipment and Legacy ICT Equipment in the Existing Schools to the Schools in accordance with the Decant Protocol.
- 11.7.9** If the Contractor has failed in its obligations to decant and ~~recommision~~recommission any Legacy ICT Equipment or any Initial Authority Equipment as required under this Agreement within three (3) Business Days of the relevant programmed ~~dated~~date the Authority may do so and recover the cost of doing so from the Contractor as a debt.^{99,106}
- 11.7.10** When the Contractor has installed the Approved Contractor Equipment and the Active ICT Infrastructure at the relevant School, title in the Approved Contractor Equipment and the Active ICT Infrastructure shall pass to the Authority or if directed by the Authority to the School Entity and the Contractor shall assign the benefit of all warranties and guarantees for the Approved Contractor Equipment and the Active ICT Infrastructure to the Authority.

¹⁰⁵ [This provisional sum drafting is unlikely to be used as the schools are more likely to be required to purchase equipment prior to decant.](#)

^{99,106} This clause may need to be amended, subject to local requirements.

- 11.7.11** The Contractor shall not be responsible for repairing, maintaining and replacing the Authority Equipment. The Authority shall, or shall procure that the relevant School Entity shall, have regard to the impact of any changes in the specification of the Authority Equipment on the Services when replacing the Authority Equipment.
- 11.7.12** The Contractor shall inform the Authority and the relevant School Representative at the same time that it submits the Lifecycle Schedule ~~which~~whether it is aware that any items of Authority Equipment will in the Contractor's reasonable opinion require replacement by the Authority within the Academic Year.
- 11.7.13** The Contractor shall inform the Authority and the relevant School Representative in writing if at any time the Contractor becomes aware that any Authority Equipment requires immediate replacement on the grounds that it creates a health and safety risk and/or is likely to damage other elements of the Buildings or Site if left in use, despite not being itemised in a Lifecycle Schedule.
- 11.7.14** If the Authority Equipment is the subject of a notice given under clause 11.7.13 and as such requires immediate replacement, then the Authority shall or shall procure that such Authority Equipment shall be taken out of service as soon as reasonably practicable. The Contractor will not be liable for any Deductions ~~that directly arise~~and the Authority shall be liable for any resulting damage or health and safety incident that, in each case, directly arises from the failure by the Authority to take such Authority Equipment out of service in accordance with this clause 11.7.14.
- 11.7.15** The Contractor shall upon request provide to the Authority and the relevant School Entity access to all the Contractor's records, receipts, invoices, reports, drawings, technical specifications and performance logs required by the Authority and/or the relevant School Entity to enable them to accurately assess any Approved Contractor Equipment supplied, installed or commissioned by the Contractor or Approved Contractor Equipment which the Contractor proposes to supply, install or commission.

11.8 Induction

The Contractor shall provide an induction to each School for all teachers, staff and Pupils at the dates and times identified in the Construction Programme and in the manner set out in the Contractor's Proposals. The Contractor shall have no responsibility to repeat such induction to those teachers, staff or Pupils who do not attend the planned induction for the School in question.

11.9 ICT Handover Period Access and Protocol

- 11.9.1** During the ICT Handover Period the ICT Service Provider and/or the Authority and/or an Authority Related Party (the **ICT Installer**) may deliver and install any ICT Assets between 8am and 5pm on any Business Day. If the ICT Installer requires additional access to ~~the~~a Site beyond these hours then the Authority shall provide not less than 24 hours' notice of such request to the Contractor specifying the nature of the access required and the activities proposed to be undertaken by the ICT Installer and the Authority shall reimburse to the Contractor all additional costs it reasonably

and properly incurs as a direct result of providing such additional access. The Contractor shall not impede such access provided that the Contractor shall be deemed not to be in breach of this clause unless it has received notice from the ICT Installer that it is so impeding, and has failed to cease impeding the ICT Installer within one hour of receiving such notice.

11.9.2 The Contractor will during the ICT Handover Period allow the ICT Installer access to the ICT server rooms^{400_107}.

11.9.3 The Authority shall and shall ensure that the ICT Installer shall during the ICT Handover Period comply with the terms of the ICT Access Protocol. The Contractor shall, and shall ensure that its sub-contractors shall during the ICT Handover Period, comply with the terms of the ICT Access Protocol.

11.10 Live Testing during ICT Handover Period

11.10.1 Subject to clause 11.10.2 the Contractor shall ensure that ~~the~~each School has mains power during the ICT Handover Period so that, amongst other things, the ICT Installer can carry out live testing of the ICT Assets.

11.10.2 For the purposes of avoiding events that would either endanger any part of the building or cause a risk of injury or death to persons the Contractor may shut down or reduce the mains power during the ICT Handover Period provided that:

11.10.2.1 for any shut down or power reduction between 8am and 5pm on a Business Day, the Contractor shall have given not less than forty eight (48) hours' prior written notice of such intention to, and obtained the prior written consent of, the Authority's Representative (such consent not to be unreasonably withheld or delayed, provided that it shall be reasonable for the Authority's Representative not to consent where such shutdown or power reduction could have a material adverse effect on the installation of the ICT Assets); or

11.10.2.2 for any shut down or power reduction outside the hours set out in clause 11.10.2.1 (an **Out of Hours Shutdown**), the Contractor shall have given not less than twenty four (24) hours' prior written notice of such intention to the Authority's Representative. If there have been two or more Out of Hours Shutdowns in any week then any further Out of Hours Shutdowns in that week shall also require the prior written consent of the Authority's Representative (such consent not to be unreasonably withheld or delayed, provided that it shall be reasonable for the Authority's Representative not to consent where such shutdown or power reduction could have a material adverse effect on the installation of the ICT Assets).

11.10.3 The Contractor shall use its best endeavours to reinstate the mains power to the relevant Area as soon as possible after any such event

^{400_107} And any other areas to be identified.

as referred to in clause 11.10.2 and the Authority shall procure that the ICT Installer shall not attempt to connect to the live power within the relevant Area until the Contractor instructs the Authority or the relevant School Entity in writing that it is safe to do so.

11.11 Non Interference by the ICT Installer

11.11.1 The Authority acknowledges that whilst it or the ICT Installer is taking delivery of and installing ICT Assets during the ICT Handover Period the Contractor shall also be at ~~the~~a Site for the purpose of:

11.11.1.1 undertaking Snagging Items and/or remedying Defects;

11.11.1.2 mobilising for the performance of the Services following the Services Availability Date;

11.11.1.3 carrying out its obligations pursuant to the Decant Protocol, including the installation and recommissioning of Legacy ICT Equipment; and;

11.11.1.4 carrying out the balancing, testing and/or commissioning of the mechanical and electrical installations at the School,

(together the **Contractor ICT Handover Period Activities**).

11.11.2 The Authority shall (and shall procure the relevant ICT Installer shall) take all reasonable steps not to impede the Contractor or any Contractor Related Party from undertaking the Contractor ICT Handover Period Activities.

11.12 Soft Services Mobilisation

The Contractor acknowledges that during the ICT Handover Period the Authority and/or the relevant Soft Services Provider and/or the relevant School's Representative will need to be at ~~the~~a Site for the purposes of mobilising for the performance of the Soft Services at ~~the Schools~~each School. The Contractor will, during the ICT Handover Period, provide training on the use of the building systems and operation of the Schools, as set in the Soft Services Training Plan.

12 REPRESENTATIVES

Representatives of the Authority

12.1 The Authority's Representative shall be []⁴⁰⁺¹⁰⁸ 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 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.

12.2 The Authority's Representative shall be entitled at any time, by notice to the Contractor, to authorise any other person to exercise the functions and powers

⁴⁰⁺108 Definition of Authority's Representative to be defined and will be from EFA. The Authority's Representative is sometimes different during the construction and services periods.

of the Authority delegated to him pursuant to this clause, either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Authority's Representative and all references to the "Authority's Representative" in this Agreement (apart from this clause) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.

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

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

12.5

12.5.1 Save where notified in writing by the Authority before such act or instruction, the Contractor and Contractor's Representative shall be entitled to treat any act or instruction of the Authority's Representative which is authorised by this Agreement as being expressly authorised by the Authority and the Contractor and the Contractor's Representative shall not be required to determine whether authority has in fact been given.

12.5.2 Save where notified in writing by the Authority before such act or instruction, the Contractor and Contractor's Representative shall not be entitled to treat any act or instruction of the Authority's Representative or any other officer, employee or other person engaged by the Authority which is not authorised by this Agreement as being authorised by the Authority and shall be required to determine by notice to the Authority whether an express authority has in fact been given.

12.6 Representative of the School Entities

The Schools' Representatives shall be []⁴⁰²₁₀₉ or such other persons appointed pursuant to this clause. Subject to clause 12.10 the ~~School's Representative's~~Schools' Representatives' role shall be to exercise those rights, duties and obligations that are expressly allocated to it by this Agreement. The Authority may ~~be~~by notice to the Contractor notify the Contractor of a change to any School's Representative. Such change shall have effect from the date specified in the written notice (which date shall other than in the case of emergency be such date as will not cause material inconvenience to the Contractor in the execution of its obligations under this Agreement).

⁴⁰²₁₀₉ Each School Entity will appoint a representative. A table should be inserted with the name of each School and its Representative. The Schools' Representatives can attend Site meetings, inspect the Works, review and approve Permits to Work and inspect the Schools prior to completion.

12.7 Representative of the Contractor

The Contractor's Representative shall be [] or such other person appointed pursuant to this clause. 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.

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

12.9 Appointment of Representatives

At any time the Authority may appoint more than one Authority's Representative and the Contractor may appoint more than one Contractor's Representative provided in each case the appointer provides written confirmation to the Contractor or Authority as appropriate of the extent of its Representative's authority.

12.10 Suspension of rights of Schools' Representatives

The Authority's Representative may on written notice to the Contractor cancel notices issued by a School's Representative and suspend for the specified period of time any rights of a School's Representative. In the event of any conflict or inconsistency between any notice issued by a School's Representative and the Authority's Representative, any notice issued by the Authority's Representative shall take precedence.

13 SITE MEETINGS

The Contractor shall procure that relevant Schools' Representatives and representatives of the Authority are afforded a reasonable opportunity to attend site meetings relating to the Works and (whether or not such representatives have attended) that a copy of the minutes of site meetings is promptly supplied to the Authority.

14 DESIGN DEVELOPMENT

14.1 Obligation to Finalise Design

The Contractor shall develop and finalise the design and specification of the Works and the Authority may review the Reviewable Design Data in accordance with the Review Procedure and the provisions of this clause 14.

14.2 Submission of Reviewable Design Data

The Contractor shall submit the Reviewable Design Data and the design of any variations developed in accordance with clause 15 (Changes to the Construction Proposals and the Construction Programme) to the Authority's Representative for review under the Review Procedure.

14.3 No Construction prior to Review

14.3.1 Subject to clause 14.3.2 the Contractor shall not commence or permit the commencement of the construction of the part or parts of the Works to which any Reviewable Design Data relates until it has submitted the relevant Reviewable Design Data for review and either it is confirmed by the Authority's Representative that the Contractor is entitled to proceed with construction in accordance with the Review Procedure or the Contractor is disputing the status of such Reviewable Design Data pursuant to paragraph 1.3 of Schedule 8 (Review Procedure).

14.3.2 If the Contractor commences or permits the commencement of construction before the Authority's Representative provides such approval or during such a dispute and it is subsequently determined that the Contractor was not entitled to proceed with construction in accordance with paragraph 4 of Schedule 8 (Review Procedure), then the Contractor shall forthwith undo, remove from the Site(s) and replace (in a manner complying with this Agreement) any parts of the Works which it has been determined the Contractor was not entitled to construct.

14.4 Approved RDD

With effect from the date on which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with the Review Procedure, the Contractor may proceed with the construction of the relevant part or parts of the Works (subject to the need to submit any associated Reviewable Design Data to review) in accordance with that Approved RDD Item.

14.5 Review of Design Data

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 reasonably practicable following receipt of any written request from the Authority's Representative.

14.6 Design Database

The Contractor shall establish and maintain a computerised design database or shall procure that a computerised design database is established and maintained, throughout the Contract Period which the Contractor's Representative and the Authority's Representative may access remotely by computer to view drawings comprised within the Design Data (including Reviewable Design Data) and electronically store and print copies of such Design Data. If the Authority's Representative is unable to access that design database, the Contractor shall procure that the database is made available as soon as reasonably practicable for inspection by the Authority's Representative or any person authorised by the Authority's Representative.

14.7 Rectification of Construction Proposals

If it should be found that the Construction Proposals do not fulfil the Facilities Output Specification, the Contractor shall at its own expense amend the Construction Proposals and rectify the Works or any part of the Works affected. Such amendment and rectification shall have the effect that:

14.7.1 the Construction Proposals shall satisfy the Facilities Output Specification; and

14.7.2 following the amendment or rectification the structural, mechanical and electrical performance of the Sites will be of an equivalent standard of performance to that set out in the Construction Proposals prior to their amendment or rectification (for the purpose of comparison disregarding the fault which required the amendment or rectification to be made).

15 CHANGES TO THE CONSTRUCTION PROPOSALS AND THE CONSTRUCTION PROGRAMME

15.1 Proposal to Vary Construction Proposals or the Construction Programme

15.1.1 Without prejudice to clause 14.7 (Rectification of Construction Proposals), the Contractor shall be entitled to propose variations to the Construction Proposals by submitting the relevant variation to the Authority for review under the Review Procedure.

15.1.2 The Contractor shall be entitled to propose variations to the Construction Programme by submitting the relevant variation to the Authority for review under the Review Procedure.

15.2 Implementing a Variation to the Construction Proposals or the Construction Programme

The Contractor shall not implement any variation to the Construction Proposals or the Construction Programme until the Authority consents or is deemed to have consented to the variation in accordance with the Review Procedure. Once consented to, a proposed variation will form part of the Construction Proposals or the Construction Programme as the case may be.

16 EXTENSIONS OF TIME

16.1 Notice

If at any time the Contractor becomes aware that there will be or is likely to be a delay in the Works such that a Start on Site Date, a Planned ICT Handover Date, a Planned Services Availability Date or a Planned Post Completion Works Acceptance Date may not be achieved, or following a Planned ICT Handover Date) such that there is a delay in the achievement of ICT Handover or (following the Planned Services Availability Date) such that there is a delay in the achievement of Services Availability, [or (following the Planned Post Completion Works Acceptance Date) such that there is a delay in the achievement of the Post Completion Works Acceptance Date,] the Contractor shall as soon as reasonably practicable and in any event within twenty (20) Business Days of becoming aware of the likely delay give notice to the Authority to that effect specifying:

16.1.1 the reason for the delay or likely delay; and

16.1.2 an estimate of the likely effect of the delay on the Works including the Start on Site Date, any Planned ICT Handover Date, [any Planned Post Completion Works Acceptance Date], any Planned Services Availability Date or the Longstop Date (taking into account any measures that the Contractor proposes to adopt to mitigate the consequences of the delay in accordance with clause 16.3 (Duty to Mitigate)).

16.2 Supply of Information

Following service of a notice by the Contractor pursuant to clause 16.1 (Notice), the Contractor shall promptly supply to the Authority any further information relating to the delay which:

16.2.1 is received by the Contractor; or

16.2.2 is reasonably requested by the Authority.

16.3 Duty to Mitigate

The Contractor shall take all reasonable steps to mitigate the delay and consequences of any delay which is the subject of a notice pursuant to clause 16.1 (Notice).

~~16.4~~ **Not Used**

16.4 ~~16.5~~ **Effect of a Compensation Event**^{103,110}

16.4.1 ~~16.5.1~~ If, for any School, on or before the Services Availability Date for that School [or (in respect of the Post Completion Works) on or before the Post Completion Works Acceptance Date for that School], as a direct result of the occurrence of a Compensation Event the Contractor will:

16.4.1.1 ~~16.5.1.1~~ be unable to commence the Works on or before the Start on Site Date; and/or

16.4.1.2 ~~16.5.1.2~~ be unable to achieve ICT Handover on or before a Planned ICT Handover Date or following the Planned ICT Handover Date but before the Longstop Date will be delayed in achieving ICT Handover or will be unable to achieve Services Availability on or before a Planned Services Availability Date or (following the Planned Services Availability Date but before the Longstop Date) will be delayed in achieving Services Availability; and/or

16.4.1.3 ~~16.5.1.3~~ [be unable to fulfil the Post Completion Works Acceptance Requirements on or before the Planned Post Completion Works Acceptance Date or (following the Planned Post Completion Works Date) will be delayed in completing the Post Completion Works; and/or;]

16.4.1.4 ~~16.5.1.4~~ be unable to comply with its obligations under this Agreement; and/or

16.4.1.5 ~~16.5.1.5~~ incur costs or lose revenue,

then the Contractor is entitled to apply for an extension of time to the Start on Site Date and/or to the Planned ICT Handover Date and/or to the Planned Services Availability Date and/or (following a Planned Services Availability Date) to the Longstop Date and/or

¹⁰³ 110 To the extent that there are other dates by which elements of the works need to be completed (such as Post Completion Works) then these dates should also be capable of extension. Suggested drafting is included in square brackets.

relief from its obligations and/or to claim compensation under this Agreement.

16.4.2 ~~16.5.2~~ If, for any School where completion of the Works at that School is scheduled to occur after the Planned Services Availability Date for that School, as a direct result of the occurrence of a Compensation Event the Contractor will be delayed in completing such Works on or before the relevant Planned Post Completion Works Acceptance Date or (following such Planned Post Completion Works Acceptance Date, but before the Longstop Date) will be delayed in completing such Post Completion Works or will be unable to comply with its obligations under this Agreement; and/or the Contractor will incur costs or lose revenue in respect of such Works, then the Contractor is entitled to apply for an extension of time to the Planned Post Completion Works Acceptance Date and/or relief from its obligations and/or to claim compensation under this Agreement.

16.5 ~~16.6~~ **Procedure for Relief and Compensation**

Subject to clause ~~16.8~~16.7 (Late Provision of Notice or Information), to obtain relief, extension and/or claim compensation the Contractor must:

16.5.1 ~~16.6.1~~ as soon as practicable, and in any event within twenty (20) Business Days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement and/or the Contractor to incur costs or lose revenue, give to the Authority a notice of its claim for an extension of time to the Start on Site Date and/or to the relevant Planned ICT Handover Date and/or to the relevant Planned Services Availability Date or (following the relevant Planned Services Availability Date) to the Longstop Date [and/or to the Planned Post Completion Works Acceptance Date], payment of compensation and/or relief from its obligations under this Agreement;

16.5.2 ~~16.6.2~~ within ten (10) Business Days of receipt by the Authority of the notice referred to in clause ~~16.6.1~~,16.5.1, give full details of the Compensation Event and the extension of time and/or relief from its obligations under this Agreement and/or any Estimated Change in Project Costs claimed; and

16.5.3 ~~16.6.3~~ demonstrate to the reasonable satisfaction of the Authority that:

16.5.3.1 ~~16.6.3.1~~ the Compensation Event was the direct cause of:

16.5.3.1.1 ~~16.6.3.1.1~~ the Estimated Change in Project Costs; and/or

16.5.3.1.2 ~~16.6.3.1.2~~ any delay in the commencement of the Works on or before the Start on Site Date; and/or

16.5.3.1.3 ~~16.6.3.1.3~~ any delay in achievement of ICT Handover on or before the relevant Planned ICT Handover Date or, (following

the relevant Planned ICT Handover Date but before the Longstop Date), any delay in the achievement of ICT Handover; and/or

16.5.3.1.4 ~~16.6.3.1.4~~ any delay in achievement of Services Availability on or before the relevant Planned Services Availability Date or, (following the relevant Planned Services Availability Date but before the Longstop Date), any delay in the achievement of Services Availability; and/or

16.5.3.1.5 ~~16.6.3.1.5~~ any delay in the completion of the Post Completion Works on or before the relevant Planned Post Completion Works Acceptance Date or (following the relevant Planned Post Completion Works Acceptance Date) any delay in completing the relevant Post Completion Works; and/or

16.5.3.1.6 ~~16.6.3.1.6~~ breach of the Contractor's obligations under this Agreement; and

16.5.3.2 ~~16.6.3.2~~ the Estimated Change in Project Costs, time lost, and/or relief from the obligations under this Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice.

16.5.4 Following service of a notice by the Contractor pursuant to clause 16.5.1, the Contractor shall promptly supply to the Authority any further information relating to delay which is:

16.5.4.1 received by the Contractor; or

16.5.4.2 reasonably requested by the Authority.

16.6 ~~16.7~~ **Giving of Relief and Compensation**

In the event that the Contractor has complied with its obligations under clause ~~16.6~~16.5 (Procedure for Relief and Compensation), then:

16.6.1 ~~16.7.1~~ in the case of a delay:

16.6.1.1 ~~16.7.1.1~~ the Start on Site Date; and/or

16.6.1.2 ~~16.7.1.2~~ the relevant Planned ICT Handover Date, the relevant Planned Services Availability Date or, following the relevant Planned Services Availability Date, the Longstop Date; [and/or]

16.6.1.3 ~~16.7.1.3~~ [the relevant Planned Post Completion Works Acceptance Date],

shall, subject to clause ~~16.11~~16.10 (School Terms), be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of the delay,

16.6.2 ~~16.7.2~~ in the case of an additional cost being incurred or revenue being lost by the Contractor:

16.6.2.1 ~~16.7.2.1~~ in relation to a Site on or before the [later of the] Services Availability Date [and the Post Completion Works Acceptance Date] for that School; or

16.6.2.2 ~~16.7.2.2~~ as a result of Capital Expenditure being incurred by the Contractor at any time,

the Authority shall compensate the Contractor for the Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred and, in the case of Change in Revenue, without double counting, for revenue actually lost (to the extent it could not reasonably have been mitigated) within twenty (20) Business Days of its receipt of a written demand by the Contractor supported by all relevant information;

16.6.3 ~~16.7.3~~ in the case of a payment of compensation for the Estimated Change in Project Costs and, in the case of Change in Revenue, without double counting, for revenue actually lost that does not result in Capital Expenditure being incurred by the Contractor referred to in clause ~~16.7.2.2~~16.6.2.2 but which reflects a change in the costs and/or without double counting, loss of revenue being incurred by the Contractor after the relevant Services Availability Date, the Authority shall compensate the Contractor in accordance with clause ~~16.10~~16.9 (Method of Calculating Compensation) by an adjustment to the Unitary Charge in accordance with clause 73 (Financial Adjustments); and/or

16.6.4 ~~16.7.4~~ the Authority shall give the Contractor such relief from its obligations under this Agreement as is reasonable for such a Compensation Event.

16.7 ~~16.8~~ **Late Provision of Notice or Information**

In the event that information is provided after the dates referred to in clause ~~16.6~~16.5 (Procedure for Relief and Compensation) then the Contractor shall not be entitled to any extension of time, compensation or relief from its obligations under this Agreement in respect of the period for which the relevant information is delayed.

16.8 ~~16.9~~ **Failure to Agree**

If the Parties cannot agree the extent of any compensation, delay incurred, relief from the Contractor's obligations under this Agreement, or the Authority disagrees that a Compensation Event has occurred (or as to its consequences), or that the Contractor is entitled to relief under this clause 16, the Parties shall resolve the matter in accordance with the Dispute Resolution Procedure.

16.9 ~~16.10~~ **Method of Calculating Compensation**

Any payment of compensation referred to in clause ~~16.7~~16.6 (Giving of Relief and Compensation) shall be calculated in accordance with clause 73 (Financial Adjustments).

16.10 ~~16.11~~ **School Terms**

The Authority agrees that, when assessing the effect of any Compensation Event pursuant to clause ~~16.7~~16.6 (Giving of Relief and Compensation), any loss of revenue and/or delay to the achievement of Services Availability that may arise as a result of the operation of clauses 20.2 (Dates on which ICT Handover may occur and 20.3 (Dates on which Services Availability may occur) shall be taken into account provided that the Planned ICT Handover Date shall only ever move to the twenty-fifth Business Day, and the Planned Services Availability Date shall only ever move to the fifth Business Day, before the first day of a Term or ~~Half-Term~~half term (other than the Summer ~~Half-Term~~half term).

17 CDM REGULATIONS⁴⁰⁴111

17.1 Responsibility for Design

As between the Contractor and the Authority, the Contractor shall be entirely responsible for the safety of any design which forms part of the Works [or the Services] and for the adequacy, stability and safety of all site operations and methods of construction.

17.2 The Contractor as Client

17.2.1 In accordance with the CDM Regulations, the Authority, the School Entities and the Contractor have elected that the Contractor shall be, and shall be treated as the only client in relation to the Works [and the Services]. Within ten (10) Business Days of the Commencement Date the Contractor shall, or shall procure that the CDM Co-ordinator shall, notify the Health and Safety Executive of this election and provide a copy of this notice to the Authority. The Contractor shall ensure that the Building Contractor is aware of such election and shall not, prior to the completion of the Works, seek to withdraw, terminate or in any way derogate from such election.

17.2.2 The Contractor acknowledges that the role of the CDM Co-ordinator in relation to the Works has prior to the Commencement Date been carried out by the Authority or its agents. The Contractor has examined the Authority's Requirements and any other information provided by the Authority prior to the Commencement Date and confirms that it is satisfied that the Authority's Requirements and such other information have taken into account the requirements of the CDM Regulations.

⁴⁰⁴111 The Authority will be the Client during the tender stage and should appoint the CDM Co-ordinator and ensure that the HSE is notified of the Project. See paragraph 39 of the HSE's Approved Code of Practice for the CDM Regulations 2007.

17.3 Duties under CDM Regulations

Subject to Regulation 8 of the CDM Regulations the Contractor shall observe, perform and discharge and/or shall procure the observance, performance and discharge of the obligations, requirements and duties arising under the CDM Regulations in connection with the Works [and the Services] and shall, prior to the Planned Services Availability Date for a School, provide a certified copy of the final draft Health and Safety File (defined as the health and safety file in the CDM Regulations) for that School to the Authority and, within thirty (30) Business Days of the issue of the Acceptance Certificate for ~~the~~that School or the relevant parts of the Works in accordance with clause 22 (Principal Obligations), a certified copy of the full and complete Health and Safety File. The Contractor shall ensure that the Health and Safety File is revised as often as may be appropriate to incorporate any relevant new information in relation either to the Works [or the Services] during the Contract Period.

17.4 Authority to co-operate and provide information

Notwithstanding the election made under clause 17.2 (The Contractor as Client), the Authority shall observe and continue to observe the duties that are, pursuant to Regulation 8 of the CDM Regulations, to remain with the Authority, notably those duties under Regulations 5(1)(b), 10(1), 15 and 17(1).

18 THE SITES⁴⁰⁵112

18.1 Access

If at any time the Contractor requires access to the Sites or any interest in any land which does not form part of the Sites or any additional rights beyond those which the Contractor has in relation to any part of the Sites, the responsibility and cost of securing or acquiring such access or interest shall be entirely the responsibility of the Contractor.

18.2 Site Matters⁴⁰⁶113

18.2.1 Subject to the other terms of this Agreement, the Site Conditions shall be the sole responsibility of the Contractor and accordingly (but without prejudice to any other obligation of the Contractor under this Agreement) the Contractor shall be deemed to have:

18.2.1.1 carried out a ground physical and geophysical investigation and to have inspected and examined the Sites and their surroundings and (where applicable) any existing structures or works on, over or under the Sites;

18.2.1.2 satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Sites, the load-bearing and other relevant properties of the Sites, the risk of injury or damage to property

⁴⁰⁵112 Where due diligence reveals site issues (or off-site contamination) that cannot, either practically or for vfm reasons, be dealt with as part of the Works, liability for those issues will be borne by the Authority and project-specific drafting developed in each case.

⁴⁰⁶113 To the extent it is not practical for the Contractor to investigate areas of the Site (for example, due to occupation or use of the Existing School) then clause 18.2.3 will provide relief. The Authority should bear any additional costs arising out of unforeseen conditions in areas which the Contractor cannot investigate and which cannot be reasonably identified by the Contractor. Areas of the Site(s) to which this carve-out applies should be clearly identified in the Agreement.

affecting the Sites, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, works and materials necessary for the execution of the Works;

18.2.1.3 satisfied itself as to the adequacy of the means and rights of access to and through the Sites and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Sites);

18.2.1.4 satisfied itself as to the possibility of interference by persons of any description whatsoever (other than the Authority) with access to or use of, or rights in respect of, the Sites with particular regard to the owners of any land adjacent to the Sites; and

18.2.1.5 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 third parties.

18.2.2 Subject to the other terms of this Agreement, the Contractor accepts full responsibility for all matters referred to in this clause 18.2 and the Contractor shall be responsible for, and hold the Authority and any owner or occupier of the Site^{407,114} harmless from, cleaning up or otherwise dealing with any Contamination at the Sites (other than any Contamination caused or to the extent exacerbated as a direct result of works or services undertaken by or on behalf of the Authority pursuant to paragraphs 4.3 of Part 2, 8.3 of Part 3 or 4.6.2 of Part 4, in each case of Schedule 24 (Change Protocol), for which the Authority shall be responsible) so that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with Good Industry Practice, any applicable Legislation and any Necessary Consents, orders, notices or directions of any regulatory body (whether made against the Authority or the Contractor or any owner or occupier of the Site).

18.2.3 To the extent that unforeseen ground conditions and/or Contamination exist in any parts of the Sites that are under existing buildings^{408,115} as at the Bid Date and which it is not practical for the Contractor to investigate or survey, the Contractor shall not be responsible for them[, unless they were discovered by the [*identify any survey undertaken*] or would have been identified in the [*identify any survey undertaken*] had that survey been carried out with the level of skill and care reasonably to have been expected from competent professionals carrying out such survey or would have been identified had the Contractor carried out such additional surveys as it would have been reasonable to expect an experienced contractor to have carried out in the circumstances]^{409,116}. If the Contractor is not responsible for such ground conditions and/or

^{407,114} Inserted to deal with any potential claim direct against the owner/occupier.

^{408,115} It may be appropriate to identify these by way of a plan.

^{409,116} Delete where no such surveys exist.

Contamination under this clause 18.2.3 then the Authority shall be so responsible.

18.2.4 Where pursuant to clauses 18.2.2 or 18.2.3 the Authority is responsible for any of the matters referred to then the following provisions shall apply:

18.2.4.1 where any such matter arises on or before the [Services Availability Date] [Post Completion Works Acceptance Date]⁴⁴⁰₁₁₇ for such Site it shall be deemed to be a Compensation Event and any work which is required or instructed to be done in consequence of it shall be deemed, without double counting, to be an Authority Change;

18.2.4.2 where any such matter arises after the [Services Availability Date] [Post Completion Works Acceptance Date] for such Site it shall be deemed to be a Relief Event and no Deductions may be made in respect of the relevant Area and any work or change to the Services required or instructed to be done in consequence of it, shall be deemed to be an Authority Change; and

18.2.4.3 where any such matter is Contamination (before or after the Services Availability Date) the Authority shall further hold the Contractor harmless from cleaning up or otherwise dealing with such Contamination and shall indemnify the Contractor in respect of all Direct Losses incurred by the Contractor resulting from such Contamination,

and the Contractor shall in carrying out any works referred to in clauses 18.2.4.1 and 18.2.4.2 do so in accordance with and so that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with Good Industry Practice, any applicable Legislation and any Necessary Consents, orders, notices or directions of any regulatory body (whether made against the Authority or the Contractor).

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

18.2.5.1 where any such matter arises on or before the Services Availability Date for such Site it shall be deemed to be a Relief Event for a reasonable⁴⁴⁴₁₁₈ period (to be agreed between the Parties acting reasonably) for the purposes of this Agreement;

⁴⁴⁰₁₁₇ Consider whether to extend Compensation Event protection to any Post Completion Works.

⁴⁴⁴₁₁₈ The Contractor will be granted relief for a reasonable but limited period but will be required to make good and deal with any such off Site Contamination.

18.2.5.2 where any such matter arises after the Services Availability Date for such Site it shall be deemed to be a Relief Event and no Deductions may be made in respect of the relevant Area pursuant to Schedule 6 (Payment Mechanism) for a reasonable period (to be agreed between the Parties acting reasonably) but any work or change to the Services required or instructed to be done in consequence of it, shall be the Contractor's responsibility and shall not constitute an Authority Change; ~~and~~

18.2.5.3 before or after the Services Availability Date the Contractor shall:

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

18.2.5.3.2 other than where clause 18.2.5.4 applies hold the Authority harmless from, and indemnify the Authority and any other owners or occupiers of the Site in respect of, all Direct Losses incurred by the Authority or any owners or occupiers of the Site resulting from such Contamination; and

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

18.2.5.4.1 take such action against third parties in its own name ~~or~~ procure that any other owner or occupier of the Site shall take such action against third parties in its own name; as the Contractor may (acting reasonably) direct; or

18.2.5.4.2 permit the Contractor to take such action in the name of the Authority and any owners or occupiers of the Site^{442,119} at the Contractor's own expense in which case the provisions of clauses 63.5 (Conduct of Claims) and 63.6 (Costs of Claims) shall apply as if the Contractor were the Indemnifying Party and the Authority were the Indemnified Party, except that the Contractor shall not pay or settle such

^{442,119} 119 Action would have to be taken in the name of the owner/occupier.

claims without the prior consent of the Authority,

subject to the Contractor indemnifying the Authority in respect of all costs properly and reasonably incurred by the Authority [for any other owner or occupier of the Site] in respect of such action. Where the Authority [or any other owner or occupier of the Site] takes action under clause 18.2.5.4.1 or 18.2.5.4.2 (or where it [or any other owner or occupier of the Site] is otherwise obliged to take action against third parties in respect of such losses), the Authority shall be liable to the Contractor for all losses suffered or incurred by the Contractor as a result of its obligations under this clause 18.2.5, provided that the Contractor's entitlement in respect of any matter to which this clause 18.2.5.4 applies shall be limited to the amount recovered by or in the name of the Authority [or any other owner or occupier of the Site] from the relevant third party in respect of the losses referred to in this clause 18.2.5.4.¹⁴³ ¹²⁰

18.3 Consents and Planning Approval

[Subject to clause 18.3A,] the Contractor shall:

- 18.3.1** obtain and maintain all Necessary Consents which may be required for the performance of the Project;
- 18.3.2** be responsible for implementing each Necessary Consent (which it is required to obtain pursuant to clause 18.3.1) within the period of its validity in accordance with its terms;
- 18.3.3** supply free of charge to the Authority's Representative a copy of any application for a Necessary Consent (with a copy of all accompanying drawings and other documents) and a copy of any Necessary Consent obtained;
- 18.3.4** comply with the conditions attached to any Necessary Consents and procure that no such Necessary Consent is breached by it or any person under its control and use all reasonable endeavours to procure that no Necessary Consent is revoked and that all Necessary Consents continue in full force and effect for such time as is necessary for the Contractor to carry out the Works and/or the Services; and
- 18.3.5** not (and shall use all reasonable endeavours to procure that any other person over whom it has control shall not) without the prior consent of the Authority under this Agreement (which consent shall not be unreasonably withheld or delayed) apply for or agree to any change, relaxation or waiver of any Necessary Consent (whether

~~¹⁴³ Authority may consider "name borrowing" provisions in respect of contamination from third party sites, and this has been included here as specimen drafting. Concerns are sometimes raised that the Contractor does not have the necessary right in land to take certain types of action against a third party polluter. This drafting is a way of alleviating the problem.~~

¹²⁰ Concerns are sometimes raised that the Contractor does not have the necessary right in land to take certain types of action against a third party polluter. This drafting is a way of alleviating the problem.

obtained before or after the date of this Agreement) or of any condition attached to it but, subject to the compliance by the Contractor with its obligations under this clause, references in this Agreement to Necessary Consents shall be construed as referring to the Necessary Consents as from time to time varied, relaxed or waived.

[18.3A Authority Necessary Consents and Authority Planning Conditions

18.3A1 The Authority shall obtain the Authority Necessary Consents, or shall procure that the Authority Necessary Consents are obtained, subject to the Contractor using all reasonable endeavours to assist the Authority to obtain or procure the obtaining of the Authority Necessary Consents.

18.3A.2 Where the Authority has obtained or procured the obtaining of an Authority Necessary Consent then such consent shall be treated as a Necessary Consent for the purposes of clauses 18.3.2, 18.3.4 and 18.3.5 (Consents and Planning Approval) unless such ongoing obligations and/or maintenance can only reasonably be carried out or procured by the Authority.

18.3A.3 [The Authority shall discharge or procure the discharge of the Authority Planning Conditions [subject to the Contractor using all reasonable endeavours to assist the Authority to discharge or procure the discharge of the Authority Planning Conditions].]⁴⁴⁴121

[18.3B Judicial Proceedings

18.3B.1 Either Party shall notify the other forthwith upon becoming aware of any Judicial Proceedings.

18.3B.2 If in accordance with clause 18.3B.1 either Party serves a notice then:

18.3B.2.1 the Authority shall be entitled by notice in writing to the Contractor (the **Suspension Notice**) to require the Contractor to suspend the Works (or the relevant part thereof) and the Contractor will forthwith suspend the Works (or the relevant part thereof) upon receipt of the Suspension Notice at the Site which is the subject of any Judicial Proceedings and such suspension shall subsist subject to clause 18.3B.5.1 until such time as (i) such Judicial Proceedings are finally dismissed or withdrawn; or (ii) provided that there is no subsisting Judicial Proceedings Action the Authority informs the Contractor that the Works (or the relevant part thereof) should be resumed (whichever is the earlier); and/or

18.3B.2.2 the Contractor must suspend the Works (or the relevant part thereof) at the Site which is the subject of any Judicial Proceedings Action and forthwith give

⁴⁴⁴121 Consider each Planning Condition and decide which Party should be responsible for each one. Those that the Authority must discharge are termed Authority Planning Conditions and are listed in a schedule. Where the Authority needs the Contractor's (or a Contractor Related Party's) assistance to discharge an Authority Planning Condition (NB the actual party fulfilling the APC will be the Local Authority), the extra wording in brackets should be added. Where the Parties are aware, prior to Close of Dialogue, that certain Planning Conditions will be imposed, they should agree the drafting prior to Close of Dialogue.

notice of such suspension in writing to the Authority (the **Contractor Suspension Notice**) and such suspension shall subsist subject to clause 18.3B.5.2 until such time as (i) such Judicial Proceedings Action is finally overturned; (ii) this Agreement is varied by means of a Authority Change in order to permit the Contractor lawfully to resume the Works (or the relevant part thereof) and/or perform its obligations under this Agreement; or (iii) the Parties otherwise agree in writing that the Works (or the relevant part thereof) should be resumed (whichever is the earlier).

18.3B.3 Save for where the Contractor or a Contractor Related Party (and for the purposes of this clause 18.3B.3 only "Contractor or a Contractor Related Party"⁴⁴⁵) shall exclude an employee or agent of the Contractor or of a Contractor Related Party acting in a personal capacity) has brought or caused to be brought on its behalf Judicial Proceedings, any suspension of the Works (or the relevant part thereof) pursuant to clause 18.3B.2.1 or 18.3B.2.2 shall be deemed to be a Compensation Event from the date of the Suspension Notice or Contractor Suspension Notice as appropriate and the provisions of clause 16 (Extension of Time) shall apply (and for the purposes of the provisions of clause 16.1 (Notice) the Contractor is deemed to have become aware that there will be or is likely to be a delay in the commencement or completion of the Works on the date of receipt of the Suspension Notice or the date of the Contractor Suspension Notice as appropriate).

18.3B.4 Where a Contractor Related Party (and for the purposes of this clause 18.3B.4 only "Contractor Related Party"⁴⁴⁵) shall exclude an employee or agent of the Contractor or any Contractor Related Party acting in a personal capacity) has brought or caused to be brought on the Contractor Related Party's behalf Judicial Proceedings any suspension of the Works (or the relevant part thereof) pursuant to clause 18.3B.2 or 18.3B.3 shall be deemed to be a Relief Event from the date of the Suspension Notice or Contractor Suspension Notice as appropriate and the provisions of clause 58 (Relief Events) shall apply but solely for the purpose of entitling the Contractor to apply for relief from any rights of the Authority to terminate this Agreement for Contractor Default pursuant to limbs (h), (i); and/or (j) of that definition.

18.3B.5 If by the date falling [twelve (12)⁴⁴⁵] months after the date of the:

18.3B.5.1 Suspension Notice, the Works (or the relevant part thereof) are still suspended pursuant to clause 18.3B.2.1; or

18.3B.5.2 Contractor Suspension Notice, the Works (or the relevant part thereof) are still suspended pursuant to clause 18.3B.2.2,

⁴⁴⁵ ~~The time limit must be realistic and must take into account the likely time required for the Judicial Proceedings to be heard and for any appropriate action agreed locally to be taken including for example, challenging the Judicial Proceedings and any Judicial Proceedings Action and to apply for and obtain a new/revised planning permission.~~

then unless agreed otherwise in writing between the Parties, the Authority will issue an Authority Notice of Change to remove that School from the scope of the Project and the provisions of paragraphs 2 to 14 of Part 4 of Schedule 24 shall apply save that the Contractor shall not be entitled to serve a notice under paragraph 3.1 of Part 4 of Schedule 24 in respect of such Authority Change.]

18.4 No Warranty

Except as otherwise expressly provided in this Agreement the Contractor shall take the Sites in their state and condition in all respects as at the date of this Agreement and nothing in this Agreement or otherwise shall constitute or imply a warranty by or on the part of the Authority as to the fitness and suitability of the Sites or any part thereof for the Works or for any other purpose.

18.5 Third Party Rights

The Contractor shall observe and comply with any third party rights (including public rights) which may exist from time to time in respect of land comprising and adjoining the Sites, and the Contractor shall ensure that the Works are carried out in such a way as not to interfere with access to and use and occupation of public or private roads or footpaths by any person who is entitled to any such access, use or occupation.

18.6 Fire Folder

The Parties shall each act reasonably and in good faith to procure that an up to date fire folder is maintained for each School in accordance with the government guidance referring to the Regulatory Reform (Fire Safety) Order 2005 (SI 2005/1541). In particular:

18.6.1 the Contractor shall:

- 18.6.1.1** design and install a fire alarm system emergency lighting [and a sprinkler system¹²²] in accordance with the terms of this Agreement;
- 18.6.1.2** provide information relating to the operation of the fire alarm system and emergency lighting [and sprinkler system];
- 18.6.1.3** maintain maintenance/test records for the fire alarm systems and emergency lighting [and sprinkler system];
- 18.6.1.4** co-operate with the Authority and relevant School Entity during practice evacuations; and

18.6.2 the Authority shall and procure that the School Entities shall:

- 18.6.2.1** prepare risk assessments for emergency events including fires;
- 18.6.2.2** prepare and communicate the evacuation procedures including instruction to staff and Pupils at the

¹²² [Some LEAs have policies requiring sprinkler systems; otherwise installation of sprinklers is solution-dependent.](#)

~~School(s)~~Schools on the correct action when discovering a fire and on the correct action when the fire alarm is sounded;

18.6.2.3 prepare notices/signs reinforcing the evacuation procedures; and

18.6.2.4 ensure and maintain discipline of occupants of the Schools to prevent fires and deliberate and/or accidental activation of the system.

18.7 Defects and Asbestos

18.7.1 [Defects⁴¹⁶₁₂₃

The Contractor accepts, in relation to the Buildings other than the New Buildings, entire responsibility (including any financial and other consequences which result whether directly or indirectly) for:

18.7.1.1 any Defects identified in any Buildings Survey~~—~~⁴¹⁷₁₂₄; and

18.7.1.2 any Defects that would have been identified in any Buildings Survey had that survey been carried out with the level of skill and care reasonably to have been expected from competent professionals carrying out such survey or (unless access to carry out additional surveys has been denied by the Authority and then only to the extent that such access was denied) would have been identified had the Contractor carried out such additional surveys as it would have been reasonable to expect an experienced contractor to have carried out in the circumstances;⁴¹⁸₁₂₅ and

⁴¹⁶₁₂₃ This clause 18.7.1 will, along with clause 18.7.2, only be appropriate where buildings are being refurbished.

⁴¹⁷₁₂₄ The Authority may identify in the IPDSB how it has interpreted the survey results in relation to parts of the Buildings and how they may apply across the remainder of the Buildings forming part of the Project. Alternatively, it may require the Contractor to assume an agreed scope of remediation works given the results of the survey. Discovery of additional remedial works outside the survey or the agreed scope shall be framed as an additional Compensation Event.

~~⁴¹⁸ The Contractor should take the risk on scope of Buildings Surveys: although one will be provided by the Authority at IPDSB, the Contractor's experience will inform whether it carries out further surveys prior to the Bid Date, which will also become listed "Buildings Surveys". This risk allocation for scope of surveys applies unless the Authority does not allow access for the Contractor to carry out such further surveys. This risk allocation does not apply to Asbestos Surveys—the scope of the named asbestos surveys is a matter for the Authority (other than as set out just below). Those surveys will in nearly all cases be the Management Surveys procured by the Authority prior to OBC. It is only where an existing school is empty prior to close that the Contractor may carry out asbestos Refurbishment and Demolition Surveys prior to close, and then those surveys must be listed in the definition of Asbestos Surveys. In those circumstances the Contractor should take scope risk.~~

¹²⁵ The Contractor should take the risk on scope of Buildings Surveys: although one will be provided by the Authority at IPDSB, the Contractor's experience will inform whether it carries out further surveys prior to the Bid Date, which will also become listed "Buildings Surveys". This risk allocation for scope of surveys applies unless the Authority does not allow access for the Contractor to carry out such further surveys. This risk allocation does not apply to Asbestos Surveys – the scope of the named asbestos surveys is a matter for the Authority (other than as set out just below). Those surveys will in nearly all cases be the Management Surveys procured by the Authority prior to OBC. It is only where an existing school is empty prior to close that the Contractor may carry out asbestos Refurbishment and Demolition Surveys prior to close, and then those surveys must be listed in the definition of Asbestos Surveys. In those circumstances the Contractor should take scope risk.

18.7.1.3 any Defects caused by the Contractor⁴⁴⁹₁₂₆,

provided that where the Contractor is, in the reasonable opinion of the Authority, diligently pursuing the party who is responsible for the Buildings Survey, then any delay to the Services Availability Date caused by a Defect shall be treated as a Relief Event, subject to and in accordance with clause 58 (Relief Events).

18.7.2 The Authority accepts, in relation to the Buildings other than the New Buildings, entire responsibility for Defects which have not been identified in the Buildings Survey (other than those referred to in clause 18.7.1.2 or 18.7.1.3 or which have been caused by the Contractor) and the discovery of any such Defects shall:

18.7.2.1 prior to the Services Availability Date for a School constitute a Compensation Event subject to and in accordance with clause 16 (Extensions of Time);

18.7.2.2 [in respect of Post Completion Works prior to the Post Completion Works Acceptance Date constitute a Compensation Event subject to and in accordance with clause 16 (Extensions of Time);] and

18.7.2.3 after the Services Availability Date for a School be deemed to be a Relief Event and no Deductions may be made in respect of the relevant Area pursuant to Schedule 6 (Payment Mechanism) for a reasonable period (to be agreed between the Parties acting reasonably) and any work or change to the Services required or instructed to be done in consequence of it, shall constitute an Authority Change.]

18.7.3 The Contractor accepts, in relation to the New Buildings, entire responsibility (including any financial and other consequences which result whether directly or indirectly) for any Defects.

18.7.4 **Asbestos Liability**⁴²⁰₁₂₇

Subject to clauses 18.7.5 and 18.7.6 the Contractor accepts, in relation to the Buildings other than the New Buildings, full responsibility (including any financial and other consequences which result whether directly or indirectly) for:

18.7.4.1 any Asbestos identified in the Asbestos Survey; and

18.7.4.2 any Asbestos that ought reasonably to have been discovered or that could otherwise have been reasonably expected to have been identified or found in the Asbestos Survey or would have been identified, had that survey been carried out with the level of skill and care reasonably to have been expected from competent professionals carrying out such survey;

⁴⁴⁹₁₂₆ This is included as the term Defect implies Defects which are already present (i.e. latent defects) but this is not explicit. Obviously, the Contractor should not be able to claim a Compensation Event where it has caused the Defect.

⁴²⁰₁₂₇ This clause will only be appropriate where buildings are being demolished and/or refurbished.

provided that where the Contractor is, in the reasonable opinion of the Authority, diligently pursuing the party who is responsible for the Asbestos Survey, then any delay to the Services Availability Date caused by such Asbestos shall be treated as a Relief Event, subject to and in accordance with clause 58 (Relief Events).

18.7.5 The Authority accepts, in relation to the Buildings other than the New Buildings, full responsibility for Asbestos which has not been identified in the Asbestos Survey (other than any Asbestos liability referred to in clause 18.7.4.2) and the discovery of any such Asbestos shall:

18.7.5.1 prior to the Services Availability Date for a School constitute a Compensation Event subject to and in accordance with clause 16 (Extensions of Time) in respect of the Works; [and]

18.7.5.2 [prior to the Post Completion Works Acceptance Date for a School constitute a Compensation Event subject to and in accordance with clause 16 (Extensions of Time) in respect of such Post Completion Works; and]

18.7.5.3 after the Services Availability Date for a School be deemed to be a Relief Event and no Deductions may be made in respect of any Area in which Works [and Post Completion Works] have been completed for a reasonable period (to be agreed between the Parties acting reasonably) and any work or change to the Services required or instructed to be done in consequence of it shall constitute an Authority Change.

18.7.6 Unless the exposure arises directly or indirectly as a result of any act or omission of the Contractor or any Contractor Related Party, the Authority accepts, in relation to the Buildings other than the New Buildings, full responsibility (including any financial and other consequences which result whether directly or indirectly) for death and personal injury in respect of exposure to Asbestos in such buildings, where the exposure takes place prior to the date on which the Contractor takes control of the relevant Site.

18.7.7 The Contractor accepts, in relation to the New Buildings, entire responsibility (including any financial and other consequences which result whether directly or indirectly) for any Asbestos.

18.8 Fossils and Antiquities

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

18.8.2 Upon the discovery of such item during the course of the Works, the Contractor shall:

18.8.2.1 immediately inform the Authority's Representative of such discovery;

18.8.2.2 take all steps not to disturb the object and, if necessary, cease any Works in so far as the carrying

out of such Works would endanger the object or prevent or impede its excavation; and

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

18.8.3 The Authority shall procure that the Authority's Representative promptly, and in any event within ~~ten~~fifteen (10~~15~~) Business Days, issues an instruction to the Contractor specifying what action the Authority's Representative requires to be taken in relation to such discovery provided that if no such instruction is forthcoming within such period the Contractor may continue to carry out the Works.

18.8.4 The Contractor shall promptly and diligently comply with any instruction issued by the Authority's Representative referred to in clause 18.8.3 at its own cost (except and to the extent that such instruction constitutes an Authority Change pursuant to clause 18.8.6 in which case the provisions of Schedule 24 (Change Protocol) shall apply).

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

18.8.6 If any instruction referred to in clause 18.8.3 includes a requirement for the Contractor to suspend the carrying out of the Works and/or to carry out works (being any work of alteration, addition, demolition or extension or variation in any School) which are not works which would be strictly necessary for the purpose of compliance with Legislation or any Necessary Consents, such works or instruction to suspend shall be deemed to be an Authority Change and the provisions of Schedule 24 (Change Protocol) shall apply.

18.8.7 The Authority shall act promptly and diligently in dealing with its obligations in this clause 18.8 in relation to any find so as to mitigate any effect on the Contractor, the Works and/or the Services.

19 MONITORING AND INSPECTION

19.1 Right of Inspection

The Contractor shall procure that the Authority or any representative or adviser of the Authority and the Schools' Representatives (when accompanied by a representative of the Authority) shall have, at all reasonable times and upon giving reasonable notice, the right (but not so as to delay or impede the progress of the Works) to enter any of the Sites (but in the case of a School's Representative, the relevant Site only) in order to inspect the state and progress of the Works (and to ascertain whether they are being properly

executed), the operation and maintenance of the Project and to monitor compliance by the Contractor with its obligations under this Agreement.

19.2 Right to Open Up

19.2.1 Subject to clause 19.2.2, the Authority's Representative shall have the right at any time prior to:

19.2.1.1 the ICT Handover Date/~~Services Availability Date~~ for a School in respect of the Works; [and

19.2.1.2 the [Post Completion Works Acceptance Date]¹²⁴ for a School in respect of the Post Completion Works¹²⁸],

to request the Contractor to open up and inspect any part or parts of such Works [or Post Completion Works] at that School where the Authority's Representative reasonably believes that such part or parts of the Works [or Post Completion Works] is or are defective and the Contractor shall comply with such request.

19.2.2 Prior to exercising his right pursuant to clause 19.2.1, the Authority's Representative shall notify the Contractor of his intention to exercise such right, setting out detailed reasons.

19.2.3 If, following the exercise by the Authority's Representative of his right pursuant to clause 19.2.1, the inspection shows that the relevant part or parts of the Works are not defective, the exercise of such rights shall, subject to (and in accordance with) the provisions of clause 16 (Extensions of Time), be treated as a Compensation Event.

19.2.4 If, following the exercise by the Authority's Representative of his right pursuant to clause 19.2, 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.

19.2.5 If, following the exercise by the Authority's Representative of his right pursuant to clause 19.2.1, 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 the Dispute Resolution Procedure.

19.2.6 Without prejudice to the rights of the Authority's Representative pursuant to this clause 19.2 the Parties acknowledge that the exercise of such rights shall not in any way affect the obligations of the Contractor under this Agreement save as expressly set out in this clause 19.

¹²⁴ ~~Authority to decide whether a right to open up Post Completion Works is needed, depending on the nature of those works.~~

¹²⁸ Authority to decide whether a right to open up Post Completion Works is needed, depending on the nature of those works.

19.3 Inspection of Facilities

The Authority or a representative or adviser of the Authority and the Schools' Representatives (when accompanied by a representative of the Authority) may at all reasonable times and on reasonable notice and subject to obtaining the consent of the relevant manufacturer or supplier (which the Contractor shall use all reasonable endeavours to obtain) enter upon any property used by the Contractor as training or workshop facilities and places where work is being prepared or materials are being obtained for the Project for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works.

19.4 Contractor's Reasonable Assistance

The Contractor shall procure that satisfactory facilities are made available to the Authority and any representative of the Authority and the Schools' Representatives (when accompanied by a representative of the Authority) and that reasonable assistance is given for the purposes of clauses 19.1 (Right of Inspection), 19.2 (Right to Open Up) and 19.3 (Inspection of Facilities), subject to the Contractor's and the Sub-Contractors' construction obligations not being adversely affected and to the Authority reimbursing the Contractor for any reasonable costs or expenses incurred as a result of the action taken by the Authority under clauses 19.1 (Right of Inspection), 19.2 (Right to Open Up) and 19.3 (Inspection of Facilities).

19.5 Health and Safety Requirements

The Authority and its representative shall and shall procure that the Schools' Representatives shall at all times comply with all relevant health and safety procedures which shall include any relevant health and safety plans for the construction of the Schools, the Building Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Building Contractor's Site Manager from time to time when exercising its rights under this clause 19.

19.6 Supply of Information

The Contractor shall supply to the Authority and [the School Entity and](#) any representative or adviser of the Authority [or the School Entity](#) visiting any of the Sites pursuant to [\(as applicable\)](#) clauses 19.1 (Right of Inspection), 19.2 (Right to Open Up) and 19.3 (Inspection of Facilities) such information in respect of the Works as may reasonably be required.

19.7 Site Meetings, Monitoring and Inspection

19.7.1 The Authority's Representative and the relevant School's Representative shall have such rights of access to an affected Site in an Emergency as it (acting reasonably) considers suitable in the circumstances.

19.7.2 Without prejudice to the generality of clause 19.7.1 the Contractor shall procure that monthly progress meetings and site meetings are held and that the Authority's Representative and the Schools' Representatives ~~{~~(and, at the discretion of the Authority's Representative, the ICT Service Provider)~~}~~ shall have the right to attend such monthly progress meetings and site meetings and to attend as observer such other meetings as the Authority's

Representative and the Schools' Representatives may reasonably request.

19.8 Increased Monitoring

If, following any viewing, visit or inspection made by the Authority, it is discovered that there are defects in the Works or that the Contractor has materially failed to comply with the Facilities Output Specification or the Construction Proposals, the Authority may (without prejudice to any other right or remedy available to it) by notice to the Contractor increase the level of its monitoring of the Contractor until such time as the Contractor shall have demonstrated to the reasonable satisfaction of the Authority that it is capable of performing and will perform all its obligations under this Agreement.

19.9 Damage

Subject to clause 65.14 (Claims), if the Authority or an Authority Related Party causes material damage to the Site in exercising any right under this clause 19 (Monitoring and Inspection), then such damage shall be deemed to be a Compensation Event.

20 NOTIFICATION OF ICT HANDOVER, SERVICES AVAILABILITY [AND/OR ACCEPTANCE OF POST COMPLETION WORKS]

20.1 Inspection of a School

The Contractor shall give the Schools' Representatives (in respect of the relevant School) and give the Authority and the Independent Certifier (in respect of all Schools) not less than five (5) Business Days' notice of the date when it proposes to inspect a School with a view to achieving:

20.1.1 the issue of the ICT Handover Acceptance Certificate in respect of the relevant School; and/or

20.1.2 the issue of the Acceptance Certificate in respect of the relevant School; and/or

20.1.3 [the issue of the Post Completion Works Acceptance Certificate in respect of the relevant School;],

and on such dates the Independent Certifier shall inspect the relevant School and representatives from the Authority and the Contractor and the Senior Lender and the School's Representative in respect of the relevant School and the ICT Installer shall be entitled to make a joint inspection with the Independent Certifier.

20.2 Dates on which ICT Handover may occur

The ICT Handover Date for a School shall be the date on which the ICT Handover Acceptance Certificate is issued in respect of ~~the~~that School, provided that if the ICT Handover Acceptance Certificate is not issued by the Planned ICT Handover Date, it shall not thereafter be issued until the ~~[twenty-fifth (25th)]~~ Business Day before the first day of the ~~Half Term~~half term (other than the Summer ~~Half Term~~half term) or Term commencing after the Planned ICT Handover Date, and, if not issued by that date, it shall not thereafter be issued until the ~~[twenty-fifth (25th)]~~ Business Day before any subsequent start of ~~Half Term~~half term (other than the Summer ~~Half Term~~half term) or Term.

20.3 Dates on which Services Availability may occur

The Services Availability Date for any School shall be the date on which an Acceptance Certificate is issued in respect of that School, provided that:

- 20.3.1 if an Acceptance Certificate is issued prior to the Planned Services Availability Date for that School, the Services Availability Date shall be the Planned Services Availability Date;
- 20.3.2 if an Acceptance Certificate is not issued by the Planned Services Availability Date, it shall not thereafter be issued until the fifth (5th) Business Day before the first day of the ~~Half Term~~half term (other than the Summer ~~Half Term~~half term) or Term commencing after the Planned Services Availability Date, and, if not issued by that date, it shall not thereafter be issued until the fifth (5th) Business Day before any subsequent start of ~~Half Term~~half term (other than the Summer ~~Half Term~~half term) or Term; and
- 20.3.3 the Acceptance Certificate shall not be issued any less than twenty Business Days after the issue of the ICT Handover Acceptance Certificate.

20.4 Post Completion Works/Site Clearance⁴²²₁₂₉

OPTION 1

20.4.1 [Subject to clauses 20.4.2 and 20.4.3 following issue of an Acceptance Certificate in respect of a School, the Contractor shall or shall procure that the Building Contractor shall [carry out the Post Completion Works at the Site relating to such School so that such Post Completion Works are completed by the relevant Planned Post Completion Works Acceptance Date provided that:

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

For the first calendar week following the Planned Post Completion Works Acceptance Date (the First Week)	£[INSERT FIGURE] ⁴²³ ₁₃₀
For each subsequent week (or part thereof) following the	An increase of £[INSERT FIGURE] ⁴²⁴ ₁₃₁ on all

⁴²²₁₂₉ Two alternate forms of drafting are set out below; the first option should be used in situations where there are Post Completion Works and the second option where there are none.

⁴²³₁₃₀ Where the post completion works are sports pitches the LADs figure will need to include all costs to be incurred in hiring alternative facilities, transporting pupils to the alternative facilities etc.

⁴²⁴₁₃₁ The ratchet will need to be significant enough to encourage the Contractor to complete the Post Completion Works.

First Week	amounts prevailing at the end of the immediately preceding week
------------	-----------------------------------------------------------------

and

20.4.1.2 after the date that falls [INSERT NUMBER OF DAYS] after the Planned Post Completion Works Acceptance Date the Authority shall be entitled to employ an alternative contractor to carry out the Post Completion Works and shall be entitled to be reimbursed by the Contractor for all costs properly and reasonably incurred in procuring the alternative contractor and in the carrying out of any such Post Completion Works by the alternative contractor.

20.4.2 Where the Authority employs an alternative contractor to carry out any Post Completion Works in accordance with clause 20.4.1.2 it shall cease to have the right to levy liquidated damages in accordance with clause 20.4.1.1 once a reasonable period of time for completing the relevant Post Completion Works (having regard to the nature and extent of the relevant Post Completion Works outstanding and the programme for carrying out of such Post Completion Works by the Authority's alternative contractor) has expired.

20.4.3 For the avoidance of doubt clause 20.4.1 and clause 20.4.2 shall be the Authority's sole remedy in connection with any delays to the completion of the Post Completion Works and the Authority shall not be entitled to levy any Deductions under Schedule 6 (Payment Mechanism) in relation to any Areas which are subject to Post Completion Works prior to the Post Completion Works Acceptance Date. ¹²⁵₁₃₂]

OPTION 2

[Following issue of an Acceptance Certificate in respect of a School, the Contractor shall or shall procure that the Building Contractor shall clear from the relevant Site to the reasonable satisfaction of the Authority all temporary structures and equipment, rubbish and all building and surplus material, and in default the Authority shall be entitled to employ an alternative contractor to clear them and shall be entitled to be reimbursed by the Contractor for any costs reasonably incurred in clearing or procuring the clearing of them provided that the Authority shall not be entitled to exercise such right for a period of one (1) week following the date of the Acceptance Certificate for that School.]

20.5 Independent Certifier

The Independent Certifier's Deed of Appointment specifies the duties of the Independent Certifier owed to the Authority and the Contractor.

¹²⁵₁₃₂ The Authority is to confirm whether, in addition to the remedies set out in this drafting whether part of the Unitary Charge should either only become payable or be temporarily withheld until completion of the Post Completion Works. Where this is chosen, the Parties may wish to provide for certainty as to when the withheld portion of Unitary Charge will be paid by fixing a time period for deemed issue of the Post Completion Works Acceptance Certificate. If this route is taken the Parties should agree some factors to take into account, such as the amount of outstanding works. The time period must not end on appointment of the replacement contractor.

20.6 Issue of ICT Handover Acceptance Certificate, Acceptance Certificate or notice of Non Completion

20.6.1 Within five (5) Business Days of any inspection referred to in clause 20.1 (Inspection of a School) to determine whether the ICT Handover, or Services Availability [or completion of the Post Completion Works] (as the case may be) has been achieved in relation to a School the Independent Certifier shall:

20.6.1.1 issue an ICT Handover Acceptance Certificate confirming that he is satisfied that the ICT Handover Requirements have been met in respect of the relevant School;

20.6.1.2 issue an Acceptance Certificate confirming that he is satisfied that the Services Availability Requirements have been met in respect of the relevant School; or

20.6.1.3 [issue a Post Completion Works Acceptance Certificate confirming that he is satisfied that the relevant Post Completion Works Acceptance Requirements have been met in respect of the relevant School; or]

20.6.1.4 issue a notice stating that the ICT Handover Acceptance Certificate, the Acceptance Certificate [or the Post Completion Works Acceptance Certificate (as the case may be)] has not been issued and specifying any outstanding matters that must be attended to before an ICT Handover Acceptance Certificate, an Acceptance Certificate [or a Post Completion Works Acceptance Certificate (as the case may be)] can be issued in respect of the relevant School,

provided that, if the ICT Handover Requirements, the Services Availability Requirements [or the Post Completion Works Acceptance Requirements] have been met, the Independent Certifier shall issue an ICT Handover Acceptance Certificate, an Acceptance Certificate [or Post Completion Works Acceptance Certificate (as the case may be)] in respect of a School notwithstanding that there are Snagging Items in respect of ~~the~~that School.

20.6.2 The Parties shall procure that where the Independent Certifier reasonably considers that in relation to a School the ICT Handover Requirements, the Services Availability Requirements for that School [or the relevant Post Completion Works Acceptance Requirements (as the case may be)] have not been met it shall immediately following its inspection pursuant to clause 20.1 (Inspection of a School) issue to the Authority and the Contractor a notice (a **Notice of Non Completion**) detailing all outstanding matters which are required to be attended to before the relevant School can be considered to have met the ICT Handover Requirements, the Services Availability Requirements for that School [or the relevant Post Completion Works can be considered to have met the relevant Post Completion Works Acceptance Requirements (as the case may be)]. Following receipt of a Notice of Non Completion the Contractor shall attend to such matters and shall give the Authority and the Independent Certifier further notice

in accordance with clause 20.1 (but dealing only with matters raised in the Notice of Non Completion and with a notice period of no less than twenty-four (24) hours for the purposes of clause 20.1 (Inspection of a School)) so that the procedures in clause 20.6.1 are repeated as often as necessary to ensure that all outstanding matters in relation to the relevant School are attended to and the ICT Handover Acceptance Certificate, the Acceptance Certificate [or a Post Completion Works Acceptance Certificate] (as the case may be) can be issued in accordance with clause 20.6.1.1 or clause 20.6.1.2 or clause 20.6.1.3.

20.7 Effect of Issue of ICT Handover Acceptance Certificate, Acceptance Certificate [or Post Completion Works Acceptance Certificate]

The issue of an ICT Handover Acceptance Certificate, an Acceptance Certificate [or Post Completion Works Acceptance Certificate] shall, in the absence of manifest error, bad faith or fraud, indicate for the purpose of ascertaining the ICT Handover Date or the Services Availability Date [or the Post Completion Works Acceptance Date (as applicable)] that the relevant School is in compliance with the ICT Handover Requirements or the Services Availability Requirements [(or that the relevant Post Completion Works are in accordance with the Post Completion Works Acceptance Requirements (as the case may be))] and, without prejudice to the right of either Party to make a claim under the Independent Certifier's Deed of Appointment, shall in no way lessen or affect the other obligations of the Contractor under this Agreement in relation to that School or any other part of the Works or the Services or signify the Authority's approval of the means of delivery of the Services, and the Contractor shall pursuant to clause 20.8 (Snagging Items) following the date of issue of the ICT Handover Acceptance Certificate or Acceptance Certificate carry out and complete such (if any) of the items on the Snagging List as have not been so completed on the date of issue of the ICT Handover Acceptance Certificate/Acceptance Certificate [or Post Completion Works Acceptance Certificate].

20.8 Snagging Items

In the event that an ICT Handover Acceptance Certificate, an Acceptance Certificate [or Post Completion Works Acceptance Certificate] for a School is expressed to be subject to Snagging Items:

20.8.1 the Independent Certifier shall within five (5) Business Days of the issue of the relevant ICT Handover Acceptance Certificate, Acceptance Certificate [or Post Completion Works Acceptance Certificate] issue to the Contractor and the Authority a list of the relevant Snagging Items for that School (the **Snagging List**). Within five (5) Business Days of receipt from the Independent Certifier of the Snagging List the Contractor shall provide to the Authority and the Independent Certifier a reasonable programme for making good each Snagging Item set out in the Snagging List provided that such programme shall require that each Snagging Item shall be made good within twenty (20) Business Days of the date of provision of that programme or within such time as is reasonably practicable and, where the Snagging List has been issued following the issue of the ICT Handover Acceptance Certificate, so that rectification of such Snagging Items does not interfere with the ICT Installer acting in accordance with clause 11.9. The Parties shall seek to agree such programme and in default of agreement shall refer the matter for determination under

the Dispute Resolution Procedure. Any programme agreed or determined in accordance with this clause 20.8 shall be known as the **Snagging Programme**; and

20.8.2 the Contractor shall procure that each Snagging Item is made good in accordance with the Snagging Programme to the satisfaction of the Independent Certifier. If any Snagging Item has not been rectified by the date set out in the Snagging Programme then the Authority shall be entitled to effect such repairs as may be necessary and recover the costs of doing so from the Contractor as a debt.

20.9 Decant Protocol

20.9.1 The Parties agree to perform their respective obligations under the Decant Protocol.

20.9.2 Notwithstanding anything to the contrary in this Agreement, where the only failure(s) to satisfy the Services Availability Requirements [or the Post Completion Works Acceptance Requirements (as the case may be)] in relation to a School arise as a direct result of a breach by the Authority of its obligations contained in the Decant Protocol, then:

20.9.2.1 the Independent Certifier shall issue an Acceptance Certificate if it is satisfied all the other Service Availability Requirements [or the Post Completion Works Acceptance Requirements (as the case may be)] have been met in relation to the relevant School; and

20.9.2.2 the Parties shall agree, acting reasonably, any necessary revision to the decanting timetable for the relevant School in accordance with the Decant Protocol. To the extent that the Contractor subsequently breaches the Decant Protocol in relation to the relevant School, the provisions of Schedule 6 (Payment Mechanism) shall apply.

20.9.3 If by the date that falls ten (10) Business Days after the ICT Handover Date the Contractor has not completed its obligations under paragraphs 7 and 16.4 of the Decant Protocol the Authority shall be entitled to employ an alternative contractor to carry out those activities and shall be entitled to be reimbursed by the Contractor for all costs properly and reasonably incurred in [procuring the alternative contractor and in the carrying out of any such activities by the alternative contractor](#).

20.10 ICT Installer's acts/omissions and the Acceptance Certificate

20.10.1 Subject to clauses [20.9.2 and](#) 20.10.2 the Parties acknowledge that notwithstanding that the ICT Handover Acceptance Certificate has been issued, the Independent ~~Tester~~[Certifier](#) shall be entitled to refuse to issue the Acceptance Certificate on the basis that on the date of inspection pursuant to clause 20.1.2 the ICT Handover Requirements are no longer being met in respect of ~~the~~[a](#) School.

20.10.2 Where the Contractor can show that the ICT Installer has caused the ICT Handover Requirements to not be met upon the inspection

referred to in clause 20.10.1 the Acceptance Certificate will be issued and the Authority's remedy shall be against the ICT Installer and not the Contractor.

21 DELAY AND SUPERVENING UNAVAILABILITY

21.1 Liquidated Damages/Provision of Temporary Accommodation

OPTION 1:

~~21.1.1~~ If for any reason an Acceptance Certificate shall not have been issued in relation to a School by the Planned Services Availability Date, then from the Planned Services Availability Date until (i) the Services Availability Date; or (ii) if earlier, the Termination Date; or (iii) the date on which the Services Availability Date would otherwise have occurred if a Compensation Event occurs following the Planned Services Availability Date and this delays the achievement of the Services Availability Requirements, the Contractor shall pay to the Authority by way of liquidated and ascertained damages the Initial Amount together with a further sum calculated at the Periodic Rate for each complete week or part of a week for that School.⁴²⁶₁₃₃⁴²⁷₁₃₄

~~21.1.2~~ ~~21.1.2~~ Without prejudice to the provisions of Part 6 (Termination) of this Agreement [and to clause 21.2 [(Unavailability of Existing Schools)], the Authority shall not be entitled to claim general damages in respect of the ICT Handover Date for any School occurring after the corresponding Planned ICT Handover Date or the Services Availability Date occurring after the Planned Services Availability Date for that School [or in respect of a Post Completion Works Acceptance Date occurring after its corresponding Planned Post Completion Works Acceptance Date.]

OR⁴²⁸₁₃₅

OPTION 2:

~~21.1.1~~ If for any reason an Acceptance Certificate shall not have been issued in relation to a School by the Planned Services Availability Date then from the Planned Services Availability Date until (i) the Services Availability Date; or (ii) if earlier, the Termination Date; or (iii) the date on which the Services Availability Date would otherwise have occurred if a Compensation Event occurs following the Planned Services Availability Date and this delays the achievement of the Services Availability Requirements, the Contractor shall, upon demand by the Authority, provide and maintain temporary accommodation within the curtilage of the

⁴²⁶₁₃₃ The Authority may wish to seek LADs in relation to a failure to clear an Existing School Site if this delays a capital receipt. In these circumstances it may also want to retain the provisions relating to provision of temporary accommodation since there will also be a need for temporary accommodation as well as LADs. Generally, insistence on LADs without a project-specific need for them is unlikely to offer value for money. This may also need to be amended to recognise Post Completion Works on a project-specific basis.

⁴²⁷₁₃₄ Where LADs are used, the Authority is to set out its calculations of pre-estimated losses in Schedule 4.

⁴²⁸₁₃₅ In the event that the Acceptance Certificate has not been issued by the Planned Services Availability Date, the Authority may need recourse to either Liquidated Damages or the provision of temporary accommodation. Drafting has been included to deal with both of these options. The Authority must decide which option is the most appropriate for its project.

relevant Site which meets the Facilities Output Specification and can be used without interfering with the provision of education to Pupils at the Existing School to allow the Existing School to accommodate all increases in pupil numbers at the Existing School or to accommodate all Pupils at the Existing School for whom accommodation is not available at the School prior to the Services Availability Date.¹³⁶

21.1.2 Without prejudice to the provisions of Part 6 (Termination) of this Agreement [and to clause 21.2 (Unavailability of Existing Schools)], the Authority shall not be entitled to claim liquidated or general damages in respect of the ICT Handover Date for any School occurring after the corresponding Planned ICT Handover Date or the Services Availability Date occurring after the Planned Services Availability Date for that School [or in respect of a Post Completion Works Acceptance Date occurring after its corresponding Planned Post Completion Works Acceptance Date.]¹²⁹¹³⁷

OR

OPTION 3:

{21.1.1 [Without prejudice to the provisions of Part 6 (Termination) of this Agreement [and to clause 21.2 (Unavailability of Existing Schools)], the Authority shall not be entitled to claim liquidated or general damages in respect of the ICT Handover Date for any School occurring after the corresponding Planned ICT Handover Date or the Services Availability Date occurring after the Planned Services Availability Date for that School [or in respect of a Post Completion Works Acceptance Date occurring after its corresponding Planned Post Completion Works Acceptance Date.]¹³⁰¹³⁸

21.2 Unavailability of Existing Schools

21.2.1 If a Disruption Event occurs at an Existing School (or part thereof) prior to the Services Availability Date for that School:

21.2.1.1 where the Disruption Event arises from a breach by the Contractor of the site conduct requirements set out in [the Facilities Output Specification/Construction Proposals] and the Disruption Event will cease upon suspension of the part of the Works which are the subject of that breach, the Authority may require a suspension of that part of the Works. The Contractor shall comply with such request until such time as it can carry out such Works in accordance with this Agreement and shall not be entitled to claim any relief

¹³⁶ [This wording will not be appropriate where LADs are payable for delay, eg. if LADs are needed if sports pitches are delayed.](#)

¹²⁹¹³⁷ This wording will not be appropriate where LADs are payable for delay, eg. if LADs are needed if sports pitches are delayed.

¹³⁰¹³⁸ This drafting is to be used where the Authority does not require temporary accommodation to be provided and does not wish to charge liquidated damages. In such circumstances this drafting will prevent any common law right to claim general damages.

or compensation in respect of any delay to the Works arising in such circumstances; and

21.2.1.2 where clause 21.2.1.1 does not apply, the Contractor and the Authority shall agree (acting reasonably) as expeditiously as possible the steps to be taken to ensure any unavailable parts of an Existing School may be re-provided as soon as practicable. The steps that the Parties agree to consider are the following (in the agreed order of preference set out below) or any combination of the following as appropriate:

21.2.1.2.1 remediation of the Disruption Event through temporary and/or permanent measures;

21.2.1.2.2 use of other facilities at the Existing School;

21.2.1.2.3 use of temporary accommodation at the Existing School;

21.2.1.2.4 use of facilities at another school or Authority property;

21.2.1.2.5 use of temporary accommodation at another school or Authority property; and/or

21.2.1.2.6 use of commercial facilities (in the case only of specialist facilities which cannot be otherwise provided under this clause).

21.2.2 The Contractor shall be responsible for providing the facilities or accommodation pursuant to clause 21.2.1.2 and shall be responsible for all proper costs arising from all administrative arrangements associated with providing such facilities or accommodation pursuant to clause 21.2.1.2, including, if relevant, the cost of providing temporary facilities or accommodation and/or costs of transportation to and from any facilities or accommodation so provided.

21.2.3 Whenever the Contractor fails to implement any steps in the manner agreed pursuant to clause 21.2.1.2, the Authority may (provided it has first served written notice on the Contractor to that effect) take such steps itself and the Contractor shall reimburse to the Authority the costs incurred by the Authority in so doing.

[21A AUTHORITY CAPITAL CONTRIBUTION ^{131,139}¹³²

^{131,139} To be used where there are capital contributions approved by HMT and IUK: see the relevant Guidance in SoPC4, [PF2](#).

¹³² ~~Section 3.9.2 of SoPC4 requires that the ratio of private capital to Authority capital not be adversely affected when draw-downs are made. Where a contract provides for capital contributions to be made it is necessary to include appropriate drafting to cover this aspect. Please use the following wording to deal with this (or if for any reason this wording is not suitable for the specifics of the project, please agree specific wording with IUK to cover it): "The ratio of private sector funding (including Senior Debt, Junior Debt and share capital) drawn down as compared with Capital Contributions made shall at all times be that determined from the Base Case." Please note that the effect of this is that if private finance contributions are delayed or retired beyond the originally~~

21A.1 The Authority hereby agrees to make a contribution of £[insert amount]^{143,140} (the Contribution) to the capital construction costs to be incurred by the Contractor in relation to the Works.

21A.2 The Authority shall pay to the Contractor the Contribution on the later of:

21A.2.1 [the Services Availability Date] OR [on/[insert number] Business Days after] the Services Availability Date; and

21A.2.2 the date falling twenty (20) Business Days of receipt by the Authority of a written VAT invoice for the Contribution.

21A.3 The Parties agree that the Contribution shall not be indexed.]

21A.4 The ratio of private sector funding (including Senior Debt, Junior Debt and share capital) drawn down as compared with Capital Contributions made shall at all times be that determined from the Base Case.¹⁴¹

~~scheduled dates then capital contributions should be retired to the same extent to avoid breaching the ratio requirement.~~

^{143,140} The Authority Capital Contribution in accordance with HMT guidance generally cannot be greater than 30% of the value of the capital works or made any earlier than Services Availability. Capital contribution to be expressed exclusive of VAT and to be broken down on a per-School basis to deliver the most vfm solution.

¹⁴¹ Section 21.3.2 of SoPC PF2 requires that Authorities should not provide date certainty for payments (i.e. payments should be linked to actual delivery of milestones rather than scheduled dates). If there is any rescheduling of Senior Debt drawdown, Authority capital contributions should be withheld until the Authority is satisfied that no drawdown of Senior Debt or equity is retired behind those of the Authority and that the ratio of private capital to Authority capital is not adversely affected. Please note that the effect of this is that if private finance contributions are delayed or retired beyond the originally scheduled dates then capital contributions should be retired to the same extent to avoid breaching the ratio requirement.

PART 4 - THE SERVICES

22 PRINCIPAL OBLIGATIONS

22.1 Standard of Performance and Continuous Improvement

22.1.1 The Contractor will at all times ensure that the Services at each School comply with and meet all the requirements of this Agreement, the Services Output Specification, the Service Delivery Proposals, Good Industry Practice, Guidance and all applicable Authorities' Policies ~~and~~ Legislation and any applicable judgment of a relevant court of law which is a binding precedent with effect from the relevant Services Availability Date for that School.

22.1.2 The Contractor shall ensure, and shall procure that any Contractor Related Party shall ensure, that the Services are carried out in compliance with the Equality Requirements and in accordance with any relevant ~~Permit~~Access to Work ~~Permit~~.

22.1.3 The Contractor will at all times ensure that the Services are performed by appropriately qualified and trained personnel.

~~**22.1.4** All targets set in the Continuous Improvement Plan will be assessed. Continuous Improvement Targets should be set [for year-on-year improvement] unless subsequently otherwise agreed by the Authority.~~

~~**22.1.5** The Contractor shall demonstrate how value for money to the Authority will be achieved and developed against the Continuous Improvement Plan (as revised from time to time) having due regard to best practice, knowledge and experience, with the aim of improving delivery of the Services, the overall cost of the Project (including sharing of Lifecycle Surplus) and the cost to the Authority and/or the School Entity of providing Soft Services and utilities.~~

23 CONDITION OF THE SCHOOLS

23.1 Maintenance

The Contractor shall ensure on a continuing basis that at all times its maintenance and operating procedures set out in the Service Delivery Proposals are and remain sufficient to ensure that:

23.1.1 the Schools are Available as required by this Agreement and the Authority's Requirements;

23.1.2 subject to any relaxation in standards agreed in accordance with ~~clause~~clauses 23.4.7, 23.4.8 and 47.9, the Schools are kept in good structural and decorative order (subject to fair wear and tear) in accordance with this Agreement, the Authority's Requirements and the Service Delivery Proposals;

23.1.3 it can maintain the design intention of the Schools to achieve their full working life as set out in paragraphs 1.4.4.6 to 1.4.4.7 of the Facilities Output Specification and ~~paragraphs 2.7.33 to 2.7.36~~

~~of paragraph 2.6.11.1 of, and Appendix E to,~~ the Services Output Specification for the duration of the Contract Period;

23.1.4 the Contractor can deliver the Services in accordance with this Agreement and the Services Output Specification; and

23.1.5 subject to any relaxation in standards agreed in accordance with clause 47.9, the Schools are handed back to the Authority on the Expiry Date in a condition complying with the Handback Requirements.

23.2 Surveys

23.2.1 If the Authority reasonably believes that the Contractor is in breach of its obligations under clause 23.1 (Maintenance) then it may carry out or procure the carrying out of a survey of the Schools to assess whether the Schools have been and are being maintained by the Contractor in accordance with its obligations under clause 23.1 (Maintenance). This right may not be exercised more than once every two (2) years.

23.2.2 The Authority shall notify the Contractor in writing a minimum of ten (10) Business Days in advance of the date it wishes to carry out the survey. The Authority shall consider in good faith any reasonable request by the Contractor for the survey to be carried out on a different date if such request is made at least five (5) Business Days prior to the notified date and the Contractor (acting reasonably) is able to demonstrate that carrying out the survey on the notified date would materially prejudice the Contractor's ability to provide the Services.

23.2.3 When carrying out any survey, the Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the Services by the Contractor. The cost of the survey, except where clause 23.2.4 (Surveys) applies, shall be borne by the Authority. The Contractor shall give the Authority (free of charge) any reasonable assistance required by the Authority from time to time during the carrying out of any survey.

23.2.4 If a survey shows that the Contractor has not complied or is not complying with its obligations under clause 23.1 (Maintenance), the Authority shall:

23.2.4.1 notify the Contractor of the standard that the condition of the Sites should be in to comply with its obligations under clause 23.1 (Maintenance) and this Agreement generally;

23.2.4.2 specify a reasonable period within which the Contractor must carry out such rectification and/or maintenance work; and

23.2.4.3 be entitled to be reimbursed by the Contractor for the cost of the survey and any administrative costs incurred by the Authority in relation to the survey [other than where the costs of the rectification and/or maintenance work are less than the costs of the survey

in which case the cost of the survey shall be shared equally between the Authority and the Contractor].¹³⁴

23.2.5 The Contractor shall carry out such rectification and/or maintenance work within the period specified by the Authority and any costs it incurs in carrying out such rectification and/or maintenance work shall be at its own expense.

23.2.6 In the event of any failure by the Contractor to comply with clause 23.2.5 or if the Authority is or becomes aware of a breach by the Contractor of its obligations under clause 23.2.5 then the Authority shall be entitled to exercise its right of access and remedy such breach in accordance with Good Industry Practice and shall be entitled to recover any costs or expenses incurred in so doing from the Contractor as a debt.

23.3 Programmed Maintenance

The Contractor shall undertake routine repair and maintenance of the Schools in accordance with a Schedule of Programmed Maintenance which has been approved or not commented on by the Authority under the Review Procedure.

23.4 Schedule of Programmed Maintenance

23.4.1 No later than two (2) months prior to the Planned Services Availability Date for each School, the Contractor shall submit to the Authority's Representative in accordance with Schedule 8 (Review Procedure) a Schedule of Programmed Maintenance for that School for the period from the Planned Services Availability Date to the expiry of that Academic Year.

23.4.2 Not later than two (2) months prior to the commencement of each subsequent Academic Year the Contractor shall submit to the Authority's Representative in accordance with Schedule 8 (Review Procedure) a Schedule of Programmed Maintenance for that Academic Year.

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

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

23.4.3.2 details of any effect of the Programmed Maintenance on the delivery of any of the Services and/or the Educational Services of the Authority; and

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

¹³⁴ ~~The Authority may, in some circumstances, agree to share the cost of any survey where the costs of rectification and/or maintenance work are less than the costs of the survey in which case the cost of the survey could be shared equally between the Authority and the Contractor. This may be appropriate for grouped but not single school projects.~~

- 23.4.4** Not later than twenty (20) Business Days prior to the end of any Term, the Contractor may submit to the Authority's Representative in accordance with paragraph 3.1.7 of Schedule 8 (Review Procedure) a revision to the Schedule of Programmed Maintenance for the Academic Year in which the relevant Term falls showing the effect of the proposed changes to the Programmed Maintenance Information. If the Authority's Representative does not raise comments on such proposed revision in accordance with Schedule 8 (Review Procedure), the Schedule of Programmed Maintenance as revised shall become the Schedule of Programmed Maintenance in respect of that Academic Year.
- 23.4.5** 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 3.1.7 of Schedule 8 (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.
- 23.4.6** The Contractor shall not carry out any Programmed Maintenance save in accordance with a Schedule of Programmed Maintenance to which no objection has been made under Schedule 8 (Review Procedure) or, where comment has been raised in respect of the Programmed Maintenance periods and/or time, the Schedule of Programmed Maintenance has been amended pursuant to this clause 23.
- 23.4.7** Notwithstanding that there has been no objection to a Schedule of Programmed Maintenance, the Authority's Representative may, at any time, require the Contractor to accelerate or defer any Programmed Maintenance or replacement of Lifecycle Assets by giving written notice to the Contractor, (unless otherwise agreed) not less than forty (40) Business Days prior to the scheduled date for carrying out such Programmed Maintenance or replacement of Lifecycle Assets (where applicable, as accelerated), which notice shall set out the time and/or periods at or during which the Authority requires the Programmed Maintenance or replacement of Lifecycle Assets to be performed. The Contractor shall, within ten (10) Business Days, notify the Authority of the amount of any additional reasonable costs which it will incur or save as a direct consequence of such acceleration or deferment (the **Estimated Increased or Decreased Maintenance Costs**). The Authority shall, within a further period of ten (10) Business Days following receipt by the Authority of notification of the amount of the Estimated Increased or Decreased Maintenance Costs, at its option, either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance or Lifecycle Schedule, as the case may be. If the Authority does not respond within this ten (10) Business Day period, the request shall be deemed to have been confirmed. The Authority shall reimburse the Contractor the direct and reasonable costs actually incurred by the Contractor as a consequence of such acceleration or deferment up to, but not exceeding, the amount of the Estimated Increased or Decreased Maintenance Costs.
- 23.4.8** Where Programmed Maintenance or replacement of Lifecycle Assets scheduled to be carried out in accordance with the Schedule of

Programmed Maintenance or Lifecycle Schedule, as the case may be has been deferred by the Authority's Representative under this clause 23, the Contractor shall not be treated as having failed to perform the Services on account of the condition of the Schools or any part of them from the time the Programmed Maintenance or replacement of Lifecycle Assets was scheduled to have been completed until the time the deferred Programmed Maintenance or replacement of Lifecycle Assets is completed, but not afterwards, provided always that the Contractor shall not be relieved from the consequences of any failure to maintain the Schools in respect of any period prior to the period for performing the particular work according to the Schedule of Programmed Maintenance or Lifecycle Schedule, as the case may be.

23.4.9 [The Contractor shall deliver to the Authority's Representative not less than two (2) months prior to the first Planned Services Availability Date and two (2) months prior to the commencement of each subsequent Academic Year the latest version of the Five Year Maintenance Plan.]¹⁴³⁵

23.4.10 The Schedule of Programmed Maintenance shall to the extent reasonably practicable provide for Programmed Maintenance to take place outside Terms.

23.5 Programmed Replacement

23.5.1 The Contractor shall undertake the renewal or replacement of Lifecycle Assets at the Schools in accordance with a Lifecycle Schedule which has been approved or not commented on by the Authority under the Review Procedure.

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

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

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

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

23.5.4 Without prejudice to clause 23.5.3 the Contractor shall replace any items listed in the Lifecycle Schedule with parts of at least equivalent standard to those at the Services Availability Date for that School measured by reference to the standards set out in the Facilities Output Specification, in which case the standard required

¹⁴³⁵ ~~This maintenance plan is optional.~~

will be that of the Contractor Equipment which such equipment replaced as set out in the Contractor's Proposals) measured in each case against the current standards for the relevant part so that as a minimum any replacement part should have an equivalent or greater anticipated lifespan at the same quality as the original part provided that nothing in this clause 23.5.4 shall require the relevant elements of the Schools to have a longer working life than required by ~~section 3.1 of~~ [Appendix E to](#) the Services Output Specification.

23.5.5 In the event that the Contractor fails to either:

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

23.5.5.2 comply with clause 23.5.4,

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

23.6 Lifecycle Profile and Lifecycle Spend¹³⁶~~142~~

23.6.1 The Contractor shall keep detailed records of the replacement and renewal of Lifecycle Assets and Lifecycle Spend for each School. [Each year the Contractor shall deliver to the Authority a proposed Lifecycle Schedule, together with a report on any differences between the Lifecycle Profile and Lifecycle Spend for the previous year and a prediction of any differences between the Lifecycle Profile and Lifecycle Spend for the following year.](#)

23.6.2 The Contractor shall upon written request permit the Authority [and/or Independent Surveyor to inspect any part of the Schools and have](#) access to all the Contractor's records, receipts, invoices, reports, drawings, technical specifications and performance logs relating to any Lifecycle Asset and Lifecycle Spend, so as to enable the Authority [and/or Independent Surveyor](#) to obtain an accurate assessment of the figures quoted. The Contractor shall provide all reasonable co-operation and assistance to the Authority [and/or Independent Surveyor](#) to allow it access to such documents and information and shall in a bona fide manner respond promptly to all reasonable requests for further documents and information made by the Authority [and/or Independent Surveyor](#) in respect of any Lifecycle Asset and the condition of the same and Lifecycle Spend.

23.6.3 At least ~~{60}~~ Business Days prior to a Lifecycle Review Date, the Contractor shall submit to the Authority a report containing:

23.6.3.1 a survey of the state and condition of the Schools and Lifecycle Assets by comparison to the Contractor's maintenance and lifecycle obligations under this Agreement;

¹³⁶ ~~To be noted that HMT policy not yet finalised~~¹⁴² [Drafting reflects position in this area.](#) ~~SoPC PF2.~~

- 23.6.3.2** a revised projection for any alteration to anticipated replacement or renewal of Lifecycle Assets in respect of:
- 23.6.3.2.1** the period from the relevant Lifecycle Review Date until the next Lifecycle Review Date; and
 - 23.6.3.2.2** the period from the relevant Lifecycle Review Date until the Expiry Date;
- 23.6.3.3** confirmation of any differences between the Lifecycle Profile and Lifecycle Spend, ~~any actual or potential Lifecycle Surplus and transactions to the date of survey, an explanation of lifecycle activity and costs that have taken place during the previous Lifecycle Review~~ Period and, accordingly a log of all Lifecycle Surpluses already accrued;
- 23.6.3.4** confirmation of the Lifecycle Profile for the Lifecycle Period up to the next Lifecycle Review Date and any potential Lifecycle Surplus in that period;
- 23.6.3.5** confirmation of the Lifecycle Profile from that Lifecycle Review Date to the Expiry Date and any potential Lifecycle Surplus in that period; and
- 23.6.3.6** a summary of how the Contractor has achieved the Lifecycle Efficiencies Plan in the period since the previous Lifecycle Review Date,

(the **Lifecycle Report**).

- 23.6.4** Subject to clause 23.6.5, on the Lifecycle Review Date, the Parties shall discuss the contents of the Lifecycle Report, and the Contractor shall make such revisions to the Lifecycle Report as the Parties agree are necessary and supply the Authority with a copy of the same within twenty (20) Business Days of the Lifecycle Review Date.
- 23.6.5** On the Lifecycle Review Date taking place on the Final Survey Date the Parties shall also consider and agree a prediction of the likely Lifecycle Surplus at the Expiry Date.
- 23.6.6** The Authority shall from the Final Survey Date until the Expiry Date deduct from each Monthly Unitary Payment due to the Contractor [1/36th]¹⁴³ of the predicted likely Lifecycle Surplus agreed in accordance with clause 23.6.5.
- 23.6.7** On the Expiry Date the Parties shall compare the actual Lifecycle Surplus with the Lifecycle Surplus predicted pursuant to clause 23.6.5. The overall amount that has been deducted from the Monthly Unitary Payment pursuant to clause 23.6.6 shall be subtracted from the Authority's share of the actual Lifecycle

¹⁴³143 The 1/36th share each month for the Authority is on the basis of a 50/50 split of any Lifecycle Surplus. Bidders are to propose any improvement on a 50/50 split, in which case this fraction will need to be amended.

Surplus, which shall be [50%^{138,144}]. If the result is a positive sum then the Contractor shall forthwith pay the Authority such amount. If the result is a negative sum the Authority shall forthwith pay the Contractor such amount— provided that the Authority shall not be required to pay any sum greater than the aggregate of amounts deducted from the Monthly Unitary Payment pursuant to clause 23.6.6.

23.6.8 On any occasion when the Authority believes that any repair or replacement of any asset or equipment used in a School is likely to give rise to a saving from projected Lifecycle Spend, the Parties shall meet and, in good faith, try to agree the quantity of such saving, and the resulting agreed saving shall be specifically logged and taken account of in the next Lifecycle Report.

23.6.9 Independent Review of Lifecycle Report

23.6.9.1 Where the Contractor fails to provide the Lifecycle Report, or fails to produce such a report to a standard acceptable to the Authority, or the Authority has reasonable grounds for questioning the accuracy of the analysis undertaken by the Contractor, the Authority may appoint the Independent Surveyor to carry out an independent review and produce an independent lifecycle report.

23.6.9.2 The Contractor shall co-operate fully with the Independent Surveyor and provide access to systems, copies of reports and any relevant data to enable the Independent Surveyor to complete its report.

23.6.9.3 The Authority shall be entitled to be reimbursed by the Contractor for all the Independent Surveyor costs and expenses incurred in carrying out its review and producing any report pursuant to clause 23.6.9.1.

24 HAZARDOUS SUBSTANCES, SWMP AND EPB REGULATIONS

24.1 Storage

The Contractor shall ensure that any hazardous materials or equipment used or intended to be used in the carrying out of the Works or the provision of the Services are kept under control and in safe keeping in accordance with all relevant Legislation and Good Industry Practice, and shall ensure that all such materials are properly and clearly labelled on their containers, and shall promptly inform the Authority of all such materials being used or stored at the Sites and shall comply with any other reasonable requirement of the Authority in respect of such materials and equipment.

24.2 COSHH Register

The Contractor shall maintain a COSHH register in relation to each School and shall ensure that a copy of each register is held at the relevant School, at the Contractor's registered office and that a copy is given to the Authority. The Authority shall notify the Contractor of any items that it or any Authority

^{138,144} Bidders are to propose any improvement on a 50/50 split.

Related Party is using or storing at any of the Sites and that are required to be included in such register.

24.3 Site Waste Management Regulations

The Authority appoints the Contractor to be the principal contractor for the purposes of the SWMP Regulations. In relation to the Works ~~and the Services¹³⁹~~, the Contractor will perform all of the duties of the principal contractor under the SWMP Regulations and in addition advise and provide support to the Authority to assist the Authority in performing the duties imposed by the SWMP Regulations on a "client" (as defined in the SWMP Regulations) and ensure that the "site waste management plan" (as defined in the SWMP Regulations) is discussed and updated following each progress meeting as necessary.

24.4 EPB Regulations

The Contractor acknowledges that it is the "relevant person" referred to in Regulation 2 of the EPB Regulations and will provide the energy performance certificate required by Regulation 9 of the EPB Regulations.

25 EMERGENCIES

25.1 Additional or Alternative Services

If an Emergency arises during the Services Period which cannot be dealt with by performance of the Services, the Authority or a School's Representative may instruct the Contractor to use its best endeavours to procure that such additional or alternative services are undertaken by the Contractor as and when required by the Authority or the School's Representative to ensure that the Emergency is dealt with and normal operation of the relevant School resumes as soon as is reasonably practicable provided that the Contractor shall not be obliged to provide any service which it is neither qualified nor competent to provide.

25.2 Costs

The properly incurred costs of the Contractor of any additional or alternative services provided to the Authority or the School Entity under clause 25.1 (Additional or Alternative Services) or any revenue lost by the Contractor shall be borne by the Authority and paid against the Contractor's invoice in accordance with clause 37 (Payment Provisions). If such costs and/or lost revenue are not agreed, the matter shall be referred to the Dispute Resolution Procedure.

26 PERFORMANCE MONITORING

26.1 Contractor Monitoring

The Contractor shall monitor its performance in the delivery of the Services in accordance with the provisions of Schedule 6 (Payment Mechanism).

26.2 Authority Monitoring

The Authority may elect to undertake its own performance monitoring at any stage during the Services Period for any purpose, including in order to ensure

¹³⁹ ~~Authority to consider whether this would apply to the Services Period.~~

that the Services are being provided in accordance with this Agreement. The Contractor will use its reasonable endeavours to assist the Authority in such an exercise. The Authority shall be entitled to notify the Contractor of the outcome of the performance monitoring exercise, and the Contractor shall have due regard to the Authority's comments in relation to the future provision of the Services.

26.3 Without prejudice to the Authority's rights under clause 41.3 (Termination on Contractor Default) and to any other express rights under this Agreement, where the Contractor has been found to:

26.3.1 be fraudulent in the submission of monitoring reports or claims for payment under clause 37 (Payment Provisions); or

26.3.2 have submitted at least ~~{two (2)}~~ erroneous monitoring reports, within a ~~{three (3)}~~ month period,

the Authority may by notice to the Contractor increase the level of its monitoring of the Contractor, and/or (at the Authority's option), of the Contractor's monitoring of its own performance of its obligations under this Agreement in respect of the relevant Service or Services the subject of such fraudulent or erroneous reporting until such time as the Contractor shall have demonstrated to the reasonable satisfaction of the Authority that it will perform (and is capable of performing) its obligations under this Agreement.

26.4 For the purposes of clause 26.3, the Authority acknowledges that if the Contractor has otherwise failed to have demonstrated to the reasonable satisfaction of the Authority as required by clause 26.3 but:

26.4.1 if the Contractor has removed the person or persons responsible for the fraudulent reporting; or

26.4.2 (under clause 26.3.2), if in the following [three (3)] month period following the Authority notice (if it has not already been established) there have been no further erroneous reports of any kind,

this shall be regarded as sufficient demonstration that the Contractor will perform and is capable of performing its obligations.

26.5 If the Authority issues a notice under clause 26.3, the Contractor shall bear its own costs and indemnify and keep the Authority indemnified at all times from and against all reasonable costs and expenses incurred by or on behalf of the Authority in relation to such increased level of monitoring arising due to circumstances under clause ~~26.3.1.26.3.~~

27 SOFT SERVICES

27.1 Standard of provision of Soft Services

27.1.1 The Authority shall procure that the Soft Services Provider shall perform the Soft Services in accordance with the requirements of Legislation and the Soft Services Interface Protocol.

27.1.2 The Contractor shall comply with the Soft Services Interface Protocol.

27.2 Duty to notify breach

Where the Contractor in the course of performing its obligations under clause 23.1 becomes aware of any breach by the Authority of clause 27.1, the Contractor shall as soon as practicable thereafter notify the Authority of the breach and, so far as it is aware of the same, the nature of the circumstances that have caused the breach.

27.3 Provision of information

The Contractor shall ensure that, when providing As-built Drawings, to the extent not already contained therein it shall at the same time provide such additional instructions and guidance in relation to the safe operation and maintenance of a School as would commonly be provided by a building contractor (acting in accordance with Good Industry Practice) to a provider of services the same as or similar to the Soft Services to enable that person to operate and maintain the relevant School safely and without causing damage.

28 CATERING EQUIPMENT

28.1 Responsibility for provision of catering

As between the Authority and the Contractor the provision of catering at the Schools shall be the responsibility of the Authority.

28.2 Contractor to be responsible for lifecycle of Catering Equipment

The Contractor shall be responsible, subject to clause 28.3, for the repair or replacement of the Catering Equipment so that such Catering Equipment meets the requirements of the Facilities Output Specification.

28.3 Contractor not responsible where failure due to Authority's failure to comply

The Contractor shall not be responsible for carrying out any repair and replacement of Catering Equipment to the extent that such repair and replacement is due to the failure of the Authority to comply (or procure that an Authority Related Party complies) with the Authority's obligations under this Agreement.

28.4 Replacement or repair of Catering Equipment under warranty

Any repair or replacement of Catering Equipment required during the period of the manufacturer's or supplier's warranty that is not covered by such warranty due to the Authority's failure to perform its obligations under this Agreement must be carried out by or on behalf of the Authority but only where the Authority has been made aware of the relevant manufacturer's or supplier's warranty by the Contractor (including through the provision to the Authority of the As-built Drawings and ~~Related Information~~[related information](#)).

28.5 Authority right to carry out urgent maintenance

Where the Authority [or the School Entity](#) (acting reasonably) considers that:

28.5.1 for health and safety reasons; or

28.5.2 in order for the ~~Authority~~[School Entity or Relevant LEA](#) to fulfil its duty to provide or procure the provision of the catering service,

there is in either case an urgent need to undertake maintenance of the Catering Equipment that would otherwise be the responsibility of the Contractor then the Authority or relevant School Entity shall, to that extent, be authorised to undertake the relevant element of maintenance ~~itself~~ provided that ~~it~~ the Authority or relevant School Entity shall do so in accordance with Good Industry Practice. The Contractor shall reimburse the ~~Authority's~~ costs of the Authority or relevant School Entity in respect of carrying out such maintenance.

29 TERMS AND USE OF SCHOOLS

29.1 Notification of Terms

29.1.1 The Terms for the next Academic Year following the date of this Agreement have been notified to the Contractor.

29.1.2 No later than [31st March] in each year, the Authority shall notify the Contractor of the dates for the Terms, which may be more or less than, or equal to, three (3) in number (including any half-term holidays) in the Academic Year following that notice.

29.1.3 If the Authority wishes Terms to have an aggregate yearly duration in excess of [one hundred and ninety five (195)] School Days in an Academic Year or where it proposes any material change to the structure of the Terms (being a change which reduces the length of any holiday by more than five (5) Business Days or introduces a Term structure substantially different to the existing Term structure) it shall propose a Medium Value Change.

29.2 Additional School Periods

29.2.1 The Services shall be provided at each School by the Contractor for Additional School Periods pursuant to this clause 29.2 (Additional School Periods).

29.2.2 The Authority shall be entitled to use each School (or any part thereof) for the amount of Additional School Periods as specified in Schedule 6 (Payment Mechanism);

29.2.3 The Authority shall notify the Contractor:

29.2.3.1 within ten (10) Business Days prior to the last day of each Academic Year of the timings of the proposed Additional School Periods for the following Academic Year; and

29.2.3.2 (subject to clause 29.2.1) in relation to Additional School Periods not notified to the Contractor pursuant to clause 29.2.3.1 (Additional School Periods) as soon as is reasonably practicable and in any event not less than forty-eight (48) hours in advance of each proposed Additional School Period,

including details of the intended use, the dates and times of such use, the areas of each School required and any Services required during such periods.

29.2.4 The obligation of the Contractor to provide services at each School in accordance with clause 29.2.1 (Additional School Periods) shall

be satisfied if, and only if, the areas of the relevant School identified by the Authority in accordance with clause 29.2.3 (Additional School Periods) are Available and the other requirements of the Services Specification relevant to those areas are satisfied throughout the Additional School Period concerned.

29.3 Use other than for School Day and Additional School Periods

At all times outside of the School Day and any Additional School Periods a School shall, subject to access in order to perform the Services always in accordance with [any agreed Permits Access](#) to Work [Permit](#), be for the exclusive use of the relevant School Entity and its invitees, and the Contractor shall not be entitled to make a charge for any such use.

30 TUPE AND EMPLOYEES

30.1 No Employee Transfer

30.1.1 The Authority and the Contractor agree that there are no individuals presently employed by the Current Employer whose contracts of employment will, by virtue of the transfer to the Contractor of responsibility for provision of (or procuring the provision by any sub-contractor of) any of the Services in accordance with this Agreement and in accordance with TUPE, have effect after the Service Transfer Date (or at any other time) as if originally made between those persons and the Contractor and/or relevant sub-contractor.

30.1.2 If it is subsequently agreed or determined that there are persons presently employed by the Current Employer whose contracts of employment do have effect after the Service Transfer Date as if originally made between those persons and the Contractor and/or relevant sub-contractor (the **Transferring Staff**) then:

30.1.2.1 the Authority shall ~~or shall~~ procure that any Current Employer [shall](#) within [seven (7)] Business Days of the date on which it was so agreed or determined ([the Decision Date](#)) have the opportunity to offer a position as an employee of the Current Employer to some or all of the Transferring Staff [and the Authority shall notify the Contractor of the period for acceptance of that offer](#);

30.1.2.2 the Contractor shall procure that no person to whom any Current Employer has offered a position in accordance with clause 30.1.2.1 shall be dismissed by reason of redundancy [or for some other substantial reason](#) until the period for acceptance of the Current Employer's offer has expired and the person in question has not accepted the Current Employer's offer;

30.1.2.3 subject to clauses 30.1.2.1 and 30.1.2.2, the Contractor or any sub-contractor shall be entitled to dismiss any or all of the Transferring Staff by reason of redundancy ~~or for some other substantial reason~~ provided that the Contractor shall use and shall procure that any sub-contractor 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.

30.1.3 ~~The Authority shall~~ Provided that the Contractor and any sub-contractor complies with its or their obligations under clause 30.1.2.2 and 30.1.2.3, the Authority shall indemnify the Contractor in respect of any Employee Costs reasonably incurred by the Contractor or relevant sub-contractor. The Authority shall also indemnify the Contractor against any ~~costs referred to in clause 30.1.2.3~~ Direct Losses reasonably incurred by the Contractor (or by a relevant sub-contractor ~~and for which the Contractor is responsible~~) where such Direct Losses arise as a result of any act, fault or omission of the Authority and/or Current Employer occurring prior to the Service Transfer Date and relating to claims made against the contractor or any relevant sub-contractor by any Transferring Staff.

30.2 Compliance with legislation and Authorities' Policies

30.2.1 The Contractor shall comply and shall procure that each sub-contractor and all persons employed or engaged by a sub-contractor 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.

30.2.2 The Contractor shall procure that each sub-contractor takes all reasonable steps to procure that all persons including ~~any~~ those employed or engaged by a sub-contractor in connection with the provision of any Service shall, so far as applicable, comply with the Authorities' Policies as regards health and safety at work (including the Authorities' Policies 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 every sub-contractor 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 Contractor or the relevant ~~Current Employer~~ sub-contractor complies with its duty under Section 3(1) Health and Safety at Work etc Act 1974 regarding the conduct of the undertaking of ~~that Current Employer~~ the Contractor or the relevant sub-contractor.

30.3 Contractor Indemnities

30.3.1 The Contractor shall indemnify and keep indemnified in full the Authority and, at the Authority's request, each and every service provider who shall provide any service equivalent to any of the Services immediately after expiry or earlier termination of this Agreement (a **Future Service Provider**) against:

30.3.1.1 claims in respect of all emoluments and all other contractual or statutory payments unpaid by the Contractor or a sub-contractor to any person entitled to such payments from the Contractor or a sub-

contractor who is or has been employed or engaged by the Contractor or any sub-contractor in connection with the provision of any of the Services which relate to any period of employment or engagement with the Contractor or any sub-contractor on or after the 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

30.3.1.2 insofar as clause 30.3.1.1 does not apply, all Direct Losses incurred by the Authority as a result of any claim against the Authority and/or the Current Employer in respect of any liability to any person who is or has been employed or engaged (whether as a consequence of TUPE or of the provisions of this clause 30) by the Contractor or any sub-contractor 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 sub-contractor occurring after the Service Transfer Date and before the expiry or termination of this Agreement,

but the indemnities in clauses 30.3.1.1 and 30.3.1.2 shall not apply to the extent that (i) the claim arises from a wrongful act or omission of the Current Employer, or (ii) the Authority's indemnity at clause 30.1.3 applies.

30.4 Retendering

30.4.1 The Contractor shall (and shall procure that any sub-contractor shall) within the period of twelve (12) months immediately preceding the Expiry Date or following the service of a notice under clauses 41 to 45 or as a consequence of the Authority notifying the Contractor of its intention to retender this Agreement or as a consequence of a Transfer Change⁴⁴⁰₁₄₅:

30.4.1.1 on receiving a written request from the Authority provide in respect of any person engaged or employed by the Contractor or any sub-contractor in the provision of the Services (the **Assigned Employees**) full and accurate details regarding the identity, number, age, sex, length of service, job title, grade and terms and conditions of employment of and other matters⁴⁴⁴₁₄₆ affecting each of those Assigned

⁴⁴⁰₁₄₅ The reference to the Change mechanism is included as implementation of a Change (for example, the removal of some of the Services from the scope of the Agreement) could result in TUPE transfers.

⁴⁴⁴₁₄₆ The list would normally show:

- Staff ref no
- DoB
- Age
- Job Title
- Start Date
- Continuous Service Date – length of reckonable service
- Contracted hours
- Sex (M/F)
- Site
- Department

Employees who it is expected, if they remain in the employment of the Contractor or of any sub-contractor as the case may be until immediately before the date for the implementation of a Transfer Change or the Termination Date or the Expiry Date (as appropriate), would be Returning Employees (the **Retendering Information**);

- 30.4.1.2** provide the Retendering Information promptly and at no cost to the Authority;
- 30.4.1.3** notify the Authority forthwith in writing of any material changes to the Retendering Information promptly as and when such changes arise;
- 30.4.1.4** be precluded from making any material increase or decrease in the numbers of Assigned Employees other than in the ordinary course of business and with the Authority's prior written consent (such consent not to be unreasonably withheld or delayed);
- 30.4.1.5** be precluded from making any increase in the remuneration or other change in the terms and conditions of the Assigned Employees other than in the ordinary course of business and with the Authority's prior written consent (such consent not to be unreasonably withheld or delayed); and
- 30.4.1.6** be precluded from transferring any of the Assigned Employees to another part of its business or moving other employees from elsewhere in its or their business who have not previously been employed or engaged in providing the Services to provide the Services save with the Authority's prior written consent (such consent not be unreasonably withheld or delayed).

30.4.2 The Contractor shall indemnify and shall keep indemnified in full the Authority and at the Authority's request any Future Service Provider against all Direct Losses arising from any claim by any party as a result of the Contractor or sub-contractor failing to provide or promptly to provide the Authority and/or any Future Service Provider where requested by the Authority with any Retendering Information and/or Employee Liability Information or to provide full Retendering Information and/or Employee Liability Information or as a result of any material inaccuracy in or omission from the Retendering Information and/or Employee Liability Information provided that this indemnity shall not apply to the extent that such information was originally provided to the Contractor or sub-contractor by the Authority and was materially inaccurate or incomplete when originally provided.

NI letter (A or D)
Scale and point
Salary
Superannuation (including contribution rates, length of reckonable pensionable service etc)
Allow/deduction code.
N.B. This is not necessarily an exhaustive list

30.5 Expiry, Termination or a Transfer Change

30.5.1 On the expiry or earlier termination of this Agreement or in the implementation of a Transfer Change, the Authority and the Contractor agree that it is their intention that TUPE shall apply in respect of the provision thereafter of any service equivalent to a Service but the position shall be determined in accordance with the law at the Expiry Date or the Termination Date or the date for the implementation of a Transfer Change as the case may be and this clause is without prejudice to such determination.

30.5.2 For the purposes of this clause 30 **Returning Employees** shall mean those employees wholly or mainly engaged in the provision of the Services as the case may be as immediately before the Expiry Date or the Termination Date or the date for the implementation of a Transfer Change whose employment transfers to the Authority or a Future Service Provider pursuant to TUPE. Upon expiry or earlier termination of this Agreement for whatever reason or the implementation of a Transfer Change (such date being termed the **Return Date**), the provisions of this clause 30.5.2 will apply:

30.5.2.1 the Contractor shall or shall procure that all wages, salaries and other benefits of the Returning Employees ~~and other employees or former employees of the Contractor or the sub-contractors (who had been engaged in the provision of the Services) and~~ all PAYE tax deductions and national insurance contributions relating thereto in respect of the employment of the Returning Employees ~~and such other employees or former employees of the Contractor or sub-contractors~~ up to the Return Date are satisfied;

30.5.2.2 the Authority shall ensure or shall procure that all wages, salaries and other benefits of the Returning Employees ~~(who had been engaged in the provision of the Services)~~ and all PAYE tax deductions and national insurance contributions relating thereto in respect of the employment of the Returning Employees on and after the Return Date are satisfied;

30.5.2.3 without prejudice to clause 30.5.2.1, the Contractor shall:

30.5.2.3.1 remain (and procure that sub-contractors shall remain) (as relevant) responsible for all the Contractor's or sub-contractor's employees (other than the Returning Employees) on or after the Expiry Date or the Termination Date or the date for implementation of a Transfer Change and shall indemnify the Authority and any Future Service Provider against all Direct Losses incurred by the Authority or any Future Service Provider resulting from any claim whatsoever whether arising before on or after the Return Date by or on behalf

of any of the Contractor's or sub-contractor's employees who do not constitute the Returning Employees; and

30.5.2.3.2 in respect of those employees who constitute Returning Employees the Contractor shall indemnify the Authority and any Future Service Provider against all Direct Losses incurred by the Authority or any Future Service Provider resulting from any claim whatsoever by or on behalf of any of the Returning Employees in respect of the period after the ~~Relevant~~ Service Transfer Date but on or before the Return Date (whether any such claim, attributable to the period up to and on the Return Date, arises before, on or after the Return Date) where such claim arises out of any act, fault or omission of the Contractor and/or any sub-contractor including but not limited to any failure by the Contractor or any sub-contractor to comply with its or their obligations under Regulation 13 of TUPE and/or Article 6 of the Directive as if such legislation applied, even if it does not in fact apply save to the extent that any such failure to comply arises as a result of an act or omission of the Authority or any Future Service Provider.

30.5.3 The Authority shall be entitled to assign the benefit of the indemnities set out in clause 30.5.2 to any Future Service Provider.

30.5.4 The Authority shall indemnify the Contractor (for itself and for the benefit of each relevant sub-contractor) in respect of those employees who constitute Returning Employees against all Direct Losses incurred by the Contractor or any relevant sub-contractor in connection with or as a result of any failure by the Authority or any Future Service Provider to comply with its or their obligations under Regulation 13 of TUPE and/or Article 6 of the Directive as if such legislation applied, even if it does not in fact so apply save to the extent that any such failure arises as a result of any act or omission of the Contractor or any relevant sub-contractor.

30.6 Sub-Contractors

In the event that the Contractor enters into any sub-contract in connection with this Agreement, it shall impose obligations on its sub-contractors in the same terms as those imposed on it pursuant to this clause 30 and 32 (Employees – General) and shall procure that the sub-contractor complies with such terms. The Contractor shall indemnify and keep the Authority indemnified in full against all Direct Losses, incurred by the Authority or any Future Service Provider as a result of or in connection with any failure on the part of the Contractor to comply with this clause and/or the sub-contractor's failure to comply with such terms.

30.7 Conduct of Claims

Clause 63.5 of this Agreement shall apply where any claim is made in respect of the indemnities given under this clause 30.

31 PENSIONS

31.1 No Employee Transfer

The Authority and the Contractor agree that there are no individuals presently employed by the Current Employer who are, or who are eligible to be, prior to the Commencement Date, members of the LGPS whose contracts of employment will, by virtue of the transfer to the Contractor of responsibility for provision of (or procuring the provision by any sub-contractor of) any of the Services in accordance with this Agreement and in accordance with TUPE, have effect after the Service Transfer Date (or at any other time) as if originally made between those persons and the Contractor and/or relevant sub-contractor.

31.2 Co-operation on Expiry or Termination

On the termination or expiry of this Agreement (for whatever reason) for a reasonable period both before and after such termination or expiry, the Contractor undertakes to co-operate fully with the Authority (and any successor that provides to the Authority services in the nature of any of or any part of the Services) in order to achieve a smooth transfer of the ongoing pension liabilities for future service whereby any employee transferring to such successor are provided with pension benefits which are broadly similar to or better than those with which they were provided under this Agreement.

32 EMPLOYEES – GENERAL

32.1 Disclosure and Barring

32.1.1 The Contractor shall procure that, in respect of all potential staff or persons performing any of the Services (each a **Named Employee**), before a Named Employee begins to attend the Sites to perform any of the Services:

32.1.1.1 each Named Employee is questioned as to whether he or she has any Convictions;

32.1.1.2 the results are obtained of a check of the most extensive available kind made with the Disclosure and Barring Service in respect of each Named Employee;

32.1.1.3 to the extent permitted by Legislation or Guidance a copy of the results of such checks as are referred to in clauses 32.1.1.2 are notified to the Authority.

32.1.2 The Contractor shall procure that:

32.1.2.1 no person who appears on a Barred List following the results of a Disclosure and Barring Service check shall be employed or engaged in the performance of [the Works or ¹⁴²₁₄₇] the Services; and

¹⁴²₁₄₇ Authority to consider the inclusion of reference to the Works depending on the location of the Site in relation to the

32.1.2.2 it shall and shall procure that all sub-contractors shall comply with all reporting requirements to the Disclosure and Barring Service.

32.1.3 The Contractor shall procure that no person who discloses any Convictions [or Asbos], or who is found to have any Convictions or Asbos following the results of a Disclosure and Barring Service check, is employed or engaged without the Authority's prior written consent (such consent not to be unreasonably withheld or delayed).

32.1.4 In so far as permitted by law, the Contractor shall procure that the Authority is kept advised at all times of any member of staff who, subsequent to his/her commencement of employment as a member of staff:

32.1.4.1 receives a Conviction or Asbo which become known to the Contractor or sub-contractor or whose previous Convictions or Asbos become known to the Contractor (or any employee of a sub-contractor involved in the provision of the Services);~~of~~

32.1.4.2 in respect of whom information is referred to the Disclosure and Barring Service pursuant to the Disclosure and Barring Scheme; or

32.1.4.3 who is placed on a barred list pursuant to the Disclosure and Barring Scheme.

32.1.5 In the event that any member of staff is added to a Barred List, the Contractor shall procure that such member of staff is immediately removed from the Site and shall cease to be engaged in [the Works or]^{143,148} the performance of the Services.

32.1.6 Save to the extent prescribed otherwise pursuant to the Disclosure and Barring Scheme, this clause 32.1 shall not apply to those individuals who shall be required by the Contractor or any sub-contractor to attend on Site to provide emergency reactive services. In the case of such individuals, the Contractor shall or shall procure that any sub-contractor shall ensure that such individuals are accompanied at all times while on each Site by a member of the Contractor or sub-contractor's staff who has been properly employed or engaged in accordance with clauses 32.1.1 to 32.1.3.

32.2 Conduct of Staff

Whilst engaged at the Sites the Contractor shall and shall procure that any sub-contractor shall comply with the Authorities' Policies^{144,149} relating to the conduct of staff and security arrangements. The Authority (acting reasonably) may:

32.2.1 instruct the Contractor that disciplinary action is taken against any employee of the Contractor or any sub-contractor involved in the provision of the Services (in accordance with the terms and conditions of employment of the employee concerned) where such

School.

¹⁴³₁₄₈ As previous footnote.

¹⁴⁴₁₄₉ Consider what policies of the School Entities are to be inserted.

employee misconducts himself or is incompetent or negligent in his duties (in which case the Authority shall co-operate with any disciplinary proceedings and shall be advised in writing of the outcome); or

- 32.2.2** where the Authority has reasonable grounds for considering that the presence or conduct of an employee at any location relevant to the performance of the Services is undesirable, require the exclusion of the relevant employee from the relevant location(s).

32.3 Admission to the Sites

- 32.3.1** Subject to the remainder of this clause 32.3 the Contractor shall, at least twenty (20) Business Days before the date on which the Contractor first [carries out any of the Works or]¹⁴⁵₁₅₀ provides any of the Services, provide the Authority with a written list of the names and addresses of all employees or other persons who it expects may require admission to each Site in connection with the [carrying out of the Works or] provision of the Services, specifying the capacities in which those employees or other persons are concerned with the [Works or] provision of the Services and giving such other particulars as the Authority may require. The Contractor shall update this information as and when any such individuals are replaced or complemented by others, not less than twenty (20) Business Days before their inclusion. The decision of the Authority on whether any person is to be refused admission to a Site shall be final and conclusive and the Authority shall not be obliged to give reasons for its decision.

- 32.3.2** Where the Contractor is unable (acting reasonably) to comply with clause 32.3.1 by the time period specified in it then the Contractor shall comply with its obligations under that clause as soon as reasonably practicable and by no later than the end of the day on which the relevant individual first goes on Site. Until such time as the Contractor has complied with its obligations in respect of that individual, he or she shall at all times be accompanied on Site by a member of the Contractor's or sub-contractor's staff who has been properly notified to the Authority in accordance with clause 32.3.1.

- 32.3.3** This clause 32.3 shall not apply to those individuals who shall be required by the Contractor or any sub-contractor to attend on Site to provide emergency reactive services. In the case of such individuals, the Contractor shall or shall procure that any sub-contractor shall ensure that such individuals are accompanied at all times while on each Site by a member of the Contractor or sub-contractor's staff who has been properly notified to the Authority in accordance with clause 32.3.1.

32.4 Refusal of Admission

The Authority reserves the right for it and the School Entities to refuse to admit to the Sites any person, employed or engaged by the Contractor or a sub-contractor, whose admission would, in the opinion of the Authority and/or the relevant School Entity, present a risk to themselves or an Authority Related Party or property, and shall not be obliged to give any reasons for such refusal.

¹⁴⁵₁₅₀ Where the Site is a self contained Construction Site with appropriate barriers to the adjoining School, then a list of attendees in relation to the Works may not be a requirement.

32.5 Decision to Refuse Admission

The decision of the Authority and/or the relevant School Entity as to whether any person is to be refused admission to the Sites pursuant to clause 32.4 (Refusal of Admission) shall be final and conclusive. If the Authority and/or the relevant School Entity declines to give reasons and/or where reasons are given but are found to be unreasonable for exercising its rights under clauses 32.2.2 (Conduct of Staff), 32.3 (Admission to the Sites), 32.4 (Refusal of Admission) and 32.6 (Removal from Sites) the Authority shall indemnify the Contractor and keep the Contractor indemnified (for itself and for the benefit of each relevant sub-contractor) against all Direct Losses suffered or incurred by the Contractor, provided that the Contractor or the relevant sub-contractors has used its reasonable endeavours to re-deploy that person elsewhere and/or to mitigate the claim.

32.6 Removal from Sites

The Contractor shall comply with and/or procure compliance with any notice issued by the Authority or the relevant School Entity from time to time requiring the removal from any of the Sites of any person employed thereon who in the opinion of the Authority and/or the relevant School Entity acting reasonably is not acceptable on the grounds of risk to themselves or an Authority Related Party or property and that such persons shall not be employed again upon the Project without the written consent of the Authority or the relevant School Entity.

32.7 Relief from Deductions

Where the Authority (or the relevant School Entity on its behalf) exercises its rights under this clause 32 and it can be shown that:

32.7.1 the Contractor or any sub-contractor has acted in accordance with the relevant provisions of this clause 32; or

32.7.2 the Authority and/or the relevant School Entity did not act reasonably in instructing the Contractor not to employ and/or in requesting any removal and/or in refusing admission,

then the Authority shall give the Contractor such relief from Deductions for a reasonable period to allow the Contractor or any sub-contractor to make alternative arrangements to replace the person whose employment has been refused or whose removal has been requested. Any relief from Deductions given under this clause 32.7 shall only be in respect of those Services in which such person is or would have been engaged.

32.8 Resources and Training

The Contractor shall procure that:

32.8.1 there shall be at all times 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. This obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absences and anticipated and actual peaks in demand for each of the Services; and

32.8.2 all staff receive such training and supervision as is necessary to ensure the proper performance of the Services under this Agreement.

32.9 Personnel Policies and Procedures

The Contractor shall procure that there are set up and maintained by it and by all sub-contractors involved in the provision of the Services, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). The Contractor shall procure that the terms and implementation of such policies and procedures comply with Legislation and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are forthwith issued to the Authority.

33 OPERATING MANUAL

33.1 ~~Maintenance~~ Provision of Operating Manual

~~The~~ Within (20) twenty Business Days of the Commencement Date, the Contractor shall throughout the Services Period maintain and update an operating and maintenance manual setting out the procedures for providing the Services provide to the Authority a summary of the Agreement and of the Contractor's operating procedures written in plain English to aid the Authority's management of the Agreement (the **Operating Manual**), containing the following items:

<u>Introduction:</u>	<u>Purpose of document and what it covers</u>
<u>Project Objectives:</u>	<u>Project overview including the overall risk allocation</u>
<u>Team Structures:</u>	<u>Contract management team organograms, roles and responsibilities, key contacts, for Authority (including stakeholders) and Contractor (including shareholder roles).</u>
<u>Decision Making:</u>	<u>Delegated powers, communication protocols and processes.</u>
<u>Reporting Requirements:</u>	<u>Meetings, purpose, frequency, attendees, chair, outputs.</u>
<u>The Agreement:</u>	<u>Purpose, key operational clauses, key dates, planned reviews.</u>
<u>Changes:</u>	<u>Change Protocol, details of, reasons for any made to date.</u>
<u>Payment mechanism:</u>	<u>Principles, application for payment, service point deductions.</u>
<u>Performance Monitoring:</u>	<u>Key output specification requirements, method statement.</u>
<u>Records:</u>	<u>Helpdesk, procedures, escalation, performance targets, Performance Standards.</u>

<u>Audit:</u>	<u>Contractual information provisions and Government requirements.</u>
<u>Facilities Management/Maintenance guide:</u>	<u>Summary of services for end users, Performance Standards expected, how to report failure.</u> <u>Summary of any other key features of the Agreement not covered above.</u>
<u>Summary of any other key features of the Agreement not covered above:</u>	

33.2 Maintenance of Operating Manual

The Contractor shall update the Operating Manual within twenty (20) Business Days of:

33.2.1 any change to the Agreement made under the Change Protocol;

33.2.2 any change to its operating procedures; and

33.2.3 the final Services Availability Date.

33.3 ~~33.2~~ **Access to Operating Manual**

The Contractor shall at the request of the Authority provide the Authority with access to the Operating Manual in order to demonstrate that the Contractor has complied with its obligation to maintain and update the Operating Manual under clause ~~33.1~~33.2 (Maintenance of Operating Manual).

33.4 ~~33.3~~ **Copy on Termination**

On termination of this Agreement (howsoever arising including expiry), the Contractor shall within ten (10) Business Days provide a copy of the Operating Manual to the Authority.

34 QUALITY ASSURANCE

- 34.1** The Contractor shall procure that all aspects of the Works and the Services are the subject of, and are conducted in accordance with the approved quality assurance systems as set out in clauses 34.2 and 34.3.
- 34.2** Not later than ten (10) Business Days following the Commencement Date, the Contractor shall submit to the Authority's Representative a proposed quality assurance system for the Works complying with ISO 9001 or, where it does not so comply, the system set out in the Construction Proposals.
- 34.3** The Contractor shall procure that the Building Contractor is, at all times during the Works Period, registered pursuant to BS 5750 or ISO 9001 (or such other quality standard as may replace or supersede the same or, in the absence of a replacement or a superseding quality standard or equivalent or such other quality assurance system acceptable to the Authority (acting reasonably)) in relation to the Works.
- 34.4** The Contractor shall appoint (or shall procure the appointment of) as soon as reasonably practicable following the date of this Agreement a quality manager, who may be directly involved in the day-to-day performance of the Works and Services, and who shall in respect of the Works:
- 34.4.1** ensure the effective operation of and implementation of the aforementioned quality assurance system;
 - 34.4.2** audit the aforementioned quality assurance system at regular intervals and report the findings of such audit to the Contractor and the Authority;
 - 34.4.3** review the aforementioned quality assurance system at intervals agreed with the Authority to ensure their continued suitability and effectiveness; and
 - 34.4.4** liaise with the Authority on all matters relating to quality assurance.
- 34.5** The Authority may carry out periodic audits of the aforementioned quality assurance systems at approximate intervals of three (3) months and may carry out other periodic monitoring, spot checks and auditing of the Contractor's quality systems. The Contractor shall procure that the Authority shall have a like right in respect of any relevant sub-contractors. The Contractor shall co-operate and shall procure that any relevant sub-contractor co-operates with the Authority including providing it with all information and documentation which it reasonably requires in connection with its rights under this clause 34.

35 CO-OPERATION FOR INVESTIGATION AND SECURITY¹⁴⁶₁₅₁

- 35.1** The Contractor shall co-operate with any investigation relating to a breach of security which is carried out by or on behalf of the Authority and:
- 35.1.1** shall use its reasonable endeavours to make its employees (and other Contractor Related Parties) identified by the Authority

¹⁴⁶ ~~Identify appropriate Authority Policies which tie in with this requirement.~~

¹⁵¹ Identify appropriate Authority Policies which tie in with this requirement.

available to be interviewed by the Authority for the purposes of the investigation; and

35.1.2 shall, subject to any legal restriction on their disclosure, provide all copies of documents, records or other material of any kind which may reasonably be required by the Authority for the purposes of the investigation. The Authority shall have the right to retain copies of any such material for use in connection with the investigation.

35.2 The Authority shall, insofar as is practical, inform the Contractor of any specific or general security information which would reasonably be expected to affect the security of the Contractor or any Contractor Related Party or their property.

35.3 The Contractor shall comply with the Authority's reasonable reporting requirements relating to infectious and notifiable diseases to the extent made known to the Contractor.

36 SERVICE DELIVERY PROPOSALS

36.1 The Services Output Specification shall at all times have priority over the Service Delivery Proposals and the Contractor shall be obliged to comply with the Services Output Specification and provide the Services in accordance with the Services Output Specification. Any changes to the Service Delivery Proposals may only be made in accordance with the Review Procedure.

PART 5 - PAYMENT

37 PAYMENT PROVISIONS AND CUSTOMER SATISFACTION SURVEYS

37.1 Payment of the Monthly Unitary Payment

The Authority shall pay the Contractor the Monthly Unitary Payment in respect of each Payment Period, calculated in accordance with paragraph 2.1 of Schedule 6 (Payment Mechanism).

37.2 Report and Invoice

On the first Business Day of each Payment Period the Contractor shall submit to the Authority:

37.2.1 a report showing for that Payment Period the Monthly Unitary Payment and, individually, each item taken into account in calculating the Monthly Unitary Payment pursuant to paragraph 2.1 of Schedule 6 (Payment Mechanism); and

37.2.2 an invoice for the amount (if any) shown by the report as owing by the Authority to the Contractor and for any VAT payable by the Authority in respect of that amount.

37.3 Final Payment Period

37.3.1 During the final two Payment Periods, in addition to the amounts referred to in clause 37.2.1 (Report and Invoice) the Authority may withhold an amount equivalent to the average per Payment Period of the sum of the Deductions made from the Monthly Unitary Charge in the previous six Payment Periods until such time as the Contractor shall have provided a report to the Authority in respect of those Payment Periods containing the information set out in clause 37.2.1 (Report and Invoice).

37.3.2 On receipt of the reports from the Contractor in respect of the final two Payment Periods the Authority may retain from the amounts withheld pursuant to clause 37.3.1 a sum equivalent to the sum of the Deductions identified in the report or any other amount agreed by the Parties or determined pursuant to the Dispute Resolution Procedure as owing to the Authority. The Authority shall pay the balance of any monies withheld to the Contractor or if it is agreed or determined the Contractor owes monies to the Authority in excess of those sums withheld, the Contractor shall pay such additional amounts to the Authority, in each case with interest on that amount at the Prescribed Rate calculated on a daily basis and compounded quarterly from the date on which the payment was withheld by the Authority pursuant to clause 37.3.1 or from the date on which over payment was made (in the case of excessive claims by the Contractor) until all relevant monies have been paid in full and whether before or after judgement.

37.4 Payment

37.4.1 Subject to clause 37.5 (Disputed Amounts), the Authority shall pay the amount stated in any invoice submitted under clause 37.2 (Report and Invoice) on the final Business Day of the Payment Period in question.

37.4.2 Where a report shows a net amount owed by the Contractor to the Authority, the Contractor shall pay that amount to the Authority on the final Business Day of the Payment Period to which the report refers, or, at the option of the Authority, carry forward that amount to the next report in reduction of amounts which would otherwise have been owed by the Authority to the Contractor.

37.5 Disputed Amounts

37.5.1 If the Authority disputes the Contractor's entitlement to any part of the amount claimed by the Contractor pursuant to clause 37.2 (Report and Invoice) in respect of any Payment Period the provisions of this clause 37.5 shall apply.

37.5.2 The Authority shall notify the Contractor in writing within ten (10) Business Days of receipt by the Authority of the relevant invoice and supporting report of that part of the amount (insofar as at the time of such notice the Authority is reasonably able to quantify it) which the Authority (acting in good faith) disputes (a **Disputed Amount**) and submit to the Contractor such supporting evidence as the Authority may have.

37.5.3 The Authority may withhold payment of any Disputed Amount pending agreement or determination of the Contractor's entitlement in relation to the Disputed Amount but shall pay on the due date any undisputed amounts.

37.6 Response to Authority Notice

Within five (5) Business Days following receipt by the Contractor of any notice served by the Authority pursuant to clause 37.5.2 (Disputed Amounts), the Contractor shall respond by notifying the Authority as to whether or not it agrees with the statements made in that notice. If the Contractor indicates that it does agree, or if the Contractor fails to make such a response within that time limit, the Authority shall be entitled:

37.6.1 to retain on a permanent basis any amounts withheld pursuant to clause 37.5.3 (Disputed Amounts); and

37.6.2 to reclaim from the Contractor the amount of any over-payment which may have been made to the Contractor together with interest on any such amount at the Prescribed Rate calculated on a daily basis and compounded quarterly from the date on which the over-payment was made until that amount has been paid in full and whether before or after judgment.

37.7 Dispute

If the Contractor responds (pursuant to clause 37.6 (Response to Authority Notice)) that it does not agree with all or any of the statements made in any notice served by the Authority pursuant to clause 37.5.2 (Disputed Amounts), the matter or matters in question shall be determined under the Dispute Resolution Procedure.

37.8 Determination of Dispute

If the determination of any dispute conducted pursuant to clause 37.7 (Dispute) shows that:

37.8.1 the Authority has withheld any amount which the Contractor was entitled to be paid; or

37.8.2 the Contractor has claimed under clause 37.2 (Report and Invoice) any amount which it was not entitled to be paid,

the Authority shall pay such amount to the Contractor or the Contractor shall repay such amount to the Authority with interest in each case on that amount at the Prescribed Rate calculated on a daily basis and compounded quarterly from the date on which payment should have been made (in the case of failure to pay by the Authority) or from the date on which over payment was made (in the case of excessive claims by the Contractor) until all relevant monies have been paid in full and whether before or after judgment.

37.9 Rights of Set Off¹⁴⁷⁻¹⁵²

The Contractor shall not be entitled to ~~retain or~~ set off any amount due to the Authority by it, but the Authority may (subject to ~~clause~~clauses 37.5 (Disputed Amounts) and 55.2 (Set Off on Termination)) ~~retain or~~ set off any amount owed to it by the Contractor under this Agreement which has fallen due and payable against any amount due to the Contractor under this Agreement.

37.10 Set Off and Disputed Amounts

If ~~the payment or deduction of~~ any amount ~~referred to in~~to be set off by the Authority pursuant to clause 37.9 (Rights of Set Off) is disputed then any undisputed element of that amount shall be ~~paid~~set off and the disputed element shall be dealt with in accordance with the Dispute Resolution Procedure.

37.11 VAT on Payments

37.11.1 All amounts due under this Agreement are exclusive of VAT.

37.11.2 If any supply made or referred to in this Agreement is or becomes chargeable to VAT then the person receiving the supply (the **Recipient**) shall in addition pay the person making the supply (the **Supplier**) the amount of that VAT against receipt by the Recipient from the Supplier of a proper VAT invoice in respect of that supply.

37.11.3 Where under this Agreement any amount payable is calculated by reference to any ~~sum~~debt which has been or may be incurred by any person, the amount shall include any VAT in respect of that ~~amount~~debt only to the extent that such VAT is not recoverable as input tax by that person (or a member of the same VAT group), whether by set off or repayment.

37.11.4 The Contractor shall provide the Authority with any information reasonably requested by the Authority in relation to the amount of VAT chargeable in accordance with this Agreement and payable by the Authority to the Contractor.

¹⁴⁷⁻¹⁵² Bidders and funders should note that no amendments to clause 37.9 will be accepted as a result of the Authority making a Capital Contribution in accordance with clause 21A.

37.12 Indexation

On each Indexation Review Date, the Unitary Charge shall be adjusted for the year commencing on that date in accordance with paragraph 2.3 of Schedule 6 (Payment Mechanism).

37.13 ~~Customer~~User Satisfaction ~~Survey~~and Post Occupancy Evaluation

~~37.13.1~~

~~The Contractor shall, on each Customer Satisfaction Survey Date undertake (or procure the undertaking of) a customer satisfaction survey (the Customer Satisfaction Survey), the purpose of which shall include:~~

~~37.13.1.1 assessing the level of satisfaction among Service Users with the Services (including the way in which the Services are provided, performed and delivered) and, in particular, with the quality, efficiency and effectiveness of the Services;~~

~~37.13.1.2 assisting in the preparation of the Contractor's Annual Service Report and Annual Service Plan; and~~

~~37.13.1.3 monitoring the compliance by the Contractor with the Services carry out Post Occupancy Evaluation in accordance with paragraphs 2.3.29.4 and 2.3.29.5 of the Services Output Specification.~~

~~37.13.2 The Customer Satisfaction Survey shall be undertaken in accordance with Part XVII of Schedule 6 (Payment Mechanism).~~

38 REFINANCING

38.1 Requirement for Authority Consent

The Contractor shall obtain the Authority's prior written consent to any Qualifying Refinancing and both the Authority and the Contractor shall at all times act in good faith with respect to (i) any Refinancing or (ii) any potential or proposed Refinancing under clause 38.9 (Authority Right to Request Refinancing).

38.2 Share of Gain

The Authority shall be entitled to receive:

38.2.1 where there is a reduction in the Margin from the Margin as shown in the Senior Financing Agreements as at Financial Close arising from a Qualifying Refinancing (or, in the case of a second or subsequent Qualifying Refinancing, from the Margin as shown in the immediately preceding Qualifying Refinancing) a 90% share of the Margin Gain arising from the Qualifying Refinancing; and

38.2.2 a share of any further Refinancing Gain (arising otherwise than from a reduction in Margin) from a Qualifying Refinancing, in

respect of any Refinancing Gain (when considered in aggregate with all previous Qualifying Refinancings) as follows:

38.2.2.1 for a Refinancing Gain from one pound (£1) to one million pounds (£1 million), a fifty percent (50%) share;

38.2.2.2 for a Refinancing Gain of one million pounds (£1 million) up to three million pounds (£3 million), a sixty percent (60%); and

38.2.2.3 for a Refinancing Gain in excess of three million pounds (£3 million), a seventy percent (70%) share.

38.3 No Withholding or Delay

The Authority shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater share of the Refinancing Gain than that specified in clause 38.2 (Share of Gain).

38.4 ~~Contractor~~ Qualifying Refinancing 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 that Refinancing (whether the Refinancing is a Qualifying Refinancing or not).

38.5 Receipt of Gain

The Authority shall have the right to elect to receive its share of any Refinancing Gain (including any Margin Gain) as:

38.5.1 a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;

38.5.2 a reduction in the Unitary Charge over the remainder of the Contract Period; or

38.5.3 a combination of any of the above.

38.6 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 (including any Margin 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 clause 38.5 (Receipt of Gain)). If the Contractor and the Authority 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 the Dispute Resolution Procedure.

38.7 Costs

The Refinancing Gain (including any Margin 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 (20) Business Days of any Qualifying Refinancing. Such costs shall be allocated as between the Margin Gain (if any) and the remaining Refinancing Gain (if any) pro rata.

38.8 Notifiable Financings

Without prejudice to the other provisions of this clause 38, the Contractor shall (i) 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 (ii) include a provision in the Financing Agreements (other than Subordinated Financing Agreements) whereby the Contractor is entitled to be informed of any proposals which the Senior Lenders may have to refinance the Financing Agreements (other than Subordinated Financing Agreements).

38.9 Authority Right to request Refinancing

38.9.1 If the Authority (acting reasonably) considers the funding terms generally available in the market to be more favourable than those reflected in the Financing Agreements (other than Subordinated Financing Agreements), the Authority may, by notice in writing to the Contractor, require the Contractor to request potential funders to provide terms for a potential Refinancing (a **Refinancing Notice**).

38.9.2 The Refinancing Notice shall set out in reasonable detail the grounds upon which the Authority believes such funding terms to be available. The Contractor and the Authority shall meet to discuss the Refinancing Notice within twenty-eight (28) days. Such a meeting will consider the evidence available to both parties about the availability of funding terms for a potential Refinancing. The Authority shall be entitled to withdraw the Refinancing Notice at or before such a meeting, or within ten (10) days following the meeting.

38.9.3 If the Authority serves a Refinancing Notice which is not withdrawn pursuant to clause 38.9.2, then the Contractor shall:

38.9.3.1 act promptly, diligently and in good faith with respect to the potential Refinancing;

38.9.3.2 use all reasonable endeavours to obtain the most favourable available terms from existing and/or new lenders for any potential Refinancing (provided that the Contractor shall not be required to propose refinancing in a manner which a prudent board of directors of a company operating the same business in the United Kingdom to that operated by the Contractor, in similar circumstances, would not approve), for the avoidance of doubt also being terms which are likely to generate a positive Refinancing Gain after the deduction of costs in accordance with the provisions of clause 38.7 (Costs); and

38.9.3.3 either:

38.9.3.3.1 as soon as reasonably practicable after receipt of the Refinancing Notice, provide to the Authority (i) full details of the proposed Refinancing, including a financial model and the basis for the assumptions used in the financial model and evidence to the reasonable satisfaction of the Authority that these assumptions represent the most favourable available terms for the potential Refinancing on the basis set out in clause 38.9.3.2 and (ii) initial drafts of any changes to this Agreement including in relation to potential compensation on termination which might be required to give effect to the proposed Refinancing; or

38.9.3.3.2 if the Contractor (acting reasonably) believes that it is not possible to obtain funding terms which are more favourable than those reflected in the Financing Agreements (other than Subordinated Financing Agreements) in accordance with the requirements of clause 38.9.3.2, provide evidence to the reasonable satisfaction of the Authority for such belief and evidence to the reasonable satisfaction of the Authority that the Contractor has complied with its obligations in clauses 38.9.3.1 and 38.9.3.2.

38.9.4 Following receipt of the information referred to in clause 38.9.3.3.1, the Authority shall (in its absolute discretion) either:

38.9.4.1 instruct the Contractor to implement the proposed Refinancing; or

38.9.4.2 instruct the Contractor to discontinue the proposed Refinancing,

provided that if the Authority reasonably considers that the requirements of clause 38.9.3.3.1 have not been satisfied, the Authority may require the Contractor to satisfy its obligations under clause 38.9.3.3.1 whereupon the provisions of clauses 38.9.3 and 38.9.4 shall apply as if the Authority had served a Refinancing Notice.

38.9.5 If the Authority instructs the Contractor to implement the proposed Refinancing:

38.9.5.1 the Contractor shall, as soon as reasonably practicable, use all reasonable endeavours to procure that such proposed Refinancing is implemented;

38.9.5.2 such proposed Refinancing shall be deemed to be a Qualifying Refinancing; and

- 38.9.5.3** the provisions of clauses 38.1 (Requirement for Authority Consent) to 38.8 (Notifiable Refinancings) shall apply.
- 38.9.6** If:
- 38.9.6.1** the Authority instructs the Contractor to discontinue the potential Refinancing pursuant to clause 38.9.4.2; or
- 38.9.6.2** the requirements of clause 38.9.3.3.2 are satisfied then the Authority shall reimburse the Contractor for the reasonable and proper professional costs incurred by the Contractor in relation to the potential Refinancing, such costs to be paid to the Contractor by the Authority within twenty (20) Business Days after receipt of a valid invoice in respect of such amount. Such costs shall not include any internal management costs incurred by the Contractor except insofar as (i) it can be demonstrated to the reasonable satisfaction of the Authority that such costs have been incurred in place of professional costs which would in the normal course of such business have been paid to third parties and (ii) the Authority has, by prior written agreement, approved the use of such internal management resource.
- 38.9.7** The Authority shall be entitled to issue a Refinancing Notice under clause 38.9.1 at any time but not more than once in any two (2) year period. For the avoidance of doubt, a Refinancing Notice that has been withdrawn under clause 38.9.2 has been issued for the purpose of this clause 38.9.7.

39 ~~EQUITY SHARING~~¹⁴⁸ **ANNUAL CONTRACT REVIEWS AND EFFICIENCY REVIEWS**

39.1 Annual Contract Reviews

39.1.1 Every twelve (12) months during the Services Period the Authority and the Contractor shall meet to review the Contractor's performance of the Services (the **Annual Contract Review**).

39.1.2 The Parties shall review:

39.1.2.1 the project reports referred to in clause 82.7.1.8 (Financing Information) for the past year;

39.1.2.2 the Contractor's Annual Services Report as against the previous Annual Services Plan where applicable;

39.1.2.3 a summary of energy consumption over the past year identifying the effectiveness of energy consumption reduction initiatives previously undertaken and identifying areas where energy consumption can be further reduced; and

¹⁴⁸ ~~HMT is considering equity gainshare mechanisms.~~

39.1.2.4 such other reports as described in clause 82.7 (Financing Information) for the past year as the Authority may request.

together the **Annual Review Reports**.

39.1.3 The Contractor shall report on any areas of this Agreement and/or the Contractor's performance which the Authority wishes to discuss with the Contractor, and the Authority and the Contractor shall consider what efficiencies and improvements can be made.

39.1.4 The Contractor shall submit its proposal for dealing with any unremedied performance or other issues identified in the Annual Review Reports or as identified by the Authority pursuant to clause 39.1.1.

39.1.5 The Authority may provide a report on the Authority's current and future requirements in relation to the Schools and what impact these will have on the Services or the Schools.

39.1.6 All savings arising from any Annual Contract Review shall be shared between the Authority and Contractor, with 50% going to the Authority and 50% going to the Contractor.

39.1.7 Within a month of each Annual Contract Review the Contractor shall prepare an Annual Services Plan.

39.2 **Efficiency Reviews**

39.2.1 The Contractor shall adopt a continuous improvement approach to the provision of the Services, and shall work with the Authority to identify opportunities for improving the performance, efficiency and effectiveness of the Buildings and the Services.

39.2.2 By no later than six months prior to the date that falls two and a half years from the first Services Availability Date and then every two and a half years thereafter (each a **Contract Efficiency Review Date**) the Parties shall commence a review (a **Contract Efficiency Review**) in order to ensure that the Services and the Buildings are providing a suitable and cost-effective solution for the Authority and which shall be used by the Contractor to produce a report in accordance with clause 39.2.4.

39.2.3 By no later than four (4) months prior to each Contract Efficiency Review Date, the Authority may make written representations to the Contractor identifying potential opportunities to improve the performance, efficiency and effectiveness of the Buildings and the Services. The Contractor shall investigate these areas identified by the Authority and include an analysis of them in the Contract Improvement Report produced in accordance with clause 39.2.4.

39.2.4 The Contractor shall produce a report (a **Contract Improvement Report**) and submit this for review by the Authority no less than thirty (30) days prior to the relevant Contract Efficiency Review Date.

39.2.5 The Contract Improvement Report shall identify any activities undertaken by the Contractor to improve the effectiveness of the Services, and any further opportunities for improvement of this

Agreement through changes to the Services, changes to the Soft Services, and/or behaviour or usage changes by either Party; it shall include as a minimum:

39.2.5.1 a trend analysis of performance against performance and availability standards over each Contract Year to date to identify areas of performance that can be improved, and steps taken by the Contractor to address performance issues. Where the performance trend analysis identifies a deteriorating trend in performance, repeat failures, or significant failures that impact on the Authority, the Contractor shall produce an action plan to identify how these failures are to be avoided;

39.2.5.2 a summary of annual User Satisfaction Surveys, identifying trends and an action plan to address any areas of School Users' dissatisfaction;

39.2.5.3 a summary of energy consumption over the period since the last Contract Efficiency Review identifying the effectiveness of energy consumption reduction initiatives previously undertaken and identifying areas where energy consumption can be further reduced;

39.2.5.4 the Contractor's review of Programmed Maintenance (other than replacement of Lifecycle Assets¹⁵³) and reactive maintenance, in the form of a risk-based maintenance analysis (in line with PAS55 requirements or equivalent) identifying areas where planned or reactive maintenance can be reviewed and opportunities for reducing planned or reactive maintenance costs; and

39.2.5.5 the Contractor's review of Elective Services provision, to identify areas where efficiency or effectiveness can be improved.

39.2.6 A financial summary identifying the cost impact of all the efficiency improvement opportunities identified separated into:

39.2.6.1 cost savings that can be achieved without instigating a Change under this Agreement, including changes made by the Authority;

39.2.6.2 savings generated by investment and/or by changes in the Services, including the implementation of gain-share and/or spend-to-save plans where the Authority can benefit from savings generated through investment or changes in the Services; and

39.2.6.3 other changes to the Services, or the Schools that can improve efficiency.

¹⁵³ Sharing of Lifecycle Surpluses is dealt with in clause 23.6.

39.3 Independent Review of Contract Improvement Report

39.3.1 Where the Contractor fails to provide the Contract Improvement Report, or fails to produce such a report to a standard acceptable to the Authority, or the Authority has reasonable grounds for questioning the accuracy of the analysis undertaken by the Contractor, the Authority may appoint independent technical advisers to carry out an independent review and produce an independent contract improvement report.

39.3.2 The Contractor shall co-operate fully with the independent technical adviser and provide access to systems, copies of reports and any relevant data to enable the independent technical adviser to complete its report.

39.3.3 The Authority shall be entitled to be reimbursed by the Contractor for all the independent technical adviser costs and expenses incurred in carrying out its review and producing any report pursuant to clause 39.3.1.

39.4 Contract Efficiency Review meeting

39.4.1 Each Contract Efficiency Review shall include a meeting or series of meetings between the Parties, where the Parties shall discuss the findings of the Contract Improvement Report produced in accordance with clauses 39.2.3 to 39.2.5 and/or the independent contract improvement report produced by the independent technical adviser pursuant to clause 39.3.1. The Parties shall discuss the improvements to be made and use reasonable endeavours to agree such improvements. The Parties will work together to agree the necessary consequential changes to this Agreement and its schedules to document the agreed improvements.

39.4.2 All savings arising from any Contract Efficiency Review shall be shared between the Authority and Contractor, with 50% going to the Authority and 50% going to the Contractor.

PART 6 - TERMINATION

40 DIRECT AGREEMENT

The provisions set out in this Part 6 of this Agreement are subject to the Direct Agreement.

41 TERMINATION OF THIS AGREEMENT

41.1 Voluntary Termination by the Authority

41.1.1 The Authority may terminate this Agreement at any time on or before the Expiry Date by complying with its obligations under clause 41.1.2.

41.1.2 If the Authority wishes to terminate this Agreement under this clause 41.1, it must give a Termination Notice to the Contractor stating:

41.1.2.1 that the Authority is terminating this Agreement under this clause 41.1;

41.1.2.2 that this Agreement will terminate on the date specified in the notice, which must be a minimum of twenty (20) Business Days after the date of receipt of the notice; and

41.1.2.3 whether the Authority has chosen to exercise its option under clause 41.1.3.

41.1.3 On termination, the Authority shall have the option to require the Contractor to transfer all of its rights, title and interest in the Assets to the Authority or as directed by the Authority.

41.1.4 This Agreement will terminate on the date specified in the Termination Notice referred to in clause 41.1.2.

41.2 Termination on Authority Default

41.2.1 If an Authority Default has occurred and the Contractor wishes to terminate this Agreement, the Contractor must serve a termination notice (the **Contractor Termination Notice**) on the Authority within thirty (30) Business Days of becoming aware of the Authority Default.

41.2.2 The Contractor Termination Notice must specify the type of Authority Default which has occurred entitling the Contractor to terminate.

41.2.3 This Agreement will terminate on the day falling thirty (30) Business Days after the date the Authority receives the Contractor Termination Notice, unless the Authority rectifies the Authority Default within twenty (20) Business Days of receipt of the Contractor Termination Notice.

41.3 Termination on Contractor Default

41.3.1 Subject to clause 41.4 (Rectification), the Authority shall be entitled to terminate this Agreement by notice in writing to the Contractor if a Contractor Default has occurred.

41.3.2 On termination the Authority may require the Contractor to transfer all of its rights, title and interest in and to the Assets to the Authority.

41.4 Rectification

41.4.1 If a Contractor Default has occurred and the Authority wishes to terminate this Agreement, it must serve a Termination Notice on the Contractor.

41.4.2 The Termination Notice must specify:

41.4.2.1 the type and nature of Contractor Default that has occurred, giving reasonable details; and

41.4.2.2 that in the case of any Contractor Default falling within limbs (a), (g) and (o) of the definition of Contractor Default this Agreement will terminate on the day falling forty (40) Business Days after the date the Contractor receives the Termination Notice, unless:

41.4.2.2.1 in the case of a breach under limb (a) of the definition of Contractor Default the Contractor puts forward an acceptable rectification programme within twenty (20) Business Days after the date the Contractor receives the Termination Notice (and implements such programme in accordance with its terms and rectifies the Contractor Default in accordance with the programme); or

41.4.2.2.2 in the case of any Contractor Default falling within limbs (a), (g) and (o) of the definition of Contractor Default the Contractor rectifies the Contractor Default within forty (40) Business Days after the date the Contractor receives the Termination Notice; or

41.4.2.3 that in the case of any other Contractor Default (not being limbs (a), (g) or (o)), this Agreement will terminate on the date falling forty (40) Business Days after the date the Contractor receives the Termination Notice.

41.4.3 If the Contractor either rectifies the Contractor Default within the time period specified in the Termination Notice, or implements the accepted rectification programme, if applicable, in accordance with its terms, the Termination Notice will be deemed to be revoked and this Agreement will continue.

41.4.4 If either in the case of a Contractor Default within limb (a) of the definition of that term where no acceptable rectification programme has been put forward pursuant to clause 41.4.2.2.1 or in the case of a Contractor Default falling within limbs (g) or (o) of the definition of Contractor Default, the Contractor fails to rectify the Contractor Default within the time period specified in the Termination Notice, the Authority may give notice stating that this Agreement will, subject to the terms of the Direct Agreement, terminate on the date falling five (5) Business Days after the date of service of such notice.

41.4.5 If the Contractor fails to implement any rectification programme in accordance with its terms, this Agreement will, subject to the terms of the Direct Agreement, terminate on the date falling five (5) Business Days after the date of notification by the Authority to the Contractor of such failure to implement the rectification programme in accordance with its terms.

42 TERMINATION FOR PERSISTENT BREACH BY THE CONTRACTOR

42.1 Warning Notice

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

42.1.1 specifying that it is a formal warning notice;

42.1.2 giving reasonable details of the breach; and

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

42.2 Final Notice

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

42.2.1 specifying that it is a Final Warning Notice;

42.2.2 stating that the breach specified has been the subject of a warning notice served within the six (6) month period prior to the date of service of the Final Warning Notice; and

42.2.3 stating that if the breach continues for more than fourteen (14) days or recurs in three (3) or more months within the six (6) month period after the date of service of the Final Warning Notice, this Agreement may be terminated.

42.3 Currency of Warning Notices

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

43 TERMINATION BY THE AUTHORITY FOR BREACH OF REFINANCING PROVISIONS

43.1 ~~43.1~~—If the Contractor wilfully breaches clause 38.1 (Requirement for Authority Consent) then the Authority may terminate this Agreement at any time on or before the Expiry Date by complying with its obligations under this clause 43.

43.2 ~~43.2~~—If the Authority wishes to terminate the Agreement under this clause 43, it must give notice to the Contractor stating:

43.2.1 ~~43.2.1~~—that the Authority is terminating the Agreement under this clause 43;

43.2.2 ~~43.2.2~~—that this Agreement will terminate on the date falling ~~{twenty (20)}~~ Business Days after the date of receipt of the notice; and

43.2.3 ~~43.2.3~~—whether the Authority has chosen to exercise its option under clause 43.3.

43.3 ~~43.3~~—On termination, the Authority shall have the option to require the Contractor to transfer to the Authority all of its rights, title and interest in and to the Assets.

43.4 ~~43.4~~—This Agreement shall terminate on the date falling ~~{twenty (20)}~~ Business Days after the date of receipt of the notice referred to in clause 43.2.

44 TERMINATION ON CORRUPT GIFTS AND FRAUD

44.1 Corrupts Gifts and Fraud

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

44.2 Termination for Corrupt Gifts and Fraud

44.2.1 If the Contractor or any Sub-Contractor (or anyone employed by or acting on behalf of any of them) or any of its or their agents or shareholders commits any Prohibited Act, then the Authority shall be entitled to act in accordance with the provisions of this clause 44.2.

44.2.2 Notwithstanding clauses 44.2.3 to 44.2.6, if a Prohibited Act is committed by the Contractor or by an employee not acting independently of the Contractor, then the Authority may terminate this Agreement by giving notice to the Contractor provided that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, the Authority may not terminate this Agreement unless, acting reasonably, it considers termination of this Agreement to be in the best interests of the Project.

44.2.3 If the Prohibited Act is committed by an employee of the Contractor acting independently of the Contractor, 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 terminates the employee's employment and (if necessary) procures the performance of such part of the Works and/or Services by another person.

- 44.2.4** If the Prohibited Act is committed by a Sub-Contractor or by an employee of that Sub-Contractor not acting independently of that Sub-Contractor, 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 terminates the relevant Ancillary Document and procures the performance of such part of the Works and/or Services by another person provided that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, the Authority may not terminate this Agreement unless, acting reasonably, it considers termination of this Agreement to be in the best interests of the Project.
- 44.2.5** If the Prohibited Act is committed by an employee of a Sub-Contractor acting independently of that Sub-Contractor, 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 Sub-Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Works and/or Services by another person.
- 44.2.6** If the Prohibited Act is committed by any other persons not specified in clauses 44.2.2 to 44.2.5, 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 such person's employment and of the appointment of their employer (where not employed by the Contractor or the Sub-Contractors) and (if necessary) procures the performance of such part of the Works and/or Services by another person provided that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, the Authority may not terminate this Agreement unless, acting reasonably, it considers termination of this Agreement to be in the best interests of the Project.
- 44.2.7** Any notice of termination under this clause 44.2 shall specify:
- 44.2.7.1** the nature of the Prohibited Act;
 - 44.2.7.2** the identity of the party whom the Authority believes has committed the Prohibited Act;
 - 44.2.7.3** the date on which this Agreement will terminate, in accordance with the applicable provision of this clause; and
 - 44.2.7.4** the Authority's chosen option under clause 50 (Compensation on Termination for Corrupt Gifts, Fraud and Refinancing Breaches).
- 44.2.8** In this clause 44, the expression "not acting independently of" (when used in relation to the Contractor or a Sub-Contractor) means and shall be construed as acting with the authority of or knowledge of any one or more of the directors of the Contractor or the Sub-Contractor (as the case may be) and "acting independently of" shall be construed accordingly.

44.2.9 The Contractor undertakes to the Authority that it will throughout the duration of this Agreement use all reasonable endeavours to have in place adequate procedures (as referred to in section 7(2) of the Bribery Act 2010) designed to prevent persons associated with the Contractor from bribing any person with the intention of obtaining or retaining business for the Contractor or with the intention of obtaining or retaining an advantage in the conduct of business for the Contractor.

45 TERMINATION ON FORCE MAJEURE

45.1 Obligations

No Party shall be entitled to bring a claim for a breach of obligations under this Agreement by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and the Affected Party is prevented from carrying out obligations by that Force Majeure Event. For the avoidance of doubt, the Authority shall not be entitled to terminate this Agreement for a Contractor Default if such Contractor Default arises from a Force Majeure Event (but without prejudice to clauses 45.5 (Unable to Agree) or 45.6 (Consequences of Termination)).

45.2 Ability to Make Deductions

Nothing in clause 45.1 (Obligations) shall affect any entitlement to make Deductions in the period during which the Force Majeure Event is subsisting.

45.3 Notification for Force Majeure

On the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.

45.4 Consultation

As soon as practicable following such notification, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this Agreement.

45.5 Unable to Agree

If no such terms are agreed on or before the date falling ~~{eighty (80)}~~ Business Days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this Agreement for a period of more than ~~{one hundred and twenty (120)}~~ Business Days, then, subject to clause 45.6 (Consequences of Termination), either Party may terminate this Agreement by giving ~~{twenty (20)}~~ Business Days' written notice to the other Party.

45.6 Consequences of Termination

If this Agreement is terminated under clause 45.5 (Unable to Agree) or clause 45.7 (Notice to Continue):

- 45.6.1** compensation shall be payable by the Authority in accordance with clause 52 (Compensation on Termination for Force Majeure); and
- 45.6.2** the Authority may require the Contractor to transfer all of its title, interest and rights in and to any Assets to the Authority.

45.7 Notice to Continue

If the Contractor gives notice to the Authority under clause 45.5 (Unable to Agree) that it wishes to terminate this Agreement, then the Authority has the option either to accept such notice or to respond in writing on or before the date falling ten (10) Business Days after the date of its receipt stating that it requires this Agreement to continue. If the Authority gives the Contractor such notice (the **Continuation Notice**), then:

- 45.7.1** the Authority shall pay to the Contractor the Monthly Unitary Payment from the day after the date on which this Agreement would have terminated under clause 45.5 (Unable to Agree) as if the Services were being fully provided; and
- 45.7.2** this Agreement will not terminate until expiry of written notice (of at least ~~twenty (20)~~ Business Days) from the Authority to the Contractor that it wishes this Agreement to terminate.

45.8 Mitigation

The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Contractor shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

45.9 Cessation of Force Majeure Event

The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement. Following such notification this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

46 CONSEQUENCES OF TERMINATION

46.1 Compensation Provisions

If this Agreement is terminated pursuant to:

- 46.1.1** clause 41.1 (Voluntary Termination by the Authority), the provisions of clause 49 (Compensation on Termination for Authority Default/ Voluntary Termination) shall apply;
- 46.1.2** clause 41.2 (Termination on Authority Default), the provisions of clause 49 (Compensation on Termination for Authority Default/ Voluntary Termination) shall apply;
- 46.1.3** clause 41.3 (Termination on Contractor Default), the provisions of clause 51 (Compensation on Termination for Contractor Default) shall apply;

- 46.1.4** clause 43 (Termination by the Authority for Breach of Refinancing Provisions), the provisions of clause 50 (Compensation on Termination for Corrupt Gifts, Fraud and Refinancing Breaches) shall apply;
- 46.1.5** clause 44 (Termination on Corrupt Gifts and Fraud), the provisions of clause 50 (Compensation on Termination for Corrupt Gifts, Fraud and Refinancing Breaches) shall apply;
- 46.1.6** clause 45 (Termination on Force Majeure), the provisions of clause 52 (Compensation on Termination for Force Majeure) shall apply; or
- 46.1.7** clause 67 (Risks that become Uninsurable), the provisions of clause 52 (Compensation on Termination for Force Majeure) shall apply.

46.2 Termination of Agreement

Notwithstanding any other provisions of this Agreement, this Agreement shall only terminate in accordance with the express provisions of this Agreement.

46.3 Continuing Obligations

Save as otherwise expressly provided in this Agreement or as already taken into account in the calculation of any Termination Sum or other payment of compensation on termination pursuant to this Agreement, and notwithstanding the provisions of clause 55.3 (Exclusivity of Remedy):

- 46.3.1** termination of this Agreement shall be without prejudice to any accrued rights or obligations under this Agreement as at the date of termination; and
- 46.3.2** termination of this Agreement shall not affect the continuing rights and obligations of the Contractor and the Authority under ~~clause 8~~ (Nature of Land Interests), [clause 23.6.7 \(Lifecycle Profile and Lifecycle Spend\)](#), clause 30 (TUPE and Employees), 31 (Pensions), 37 (Payment Provisions), 48 (Transition to Another Contractor), Part 7 (Compensation on Termination), clause 62 (Freedom of Information and Confidentiality), clause 63 (Indemnities, Guarantees and Contractual Claims), clause 65 (Insurance), clause 66 (Reinstatement and Change of Requirement after Insured Event), clause 67 (Risks that become Uninsurable), clause 68 (Dispute Resolution Procedure), clause 70 (Intellectual Property), clause 77 (Notices), clause 82 (Contractor's Records), clause 84 (Interest on Late Payment) and clause 86 (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.

47 SURVEYS ON EXPIRY AND RETENTION FUND

47.1 Final Survey

- 47.1.1** No later than the date ~~eighteen (18)~~ months prior to the Expiry Date, the Authority shall be entitled to carry out or procure the carrying out of a final survey of ~~the Sites~~[each Site](#) to assess whether they have been and are being maintained by the

Contractor in accordance with its obligations under clause 23.1 (Maintenance).

- 47.1.2** The Authority shall notify the Contractor in writing a minimum of five (5) Business Days in advance of the date it wishes to carry out or procure the carrying out of ~~the~~ final survey. The Authority shall consider in good faith any reasonable request by the Contractor for the final survey to be carried out on a different date if such request is made at least two (2) Business Days prior to the notified date and the Contractor (acting reasonably) is able to demonstrate that carrying out the final survey on the notified date would materially prejudice the Contractor's ability to provide the Services.

47.2 Minimisation of Disruption

Where the Authority carries out or procures the carrying out of the final survey, the Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the Services by the Contractor. The Contractor shall afford the Authority or any person carrying out the survey (free of charge) any reasonable assistance required by the Authority during the carrying out of the final survey. [The cost of the final survey shall be borne by the Authority.](#)

47.3 Results of Survey

If the final survey shows that the Contractor has not complied with or is not complying with its obligations under clause 23.1.5 (Maintenance) the Authority shall:

- 47.3.1** notify the Contractor of the rectification and/or maintenance work which is required to bring the condition of the Schools to the standard they would have been in if the Contractor had complied or was complying with its obligations under clause 23.1.5 (Maintenance) (the **Required Standard**);
- 47.3.2** specify a reasonable period within which the Contractor must carry out such rectification and/or maintenance work; and
- 47.3.3** recover the cost of the survey from the Contractor by means of a withdrawal from the Retention Fund Account or deduction from the next payment of the Monthly Unitary Payment.

47.4 Maintenance Work

The Contractor shall carry out such rectification and/or maintenance work notified pursuant to clause 47.3.1 (Results of Survey) (the **Outstanding Work**) in order for the condition of the ~~School(s)~~[Schools](#) to reach the Required Standard within the period specified and any costs it incurs in carrying out the Outstanding Work shall be at its own expense.

47.5 Retention Fund

- 47.5.1** If the Contractor has been notified under clause 47.3.1 (Results of Survey) that rectification and/or maintenance work is required then twelve (12) months prior to the Expiry Date the Authority shall[, if an acceptable on demand bond has not been provided pursuant to clause 47.5.2, ⁴⁴⁹[154](#)] (to the extent the Outstanding Works have not

⁴⁴⁹[154](#) The Authority may consider accepting a retention bond. If so the drafting in clause 47.5.2 will need to be used. The drafting is recommended drafting only but any amendment will need to be included in the IUK derogations table.

been carried out in the interim) deduct the costs of that work as quantified by the survey referred to in clause 47.1 (Final Survey) from the next following instalment (or, if the amount of such instalment is insufficient, the next instalments as necessary) of the Monthly Unitary Payment and pay such amount into an interest bearing account (the **Retention Fund Account**) until this Agreement has expired or terminated (subject to clause 47.6 (Costs)).

[47.5.2] The Contractor shall have the right to provide an on-demand payable bond to the Authority from a UK clearing bank or other financial institution reasonably acceptable to the Authority in lieu of the deductions referred to in clause 47.5.1 as security for the cost of the rectification and/or maintenance work required. The Authority shall have the right to refuse such a bond if it is not satisfied that the terms and value of the bond offered would offer security at least equivalent to that provided by the retention fund described at clause 47.5.1.]

47.6 Costs

If and to the extent that the Contractor carries out the Outstanding Work, the Authority, to the extent that then or subsequently there are funds standing to the credit of the Retention Fund Account, shall reimburse the Contractor's costs of so doing by withdrawing amounts from the Retention Fund Account and paying these to the Contractor. If the aggregate of the amounts from time to time paid into the Retention Fund Account are insufficient to cover the Contractor's costs the Contractor shall bear the balance of such costs itself.

47.7 Failure to Carry Out Work

If and to the extent that the Contractor fails to carry out the Outstanding Work within the period specified in clause 47.3.2 (Results of Survey), the Authority shall be entitled to carry out itself, or procure, such rectification and/or maintenance work at the Contractor's expense and shall [claim against any bond provided pursuant to clause 47.5.2 (Retention Fund) or] make withdrawals from the Retention Fund Account or, where [the amount of the bond has been exhausted or] there are insufficient funds in the Retention Fund Account, make subject to clause 37.9 (Rights of Set Off) deductions from any subsequent payment of the Monthly Unitary Payment to pay for such rectification and/or maintenance work or recover such amounts from the Contractor as a debt payable on demand.

47.8 Balance of Fund

If:

47.8.1 all the rectification and/or maintenance work identified by the Authority or the person the Authority procures to carry out the final survey has been carried out to the Required Standard;

47.8.2 all such rectification and/or maintenance work has been paid for by the Contractor; and

Note also that any bond must be payable on demand; adjudication or other bonds are not acceptable as alternative security to cash in an account.

47.8.3 no termination notice given in accordance with this Agreement is outstanding,

then the Authority shall pay any credit balance on the Retention Fund Account to the Contractor as soon as practicable.

47.9 Relaxation in Handback Requirements

The Parties may ~~around the time of~~ when considering the survey carried out in accordance with clause 47.1 (Final Survey), agree relaxations to the Handback Requirements and any associated relaxation in ~~performance standards~~ Performance Standards and Availability ~~Requirements~~ ⁴⁶⁰ Criteria¹⁵⁵.

48 TRANSITION TO ANOTHER CONTRACTOR⁴⁵⁴₁₅₆

48.1 Duty to Co-operate

During the final six (6) months of the Contract Period (where this expires by effluxion of time) or during the period of any Termination Notice of this Agreement, and in either case for a reasonable period thereafter, the Contractor shall co-operate fully with the transfer of responsibility for the Works and/or Services (or any of the Works and/or Services) to the Authority or any New Contractor of such works and/or services the same or similar to the Works and/or Services, and for the purposes of this clause 48 the meaning of the term "co-operate" shall include:

48.1.1 liaising with the Authority and/or any New Contractor, and providing reasonable assistance and advice concerning the Works and/or Services and their transfer to the Authority or to such New Contractor;

48.1.2 allowing any New Contractor access (at reasonable times and on reasonable notice) to the Schools but not so as to interfere with or impede the provision of the Works and/or Services;

48.1.3 (without prejudice to the obligations of the Contractor pursuant to clause 33 (Operating Manual)) providing to the Authority and/or to any New Contractor all and any information concerning the Sites and the Works and/or Services which is reasonably required for the efficient transfer of responsibility for their performance but information which is commercially sensitive to the Contractor shall not be provided (and for the purposes of this clause 48.1.3, "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 not include any information referred to in clause 30 (TUPE and Employees)); and

48.1.4 transferring its rights, title and interest in and to the Assets to ~~the New Contractor with effect on and from the Expiry Date~~ :

48.1.4.1 the New Contractor with effect on and from the Termination Date; or

⁴⁶⁰₁₅₅ Any savings generated will fall into the Lifecycle Surplus provisions.

⁴⁵⁴ ~~This is to ensure continued service provision beyond expiry or termination.~~

¹⁵⁶ This is to ensure continued service provision beyond expiry or termination.

48.1.4.2 the Authority or (as directed) a new contractor with effect on and from the Expiry Date.

48.2 Transfer of Responsibility

The Contractor shall use all reasonable endeavours so as to facilitate the smooth transfer of responsibility for the Works and/or Services to a New Contractor or to the Authority, as the case may be, and the Contractor shall take no action at any time during the Contract Period or thereafter which is calculated or intended, directly or indirectly, to prejudice or frustrate or make more difficult such transfer.

PART 7 - COMPENSATION ON TERMINATION

49 COMPENSATION ON TERMINATION FOR AUTHORITY DEFAULT/VOLUNTARY TERMINATION

49.1 On termination of this Agreement pursuant to clauses 41.1 (Voluntary Termination by the Authority) or 41.2 (Termination on Authority Default), the Authority shall pay the Contractor the Authority Default Termination Sum in accordance with clauses 55 (Miscellaneous Compensation Provisions) and 56 (Method of Payment). Subject to clauses 49.3 to 49.5, the Authority Default Termination Sum shall be an amount equal to the aggregate of:

49.1.1 the Base Senior Debt Termination Amount;

49.1.2 redundancy payments for employees of the Contractor that have been or will be reasonably incurred by the Contractor as a direct result of termination of this Agreement and any Sub-Contractor Breakage Costs; and ⁴⁵²₁₅₇

49.1.3 [an amount which when taken together with:

49.1.3.1 dividends (or other distributions) paid by the Contractor on its share capital on or before the Termination Date; and

49.1.3.2 interest paid and principal repaid by the Contractor under the Subordinated Financing Agreements on or before the Termination Date,

taking account of the actual timing of all such payments, gives a real internal rate of return on the share capital subscribed and amounts advanced under the Subordinated Financing Agreements equal to the Base Case Equity IRR;]

[OR

49.1.3 the aggregate amount for which the share capital of the Contractor and the amounts outstanding under the Subordinated Financing Agreements could have been sold on an open market basis based on the Relevant Assumptions];

[OR

49.1.3 all amounts shown in the Base Case as payable by the Contractor from the Termination Date, either in dividends or other distributions on the share capital of the Contractor or as payments of interest or repayments of principal made by the Contractor under the Subordinated Financing Agreements, each amount discounted back at the Base Case Equity IRR from the date on which it is shown to be payable in the Base Case to the Termination Date].

49.2 On payment of the amount referred to in clause 49.1, the Authority shall have the option to require the Contractor to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority.

49.3 If the aggregate of the amounts referred to in clause 49.1.1 and clause 49.1.3 is less than the Revised Senior Debt Termination Amount, then the Authority

⁴⁵²₁₅₇ Bidders to nominate which one of the options should apply in their IPDSB response.

Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in clause 49.1.2 provided always that:

- 49.3.1** the amount referred to in clause 49.1.2 shall only be paid to the extent that the Contractor has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and
- 49.3.2** if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Sub-Contract in circumstances where there is an event of default under such Sub-Contract which would entitle the Contractor to terminate such Sub-Contract.

49.4 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Contractor has wilfully, or through gross negligence, failed to comply with its obligations under clause [11.4.4\(a\)](#) of the Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Authority Default Termination Sum, provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

49.5 If the Contractor has wilfully or through gross negligence failed to comply with its obligations under clause [11.4.4\(b\)](#) of the Direct Agreement and there has been an overstatement of the cash balances by the Contractor as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this clause 49, then the Authority Default Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

49.6 Authority's share of Lifecycle Surplus to be paid

On termination of this Agreement pursuant to clause 41.1 (Voluntary Termination by the Authority) the Contractor shall within forty (40) Business Days of the Notice Date pay to the Authority an amount equal to half of the Lifecycle Surplus as at the Termination Date.

50 COMPENSATION ON TERMINATION FOR CORRUPT GIFTS, FRAUD AND REFINANCING BREACHES

50.1 On termination of this Agreement in accordance with clauses 43 (Termination by the Authority for Breach of Refinancing Provisions) or 44.2 (Termination for Corrupt Gifts and Fraud) the Authority shall pay the Contractor an amount equal to the Revised Senior Debt Termination Amount.

50.2 Such amount shall be determined and paid in accordance with clauses 55 (Miscellaneous Compensation Provisions) and 56 (Method of Payment).

50.3 If termination occurs, then the Authority may require the Contractor to transfer its rights, title and interest in and to the Assets to the Authority.

50.4 The Contractor shall within forty (40) Business Days of the Notice Date following termination in the circumstances referred to in clause 50.1 pay to the Authority an amount equal to the Lifecycle Surplus as at the Termination Date.

51 COMPENSATION ON TERMINATION FOR CONTRACTOR DEFAULT

51.1 Retendering Election

51.1.1 Subject to clause 51.1.2, [if the Authority terminates this Agreement pursuant to clause 41.4 \(Rectification\)](#), the Authority shall be entitled to either:

51.1.1.1 retender the provision of the Project in accordance with clause 51.2 (Retendering Procedure); or

51.1.1.2 require an expert determination in accordance with clause 51.3 (No Retendering Procedure).

51.1.2 the Authority shall be entitled to elect to retender the provision of the Project in accordance with clause 51.2 (Retendering Procedure) if:

51.1.2.1 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

51.1.2.2 there is a Liquid Market; and either:

51.1.2.2.1 the Senior Lenders have not exercised their rights to step-in under the Direct Agreement; or

51.1.2.2.2 the Contractor or the Senior Lenders have not procured the transfer of the Contractor's rights and liabilities under this Agreement to a Suitable Substitute Contractor and have failed to use all reasonable efforts to do so,

but otherwise the Authority shall not be entitled to retender the provision of the Project and clause 51.3 (No Retendering Procedure) shall apply.

51.2 Retendering Procedure

If the Authority elects to retender the provision of the Project under clause 51.1 (Retendering Election), then the following provisions shall apply:

51.2.1 The objective of the retendering procedure shall be to establish and pay to the Contractor the Adjusted Highest Compliant Tender Price, as a result of the Tender Process.

51.2.2 The Authority shall (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as practicable.

51.2.3 The Authority shall notify the Contractor of the Qualification Criteria and the other requirements and terms of the Tender Process,

including the timing of the Tender Process, but shall act reasonably in setting such requirements and terms.

- 51.2.4** The Contractor authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under clause 62 (Freedom of Information and Confidentiality) that is reasonably required as part of the Tender Process.
- 51.2.5** The Contractor may appoint a person (the Tender Process Monitor) to monitor the Tender Process for the purpose of monitoring and reporting to the Contractor and the Senior Lenders on the Authority's compliance with the Tender Process and making representations to the Authority. The Tender Process Monitor will not disclose any confidential information to the Contractor or any other person (and shall provide an undertaking to the Authority to such effect as a condition of its appointment) but shall be entitled to advise the Contractor as to whether it considers that the Authority has acted in accordance with the Tender Process, and correctly determined the Adjusted Highest Compliant Tender Price.
- 51.2.6** 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 the tender documentation and bids and shall be required to make written representations to the Authority regarding compliance with the Tender Process. All representations shall be made by the Tender Process Monitor in a timely manner as the Tender Process proceeds. 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 relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with the Dispute Resolution Procedure.
- 51.2.7** 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:
- 51.2.7.1** the Post Termination ~~Service~~Services Amount for that month, on or before the date falling ten (10) Business Days after the end of that month; and
- 51.2.7.2** the Post Termination ~~Service~~Services Amount for the period ending on the Compensation Date, on or before the date falling twenty (20) Business Days after the Compensation Date.
- 51.2.8** If any Post Termination ~~Service~~Services Amount is less than zero, then it shall be carried forward and shall be set off against any future positive Post Termination ~~Service~~Services Amounts. If any such Post Termination ~~Service~~Services Amount has not been set off on or before the Compensation Date then it shall be taken into account in the calculation of the Adjusted Highest Compliant Tender Price.
- 51.2.9** 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 amounts (if any) standing to the credit of the Joint Insurance Account on the date that the New Contract is entered into.

- 51.2.10** As soon as practicable after tenders have been received, the Authority shall (acting reasonably) determine the Compliant Tenders and shall notify the Contractor of the Adjusted Highest Compliant Tender Price.
- 51.2.11** If the Contractor refers a dispute relating to the Adjusted Highest Compliant Tender Price to the Dispute Resolution Procedure, the Authority shall be entitled to enter into a New Contract. The Authority shall pay to the Contractor the element of the Adjusted Highest Compliant Tender Price that is not disputed no later than the date specified in clause 51.2.12 and the remainder on or before the date falling {twenty (20)} Business Days after it has been determined under the Dispute Resolution Procedure and the Authority shall pay interest to the Contractor at the Senior Debt Rate on any amount of Adjusted Highest Compliant Tender Price which has been withheld from the date specified in clause 51.2.12 until the date specified in this clause 51.2.11.
- 51.2.12** Subject to clauses 51.2.11 and 51.2.15, the Authority shall pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price, less an amount equal to the Lifecycle Surplus as at the Termination Date, no later than the date falling {twenty (20)} Business Days after the date of the New Contract.
- 51.2.13** The discharge by the Authority of its payment obligation in clauses 51.2.11 and/or 51.2.12 shall be in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Agreement and the Project Documents whether under contract, tort, restitution or otherwise, save for any liability of the Authority which arose prior to the Termination Date that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price.
- 51.2.14** Subject to clauses 51.2.15 and 51.2.18, if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price, less an amount equal to the Lifecycle Surplus as at the Termination Date, to the Contractor on or before the date falling two (2) years after the Termination Date then the provisions of this clause 51.2 shall not apply to that termination and the provisions of clause 51.3 (No Retendering Procedure) shall apply instead.
- 51.2.15** If the Adjusted Highest Compliant Tender Price, less an amount equal to the Lifecycle Surplus as at the Termination Date, is zero or a negative number then the Authority shall have no obligation to make any payment to the Contractor and with effect from the time that the Authority gives notice of that event to the Contractor, 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, tort, restitution or otherwise save for any antecedent liability of the Authority which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price.

- 51.2.16** If the Adjusted Highest Compliant Tender Price, less an amount equal to the Lifecycle Surplus as at the Termination Date, is less than zero, then ~~an amount equal to the Adjusted Highest Compliant Tender Price, less an amount equal to the Lifecycle Surplus as at the Termination Date,~~ the amount by which it is less than zero shall be due and payable by the Contractor to the Authority on the date of the New Contract.
- 51.2.17** The Authority may elect at any time prior to the receipt of a Compliant Tender to follow the no retendering procedure under clause 51.3 (No Retendering Procedure) by notifying the Contractor that this election has been made.
- 51.2.18** 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 pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price, less an amount equal to the Lifecycle Surplus as at the Termination Date, within ~~{twenty (20)}~~ Business Days of such notification.

51.3 No Retendering Procedure

If either the Authority is not entitled to retender the provision of the Project under clause 51.1 (Retendering Election) or the Authority elects to require an expert determination in accordance with this clause 51.3, then the following procedure shall apply:

- 51.3.1** Subject to clause 51.3.2, the Contractor shall not be entitled to receive any Post Termination ~~Service~~Services Amount.
- 51.3.2** If the Authority elects to require an expert determination in accordance with this clause 51.3 after it has elected to follow the procedure under clause 51.2 (Retendering Procedure), then the Authority shall continue to pay to the Contractor each Post Termination ~~Service~~Services Amount until the Compensation Date, in accordance with clause 51.2 (Retendering Procedure).
- 51.3.3** In agreeing or determining the Estimated Fair Value of the Contract, the Parties shall be obliged to follow the principles set out below:
- 51.3.3.1** all forecast amounts ~~shall~~should be calculated in nominal terms at current prices, and for Unitary Charge payment using the ~~Indexation Formula~~indexation formulae set out in paragraph ~~2.3.1(c)~~2.3 of Schedule 6 (Payment Mechanism) for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Agreement, and using the agreed assumed forecast rate of increase in RPIX ~~(and AWEI~~ (in each case as set out in the Base Case) in applying the formula;
- 51.3.3.2** the total of all future payments of the ~~Monthly~~full Unitary Charge (without deductions) [and any amount

to be paid by the Authority under clause 21A] (Capital Contributions) forecast to be made shall be calculated and discounted to the Termination Date at the Termination Date Discount Rate; and

51.3.3.3 the total of all costs forecast to be incurred by the Authority as a result of termination shall be calculated and discounted at the Termination Date Discount Rate and deducted from the payment calculated pursuant to clause 51.3.3.2, such costs to include (without double counting):

51.3.3.3.1 a reasonable risk assessment of any cost overruns that will arise¹⁵⁸, whether or not forecast in the ~~Base Case~~ relevant base case;

51.3.3.3.2 the costs of the Service forecast to be incurred by the Authority in providing the Project to the standard required¹⁵⁹; and

51.3.3.3.3 any rectification costs required to deliver the Project to the standard required (including any costs forecast to be incurred by the Authority to complete construction or development work and additional operating costs required to restore operating services standards),

in each case such costs to be forecast at a level that will ~~result in no Deductions being made to deliver~~ the Monthly full Unitary Charge ~~in any calendar month~~ referred to above.

51.3.4 If the Parties cannot agree on the Adjusted Estimated Fair Value of the Contract on or before the date falling twenty (20) Business Days after the date on which the Authority elected to require an expert determination in accordance with this clause 51.3, then the Adjusted Estimated Fair Value of the Contract shall be determined in accordance with the Dispute Resolution Procedure.

51.3.5 Subject to clause 56.2 (Instalments) the Authority shall pay to the Contractor an amount equal to the Adjusted Estimated Fair Value of the Contract, less an amount equal to the Lifecycle Surplus as at the Termination Date, on the date falling forty (40) Business Days after the date on which the Adjusted Estimated Fair Value of the Contract has been agreed or determined in accordance with this clause 51.3.

51.3.6 The discharge by the Authority of its obligation in clause 51.3.5 is in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Agreement or other Project Document whether in contract, tort,

¹⁵⁸ A methodology can be agreed in advance for what constitutes a reasonable risk assessment.

¹⁵⁹ This includes both the every day running of the Hard FM Service and Lifecycle Maintenance Costs. Forecasts by agreement or, in the event of a dispute, by an expert.

restitution or otherwise, save for any liability that arose prior to the Termination Date (but not from the termination itself) that has not been taken into account in determining the Adjusted Estimated Fair Value of the Contract.

- 51.3.7** To the extent that the Adjusted Estimated Fair Value of the Contract, less an amount equal to the Lifecycle Surplus as at the Termination Date, is less than zero, then ~~an amount equal to the Adjusted Estimated Fair Value of the Contract, less an amount equal to the Lifecycle Surplus as at the Termination Date,~~ the amount by which it is less than zero shall be due and payable by the Contractor to the Authority on the Compensation Date.

52 COMPENSATION ON TERMINATION FOR FORCE MAJEURE

52.1 Amount

On termination of this Agreement under clause 45.5 (Unable to Agree), or clause 67.3.1.1 (Consequences) or clause 67.3.1.2 (Consequences) the Authority shall pay to the Contractor the Force Majeure Termination Sum in accordance with clauses 55 (Miscellaneous Compensation Provisions) and 56 (Method of Payment). Subject to clauses 52.3 to 52.5 the Force Majeure Termination Sum shall be an amount equal to the aggregate of:

- 52.1.1** the Base Senior Debt Termination Amount;
- 52.1.2** the Junior Debt less an amount equal to the aggregate of payments of interest made by the Contractor under the Subordinated Financing Agreements;^{453,160}
- 52.1.3** all amounts paid to the Contractor by way of subscription for shares in the capital of the Contractor less dividends and other distributions paid to the shareholders of the Contractor (save to the extent deducted under clause 52.1.2); and
- 52.1.4** redundancy payments for employees of the Contractor that have been or will be reasonably incurred by the Contractor as a direct result of termination of this Agreement and any Sub-Contractor Breakage Costs.

52.2 If the amounts referred to in clauses 52.1.2 and/or 52.1.3 are less than zero, then, for the purposes of the calculation in clause 52.1 they shall be deemed to be zero.

52.3 If the aggregate of the amounts referred to in clauses 52.1.1, 52.1.2 and 52.1.3 is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in clause 52.1.4 provided always that:

- 52.3.1** the amount referred to in clause 52.1.4 shall only be paid to the extent that the Contractor has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and

^{453,160} This excludes interest accrued but unpaid but the Junior Debt documentation should, of course, be checked to ensure this is the way it works. Repayment of principal is caught through the definition of Junior Debt.

52.3.2 if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Sub-Contract in circumstances where there is an event of default under such Sub-Contract which would entitle the Contractor to terminate such Sub-Contract.

52.4 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Contractor has wilfully, or through gross negligence, failed to comply with its obligations under clause [11.4.4\(a\)](#) of the Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.

52.5 If the Contractor has wilfully or through gross negligence failed to comply with its obligations under clause [11.4.4\(b\)](#) of the Direct Agreement and there has been an overstatement of the cash balances by the Contractor as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this clause 52, then the Force Majeure Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.

~~52.6~~ **Payment**

~~The Force Majeure Termination Sum payable pursuant to this clause 52 shall be determined and paid in accordance with clauses 55 (Miscellaneous Compensation Provisions) and 56 (Method of Payment).~~

[52.6](#) ~~52.7~~ **Authority's share of Lifecycle Surplus to be paid**

The Contractor shall within forty (40) Business Days of the Notice Date following termination in the circumstances referred to in clause 52.1 pay to the Authority an amount equal to half of the Lifecycle Surplus as at the Termination Date.

53 ASSETS

Where this Agreement expires due to effluxion of time then the Authority shall have the option to require the Contractor to transfer its rights, title and interest in and to the Assets to the Authority, or as directed by the Authority, at no cost to the Authority.

54 CHANGES TO FINANCING AGREEMENTS AND ANCILLARY DOCUMENTS

54.1 Without prejudice to the provisions of clauses 7.2 (Delivery of Initial and Changed Ancillary Documents and Financing Agreements), 38 (Refinancing) and 54.2, the Contractor shall not, without the prior written consent of the Authority, enter into new Financing Agreements or terminate, amend, waive its rights or otherwise deal with its Financing Agreements if the same may reasonably be expected to have a material adverse effect on the ability of the Contractor to perform its obligations under the Project Documents or this Agreement.

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

54.2.1 the Contractor has obtained the prior written consent of the Authority to such increased liability for the purposes of this clause 54.2; or

54.2.2 it is a Permitted Borrowing.

In the event of any conflict between the provisions of this clause 54.2 and any other provision of this Agreement, the provisions of this clause 54.2 shall prevail.

55 MISCELLANEOUS COMPENSATION PROVISIONS

55.1 Gross Up of Termination Payments

If any amount of compensation payable by the Authority (whether payable as a lump sum or instalments) under clauses 52 (Compensation on Termination for Force Majeure), 49 (Compensation on Termination for Authority Default/Voluntary Termination) and 50 (Compensation on Termination for Corrupt Gifts, Fraud and Refinancing Breaches) is subject to Tax payable to a Relevant Authority in the United Kingdom, then the Authority shall pay to the Contractor such additional amount as will put the Contractor in the same after Tax position as it would have been in had the payment not been subject to Tax taking account of any relief, allowances deduction, setting off or credit in respect of Tax (whether available by choice or not) which may be available to the Contractor to reduce the Tax to which the payment is subject.

55.2 Set Off on Termination

Except where expressly stated otherwise, the Authority is not entitled to set off any amount against any payment of termination compensation (whether payable as a lump sum or instalments) under clause 52 (Compensation on Termination for Force Majeure), clause 49 (Compensation on Termination for Authority Default/Voluntary Termination), and clause 50 (Compensation on Termination for Corrupt Gifts Fraud and Refinancing Breaches) save to the extent that after such an amount has been set off, the termination payment made would be an amount greater than or equal to the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount, as the case may be, at that time.

55.3 Exclusivity of Remedy

Any and all sums irrevocably paid by the Authority to the Contractor under this Part 7 shall be in full and final settlement of each Party's rights and claims against the other for breaches and/or termination of this Agreement or any Project Document whether under contract, tort, restitution or otherwise, but without prejudice to:

55.3.1 any antecedent liability of the Contractor to the Authority which the Authority has been unable to set off pursuant to clause 55.2 (Set Off on Termination);

55.3.2 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 Termination Sum as the case may be; and

- 55.3.3** any liabilities arising in respect of any breach by either Party of their obligations under clause 46.3 (Continuing Obligations) which arises or continues after the Termination Date to the extent not taken into account in the calculation of any Termination Sum or other payment of compensation on termination pursuant to this Agreement.

56 METHOD OF PAYMENT

56.1 Termination Sum

The Authority shall pay to the Contractor the Termination Sum, together with any interest on any Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount element of the Termination Sum at the Senior Debt Rate on or before the date falling forty (40) Business Days after the Notice Date provided that it may elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in accordance with clause 56.2 (Instalments). Where this Agreement terminates pursuant to clause 41.2 (Termination on Authority Default) the Authority shall pay to the Contractor the Authority Default Termination Sum on the Termination Date.

56.2 Instalments

The Authority may, other than on an Authority Default, elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum:

- 56.2.1** in instalments as follows:

56.2.1.1 where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) is greater than or equal to the Outstanding Principal:

56.2.1.1.1 ~~56.2.1.1~~ in respect of that element of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) representing the Outstanding Principal ~~(where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) is greater than or equal to the Outstanding Principal)~~ on the dates (the **Instalment Dates**) and in the amounts that the Contractor would have been required to pay principal to the Senior Lenders under the terms of the

Senior Financing Agreements ~~(disregarding any changes to such amounts or dates that have not been approved by the Authority other than changes giving rise to an Additional Permitted Borrowing)~~ had the Termination Date not occurred; and ~~the sum remaining after deducting the Outstanding Principal from the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) shall be paid in equal instalments on the Instalment Dates; or~~

56.2.1.1.2 in respect of the sum (if any) remaining after deducting the Outstanding Principal from the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant), in equal instalments on the Instalment Dates; or

56.2.1.2 where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) is less than the Outstanding Principal, on the Instalment Dates pro rata to the amounts that the Contractor would have been required to pay as principal to the Senior Lenders under the terms of the Senior Financing Agreements (disregarding any changes to such amounts or dates that have not been approved by the Authority other than changes giving rise to an Additional Permitted Borrowing) had the Termination Date not occurred; or

56.2.2 as the Parties may otherwise agree.

56.3 Interest

Where the Authority elects to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in instalments pursuant to clause 56.2 (Instalments), from the Notice Date until the date of payment, interest shall accrue on any unpaid element of the Termination Sum at the Senior Debt Rate and be payable on the next occurring Instalment Date.

56.4 Payment of Outstanding Element

If the Authority has elected to pay in accordance with clause 56.2 (Instalments) it may (on twenty (20) Business Days' prior written notice to the Contractor) elect to pay any outstanding element of the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior

Debt Termination Amount (as relevant) together with any interest accrued pursuant to clause 56.3 (Interest) in full on any Instalment Date.

56.5 Authority Default in Payment

If the Authority:

- 56.5.1** fails to make a payment to the Contractor in accordance with clauses 56.1 (Termination Sum) and/or 56.2 (Instalments) and/or 56.3 (Interest); or
- 56.5.2** breaches clause 71.1 (Restrictions on Transfer of this Agreement by the Authority),

the Contractor may issue a notice to the Authority declaring any unpaid and outstanding element of (as applicable) the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) together with any accrued but unpaid interest to be immediately due and payable⁴⁵⁴₁₆₁.

⁴⁵⁴₁₆₁ Break costs arising should also be payable in respect of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount elements of the payment.

PART 8 - GENERAL

57 LIAISON

57.1 The Parties shall give effect to the procedure set out in Schedule 10 (Liaison Procedure).

58 RELIEF EVENTS

58.1 Occurrence

If and to the extent that a Relief Event:

58.1.1 is the direct cause of either a failure by the Contractor

58.1.1.1 to commence the Works on or before the Start on Site Date; [and/or]

58.1.1.2 to achieve ICT Handover on or before the relevant Planned ICT Handover Date or (following the relevant Planned ICT Handover Date but before the Longstop Date) is the direct cause of a delay in achievement of ICT Handover; and/or

58.1.1.3 to achieve Services Availability on or before a relevant Planned Services Availability Date or (following the relevant Planned Services Availability Date but before the Longstop Date) is the direct cause of a delay in achievement of Services Availability; [and/or]

58.1.1.4 to achieve completion of the Post Completion Works on or before the relevant Planned Post Completion Works Acceptance Date or (following the relevant Planned Post Completion Works Acceptance Date) is the direct cause of a delay in completion of the relevant Post Completion Works]; or

58.1.2 adversely affects the ability of the Contractor to perform any of its obligations under this Agreement,

then the Contractor shall be entitled to apply for relief from any rights of the Authority arising under clause 41.3 (Termination on Contractor Default) [and its obligations under this Agreement].^{455,162}

58.2 Relief

Subject to clause 58.5 (Information), to obtain relief, the Contractor must:

58.2.1 as soon as practicable, and in any event within twenty (20) Business Days after it becomes aware that the Relief Event has caused or is likely to cause delay and/or adversely affect the ability of the Contractor to perform its other obligations give to the Authority a notice of its claim for relief from its obligations under this Agreement, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;

^{455,162}

In most contracts Relief Events should give only relief from the risk of termination for failure to complete or failure to perform. In cases in which liquidated damages are payable to the Authority there will be an issue of the extent to which relief can be given from claims for damages or liquidated damages. The performance regime should still apply and this should be made clear, to the extent there is potential for relief from liquidated and other damages.

58.2.2 within five (5) Business Days of receipt by the Authority of the notice referred to in clause 58.2.1, give full details of the relief claimed; and

58.2.3 demonstrate to the reasonable satisfaction of the Authority that:

58.2.3.1 the Contractor and its Sub-Contractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;

58.2.3.2 the Relief Event directly caused:

58.2.3.2.1 the delay in the commencement of the Works on or before the Start on Site Date; and/or

58.2.3.2.2 the delay in achievement of ICT Handover on or before the relevant Planned ICT Handover Date or (following the relevant ICT Handover Date but before the Longstop Date) any delay in the achievement of ICT Handover; and/or

58.2.3.2.3 the delay in the achievement of Services Availability on or before the relevant Planned Services Availability Date or (following the relevant Planned Services Availability Date but before the Longstop Date) any delay in the achievement of Services Availability; and/or

58.2.3.2.4 any delay in the completion of the Post Completion Works on or before the relevant Planned Post Completion Works Acceptance Date or (following the relevant Planned Post Completion Works Acceptance Date) any delay in completing the relevant Post Completion Works; and/or]

58.2.3.2.5 the need for relief from obligations;

58.2.3.3 the time lost and/or relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice, without incurring material expenditure; and

58.2.3.4 the Contractor is using reasonable endeavours to perform its obligations under this Agreement.

58.2.4 Following the service of a notice by the Contractor pursuant to clause 58.2.1 above, the Contractor shall promptly supply to the Authority any further information relating to the delay which is:

58.2.4.1 received by the Contractor; or

58.2.4.2 reasonably requested by the Authority.

58.3 Consequences

In the event that the Contractor has complied with its obligations under clause 58.2 (Relief), then:

58.3.1 the Start on Site Date; and/or

58.3.2 the relevant Planned ICT Handover Date, the relevant Planned Services Availability Date and/or following the Planned Services Availability Date, the Longstop Date; [and/or]

58.3.3 [the relevant Planned Post Completion Works Acceptance Date],

shall, subject to clause 58.8 (School Terms), be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and/or

58.3.4 the Authority shall not be entitled to exercise its right to terminate this Agreement under clause 41.3 (Termination on Contractor Default) and, subject to clause 58.4 (Deductions), shall give such other relief as has been requested by the Contractor.

58.4 Deductions

Nothing in clause 58.3 (Consequences) shall affect any entitlement to make Deductions under clause 37 (Payment Provisions) and Schedule 6 (Payment Mechanism) during the period in which the Relief Event is subsisting provided that any such Deductions shall be disregarded for the purposes of the Authority's right to terminate this Agreement for a Contractor Default.

58.5 Information

In the event that information required by clause 58.2 (Relief) is provided after the dates referred to in that clause, then the Contractor shall not be entitled to any relief during the period for which the information is delayed.

58.6 Notice

The Contractor shall notify the Authority if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

58.7 Disputes

If the Parties cannot agree the extent of the relief required, or the Authority disagrees that a Relief Event has occurred or that the Contractor is entitled to any extension to the Start on Site Date, any Planned ICT Handover Date and/or any Planned Services Availability Date and/or (following any Planned Services Availability Date) to the Longstop Date [and/or any Planned Post Completion Works Acceptance Date] and/or relief from other obligations under this Agreement, the Parties shall resolve the matter in accordance with the Dispute Resolution Procedure.

58.8 School Terms

The Authority agrees that, when assessing the effect of any Relief Event pursuant to clause 58.3 (Consequences), any delay to the achievement of ICT Handover that may arise as a result of the operation of clause 20.2 (Dates on which ICT Handover may occur) and any delay to the achievement of Services Availability that may arise as a result of the operation of clause 20.3 (Dates on which Services Availability may occur) shall be taken into account provided that the Planned ICT Handover Date shall only ever move to the twenty-fifth Business Day and the Planned Services Availability Date shall only ever move to the fifth Business Day before the first day of a ~~Half Term~~half term (other than the Summer ~~Half Term~~half term) or Term.:-

59 CHANGE IN LAW

59.1 Occurrence

The Contractor shall take all steps necessary to ensure that the Works and the Services are performed in accordance with the terms of this Agreement following any Change in Law.

59.2 Qualifying Change in Law

If a Qualifying Change in Law occurs or is shortly to occur, then either Party may write to the other to express an opinion on its likely effects, giving details of its opinion of:

- 59.2.1** any necessary change to the Works or the Services;
- 59.2.2** whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law;
- 59.2.3** whether relief from compliance with obligations is required, including the obligation of the Contractor to commence the Works by the Start on Site Date, to achieve ICT Handover by the Planned ICT Handover Date in relation to a School, to achieve Services Availability by the Planned Services Availability Date in relation to a School [to complete the Post Completion Works by the relevant Planned Post Completion Works Acceptance Date] and/or meet the Authority's Requirements and/or the Contractor's Proposals during the implementation of any relevant Qualifying Change in Law;
- 59.2.4** any loss of or increase in revenue that will result from the relevant Qualifying Change in Law;
- 59.2.5** any Estimated Change in Project Costs that directly result from the Qualifying Change in Law; and
- 59.2.6** any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect after the final Services Availability Date,

in each case giving in full detail the procedure for implementing the change in the Works or in the Services. Responsibility for the costs of implementation (and any resulting variation to the Unitary Charge) shall be dealt with in accordance with clauses 59.3 (Parties to Discuss) to 59.7 (Adjustment to Unitary Charge).

59.3 Parties to Discuss

As soon as practicable after receipt of any notice from either Party under clause 59.2 (Qualifying Change in Law), the Parties shall discuss and agree the issues referred to in clause 59.2 (Qualifying Change in Law) and any ways in which the Contractor can mitigate the effect of the Qualifying Change in Law, including:

- 59.3.1** providing evidence that the Contractor has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its sub-contractors to minimise any increase in costs and maximise any reduction in costs;
- 59.3.2** demonstrating 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 or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Contractor;

59.3.3 giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project, including similar businesses in which the Shareholders or their Affiliates carry on business; and

59.3.4 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under clauses 59.2.5 (Qualifying Change in Law) and/or 59.2.6 (Qualifying Change in Law).

59.4 Change Agreed

If the Parties agree or it is determined under the Dispute Resolution Procedure that the Contractor is required to incur additional Capital Expenditure due to a Qualifying Change in Law, then the Contractor shall use its reasonable endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to it and to the Senior Lenders.

59.5 Not used

59.6 Financing

If the Contractor has used reasonable endeavours to obtain funding for the Capital Expenditure referred to in clause 59.4 (Change Agreed), but has been unable to do so within forty (40) Business Days of the date that the agreement or determination referred to in clause 59.4 (Change Agreed) occurred, then the Authority shall pay to the Contractor an amount equal to that Capital Expenditure on or before the date falling twenty (20) Business Days after the Capital Expenditure has been incurred.

59.7 Adjustment to Unitary Charge

Any compensation payable under this clause 59 by means of an adjustment to or reduction in the Unitary Charge shall be determined and made in accordance with clause 73 (Financial Adjustments).

59.8 Payment of Irrecoverable VAT

The Authority shall pay to the Contractor from time to time as the same is incurred by the Contractor sums equal to any Irrecoverable VAT but only to the extent that it arises as a result of a Change in Law. Any such payment shall be made within twenty (20) Business Days of the delivery by the Contractor to the Authority of written details of the amount involved accompanied by details as to the grounds for and computation of the amount claimed. For the purposes of this clause 59.8, Irrecoverable VAT means input VAT incurred by the Contractor on any supply which is made to it which is used or to be used exclusively in performing the Works or the Services or any of the obligations or provisions under this Agreement (together with input VAT incurred as part of its overhead in relation to such activities) to the extent that the Contractor is not entitled to repayment or credit from HM Revenue & Customs in respect of such input VAT.

60 AUTHORITY AND CONTRACTOR CHANGES

60.1 Change Protocol

The provisions of Schedule 24 (Change Protocol) shall have effect in respect of Changes except as otherwise expressly provided in this Agreement.

60.2 No Alterations

Without prejudice to the Authority's rights under Schedule 24 (Change Protocol), the Authority shall not make any Alterations, save:

- 60.2.1** in circumstances where the Authority is entitled to procure a Change other than through the Contractor pursuant to paragraphs 4.3 of Part 2, 8.3 of Part 3 and 4.6.2 of Part 4, in each case of Schedule 24 (Change Protocol); and
- 60.2.2** where the Alteration comprises provision of separate facilities at the relevant School and does not require any Alteration to any existing buildings or other facilities (other than any Alterations comprising connection into utilities or other service media at the relevant School necessary to implement the relevant Change, which Alterations shall not be prohibited by this clause 60.2).

61 AUTHORITY STEP-IN

61.1 Right to Step-In

If the Authority reasonably believes that it needs to take action in connection with the Services:

- 61.1.1** because a serious risk exists to the health or safety of persons or property or to the environment;
- 61.1.2** to discharge a statutory duty; and/or
- 61.1.3** because an Emergency has arisen,

then the Authority shall be entitled to take action in accordance with clauses 61.2 (Notice to the Contractor) to 61.5 (Step-In on Contractor Breach).

61.2 Notice to the Contractor

If clause 61.1 (Right to Step-In) applies and the Authority wishes to take action, the Authority shall notify the Contractor in writing of the following:

- 61.2.1** the action it wishes to take;
- 61.2.2** the reason for such action;
- 61.2.3** the date it wishes to commence such action;
- 61.2.4** the time period which it believes will be necessary for such action; and
- 61.2.5** to the extent practicable, the effect on the Contractor and its obligation to carry out the Works and/or provide the Services during the period such action is being taken.

61.3 Action by Authority

- 61.3.1** Following service of such notice, the Authority shall take such action as notified under clause 61.2 (Notice to the Contractor) 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. The Authority shall provide the Contractor with notice of completion of the Required Action and shall use reasonable

endeavours to provide such advance notice as is reasonably practicable of its anticipated completion.

- 61.3.2** Where the Required Action has been taken otherwise than as a result of a breach by the Contractor, the Authority shall undertake the Required Action in accordance with Good Industry Practice and shall indemnify the Contractor against all Direct Losses where it fails to do so.

61.4 Step-In without Contractor Breach

If the Contractor is not in breach 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 carrying out the Works and/or providing any part of the Services:

- 61.4.1** the Contractor shall be relieved from its obligations to carry out the Works and/or provide such part of the Services; and
- 61.4.2** in respect of the 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 incremental costs are incurred), the Monthly Unitary Payment due from the Authority to the Contractor shall equal the amount the Contractor would receive if it were satisfying all its obligations and carrying out the Works and/or providing the Services affected by the Required Action in full over that period.

61.5 Step-In on Contractor Breach

If the Required Action is taken as a result of a breach of the obligations of the Contractor under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Contractor from carrying out any part of the Works and/or providing any part of the Services:

- 61.5.1** the Contractor shall be relieved of its obligations to carry out such part of the Works and/or provide such part of the Services; and
- 61.5.2** in respect of the period in which the Authority is taking the Required Action, the Monthly Unitary Payment due from the Authority to the Contractor shall equal the amount the Contractor would receive if it were satisfying all its obligations and carrying out the Works and/or providing the Services affected by the Required Action in full over that period, less an amount equal to all the Authority's costs of operation in taking the Required Action.

62 FREEDOM OF INFORMATION AND CONFIDENTIALITY¹⁵⁶

62.1 Duty of Confidentiality

- 62.1.1** The Parties agree that the terms of this Agreement and each Project Document and Ancillary Document shall, subject to clause 62.1.2, not be treated as Confidential Information and may be disclosed without restriction and the Contractor acknowledges that the Authority intends to publish, subject to clause ~~62.1.2 below, the~~62.1.2, this Agreement and some of the Project Documents and Ancillary Documents on a website.

- 62.1.2** Clause 62.1.1 shall not apply to the terms of this Agreement, a Project Document or an Ancillary Document designated as Commercially Sensitive Information and listed in Part 1 of Schedule 21 (Commercially Sensitive

¹⁵⁶ ~~Further HMT required changes may be made.~~

Information) to this Agreement⁴⁵⁷¹⁶³ which shall, subject to clause 62.2 (Permitted Disclosure), be kept confidential for the relevant periods specified in that Part.

62.1.3 The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this Agreement and the Project Documents 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.

62.1.4 The Parties agree that the internal rate of return information provided pursuant to clause 82.7.1.4 shall not be treated as Confidential Information and the Contractor acknowledges that the government intends to publish such information on a website.

62.1.5 The Parties agree that information provided pursuant to clause 72 (Change of Ownership) in respect of any change of ownership which has actually taken place shall not be treated as Confidential Information.

62.2 Permitted Disclosure

Clauses 62.1.2 and 62.1.3 (Duty of Confidentiality) shall not apply to:

62.2.1 any disclosure of information that is reasonably required by any persons engaged in the performance of their obligations under this Agreement for the performance of those obligations;

62.2.2 any matter which a Party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this clause 62;

62.2.3 any disclosure to enable a determination to be made under the Dispute Resolution Procedure or in connection with a dispute between the Contractor and any of its sub-contractors;

62.2.4 any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;

62.2.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;

62.2.6 any provision of information to the Parties' own professional advisers or insurance advisers or to the Senior Lenders or the Senior Lenders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Contractor [and/or Holdco] in connection with carrying out its obligations under this Agreement, or may wish to acquire shares in the Contractor [and/or Holdco] in accordance with the provisions of this Agreement to that person or their respective professional advisers but only

⁴⁵⁷ ~~Keep this~~¹⁶³ This exemption will be strictly limited and ~~should~~we will be mindful of FOIA and OGC guidance when agreeing what parts of the documents should be treated as Commercially Sensitive Information.

to the extent reasonably necessary to enable a decision to be taken on the proposal;

62.2.7 any disclosure by the Authority of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new contractor, its advisers and lenders should the Authority decide to re-tender this Agreement;

62.2.8 any application for registration or recording of the Necessary Consents and property registration required;

62.2.9 any disclosure of information by the Authority to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Authority for any purpose related to or ancillary to this Agreement, or to the School Entities or the Relevant LEA;

62.2.10 any disclosure for the purpose of:

62.2.10.1 the examination and certification of the Authority's or the Contractor's accounts; or

62.2.10.2 any examination pursuant to the 1999 Act of the economy, efficiency and effectiveness with which the Authority has used its resources; or

62.2.10.3 complying with a proper request from either Party's insurance advisers, or insurers on placing or renewing any insurance policies; or

62.2.10.4 (without prejudice to the generality of clause 62.2.4) compliance with the FOIA and/or the Environmental Information Regulations,

provided that neither clauses 62.2.10.4 nor 62.2.4 shall permit disclosure of Confidential Information otherwise prohibited by clause 62.1.3 (Duty of Confidentiality) where that information is exempt from disclosure under section 41 of the FOIA; and

62.2.11 any disclosure by the Authority of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required by (i) the ICT Services Provider for the performance of its obligations under the ICT Services Contract or (ii) any Soft Services Provider for the performance of its obligations under its Soft Services Contract.

62.3 Obligations Preserved

Where disclosure is permitted under clause 62.2 (Permitted Disclosure) (other than clauses 62.2.2, 62.2.4, 62.2.5, 62.2.8 and 62.2.10) the Party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

62.4 Audit

For the purposes of:

62.4.1 the examination and certification of the Authority's accounts;

62.4.2 the Audit Commission Act 1998 (and any other Legislation relating to the inspection, examination and auditing of the Authority's accounts); and

62.4.3 an examination pursuant to the 1999 Act of the economy, efficiency and effectiveness with which the Authority has performed its functions,

the Audit Commission may examine such documents as he or it may reasonably require which are owned, held or otherwise within the control of the Contractor and any sub-contractor and may require the Contractor and any sub-contractor to produce such oral or written explanations as he or it considers necessary.

62.5 Exploitation of Information

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 purposes of this Agreement, except with the written consent of the Authority.

62.6 Information about Pupils, Staff and Governors

Where the Contractor, in carrying out its obligations under this Agreement, is provided with information relating to Pupils, staff or governors or the School Entities 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 Pupil, member of staff or governor or member of the School Entity and has obtained the prior written consent of the Authority.

62.7 Expiry

On or before the Expiry Date or the Termination Date, the Contractor shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any Pupil, member of staff or governor or the School Entities, including any documents in the possession, custody or control of a sub-contractor, are delivered up to the Authority.

62.8 Disclosure by Audit Commission

The Parties acknowledge that the Audit Commission has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.

62.9 The provisions of this clause 62 are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

62.10 Freedom of Information

62.10.1 The Contractor acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall facilitate the Authority's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in clauses 62.10.2 to 62.10.4 (inclusive).

62.10.2 Where the Authority receives a Request for Information in relation to Information that the Contractor is holding on its behalf the Authority shall transfer to the Contractor such Request for Information that it receives as soon as practicable and in any event within [five (5)] Business Days of receiving a Request for Information and the Contractor shall:

62.10.2.1 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 [ten (10)] Business Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and

62.10.2.2 provide all necessary assistance as reasonably requested by the Authority in connection with any such Information, to enable the Authority to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.

62.10.3 Following notification under clause 62.10.2 and up until such time as the Contractor has provided the Authority with all the Information specified in clause 62.10.2.1, 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:

~~62.10.3.1~~ **62.10.3.1** whether the Information is exempt from disclosure under the FOIA and the Environmental Information Regulations; and

~~62.10.3.2~~ **62.10.3.2** whether the 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.

62.10.4 The Contractor shall ensure that all Information held on behalf of the Authority is retained for disclosure for at least [] years from the date it is acquired and shall permit the Authority to inspect such Information as requested from time to time.

62.10.5 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.

62.10.6 The Contractor acknowledges that any lists provided by him listing or outlining Confidential Information, are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of FOIA and the Environmental Information Regulations.

62.10.7 In the event of a request from the Authority pursuant to clause 62.10.2, 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 12(1) of the FOIA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in Section 12(1) of the FOIA and as set out in the Fees Regulations the 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 FOIA. 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 the Authority is itself entitled to reimbursement of such costs in accordance with the Authority's own FOIA policy from time to time.

62.10.8 The Contractor acknowledges that (notwithstanding the provisions of clause 62) the Authority may, acting in accordance with the Code of Practice on the Discharge of Public Authorities' Functions under Part I of the Freedom of Information Act 2000 (the **FOIA Code**), be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning the Contractor or the Project:

62.10.8.1 in certain circumstances without consulting with the Contractor; or

62.10.8.2 following consultation with the Contractor and having taken its views into account,

provided always that, where clause 62.10.8.1 applies, the Authority shall, in accordance with the recommendations of the FOIA Code, draw this to the attention of the Contractor prior to any disclosure.

63 INDEMNITIES, GUARANTEES AND CONTRACTUAL CLAIMS

63.1 Contractor's Indemnity

63.1.1 The Contractor shall, subject to clause 63.2 (Contractor not Responsible), be responsible for, and shall release and indemnify the Authority or any Authority Related Party or the Relevant LEA on demand from and against all liability for Direct Losses arising from:

63.1.1.1 death or personal injury;

63.1.1.2 loss of or damage to property (including property which is in the ownership or control of the Authority or the School Entity or the Relevant LEA and on or adjacent to a Site (including the ICT Assets), referred to as **Authority Property**) but excluding the, land, buildings, plant, equipment^{158,164} and other assets which are the responsibility of the Contractor to provide under this Agreement (other than Contractor Equipment) and which form part of the Schools; and

63.1.1.3 third party actions, claims and/or demands (other than any which are the subject of the indemnity in clause 63.1.2) brought against the Authority or any Authority Related Party or the Relevant LEA including by the ICT Services Provider or the Soft Services Provider,

which may arise out of, or in consequence of, the design, construction, operation or maintenance of the Sites or the performance or non-performance by the Contractor of its obligations under this Agreement or the presence on the Site or Authority Property of the Contractor or any Contractor Related Party.

63.1.2 The Contractor shall, subject to clause 63.2 (Contractor not Responsible), be responsible for, and shall release and indemnify the Authority or any Authority Related Party or the Relevant LEA, on demand from and against all liability for Direct Losses and Indirect Losses arising from third party actions, claims or demands (as described in clause 63.1.1.3) brought against the Authority or

¹⁵⁸164 Where the Contractor provides but does not maintain or replace certain equipment the Authority should consider whether to carve that equipment out so that it is covered by the indemnity.

any Authority Related Party or the Relevant LEA for breach of statutory duty which may arise out of, or in consequence of a breach by the Contractor of its obligations under this Agreement to the extent that there are no other remedies available to the Authority under this Agreement.

63.2 Contractor not Responsible

The Contractor shall not be responsible or be obliged to indemnify the Authority:

- 63.2.1** for any matter referred to in clause 63.1 (Contractor's Indemnity) that arises as a direct result of the Contractor acting on a written notice issued by the Authority (and, for the purposes of this clause 63.2.1, clause 1.6 (Responsibility for Related Parties) shall not apply);
- 63.2.2** for any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Authority or any Authority Related Party or the Relevant LEA (other than to the extent such negligence or wilful misconduct would not have occurred but for a breach by the Contractor of its obligations under this Agreement) or by the breach of the Authority of its obligations under this Agreement; ~~or~~
- 63.2.3** to the extent that any cost and expense related to any injury, loss or damage, is the responsibility of the Authority pursuant to clause 64 (Damage to the Facilities); ~~or~~
- 63.2.4** in respect of any claim made pursuant to clause 63.1.2 (Contractor's Indemnity) to the extent that, when taken together with any other claims made under that clause over the five previous years, the amount of the Contractor's Uninsured Losses exceeds one million five hundred thousand pounds (£1,500,000) (indexed).

63.3 Limitation of Indemnity

An indemnity by either Party under any provision of this Agreement shall be without limitation to any indemnity by that Party under any other provision of this Agreement.

63.4 Notification of Claims

Where either Party (the Indemnified Party) wishes to make a claim under this Agreement against the other (the Indemnifying Party) in relation to a claim made against it by a third party (a Third Party Claim), the Indemnified Party shall give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim.

63.5 Conduct of Claims

Subject to the rights of the insurers under the Required Insurances, the Indemnifying Party may at its own expense and with the assistance and co-operation of the Indemnified Party have conduct of the Third Party Claim including its settlement and the Indemnified Party shall not, unless the Indemnifying Party has failed to resolve the Third Party Claim within a reasonable period, take any action to settle or prosecute the Third Party Claim.

63.6 Costs of Claims

The Indemnifying Party shall, if it wishes to have conduct of any Third Party Claim, give reasonable security to the Indemnified Party for any cost or liability arising out of the conduct of the Third Party Claim by the Indemnifying Party.

63.7 Mitigation

The Indemnified Party shall at all times take all reasonable steps to minimise and mitigate any loss for which the Indemnified Party is entitled to bring a claim against the Indemnifying Party pursuant to this Agreement.

63.8 Sub-Contractor Losses

Where:

63.8.1 a Sub-Contractor is entitled to claim any compensation and/or relief from the Contractor under the Sub-Contracts; and

63.8.2 the Contractor subsequently makes a claim against the Authority under this Agreement in relation to such compensation and/or relief,

the Authority waives any right to defend the Contractor's claim on the ground that the Contractor is only required to pay compensation or grant relief to the Sub-Contractor under the Sub-Contracts to the extent that the same is recoverable from the Authority.

64 DAMAGE TO THE FACILITIES

64.1 Accidental Damage and Vandalism

Without prejudice to the obligations of the Contractor to repair, maintain and replace the Schools and subject to clause 64.5, as between the Authority and the Contractor:

64.1.1 the Authority will have responsibility for the cost of damage to land, buildings, plant, equipment and other assets that are the responsibility of the Contractor to provide and maintain under this Agreement to the extent that the damage was not caused or contributed to by:

64.1.1.1 any act or negligence of the Contractor or a Contractor Related Party; or

64.1.1.2 a breach by the Contractor or a Contractor Related Party of this Agreement (including any failure to monitor or provide the Services),

and that such damage:

64.1.1.3 does not constitute fair wear and tear; and

64.1.1.4 does not arise as a result of the damaged item being used for its reasonable and proper purpose or an Area being used for its reasonable and proper purpose; and

64.1.1.5 that the cost of such damage is either:

64.1.1.5.1 of a value below the level of the deductible of the Required Insurance (up to the maximum deductible specified in the Required Insurances); or

64.1.1.5.2 ~~is~~ not covered by the insurances taken out, or which should have been taken out by the Contractor in accordance with this Agreement,

provided that the Authority shall be liable for any excess or deductible (up to the amount of any maximum deductible specified in the Required Insurances) which is payable as a result of any Authority Damage which has resulted in a Repair Cost being incurred where such Repair Cost has been funded under any such insurance; and

64.1.2 the Contractor shall be responsible for the cost of all damage to land, buildings, plant, equipment and other assets that are the responsibility of the Contractor to provide and maintain under this Agreement that is not the responsibility of the Authority pursuant to this clause 64.1.

64.2 Upon the discovery of any damage the Contractor shall:

64.2.1 record any relevant details of the damage (including photographs if necessary);

64.2.2 as soon as is practicable or within such later time as instructed by the Authority's Representative, reinstate, replace or make good the damage returning the damaged item to its original standard (or equivalent) in accordance with the relevant provisions of this Agreement including where relevant in accordance with clause 66 (Reinstatement and Change of Requirement after Insured Event); and

64.2.3 as soon as practicable notify the relevant ~~headteacher~~¹⁵⁹ School's Representative, and the Contractor and the ~~headteacher~~ School's Representative shall form an initial view to inform the decision to be made between the Contractor and the Authority's Representative pursuant to clause 64.3 as to whether or not the damage constitutes Authority Damage. If despite using reasonable efforts to discuss the damage with the ~~headteacher~~ School's Representative, the Contractor has been unable to do so within two (2) hours of discovering the relevant damage, the Contractor shall make reasonable efforts to locate the ~~headteacher~~ School's Representative's alternate (as may be nominated from time to time) who shall engage with the Contractor for the purposes of this clause 64.2.3 in substitution for the ~~headteacher~~ School's Representative. Where neither the ~~headteacher~~ School's Representative nor the ~~headteacher~~ School's Representative's alternate can be located within three (3) hours of discovering the relevant damage, the Contractor shall record the details of the damage as required by this clause 64.2.3 and assess (acting reasonably) whether and if so why the damage constitutes Authority Damage and shall notify the Authority of its assessment.

64.3 The Contractor's Representative and the Authority's Representative shall, as soon as reasonably practicable following the discovery of any damage in accordance with clause 64.2 meet to discuss whether such damage is Authority Damage and whether there should be an extension of the Rectification Periods pursuant to Part XII of Schedule 6 (Payment Mechanism) and, if so, what reasonable extension should be agreed. Where the Contractor's Representative and the Authority's Representative:

64.3.1 agree that the relevant damage constitutes Authority Damage, the Contractor shall be entitled to issue an invoice in respect of its reasonable and demonstrable costs incurred in reinstating the damage, but only in respect of

¹⁵⁹ ~~Consider a nominated representative where the headteacher is unavailable.~~

those costs that are the responsibility of the Authority under clause 64.1 (Accidental Damage and Vandalism);

- 64.3.2** do not agree that the relevant damage constitutes Authority Damage, the matter shall be referred to the Dispute Resolution Procedure for resolution and if the dispute is resolved in the Contractor's favour, the Contractor shall be permitted to submit an invoice in respect of its reasonable and demonstrable costs incurred in repairing the damage, but only in respect of those costs that are the responsibility of the Authority under clause 64.1 (Accidental Damage and Vandalism);
- 64.3.3** agree an extension to the applicable Rectification Period in accordance with clause 64.3, such Rectification Period shall apply in respect of the relevant damage for the purposes of Schedule 6 (Payment Mechanism); or
- 64.3.4** do not agree either that there should be an extension to the relevant Rectification Period or what the extension should be, the matter shall be referred to the Dispute Resolution Procedure.
- 64.4** Any invoice submitted to the Authority pursuant to clause 64.3 shall be supported by any relevant information recorded pursuant to clause 64.2.1, and may be in respect of multiple incidents of damage. The Authority shall pay any such invoice within twenty (20) Business Days of receipt by the Authority of the invoice and supporting information.
- 64.5** If any Authority Damage is of such a minor nature (when considered item by item and in aggregate) that it can be remedied by the Contractor without incurring any additional costs through the use of its site-based resources during their normal working hours and without adversely affecting the ability of the Contractor to perform the Services, then the cost of rectifying such damage shall be for the account of the Contractor.
- 64.6** Any disputes between the Parties arising from this clause 64 shall be referred to the Dispute Resolution Procedure.
- 64.7** In relation to any Repair Cost which has been funded or partly funded by the Authority or under any Required Insurance (Damage Funding) the Contractor shall take such funding and the timing of such repair or replacement into account in preparing and agreeing with the Authority the Schedule of Programmed Maintenance and any savings shall be offset against any future Estimated Increased Maintenance Costs pursuant to clause 23.4.7 (Schedule of Programmed Maintenance). If there are no Estimated Increased Maintenance Costs pursuant to clause 23.4.7 (Schedule of Programmed Maintenance), the savings shall be shared equally between the Contractor and the Authority.
- 64.8** At the end of each Academic Year the Contractor shall supply to the Authority an account of any damage and associated Repair Costs and Damage Funding, as well as money spent or saved or to be spent or saved in accordance with the Schedule of Programmed Maintenance.
- 64.9** On every fifth (5th) anniversary of the first Services Availability Date the Contractor shall provide a consolidated and reconciled account of the accounts referred to in clause 64.8. If such account shows that in respect of the preceding five (5) year period there was or in respect of the next five (5) year period there is likely to be a saving in the money needed to be spent by the Contractor in complying with its obligations under this Agreement because of the Damage Funding then the Contractor will within thirty (30) days after submission of the account pay to the Authority half of such saving.
- 64.10** The Authority shall be responsible for the cost of damage to any separate facilities erected on the Site by or on behalf of the Authority pursuant to paragraphs 4.3 of Part 2, 8.3 of Part 3 or 4.6.2 of Part 4, in each case of Schedule 24 (Change Protocol) (the Separate

Facilities), except, subject to clause 64.11, to the extent that such damage has been caused or contributed to by any act, omission or negligence of the Contractor or a Contractor Related Party or a breach by the Contractor or a Contractor Related Party of this Agreement (including a failure to provide the Services).

- 64.11** The Contractor shall not be responsible or otherwise liable in respect of any claim made by the Authority for the cost of damage to any Separate Facilities to the extent that the Contractor's liability for such cost (excluding the cost of damage recovered from the proceeds of any Required Insurance or any other insurance held by the Contractor or a Contractor Related Party) exceeds ~~£10,000~~ indexed for each and every claim or series of related claims arising from the same incident whether made under this clause 64, clause 63.1.1.2 or otherwise.

65 INSURANCE¹⁶⁰

65.1 Requirement to Maintain

The Contractor shall, in relation to a School, prior to carrying out of any building or demolition work at that School, take out and maintain or procure the maintenance of the insurances described in Part 1 of Schedule 14 (Insurances) and any other insurances as may be required by law. These insurances must be effective in each case not later than the date on which the relevant risk commences.

- 65.2** The Contractor shall, in relation to each School, during the Services Period take out and maintain or procure the maintenance of the insurances described in Part 2 of Schedule 14 (Insurances) and any other insurances as may be required by law.

65.3 Obligation on Parties

Neither Party to this Agreement shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co-insured or an additional insured person.

65.4 Nature of the Insurances^{164,165}

With the exception of the insurances required by law, the insurances referred to in clauses 65.1 (Requirement to Maintain) and 65.2 (Requirement to Maintain) shall:

- 65.4.1** name the Contractor and the School Entities as co-insured parties with any other party maintaining the insurance as required by Part 1 and Part 2 of Schedule 14 (Insurances);
- 65.4.2** ~~provide for non-vitiation protection in respect of any claim made by the Authority or the School Entities as co-insured parties in accordance with endorsement 2 in Part 3 of Schedule 14 (Insurances)~~};
- 65.4.3** contain a clause waiving the insurers' subrogation rights against the Authority and the School Entities and their employees and agents in accordance with endorsement 2 in Part 3 of Schedule 14 (Insurances);
- 65.4.4** provide for thirty (30) days¹ prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with endorsement 1 in Part 3 of Schedule 14 (Insurances); and

¹⁶⁰ ~~Insurance clause subject to review by HMT.~~

^{164,165} ~~To be reviewed following insurance advice on the insured parties, eg. Local Authority.~~

65.4.5 in respect of the Physical Damage Policies provide for payment of any proceeds received by the Contractor to be applied in accordance with clause 66 (Reinstatement and Change of Requirement after Insured Event).

65.5 The Contractor shall ensure that the insurances referred to in clauses 65.1 and 65.2 (Requirement to Maintain) shall name the Authority as a co-insured for its separate interest as required by Part 1 and Part 2 of Schedule 14 (Insurances).

65.6 Evidence of Policies

The Contractor shall provide, to the Authority:

65.6.1 copies on request, of all insurance policies referred to in clauses 65.1 and 65.2 (Requirement to Maintain) (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;

65.6.2 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 65 and Schedule 14 (Insurances); and

65.6.3 on or before the date of expiry of any insurance required by clauses 65.1¹⁶²₁₆₆ and 65.2 (Requirement to Maintain), satisfactory evidence that the relevant insurance has been or is being renewed.

65.7 Renewal Certificates

Renewal certificates in relation to any of the insurances required by clause 65.1 and 65.2 (Requirement to Maintain) 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 on or before the renewal date.

65.8 Breach

If the Contractor is in breach of clauses 65.1 or 65.2 (Requirement to Maintain) the Authority may pay any premiums, fees, broker's costs or other expenses required to keep such insurance in force or itself procure such insurance and may, in either case, recover such amounts from the Contractor on written demand.

65.9 Notification of Claims

The Contractor shall give the Authority notification within ten (10) Business Days after any claim in excess of [twenty thousand pounds (£20,000)] (indexed) on any of the Required Insurances or which, but for the application of the applicable policy excess, would be made on any of the Required Insurances and (if required by the Authority) give full details of the incident giving rise to the claim.

65.10 Limit of Liability

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

¹⁶²₁₆₆ Applies to any of the relevant insurances which are renewable during the construction period such as terrorism, which is typically available on an annual basis only.

65.11 Premiums

Save where expressly set out in this Agreement, the insurance premiums for the Required Insurances and the amount of any loss that would otherwise be recoverable under any of the Required Insurances but for the applicable uninsured deductible and limit of indemnity in respect of such insurance shall at all times be the responsibility of the Contractor.

65.12 Authority Approval

The Required Insurances shall be effected with insurers approved by the Authority, such approval not to be unreasonably withheld or delayed.

65.13 Professional Indemnity Insurance^{463,167}

In addition to the Required Insurances, the Contractor undertakes to procure that the Building Contractor, its Principal Building Sub-Contractor(s) and members of the Professional Team take out and maintain in force professional indemnity insurance (PI Insurance), provided that such insurance is generally available in the market to members of the relevant party's profession at commercially reasonable rates and provided further that payment of any increased or additional premiums required by insurers by reason of the relevant party's own claims record or other acts, omissions, matters or things peculiar to the relevant party will be deemed to be within the reasonable rates and, where such insurance is effected, and to:

65.13.1 provide evidence satisfactory to the Authority (as and when reasonably required by the Authority^{464,168}) of the PI Insurance being in full force and effect from the date of this Agreement until the date twelve (12) years from and including the completion of all the Works (such evidence to include details of the cover) including confirmation of territorial limits, levels of excess, insurers, policy number and indemnity limit (which shall be a minimum of [ten million pounds £10,000,000^{465,169}]) either each and every loss or in the aggregate (if in the aggregate then in any one (1) year of insurance a minimum of one (1) automatic reinstatement of the aggregate indemnity limit is required),

65.13.2 provide the Authority with notice of:

~~65.13.2.1~~ **65.13.2.1** any cancellation of the PI Insurance not less than thirty (30) days prior to the relevant cancellation date; and

~~65.13.2.2~~ **65.13.2.2** any adverse material changes to or suspension of cover relevant to the Project not less than thirty (30) days prior to the relevant change or suspension; and

65.13.3 inform the Authority as soon as reasonably practicable of any claim under the PI Insurance in respect of the Project of in excess of [one million pounds (£1,000,000)⁴⁶⁶] (such sum to be gross of any deductible), provide such information to the Authority as the Authority may reasonably require in

^{463,167} Not to be a Required Insurance.

^{464,168} Authority to consider with advisers whether to require evidence of renewal of PI insurance on fixed dates or within a set number of days of renewal. If no fixed dates are set out in the contract then the Authority should, as a matter of good practice, diarise to require evidence of renewal.

^{465,169} If it is agreed with the Authority (on advice from its insurance adviser) that PI levels of less than £10m are appropriate in the case of particular Principal Building Sub-Contractors or members of the Professional Team then a table showing the different levels of PI cover should be inserted here prior to Close of Dialogue. It is not sufficient to simply refer to the levels set out in the collateral warranties or leave levels open to be agreed. Please also refer to the footnotes in the collateral warranties (Parts 2 & 3 of Schedule 7).

~~⁴⁶⁶ Authority's insurance adviser to consider.~~

relation to such claim and provide notice of any potential breach of the aggregate limit.

65.14 Claims⁴⁶⁷₁₇₀

The Contractor shall where it is obliged to effect insurance under this clause 65 not bring any claim or action against the Authority (or any Authority Related Party other than any contractor or sub-contractor (of any tier) of the Authority or of any Authority Related Party) in respect of any loss or damage in circumstances where the Contractor is able to recover such loss or damage under such insurance (or where it would have been able to recover such loss had it been complying with its obligations under this Agreement) provided that this clause 65.14 shall not by itself prevent the Contractor from claiming against the Authority (or any Authority Related Party) 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 level of such insurance required by this Agreement.

65.15 Insurance Review Procedure

65.15.1 This procedure shall be used to determine whether the Authority shall bear any increase or benefit from any decrease in the cost of taking out and maintaining the Relevant Insurances.

65.15.2 The Contractor's insurance broker shall prepare a report on behalf of both the Contractor and the Authority (the **Joint Insurance Cost Report**). The Joint Insurance Cost Report is to be prepared at the Contractor's expense and should, as a minimum, contain the following information for the relevant Insurance Review Period:

~~65.15.2.1~~ 65.15.2.1 a full breakdown of the Actual Relevant Insurance Cost;

~~65.15.2.2~~ 65.15.2.2 a full breakdown of the Base Relevant Insurance Cost;

~~65.15.2.3~~ 65.15.2.3 a spreadsheet (the Insurance Summary Sheet) detailing separately:

~~65.15.2.3.1~~ 65.15.2.3.1 the sum(s) insured/limit of indemnity (i.e. rateable factor) for each of the Relevant Insurances;

~~65.15.2.3.2~~ 65.15.2.3.2 the premium rate for each of the Relevant Insurances;

~~65.15.2.3.3~~ 65.15.2.3.3 the net premium paid (or to be paid) for each of the Relevant Insurances (i.e. excluding both insurance premium tax and broker's fees and commissions);

~~65.15.2.3.4~~ 65.15.2.3.4 the deductible(s) for each Relevant Insurance; and

~~65.15.2.3.5~~ 65.15.2.3.5 details of any claims (paid or reserved) (including incident date, type and quantum) in

⁴⁶⁷₁₇₀ To be updated following consideration of insured parties such as Local Authorities.

excess of {twenty thousand pounds (£20,000) indexed)¹⁶⁸};

~~65.15.2.4~~ 65.15.2.4 an assessment and quantification of each Project Insurance Change and Vandalism Insurance Change, together with reasons therefor;

~~65.15.2.5~~ 65.15.2.5 full details of any Portfolio Cost Savings;

~~65.15.2.6~~ 65.15.2.6 any other reasons that the Contractor believes may have caused a change (by way of increase or decrease by reference to the Base Relevant Insurance Cost) in the Actual Relevant Insurance Cost;

~~65.15.2.7~~ 65.15.2.7 the opinion of the Contractor's insurance broker as to the reasons why the Actual Relevant Insurance Cost has varied from the Base Relevant Insurance Cost, specifying the impact of each of the factors and quantifying the amount attributable to each factor specified above;

~~65.15.2.8~~ 65.15.2.8 the calculation of the Insurance Cost Differential and any Exceptional Cost or Exceptional Saving arising from this calculation;

~~65.15.2.9~~ 65.15.2.9 evidence satisfactory to the Authority (acting reasonably) of any changes to circumstances generally prevailing in the Relevant Insurance Market that are claimed to account for the Insurance Cost Differential; and

~~65.15.2.10~~ 65.15.2.10 details of movements in the CBS Private Capital non marine index, plus, if available from other appropriate sources, details of changes in insurance cost across the PFI/PF2 market as a whole.

65.15.3 The Contractor shall procure that its insurance broker, no later than the date which is ten (10) Business Days after the Insurance Review Date, delivers to the Authority at the same time as it delivers to the Contractor at least two copies of the Joint Insurance Cost Report. At the same time the Contractor ~~should~~shall send a copy of its Insurance Summary Sheet to HM Treasury ~~private finance unit or its nominee~~at PPI-Insurance@hmtreasury.gsi.gov.uk or such other address as HM Treasury shall specify from time to time. Following receipt of the Joint Insurance Cost Report the Authority shall notify the Contractor in writing within fifteen (15) Business Days whether or not it accepts the Joint Insurance Cost Report including full details of any disagreement. If the Authority does not provide such notification and/or details of any disagreement to the Contractor within fifteen (15) Business Days, the Authority shall be deemed to have accepted the Joint Insurance Cost Report. If the Authority disagrees with any item in the Joint Insurance Cost Report, the Parties shall use their respective reasonable endeavours acting in good faith to agree the contents of the Joint Insurance Cost Report. If the Parties fail to agree the contents of the Joint Insurance Cost Report within thirty five (35) Business Days from the date it was delivered to the Authority, the matter shall be resolved pursuant to clause 68 (Dispute Resolution) provided always that references in clause 68.4 (Identity of Adjudicator) to an expert shall be construed as references to an independent insurance expert

¹⁶⁸ ~~Note: amount to correspond to figure in clause 65.9.~~

agreed by the Parties or, in the absence of agreement, appointed by the President for the time being of the Chartered Institute of Arbitrators.

- 65.15.4** The Authority may make the Joint Insurance Cost Report available to any of HM Treasury's agents or advisers for insurance cost verification, benchmarking or similar purpose.

65.16 Exceptional Cost ~~and~~ Exceptional Saving and Vandalism Insurance Changes

- 65.16.1** If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Cost, the Authority shall within ~~thirty~~twenty (~~30~~20) Business Days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Contractor equal to eighty-five per cent (85%) of the Exceptional Cost.

- 65.16.2** If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Saving, the Contractor shall within ~~thirty~~twenty (~~30~~20) Business Days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Authority equal to eighty-five per cent (85%) of the Exceptional Saving.

- 65.16.3** Following the completion of the Insurance Review Procedure, if it is agreed or determined that there is neither an Exceptional Cost nor an Exceptional Saving, any Insurance Cost Differential shall be borne by or benefit the Contractor.

- 65.16.4** If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is a Vandalism Insurance Change and that sum is a positive number, the Authority shall within thirty (30) Business Days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Contractor equal to the Vandalism Insurance Change.

- 65.16.5** If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is a Vandalism Insurance Change and that sum is a negative number, the Contractor shall within thirty (30) Business Days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Authority equal to the Vandalism Insurance Change.

65.17 Insurance Cost Index

If at any time an Insurance Cost Index is published and intended for use in PFI/PF2 contracts of a similar nature to this Agreement, the Parties shall meet with a view to agreeing (i) its application to the Project, taking into account any relevant guidance issued by HM Treasury and (ii) how a Portfolio Cost Saving may be accounted for when the index is in use.

65.18 Broker's Letter of Undertaking

- 65.18.1** On the date of this Agreement and within thirty (30) days following each renewal of Required Insurances, the Contractor shall deliver to the Authority a broker's letter of undertaking signed by the insurance broker to the Contractor in the Agreed Form as set out in Part 4 of Schedule 14 (Broker's Letter of Undertaking).

- 65.18.2** The Contractor shall procure that any broker(s) appointed during the currency of this Agreement shall:

~~65.18.2.1~~ 65.18.2.1 owe the Authority such obligations and give to the Authority such warranties as are substantially the same as those set out in Part 4 of Schedule 14 (Broker's Letter of Undertaking) and in this clause 65 (Insurance); and

~~65.18.2.2~~ 65.18.2.2 enter into an agreement in substantially the same form as that set out in Part 4 of Schedule 14 (Broker's Letter of Undertaking).

65.19 Model for self-insurance

65.19.1 The Authority and the Contractor agree (subject to clause 65.19.2 and if requested by the Authority) to explore in good faith a model for Authority self-insurance based upon:

~~65.19.1.1~~ 65.19.1.1 the Authority becoming principally responsible for the cover provided by either or both of the following insurances that are in place after the Services ~~Commencement~~Availability Date, namely:

~~65.19.1.1.1~~ 65.19.1.1.1 property damage insurance (but not where and to the extent that Contractors' 'All Risks' Insurance is in force); and

~~65.19.1.1.2~~ 65.19.1.1.2 business interruption insurance,

and if the Authority so requires delay in start up insurance that applies during the Works Period and insurance against any other risk that the Authority determines;

~~65.19.1.2~~ 65.19.1.2 such self-insurance being subject to insured interests, sums insured, deductibles, limits, periods of insurance, cover feature and extensions, exclusions and endorsements to substantially the same effect as if insurance were maintained under the provisions of this Agreement;

~~65.19.1.3~~ 65.19.1.3 a reduction in the Unitary Charge to reflect the self-insurance model agreed upon and all insurance premia savings arising;

~~65.19.1.4~~ 65.19.1.4 such protections as may be reasonably required by Senior Lenders and any Contractor Related Party in consequence of any self-insurance model agreed upon;

~~65.19.1.5~~ 65.19.1.5 a process for reverting to commercial insurance if required by the Authority; and

~~65.19.1.6~~ 65.19.1.6 such (if any) guidance as may be issued by or on behalf of Government,

and if such a self-insurance model can be developed and agreed between the Authority and the Contractor to amend this Agreement ~~{and~~ {if relevant the Project Documents~~}~~ to reflect such self-insurance model.

65.19.2 This clause 65.19 shall not, save in relation to the obligation to act in good faith, have legally binding effect.

66 REINSTATEMENT AND CHANGE OF REQUIREMENT AFTER INSURED EVENT

66.1 All insurance proceeds received under any policy referred to in paragraph 1 of Part 1 and paragraph 1 of Part 2 of Schedule 14 (Insurances) (the Physical Damage Policies) shall be applied to repair, reinstate or replace each part or parts of the Assets in respect of which such proceeds were received.

66.2 Joint Account

The Contractor shall set up and at all times maintain an account in the joint names of the Authority and the Contractor (the **Joint Insurance Account**). All insurance proceeds paid under any Physical Damage Policy in respect of a single event (or a series of related events) in an amount in excess of £~~[minimum level]~~100,000 indexed shall be paid into the Joint Insurance Account.

66.3 Obligations^{469,171}

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) ~~[in respect of that School]~~ (the **Relevant Incident**) in an amount in excess of £~~[~~100,000 (indexed):

66.3.1 the Contractor shall deliver to the Authority as soon as practicable and in any event within twenty (20) Business 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 Outline**) the School(s) which is or are the subject of the relevant claim or claims in accordance with this clause 66.3 provided that such repair, reinstatement or replacement shall not include property belonging to the Soft Services Provider and/or the ICT Assets. The Reinstatement Outline shall set out:

66.3.1.1 if not the Building 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

66.3.1.2 the proposed 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 (such approval not to be unreasonably withheld or delayed).

66.3.2 the Authority shall within ten (10) Business Days of receipt of the Reinstatement Outline notify the Contractor in writing that:

66.3.2.1 it is satisfied that the Reinstatement Outline will enable the Contractor to comply with its obligations to carry out the Reinstatement Works within a reasonable timetable, and that the identity of any person (set out in the Reinstatement Outline) that may be appointed to effect the Reinstatement Works is approved;

66.3.2.2 the identity of any person (set out in the Reinstatement Outline) that may be appointed to effect the Reinstatement Works is not approved together with its reasons for such non-approval in sufficient detail so as to enable the Contractor to understand the

^{469,171} Economic Reinstatement Tests will not be accepted on PSBP.

nature and extent of such non-approval and to assess whether the Authority's approval under clause 66.3.1.1 has been unreasonably withheld;

66.3.2.3 the Authority does not approve the Reinstatement Outline together with its reasons for such non-approval, in sufficient details so as to enable the Contractor to understand the nature and extent of such non-approval and to assess whether the Authority's approval under clause 66.3.1.2 has been unreasonably withheld; or

66.3.2.4 if the Authority does not make one (1) of the said responses within the period specified in clause 66.3.2 it shall be deemed to have approved the Reinstatement Outline, save where the Authority has reasonably requested any further information from the Contractor, in which case the time limit outlined in clause 66.3.2 will be deemed to commence upon receipt of such information by the Authority.

66.3.3 If the Authority gives notice of non-approval in accordance with clauses 66.3.2.2 or 66.3.2.3 the Contractor may amend and re-submit the Reinstatement Outline (the **Amended Reinstatement Outline**) to the Authority for its reconsideration and the Authority shall give its approval or non-approval within five (5) Business Days of the submission of the Amended Reinstatement Outline to the Authority. If the Authority does not approve the Amended Reinstatement Outline, it shall provide reasons for such non-approval in sufficient detail so as to enable the Contractor to understand the nature and extent of such non-approval and to assess whether the Authority's approval has been unreasonably withheld.

66.3.4 In the event that the Amended Reinstatement Outline or a person proposed to carry out the Reinstatement Works is not approved by the Authority in accordance with clause 66.3.3 the Contractor may submit the Amended Reinstatement Outline to the Dispute Resolution Procedure in order for it to be determined whether the Authority's approval under clause 66.3.3 was unreasonably withheld.

66.3.5 The Reinstatement Outline or the Amended Reinstatement Outline (as the case may be) as approved by the Authority pursuant to this clause 66 or as determined pursuant to the Dispute Resolution Procedure shall become the reinstatement plan (the **Reinstatement Plan**).

66.3.6 The Contractor shall effect the Reinstatement Works in accordance with the Reinstatement Plan, and:

66.3.6.1 shall enter into contractual arrangements to effect the Reinstatement Works with the person(s) identified in the Reinstatement Plan;

66.3.6.2 prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Joint Insurance Account (the **Relevant Proceeds**) (together with any interest accrued) may be withdrawn by the Contractor from the Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements entered into to effect the Reinstatement Works and to meet any other reasonable costs and expenses of the Contractor for the sole purposes of funding the Reinstatement Works and the

Parties shall operate the signatory requirements of the Joint Insurance Account 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 Joint Insurance Account for the purposes of funding any Reinstatement Works;

- 66.3.6.3** the Authority agrees and undertakes that, subject to compliance by the Contractor with its obligations under this clause 66, and provided that the Contractor procures that the Reinstatement Works are carried out and completed in accordance with this clause 66.3 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;
- 66.3.6.4** the Authority undertakes to use reasonable endeavours to assist the Contractor in the carrying out of the Reinstatement Plan;
- 66.3.6.5** after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with this clause 66.3 the Authority shall permit withdrawal by the Contractor of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under this clause 66.3 in respect of the Relevant Incident, together with any interest accrued; and
- 66.3.6.6** subject to clause 63 (Indemnities, Guarantees and Contractual Claims), the Contractor shall be solely responsible for the payment of any deficiency.

66.4 Works Carried Out

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

67 RISKS THAT BECOME UNINSURABLE

67.1 Uninsurable Risks

Nothing in clause 65 (Insurance) or this clause 67 shall oblige the Contractor to take out insurance in respect of a risk which is Uninsurable save where the predominant cause of the risk being Uninsurable is any act(s) or omission(s) of the Contractor or a Contractor Related Party.

67.2 Risks Become Uninsurable

If a risk usually covered by construction all risks, material damage, third party liability, business interruption (but excluding loss of profits) or delay in start up (but excluding loss of profits) or statutory insurances, in each case required under this Agreement, becomes Uninsurable then:

- 67.2.1** the Contractor shall notify the Authority within five (5) Business Days of the risk becoming Uninsurable⁴⁷⁰¹⁷²; and

⁴⁷⁰¹⁷² At the Authority's¹ discretion it may elect to use the following alternative wording: "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

67.2.2 if both Parties agree, or it is determined in accordance with the Dispute Resolution Procedure, that the risk is Uninsurable and that:

67.2.2.1 the risk being Uninsurable is not caused by the actions, breaches, omissions or defaults of the Contractor or a ~~sub-contractor~~Contractor Related Party; and

67.2.2.2 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 PFI and/or PF2 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,

then 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).⁴⁷⁴173

67.3 Consequences

67.3.1 If the requirements of clause 67.2 (Risks Become Uninsurable) are satisfied, but the Parties cannot agree as to how to manage or share the risk, then:

67.3.1.1 in respect of ~~such~~ third party liability insurance only, the Authority shall (at the Authority's option) either pay to the Contractor an amount equal to the amount calculated in accordance with clause 52 (Compensation on Termination for Force Majeure) and this Agreement will terminate or elect to allow this Agreement to continue and clause 67.3.1.2 shall thereafter apply in respect of such risk;

67.3.1.2 in respect of ~~such~~ contractor's "all risks" insurance, property damage insurance, third party liability insurance (if the Authority elects to allow the Contract to continue in accordance with clause 67.3.1.1) business interruption (but not loss of profits), delay in start up (but not loss of profits) or statutory insurances this Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to 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 clause 52.1 (Compensation on Termination for Force Majeure) plus (in relation to third party liability insurance only) the amount of insurance proceeds that

event at least 5 Business Days before expiry or cancellation of any existing insurance in respect of that risk⁴⁷⁴173.

⁴⁷⁴173 In discussing this issue, each party shall consider the extent to which it may be deemed to be carrying out insurance business and whether it has the necessary powers and authorisations to do so.

would have been payable whereupon this Agreement will terminate;

67.3.1.3 where pursuant to clause 67.3.1.1 and/or 67.3.1.2 this Agreement continues then the Unitary Charge shall be reduced in each Contract 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 Contract Year prior to it becoming Uninsurable (~~Uninsurable (Indexed~~indexed from the date that the risk becomes Uninsurable). Where the risk is Uninsurable for part of a Contract Year only the reduction in the Unitary Charge shall be pro rated to the number of months for which the risk was Uninsurable; and

67.3.1.4 where pursuant to clauses 67.3.1.1 and/or 67.3.1.2 this Agreement continues, the Contractor shall approach the insurance market at least every four months to establish whether the risk remains Uninsurable. As soon as the Contractor is aware 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 Agreement⁴⁷² and provide the Authority with reasonable evidence of the existence of such insurance¹⁷⁴.

67.3.2 If, pursuant to clause 67.3.1.2, the Authority elects to make payment to Contractor (such that the Agreement will terminate) (the **Relevant Payment**) the Contractor shall have the option (exercisable within twenty (20) Business Days of the date of such election by the Authority) (the **Option Period**) to pay to the Authority on or before the end of the Option Period an amount equal to the insurance proceeds that would have been payable had the 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.

67.4 Increase in Insured Amounts

The limit of indemnity and the maximum deductibles for each of the Required Insurances shall be indexed, provided such limits of indemnity and maximum deductibles shall only be increased on each renewal date such that the limit that is indexed becomes equal to or exceeds the next whole insurable amount or deductible (as the case may be) available in the insurance market.

⁴⁷²174 Additional clauses 67.3.1.5 and 67.3.1.6 may be added at the Authority's discretion as follows:

67.3.1.5: in respect of any period between the Authority receiving notification in accordance with clause 67.2.1 that a TPL Risk has become Uninsurable and the Authority's notification to the Contractor in accordance with clause 67.3.1 in respect of such risk then, provided it is ultimately agreed or determined that the requirements of clause 67.2.2 are satisfied in respect of the Uninsurable TPL Risk and subject to clause 67.3.1.6 below, clause 67.3.1.2 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

67.3.1.6: clause 67.3.1.5 shall only apply provided the Contractor does not unreasonably materially delay (i) agreement and/or determination in accordance with the Dispute Resolution Procedure as to whether the requirements of clause 67.2.2 are satisfied in respect of the Uninsurable TPL Risk and/or (ii) meeting the Authority to discuss the means by which the risk should be managed.

TPL Risk should be defined as 'a risk which is required to be insured under the third party liability insurance policy'.

67.5 Unavailability of Terms or Conditions

67.5.1 If, upon the renewal of any insurance which the Contractor is required to maintain or to procure the maintenance of pursuant to this Agreement:

67.5.1.1 any Insurance Term is not available to the Contractor in the worldwide insurance market with reputable insurers of good standing; and/or

67.5.1.2 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 or omissions of the Contractor and/or any ~~sub-contractors~~Contractor Related Party) then clause 67.5.2 shall apply.

67.5.2 If it is agreed or determined that clause 67.5.1 applies then the Authority shall waive the Contractor's obligations in clause 65 (Insurances) and/or Schedule 14 (Insurances) 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 ~~67.5.1.~~67.5.1 continue to apply to such Insurance Term.

67.5.3 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. Notwithstanding any other provision of this Agreement whatsoever, the costs of such insurance shall be subject to the premium costs sharing mechanism set out at clause 65.15 (Insurance Review Procedure).

67.5.4 [Where the Authority has exercised the waiver pursuant to clause 67.5.2, it shall be entitled to deduct from the Monthly Unitary Charge an amount (the **Adjusted Amount**), such amount being an amount equal to one-twelfth of the amount paid for the particular Insurance Term in the preceding Contract Year (using a reasonable estimate of such amount where a precise figure is not available), less any annual amount paid or payable by the Contractor to maintain and/or procure the maintenance of any (whether full or partial) alternative or replacement insurance in respect of such Insurance Term pursuant to clause 67.5.3.

67.5.5 While clause 67.5.1 applies, the Unitary Charge shall be reduced each Contract Year by the Adjusted Amount, Indexed from the date that the particular Insurance Term is no longer available.]⁴⁷³₁₇₅

⁴⁷³₁₇₅ If insurance is no longer available for a term or condition included as a Required Insurance, the parties may agree that

67.5.6 The Contractor shall notify the Authority as soon as reasonably practicable and in any event within five ~~days~~ (5) Business Days of becoming aware that clauses 67.5.1.1 and/or 67.5.1.2 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). 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.

67.5.7 In the event that clauses 67.5.1.1 and/or 67.5.1.2 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 months to establish whether clause 67.5.1.1 and/or 67.5.1.2 remain applicable to the Insurance Term. As soon as the Contractor is aware that clause 67.5.1.1 and/or 67.5.1.2 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.

68 DISPUTE RESOLUTION

68.1 Disputes

Any dispute arising in relation to any aspect of this Agreement shall be resolved in accordance with this clause 68.

68.2 Consultation

If a dispute arises in relation to any aspect of this Agreement, the Contractor and the Authority shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter.

68.3 Adjudication

Without prejudice to clause 68.2 (Consultation), either Party may give the other notice of its intention to refer the dispute to adjudication (the **Notice of Adjudication**). The Notice of Adjudication shall include a brief statement of the issue to be referred and the redress sought. The Party giving the Notice of Adjudication (the **Referring Party**) shall on the same day and by the same means of communication send a copy of the Notice of Adjudication to an adjudicator selected in accordance with clause 68.4 (Identity of Adjudicator) (the **Adjudicator**).

the Unitary Charge should be reduced to reflect the extent to which the insurance premium payable by the Contractor is lower than it would have been had insurance been effected for the particular term or condition. Whilst the increased risk further to unavailability of a term or condition may reside first and foremost with the Contractor, the Authority's exposure is likely to be increased, as there may be certain circumstances where the Authority bears the risk eg. where an aggrieved party brings a claim against the Authority for an act committed by the Contractor, but insurance proceeds to cover the claim are no longer available on account of the unavailability of a term or condition. The extent to which the Authority may be exposed will depend in part on the indemnity provisions. In addition where there is such a loss, then if the Contractor elects not to reinstate the loss then, depending on the size of the loss, it is possible that the Authority would not be able to terminate for Contractor Default, and be forced to accept instead a reduced service. Given that an Authority's potential exposure will depend on contractual provisions, some of which may be project-specific, an adjustment to the Unitary Charge further to unavailability of a term or condition is not mandatory. It is for the Authority to determine, in conjunction with the insurance and legal advisers, whether the Agreement should contain a Unitary Charge adjustment provision.

68.4 Identity of Adjudicator

The Adjudicator nominated to consider a dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of experts selected in accordance with the following:

- 68.4.1** there shall be two (2) panels of experts, one (1) in respect of construction matters (the Construction Panel) and one (1) in respect of operational and maintenance matters (the Operational Panel). All the experts on each panel shall be wholly independent of the Contractor, the Authority, the relevant Sub-Contractor and any of the major competitors of the Contractor or relevant Sub-Contractor;
- 68.4.2** the Construction Panel shall comprise three (3) experts, who shall be selected jointly by the Contractor and the Authority. Such selection shall take place within twenty (20) Business Days of the Commencement Date;
- 68.4.3** the Operational Panel shall comprise three (3) experts, who shall be selected jointly by the Contractor and the Authority. Such selection shall take place within twenty (20) Business Days of the Commencement Date;
- 68.4.4** if any member of a panel resigns during the Contract Period, a replacement expert shall be selected by the Contractor and the Authority as soon as practicable;
- 68.4.5** In the event that the nominated Adjudicator is unable or unwilling to confirm acceptance of his appointment as Adjudicator within two (2) Business Days of receipt of the Notice of Adjudication, then the Referring Party shall invite the person next in line to act as the Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within two (2) ~~days~~Business Days or if the Parties disagree as to the relevant panel of experts to be used then the Referring Party may apply to the President for the time being of the Chartered Institute of Arbitrators who shall within three (3) Business Days of any such application nominate an Adjudicator to determine the issue set out in the Notice of Adjudication; and
- 68.4.6** if the Authority and the Contractor are unable to agree on the identity of the experts to be selected to the panels, the President for the time being of the Chartered Institute of Arbitrators shall appoint such expert(s) within thirty (30) days of any application for such appointment by either Party.

68.5 Referral of the Dispute

Within seven (7) days of the service of the Notice of Adjudication, or as soon thereafter as the Adjudicator is appointed, the Referring Party shall serve its statement of case (the **Referral Notice**) on the Adjudicator and the other Party (the **Responding Party**). The Referral Notice shall include a copy of this Agreement, details of the circumstances giving rise to the dispute as set out in the Notice of Adjudication, the reasons why the Referring Party is entitled to the redress sought, and the evidence upon which it relies.

68.6 Response to the Referral

The Responding Party shall serve its statement of case (the **Response**) on the Adjudicator and the Referring Party within a period of time to be directed by the Adjudicator. The Response shall include any arguments in response to the Referral Notice of the dispute set out in the Notice of Adjudication and any additional evidence on which the Responding Party relies.

68.7 Procedure

Subject to clause 68.11 (Adjudicator's Powers), 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.

68.8 Adjudicator's Decision

In any event, the Adjudicator shall provide to both Parties his written decision on the dispute, within twenty eight (28) days after the date of receipt of the Referral Notice (or such other period as the Parties may agree). The Adjudicator shall be entitled to extend the said 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 revised, cancelled or varied by the English courts, the Adjudicator's decision shall be binding on both Parties who shall forthwith give effect to the decision.

68.9 Adjudicator's Costs

The Adjudicator's costs of any referral 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 referral, including legal costs and the costs and expenses of any witnesses.

68.10 Adjudicator as Expert

The Adjudicator shall ~~be deemed not to~~ be an arbitrator but shall render his decision as an expert, and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.

68.11 Adjudicator's Powers

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.

68.12 Confidentiality

All information, data or documentation disclosed or delivered by a Party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by clause 62 (Freedom of Information and 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.

68.13 Liability of Adjudicator

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.

68.14 Reference to the Courts

Either Party may (within ninety (90)~~-calendar~~ days of receipt of the Adjudicator's decision or where the Adjudicator fails to give a decision pursuant to clause 68.8 Adjudicator's

Decision) give notice to the other Party of its intention to refer the dispute to the courts of England and Wales for final determination.

68.15 Parties' Obligations

The Parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the dispute and notwithstanding the referral of the dispute for resolution under this clause and shall give effect forthwith to every decision of the Adjudicator and the courts delivered under this clause.

68.16 Similar Disputes

If any dispute arising under this Agreement raises issues which relate to:

68.16.1 any dispute between the Contractor and the Building Contractor arising under the Building Contract or otherwise affects the relationship or rights of the Contractor and/or the Building Contractor under the Building Contract (the **Building Contract Dispute**); or

68.16.2 any dispute between the Contractor and the FM Contractor arising under the FM Agreement or otherwise affects the relationship or rights of the Contractor and/or the FM Contractor under the FM Agreement (the **FM Agreement Dispute**),

then the Contractor may include as part of its submissions made to the Adjudicator or to the courts submissions made by the Building Contractor or by the FM Contractor as appropriate.

68.17 Jurisdiction over Sub-Contractors

The Adjudicator shall not have jurisdiction to determine the Building Contract Dispute or the FM Agreement Dispute but the decision of the Adjudicator and/or the courts shall, subject to clause 68.14 (Reference to the Courts), be binding on the Contractor and the Building Contractor insofar as it determines the issues relating to the Building Contract Dispute and on the Contractor and the FM Contractor insofar as it determines the issues relating to the FM Agreement Dispute.

68.18 Sub-Contractors' Submissions

Any submissions made by the Building Contractor or the FM Contractor shall:

68.18.1 be made within the time limits applicable to the delivery of submissions by the Contractor; and

68.18.2 concern only those matters which relate to the dispute between the Authority and the Contractor under this Agreement.

68.19 Costs

Where the Building Contractor or the FM Contractor makes submissions in any reference before:

68.19.1 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 (2/3) by the Contractor; and

68.19.2 the courts, the costs of the litigation shall be in the discretion of the court.

68.20 Authority's Liability

The Authority shall have no liability to the Building Contractor or the FM Contractor arising out of or in connection with any decision of the Adjudicator or courts or in respect of the costs of the Building Contractor or the FM Contractor in participating in the resolution of any dispute under this Agreement.

68.21 Access to Documents

The Contractor shall not allow the Building Contractor or the FM Contractor access to any document relevant to issues in dispute between the Authority and the Contractor save where:

68.21.1 the document is relevant also to the issues relating to the Building Contract Dispute or the FM Agreement Dispute as the case may be; and

68.21.2 the Contractor has first delivered to the Authority a written undertaking from the Building Contractor and/or the FM Contractor (as appropriate) addressed to the Authority that they shall not use any such document otherwise than for the purpose of the dispute resolution proceedings under this Agreement and that they shall not disclose such documents or any information contained therein to any third party other than the Adjudicator or the courts or any professional adviser engaged by the Building Contractor or the FM Contractor (as appropriate) to advise in connection with the dispute.

69 ORDERING OF GOODS AND SERVICES

Neither Party shall place or cause to be placed any orders with suppliers or otherwise incur liabilities in the name of the other Party or any representative of the other Party.

70 INTELLECTUAL PROPERTY

70.1 Project Data

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~~is requested by the Authority and the Contractor shall ensure that it obtains all necessary licences, permissions and consents to ensure that it can make the Project Data available to the Authority on these terms, for the purposes of:

70.1.1 the provision of education at the relevant School;

70.1.2 the Authority's duties under this Agreement and the Governing Body Agreements;

70.1.3 the provision of the Soft Services and/or the provision of ICT Assets; and

70.1.4 following termination of this Agreement, the design or construction of the Schools, the operation, maintenance or improvement of the Schools and/or the provision of works and/or services the same as or similar to the Works and/or Services,

(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.

70.2 Licence in Respect of Intellectual Property Rights

The Contractor:

70.2.1 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

70.2.2 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 70.2.1 to the Authority,

in both cases, solely for the Approved Purposes.

70.3 Vesting of Intellectual Property Rights

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 Related Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

70.4 Maintenance of Data

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:

70.4.1 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 the Approved Purposes. 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; and

70.4.2 enter into the National Computing Centre's then current multi-licence escrow deposit agreement or standard single licence escrow deposit agreement as appropriate in each case.

70.5 Back-up and safe storage of data

The Contractor shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in clause 70.4 (Maintenance of Data) in accordance with Good Industry Practice. Without prejudice to this obligation, the Contractor shall submit to the Authority's Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and the Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. The Contractor shall comply, and shall cause all Contractor Related Parties to comply, with all procedures to which the Authority's Representative has given its approval. The Contractor may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Authority's Representative, who shall be entitled to object on the basis set out above.

70.6 Indemnity

70.6.1 Where a claim or proceeding is made or brought against the Authority and/or any School Entity which arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or

equipment in connection with the Works, or the Project, infringes any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority and/or any School Entity otherwise than in accordance with the terms of this Agreement, the Contractor shall indemnify the Authority and/or any School Entity at all times from and against all Direct Losses and Indirect Losses arising as a result of such claims and proceedings and the provisions of clause 63 (Indemnities, Guarantees and Contractual Claims) shall apply.

70.6.2 Where a claim or proceeding is made or brought against the Contractor which arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Works or the Project infringes any rights in or to any Intellectual Property Rights of a third party then, if such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority and/or any School Entity otherwise than in accordance with the terms of this Agreement and otherwise than as a result of a breach of this clause 70 by the Contractor then the Authority shall indemnify the Contractor at all times from and against all Direct Losses and Indirect Losses arising as a result of such claims and proceedings.

70.7 Licence to Contractor

The Authority hereby grants to the Contractor a non-transferable, non-exclusive, royalty free licence (carrying the right to grant sub-licences) to use for the duration of this Agreement only and only for purposes directly relating to the Project any Intellectual Property Rights relating to the Project which are or become vested in the Authority and/or any School Entity.

71 ASSIGNMENT AND SUB-CONTRACTING

71.1 Restrictions on Transfer of this Agreement by the Authority

The rights and obligations of the Authority under this Agreement shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) to any person other than to any public body (being a single entity) acquiring the whole of the Agreement and having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Agreement being:

71.1.1 a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975; or

71.1.2 any other public body whose obligations under this Agreement and the Direct Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the Contractor) by the Authority or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Agreement and the Direct Agreement.

71.2 Restriction on the Contractor

Subject to clause 71.3 (Exception) and subject always to the provisions of the Direct Agreement, the Contractor shall not sub-contract, assign, underlet, charge, sell, bargain or otherwise deal in any way with the benefit of this Agreement in whole or in part except with the prior written consent of the Authority.⁴⁷⁴¹⁷⁶

⁴⁷⁴¹⁷⁶ There may be critical services that are provided by second tier sub-contractors. In these circumstances, the Authority

71.3 Exception

71.3.1 The provisions of clause 71.2 (Restriction on the Contractor) do not apply to the grant of any security for any loan made to the Contractor under the Financing Agreements or to the enforcement of the same.

71.3.2 Nothing in this Agreement shall prohibit the Contractor from providing or procuring the provision of the Works or the Services from a Sub-Contractor having the legal capacity, power and authority to become a party to and perform the obligations of the relevant Sub-Contract and employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it which are sufficient to enable it to perform the obligations of the Sub-Contractor under the relevant Sub-Contract and whose identity has been notified to the Authority (and who the Authority has approved, such approval not to be unreasonably withheld, and to be given (or withheld) within thirty (30) days of notice) prior to the appointment of such Sub-Contractor, provided that the Contractor shall remain primarily and directly liable for the Contractor's obligations under this Agreement. By entering into this Agreement, the Authority approves the Sub-Contractors appointed by the Contractor as at the Commencement Date.

71.4 Contractor's Obligations

The Contractor shall perform its obligations under and observe all the terms of any Sub-Contract with a Sub-Contractor.

71.5 Sub-Contractors

Nothing in this Agreement shall prohibit or prevent any Sub-Contractor employed by the Contractor from being employed by the Authority at any establishments of the Authority.

71.6 Replacement of Sub-Contractors

The rights set out in clause 71.6.1 may be exercised on no more than two (2) occasions during the Contract Period and during the same period the rights set out in clause 71.6.3 may be exercised no more than once.

71.6.1 On the substitution or replacement of the defaulting FM Contractor or a defaulting sub-contractor to the FM Contractor (in both cases provided that the Contractor is acting in compliance with clause 7.1 (Ancillary Documents)), the Contractor may elect that, for the purposes of clause 41.3 (Termination on Contractor Default) only:

~~71.6.1.1~~ 71.6.1.1 any accrued Unavailability Deductions; and/or

~~71.6.1.2~~ 71.6.1.2 any accrued Service Failure Deductions; and/or

~~71.6.1.3~~ 71.6.1.3 any warning notices or Final Warning Notices in respect of clause 42 (Termination for Persistent Breach by the Contractor); and/or

~~71.6.1.4~~ 71.6.1.4 any accrued Unavailability,

in each case relating to the relevant Services in respect of which the FM Contractor or any sub-contractor to the FM Contractor is being replaced, shall

may decide that clauses 71.2 and 71.3 should also apply to such critical services and amendment made to require Authority consent to such providers.

be cancelled. The Contractor shall notify the Authority on or before the appointment of any such substitute or replacement FM Contractor or sub-contractor whether it elects for this clause 71.6 to apply on that occasion.

71.6.2 Where an election is made pursuant to clause 71.6.1 on the substitution or replacement of the defaulting FM Contractor or a defaulting sub-contractor to the FM Contractor then, for the purposes of clause 41.3 (Termination on Contractor Default) only:

~~71.6.2.1~~ 71.6.2.1 no Unavailability Deductions shall accrue for the purposes of limb (k) of the definition of Contractor Default;

~~71.6.2.2~~ 71.6.2.2 no Service Failure Deductions shall accrue for the purposes of limb (l) of the definition of Contractor Default; and

~~71.6.2.3~~ 71.6.2.3 no warning notices or Final Warning Notices in respect of clause 42 (Termination for Persistent Breach by the Contractor) shall accrue for the purposes of limb (b) of the definition of Contractor Default,

in respect of a Service during a period of two (2) months from the date on which that Service is first provided by the replacement or substitute FM Contractor or sub-contractor as appropriate. Deductions shall still be made from the Monthly Unitary Charge during that period but, where as at the date of replacement pursuant to clause 71.6.1, the Ratchet is being applied pursuant to paragraph ~~56~~ of Schedule 6 (Payment Mechanism) the Ratchet shall be reset with effect from the date of such replacement.

71.6.3 On the substitution or replacement of the defaulting Building Contractor or a defaulting sub-contractor to the Building Contractor (in both cases provided that the Contractor is acting in compliance with clause 7.1 (Ancillary Documents)), the Contractor may elect that, for the purposes of clause 41.3 (Termination on Contractor Default) only any warning notices or Final Warning Notices in respect of clause 42 (Termination for Persistent Breach by the Contractor) in each case relating to the relevant Works in respect of which the Building Contractor or any sub-contractor to the Building Contractor is being replaced, shall be cancelled. The Contractor shall notify the Authority on or before the appointment of any such substitute or replacement Building Contractor or sub-contractor whether it elects for this clause 71.6 to apply on that occasion.

71.6.4 Where an election is made pursuant to clause 71.6.3 on the substitution or replacement of the defaulting Building Contractor or a defaulting sub-contractor to the Building Contractor then, for the purposes of clause 41.3 (Termination on Contractor Default) only no warning notices or Final Warning Notices in respect of clause 42 (Termination for Persistent Breach by the Contractor) shall accrue for the purposes of limb (b) of the definition of Contractor Default in respect of the Works during a period of two (2) months from the date on which such Works are first provided by the replacement or substitute Building Contractor or sub-contractor as appropriate.

72 CHANGE ~~IN~~ OF OWNERSHIP^{175,177}

72.1 Restricted Share Transfer

72.1.1 No Change in Ownership may occur during the Lock In Period.

^{175,177} Any amendments to this clause are to be provided for IUK review prior to Close of Dialogue.

72.1.2 ~~Subject to clause 72.1.1 a Change in Ownership may only occur to a Suitable Third Party~~The Contractor shall obtain the Authority's prior written consent (which may be given subject to conditions) to any Restricted Share Transfer.

72.1.3 ~~Clause 72.1.1 shall not apply:~~Any Change of Ownership arising as a consequence of:

72.1.3.1 ~~where the Change In Ownership arises as a consequence of~~ the grant or enforcement of security in favour of the Senior Lenders over or in relation to any of the shares of the Contractor [or Holdco], provided that any document conferring security over any of such shares has been approved by the Authority (such approval not to be unreasonably withheld or delayed);

72.1.3.2 any change in legal or beneficial ownership of any shares that are listed on a recognised investment exchange (as defined in Section 285 of the Financial Services and Markets Act 2000); or

72.1.3.3 72.1.3.2 to any transfer of shares in the Contractor [or Holdco] by [**here insert name of parent company (the Parentco) of the corporate group of which the Contractor or Holdco or a relevant shareholder of Contractor or Holdco is a member**] and/or an Affiliate of [Parentco], to [Parentco] and/or an Affiliate of [Parentco];]⁴⁷⁶₁₇₈ or

72.1.3.4 72.1.3.3 to any change in legal or beneficial 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)~~interest in shares owned at the date of this Agreement by CGU.

shall be disregarded for the purpose of clause 72.1.1.

72.1.4 Where, during the Lock-in Period, the holder of any shares in the Contractor [or Holdco] is an Affiliate of [Parentco] and that holder ceases to be an Affiliate of [Parentco] it shall be a breach of this clause 72.1 if the shares held by that holder are not within 20 Business Days of that holder ceasing to be an Affiliate of [Parentco] transferred to [Parentco] or an Affiliate of [Parentco].⁴⁷⁷₁₇₉

72.2 Notification

72.2.1 The Contractor shall ~~provide~~inform the Authority ~~with at least ten (10) Business Days' prior written notice of any Change in Ownership~~

⁴⁷⁶₁₇₈ Depending on the structure this clause may need to be repeated where there is more than one shareholder of Contractor or Holdco.

⁴⁷⁷₁₇₉ Depending on the structure this clause may need to be repeated where there is more than one shareholder of Contractor or Holdco.

~~contemplated by clause 72.1.2 (Restricted Share Transfer)~~ in writing, if it becomes aware, of any proposed Change of Ownership prior to its occurrence, or, if it does not have prior information as soon as reasonably practicable provide written notice (and in any event, within ten (10) Business Days) of any Change of Ownership occurring and shall provide, with this information, details of the new ownership structure (legal and beneficial) and of the purchase price paid.

- 72.2.2** The Authority may, not more than twice in any Contract Year, or at any time when a Contractor Default is outstanding, ~~request~~require that the Contractor ~~inform it~~confirm as soon as reasonably practicable and in any event within ~~twenty (20) Business Days~~ten (10) days of receipt of the Authority's request for details ~~of whether~~ any Change ~~in~~of Ownership ~~has occurred, together with the supplementary information specified in clause 72.2.1.~~
- 72.2.3** The Contractor's obligation under clause 72.2.1 shall, except where a legal transfer of shares is proposed, be limited to the extent of the Contractor's awareness.
- 72.2.4** The Contractor's obligation under clause 72.2.2 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~~enquiries.
- 72.2.5** For the purposes of this clause 72.2 any change in legal or beneficial 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.

72.3 Contractor Warranty

The Contractor warrants and represents ~~to the Authority that legal and beneficial ownership of the Contractor and Holdco~~ (other than ~~the ownership of~~in relation to any shares owned by CGU to the Authority) ~~that~~ at the date of this Agreement the legal and beneficial ownership of the Contractor [and Holdco] is as set out in Part [2] of Schedule 11 (Warranted Data) and ~~that,~~ [other than any Shareholder pre-emption rights] ~~that,~~ 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 ~~(other than in relation to any shares owned by the Authority)~~ in the Contractor [or [HoldCo]].

73 FINANCIAL ADJUSTMENTS

73.1 Updating the Base Case

Whenever a Relevant Event occurs, the financial consequence shall (save where otherwise provided in this Agreement or where the Parties mutually agree otherwise) be determined in accordance with this clause 73. Where for the purposes of this clause 73 the Base Case is to be adjusted by reference to a Relevant Event, this shall be carried out by the Contractor, in consultation with the Authority, to reflect the cumulative impact of any prior Relevant Event on the version of the Base Case applicable immediately prior to the relevant adjustment and to reflect the impact of the Relevant Event in respect of which such adjustment is being undertaken. In calculating the Estimated Change in Project Costs and in assessing other adjustments to be made to the Base Case arising from the Relevant Event, the Contractor shall be entitled to take into account, inter alia:

- 73.1.1** any Change in Costs and Change in Revenue;

- 73.1.2** reasonable economic assumptions prevailing at the time; and
- 73.1.3** changes in the prospective technical performance of the Project arising as a result of the Relevant Event,

provided that the Authority shall not be required (and the Contractor shall not be entitled) to take into account the financial impact up to the date of the Relevant Event of those risks which the Contractor bears under the terms of this Agreement, including (to the extent so borne by the Contractor under this Agreement) changes in VAT rates, taxation rates, RPIX and the impact of Deductions.

73.2 Application to the Base Case

Where, pursuant to this Agreement, either Party is entitled to payment of any sum the assessment of which properly requires reference to the Base Case (with the exception of payment of the Authority's Refinancing Share to which clause 38 (Refinancing) shall apply), the adjustment to the Unitary Charge due shall be that required to ensure that, by reference to the Base Case adjusted under this clause 73, the Contractor is left in a no better and no worse position than under the version of the Base Case applicable immediately prior to the relevant adjustment, and shall be ascertained by determining the adjustment to the Unitary Charge required to maintain the financial position of the Contractor with that in which it would have been under the version of the Base Case applicable immediately prior to the relevant adjustment.

73.3 No Better and no Worse

73.3.1 Any reference in this Agreement to "no better and no worse" or to leaving the Contractor in a "no better and no worse position" shall be construed by reference to the Contractor's:

~~73.3.1.1~~ 73.3.1.1 rights, duties and liabilities under or arising pursuant to performance of this Agreement, the Financing Agreements, the Building Contract and FM Agreement; and

~~73.3.1.2~~ 73.3.1.2 ability to perform its obligations and exercise its rights under this Agreement, the Financing Agreements, the Building Contract and the FM Agreement,

so as to ensure that:

~~73.3.1.3~~ 73.3.1.3 the Contractor is left in a position which is no better and no worse in relation to the [key ratios (to include loan life cover and debt service cover ratios) and internal rate of return]^{478,180} by reference to the version of the Base Case applicable immediately prior to the Relevant Event than had the Relevant Event not occurred; and

~~73.3.1.4~~ 73.3.1.4 the ability of the Contractor to comply with this Agreement is not adversely affected or improved as a consequence of the Relevant Event.

73.4 Replacement of Base Case

Any Base Case produced following adjustments in accordance with this clause 73 shall, when it is approved by the Authority (such approval not to be unreasonably withheld),

^{478,180} Project-specific issue - to be discussed with bidders and conformed to Financing Agreements.

become the Base Case for the purposes of this Agreement until its further amendment in accordance with this Agreement.

73.5 Amendments to Logic and/or Formulae

73.5.1 Where it is necessary to amend the logic or formulae incorporated in the Base Case to permit adjustments to be made, this shall be done to the extent necessary and in accordance with generally accepted accounting principles.

73.5.2 Where any amendment is made to the logic or formulae incorporated in the Base Case, the Base Case, shall first be run as at the date immediately prior to amendment to ensure that the [key ratios (to include loan life cover and debt service ratios)] from the Base Case are maintained at no lower or no higher levels than the [key ratios (to include loan life cover and debt service ratios)] immediately post the amendment, and the difference in the real pre-tax Project IRR after and immediately prior to amendment does not differ by more than five (5) basis points (being zero point zero five percent (0.05%) as shown in the resulting figure).

73.6 Copies of the Revised Base Case

Following any change to the Base Case under the provisions of this clause 73, the Contractor shall promptly deliver a copy of the revised Base Case to the Authority in the same form as is established at the date of this Agreement or in such other form as may be agreed between the Parties.

74 AUDIT ACCESS

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 any sub-contractor shall be available to it and the Contractor shall (and shall procure that the sub-contractors shall) include appropriate terms in contracts with all sub-contractors to this effect as may be reasonably requested by the Authority's Representative for any purpose in connection with this Agreement.

75 NO AGENCY

75.1 No Partnership or Employment

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

75.2 Power to Bind

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.

75.3 Deemed Knowledge

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 Related Party.

76 ENTIRE AGREEMENT

76.1 Prior Representations etc Superseded

Except where expressly provided 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.

76.2 Acknowledgements

Each of the Parties acknowledges that:

76.2.1 subject to clauses 5.1 (Contractor Warranties), 6.5 (Authority Title Warranty) [and 6.9 (Authority Warranted Data)] 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

76.2.2 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.

77 NOTICES

77.1 Form and Service of Notices

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, ~~facsimile~~ or by hand¹⁷⁹, or leaving the same at:

Contractor	Authority
[INSERT NAME]	[INSERT NAME]
[INSERT ADDRESS]	[INSERT ADDRESS]
[INSERT FAX NUMBER]	[INSERT FAX NUMBER]

77.2 Provision of Information to Representatives

Where any information or documentation is to be provided or submitted to the Authority's Representative, the Schools' Representatives or the Contractor's Representative it shall be provided or submitted by sending the same by first class post, ~~facsimile~~ or by hand, or leaving the same at:

Contractor's Representative	Authority's Representative	Schools' Representatives ^{180,181}

¹⁷⁹ Consider whether Notices may be deliverable by email.

^{180,181} Replicate for each school.

[INSERT NAME]	[INSERT NAME]	[INSERT NAME]
[INSERT ADDRESS]	[INSERT ADDRESS]	[INSERT ADDRESS]
[INSERT FAX NUMBER] _____	[INSERT FAX NUMBER] _____	[INSERT FAX NUMBER] _____

77.3 Change of Details

Either Party (and either Party's Representative) may change its nominated address ~~or facsimile number~~ by prior notice to the other Party.

77.4 Notices by Post

Notices given by post shall be effective upon the earlier of actual receipt and five (5) Business Days after mailing. Notices delivered by hand shall be effective upon delivery. ~~Notices given by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:~~

~~77.4.1~~ within two (2) hours after sending, if sent on a Business Day between the hours of 9am and 4pm; or

~~77.4.2~~ by 11am on the next following Business Day, if sent after 4pm on a Business Day but before 9am on that next following Business Day.

78 SEVERABILITY

If any term, condition or provision of 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 and enforceability of the other provisions of or any other documents referred to in this Agreement.

79 WAIVER

79.1 Waiver to be Written

No term or provision of this Agreement shall be considered as waived by any Party unless a waiver is given in writing by that Party.

79.2 Extent of Waiver

No waiver under clause 79.1 (Waiver to be Written) shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.

80 PUBLIC RELATIONS AND PUBLICITY

80.1 Restriction

The Contractor shall not by itself, its employees or agents, and shall procure that its sub-contractors shall not communicate with representatives of the press, television, radio or other communications media on any matter concerning this Agreement or the Project without the prior written approval of the Authority.

80.2 Photographs

No permission to photograph or film in or upon any property used in relation to the Project shall be given unless the Authority has given its prior written approval (such approval not to be unreasonably withheld or delayed).

81 ADVERTISEMENTS

The Contractor shall not exhibit or attach to any part of the Sites any notice or advertisement without the prior written permission of the Authority's Representative, save where otherwise required to comply with Legislation.

82 CONTRACTOR'S RECORDS¹⁸⁴

82.1 Records and Open Book Accounting

The Contractor shall (and shall procure that ~~each~~every sub-contractor shall) ~~at all times~~:

- 82.1.1 at all times maintain a full record of particulars of the costs of performing the Works and the Services;
- 82.1.2 upon request by the Authority, provide any of the costs referred to in clause 82.1.1, including details of any funds held by the Contractor specifically to cover such costs, in such form and detail as the Authority may require; and
- 82.1.3 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 clause ~~- 82.1.~~

82.2 Books of Account

The Contractor shall keep (and procure that ~~each~~every sub-contractor shall keep) books of account in accordance with best accountancy practices with respect to this Agreement, showing in detail:

- 82.2.1 administrative overheads;
- 82.2.2 payments to Sub-Contractors and ~~by Sub-Contractors~~ to sub-contractors and any other operating costs;
- 82.2.3 capital and revenue expenditure; and
- 82.2.4 such other items as the Authority may require from time to time to conduct costs audits for verification of cost expenditure or estimated expenditure, for the purpose of this Agreement,

and the Contractor shall have (and procure that its sub-contractors shall have) the books of account evidencing the items listed in clauses 82.2.1 to 82.2.4 inclusive, available for inspection by the Authority (and its advisers) upon reasonable notice, and shall provide a copy of these to the Authority as and when requested from time to time.

¹⁸⁴ ~~The obligations contained in clause 82 shall, together with the obligation to provide a Joint Insurance Cost Report under clause 65.15.2, the obligation to provide information relating to a proposed Refinancing pursuant to clause 38.4 and the obligation to provide ownership information pursuant to clause 72.2.1, constitute part of the Authority's Requirements and will be added as an obligation to the Services Output Specification. Any breach of them by the Contractor shall be a failure in performance of the Services triggering deductions in accordance with the Payment Mechanism.~~

82.3 Maintenance of Records

82.3.1 The Contractor shall maintain or procure that detailed records relating to the performance of the Works and the delivery of the Services, in each case in accordance with Good Industry Practice, the requirements of clause 34 (Quality Assurance) and any applicable Legislation.

82.3.2 Without prejudice to clause 82.3.1, the Contractor shall maintain or procure that the following are maintained:

82.3.2.1 a full record of all incidents relating to health, safety and security which occur during the term of this Agreement;

82.3.2.2 full records of all maintenance procedures carried out during the term of this Agreement;

82.3.2.3 full records of all staff matters including turnover, pay and disciplinary matters; and

82.3.2.4 full records of Helpdesk¹⁸² data (including providing a live link direct access),

and the Contractor shall have the items referred to in clauses 82.3.2.1 and ~~82.3.2.4~~82.3.2.2 available for inspection by the Authority (and its advisers) upon reasonable notice, and shall provide copies of these to the Authority as and when requested from time to time.

82.4 Auditor

The Contractor shall permit all records referred to in this clause 82 to be examined and copied from time to time by the ~~Authority's auditor (whether internal or external) and OFSTED and their representatives~~Controller and other representatives of the Authority ~~who reasonably require access to the same, and by the Comptroller and Auditor General and his representatives.~~

82.5 Retention

The records referred to in this clause 82 shall be retained for a period of at least five (5) years after the Contractor's obligations under this Agreement have come to an end.

82.6 Termination or Expiry

Upon termination or expiry of this Agreement, and in the event that the Authority wishes to enter into another agreement for the operation and management of a project the same as or similar to the Project, the Contractor shall (and shall ensure that its sub-contractors will) comply with all requests of the Authority to provide information relating to the Contractor's costs of operating and maintaining the Project.

82.7 Financing Information

82.7.1 The Contractor shall:

82.7.1.1 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 Lenders during the preceding three (3) month period and, at the request of the Authority, provide to

¹⁸² A definition of Helpdesk will be needed.

the Authority any information provided by it to the Senior Lenders during the term of the Agreement¹⁸³ and any other information relating to the Project that the Authority may require including, if requested, any Technical Adviser's report;

82.7.1.2 provide to the Authority copies of its annual report and accounts within thirty (30) days of publication;

82.7.1.3 provide to both the Authority and HM Treasury (addressed to PF2@hmtreasury.gsi.gov.uk) or such other address as HM Treasury may notify to the Contractor from time to time) the following information: a calculation of the equity internal rate of return (for both an actual cumulative return to the date of preparation and for the expected forecast return up to the Expiry Date) for the Project and for each of the Shareholders to be prepared using the [Senior Lenders' Financial Model] and calculated on a cash basis to include all Distributions and any other payments made to Shareholders in respect of fees. This is to be provided on each 31 March and 30 September throughout the Contract Period (or such other 6 month reporting cycle as the Parties may agree);

82.7.1.4 ~~82.7.1.3~~ provide to the Authority a copy of the [Senior Lenders' Financial Model]¹⁸⁴ at Financial Close and (as the same may be amended) within thirty (30) days of any amendment thereto;

82.7.1.5 ~~82.7.1.4~~ promptly upon the occurrence of a Financing Default¹⁸⁵ notify the Authority of such Financing Default;

82.7.1.6 ~~82.7.1.5~~ use all reasonable endeavours to assist the Authority in its preparation of any report required by DfE, the EFA or any Government Department from time to time;

82.7.1.7 ~~82.7.1.6~~ all information required by the Authority in connection with Changes in accordance with the Change Protocol; and

82.7.1.8 ~~82.7.1.7~~ provide regular project reports in accordance with the Services Output Specification which are clearly written and include analysis of ~~the key performance indicators~~ utilities consumption, the Performance Standards, detailed illustrations of the continuous improvement achieved and explanations of any failures ~~incurred~~ suffered, planned maintenance (and associated FM unit cost information and lifecycle schedule), accompanied by appropriate graphic interpretations of the underlying performance data and including explicit links to the actual deductions to be made and any warning notices accrued in accordance with Schedule 6 (Payment Mechanism).

82.7.2 The Authority may, in the circumstances referred to in clause ~~82.7.1.4~~ **82.7.1.5** (regardless of whether the Senior Lenders have exercised any enforcement or

¹⁸³ This enables financial information such as audited accounts to be obtained. Alternatively, the precise financial information required can be listed.

¹⁸⁴ This may be defined by reference to the Senior Financing Agreements as appropriate.

¹⁸⁵ This should be defined by reference to the borrower defaults under the Senior Financing Agreements (and applies whether or not the Senior Lenders choose to accelerate their loan). Please note that this obligation is additional to the obligations of the Agent under clause 10(d) of the Funders' Direct Agreement.

similar rights under the Senior Financing Agreements) require the Contractor to provide an Interim Project Report¹⁸⁶ and to attend, and use all reasonable endeavours to ensure that the Senior Lenders attend, such meetings as the Authority may convene to discuss such Interim Project Report and the circumstances giving rise to it.

82.7.3 The obligations:

82.7.3.1 contained in clause 39 (Annual Contract Reviews and Efficiency Reviews);

82.7.3.2 contained in this clause 82 (Contractor's Records);

82.7.3.3 contained in clause 23.1 (Maintenance) and clause 23.6 (Lifecycle Profile and Lifecycle Spend);

82.7.3.4 to provide a Joint Insurance Cost Report under clause 65.15.2 (Insurance Review Procedure);

82.7.3.5 to provide information relating to a proposed Refinancing pursuant to clause 38.4 (Qualifying Refinancing Details);

82.7.3.6 to provide ownership information pursuant to clause 72.2;

82.7.3.7 to provide information required pursuant to Schedule 24 (Change Protocol);

constitute part of the Services requirements in accordance with the Services Output Specification and any breach of them by the Contractor shall be a failure in performance of the Services triggering deductions in accordance with Schedule 6 (Payment Mechanism), in addition to any Authority rights which may arise under clause 42 (Termination for Persistent Breach by the Contractor).

82.8 Confidentiality

All information referred to in this clause 82 (Contractor's Records) is subject to the obligations set out in clause 62 (Freedom of Information and Confidentiality).

83 DATA PROTECTION

83.1 General

83.1.1 In relation to all Personal Data, the Contractor shall at all times comply with the DPA as a data controller if necessary, including maintaining a valid and up to date registration or notification under the DPA covering the data processing to be performed in connection with the Project.

83.1.2 The Contractor and any sub-contractor shall only undertake processing of Personal Data reasonably required in connection with the Project and shall not transfer any Personal Data to any country or territory outside the European Economic Area.

83.2 No Disclosure

83.2.1 The Contractor shall not disclose Personal Data to any third parties other than:

¹⁸⁶ The Authority should insert a definition of Interim Project Report, setting out in this the broad headings and issues which it requires it to cover. A suggested definition has been included in clause 1.1.

83.2.1.1 to employees and sub-contractors to whom such disclosure is reasonably necessary in order for the Contractor to carry out the Works and/or the Services; or

83.2.1.2 to the extent required under a court order,

provided that disclosure under clause 83.2.1.1 is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this clause 83.2.1 and that the Contractor shall give notice in writing to the Authority of any disclosure of Personal Data which either the Contractor or a sub-contractor is required to make under clause 83.2.1.2 immediately upon becoming aware of such a requirement.

83.2.2 The Contractor shall bring into effect and maintain all technical and organisational measures to prevent unauthorised or unlawful processing of Personal Data and accidental loss or destruction of, or damage to, Personal Data including ~~to take~~taking reasonable steps to ensure the reliability of staff having access to the Personal Data.

83.2.3 The Authority may, at reasonable intervals, request a written description of the technical and organisational methods employed by the Contractor or the sub-contractors referred to in clause 83.2.2. Within twenty (20) Business Days of such a request, the Contractor shall supply written particulars of all such measures detailed to a reasonable level such that the Authority can determine whether or not, in connection with the Personal Data, it is compliant with the DPA.

83.3 The Contractor shall indemnify and keep indemnified the Authority against all Direct Losses incurred by it in respect of any breach of this clause 83 by the Contractor and/or any act or omission of any sub-contractor which causes the Contractor to be in breach of this clause 83.

84 INTEREST ON LATE PAYMENT

Save where otherwise specifically provided, where any payment or sum of money due from the Contractor to the Authority or from the Authority to the Contractor under any provision of this Agreement is not paid on or before the due date, it shall bear interest thereon at the Prescribed Rate from the due date (whether before or after any judgement) until actual payment and it is agreed between the Parties that the Prescribed Rate and the provisions of this Agreement relating to the payment of compensation on termination of this Agreement following the occurrence of an Authority Default provide the Contractor with a substantial remedy pursuant to Sections 8 and 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

85 CHANGES IN STATUS

The Parties acknowledge that the legal status of the School Entitles may change during the Contract Period and the Contractor agrees that any such change in legal status shall not in itself be capable of giving rise to (i) an Authority Default or (ii) a claim that the Authority has breached any term of this Agreement.

86 GOVERNING LAW AND JURISDICTION

This Agreement and any non-contractual obligation arising out of or in connection with this Agreement shall be governed by and construed in all respects in the accordance with the laws of England and Wales. Subject to clause 68 (Dispute Resolution), the English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement.

87 SOLE REMEDY

87.1 Common Law Rights for the Contractor

87.1.1 Without prejudice to any entitlement of the Contractor:

87.1.1.1 to specific performance of any obligation under this Agreement;

87.1.1.2 to injunctive relief; or

87.1.1.3 to any other express right or remedy of the Contractor pursuant to this Agreement,

the Contractor's sole remedy in relation to matters for which an express right or remedy is stated in this Agreement shall be that right or remedy and the Contractor shall have no additional right or remedy arising by common law, in equity, by statute or otherwise.

87.1.2 ~~87.1.2~~ Without prejudice to any entitlement of the Contractor;

87.1.2.1 ~~87.1.2.1~~ to specific performance of any obligation under this Agreement;

87.1.2.2 ~~87.1.2.2~~ to injunctive relief; or

87.1.2.3 ~~87.1.2.3~~ to any other express right or remedy of the Contractor pursuant to this Agreement,

the Contractor's sole remedy in relation to any Compensation Event in respect of the Works at any Site that occurs prior to the applicable Longstop Date [and the Post Completion Works at any Site] shall be the operation of clause ~~16.5~~16.4 (Effect of a Compensation Event).

87.1.3 ~~87.1.3~~—The reference in clause 87.1.1 to "matters" shall be construed as a reference to the particular type of Loss which arises from the circumstance in question (which circumstance may include a breach by the Authority of this Agreement) and in relation to which an express right or remedy is stated in this Agreement and accordingly clause 87.1.1 shall not restrict the rights and/or remedies of the Contractor which are provided by law in respect of breach of this Agreement in respect of any other type of Loss which may arise from the same circumstance and in relation to which an express right or remedy is not stated in this Agreement.

87.2 Common Law Rights of the Authority

Subject to:

87.2.1 any other express right of the Authority pursuant to this Agreement; and

87.2.2 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 calculate any compensation payable pursuant to Part 7 (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 Schedule 6 (Payment Mechanism).

87.3 Injunctive Relief and other Remedies of the Court

Nothing in clause 87.2 (Common Law Rights of the Authority) shall prevent or restrict the right of the Authority to seek injunctive relief or a decree of specific performance or other discretionary remedies of the court.

87.4 No Breach

87.4.1 The Contractor shall not be held to be failing to comply with its obligations under this Agreement to the extent that such failure to comply is a result of the Authority's breach of its obligations hereunder.

87.4.2 The Authority shall not be held to be failing to comply with its obligations under this Agreement to the extent that such failure to comply is a result of the Contractor's breach of its obligations hereunder.

87.5 Indirect Losses

87.5.1 Save where stated to the contrary, the indemnities under this Agreement shall not apply and (without prejudice to the Authority's rights under the Payment Mechanism) there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever, to the extent that any loss claimed by either Party is for Indirect Losses.

87.5.2 The Authority agrees that, notwithstanding clause 87.5.1, any Losses of the Contractor arising under the Sub-Contracts as originally executed (or as amended in accordance with the terms of this Agreement) that are not of themselves Indirect Losses shall not be excluded from such a claim solely by reason of this clause.

87.5.3 The Contractor agrees that notwithstanding clause 87.5.1, any Losses of the ICT Service Provider or the Soft Services Provider arising under the ICT Services Contract or any contract entered into by the School Entities or the Relevant LEA for the provision of Soft Services that are not of themselves Indirect Losses shall not be excluded from such a claim solely by reason of this clause.

87.5.4 The Contractor agrees that notwithstanding clause 87.5.1, any Losses of a School Entity arising under a Governing Body Agreement that are not of themselves Indirect Losses shall not be excluded from such a claim solely by reason of this clause.

87.5.5 The Contractor agrees that notwithstanding clause 87.5.1, any Losses of a Landowner arising under a Landowner Agreement that are not of themselves Indirect Losses shall not be excluded from such a claim solely by reason of this clause.

87.6 Authority Losses

Where a School Entity or another party to a Governing Body Agreement¹⁸⁷ or Landowner Agreement is entitled to claim an indemnity against the Authority under a Governing Body Agreement (in respect of an act or omission of the Contractor or a Contractor Related Party) and the Authority subsequently makes a claim against the Contractor under any of the indemnities in ~~clauses 63.1 (Contractor's Indemnity), 30.3 (Indemnities), and/or clause 30.6 (Sub-Contractors)~~this Agreement in respect of the same act or omission of the Contractor or a Contractor Related Party, the Contractor waives any right to defend the Authority's claim on the ground that the Authority is only required to make payments to the School Entity or other party to a Governing Body Agreement or Landowner Agreement under the relevant indemnity to the extent that the same is recoverable by the Authority from the Contractor.

88 NO DOUBLE RECOVERY

Notwithstanding any other provisions of this Agreement, neither Party shall be entitled to recover compensation or make a claim under this Agreement in respect of any loss that it has incurred to the extent that it has already been compensated in respect of that loss pursuant to this Agreement or otherwise.

89 COUNTERPARTS

This Agreement may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

90 CONSTRUCTION INDUSTRY SCHEME

90.1 This clause 90 relates to the Construction Industry Scheme (the Scheme) the framework of which is contained in the Finance Act 2004 with the operational details contained in the Income Tax (Construction Industry Scheme) Regulations 2005 SI 2005/2045 (the 2005 Regulations) and which commenced on 6 April 2007.

90.2 All payments made under this Agreement will be paid in accordance with this clause.

90.3 The Parties believe that all payments made under this Agreement will be exempt from the Scheme under Regulation 23 of the 2005 Regulations (Arrangements involving public bodies).

90.4 If and to the extent that payments are not exempt from the Scheme by virtue of Regulation 23, the Parties agree to operate the Scheme in accordance with the 2005 Regulations, the Finance Act 2004 or any other statute or subordinate legislation (the Relevant Legislation) relating to the Scheme as from time to time modified or replaced whether before or after the date of this Agreement and in particular the Authority shall be entitled to make the statutory deduction from any payment due to the Contractor in accordance with the 2005 Regulations and/or the Relevant Legislation.

90.5 If compliance with this clause involves the Authority or the Contractor in not complying with any other of the terms of this Agreement (save for the Parties' obligations to comply with all laws), then the provisions of this clause shall prevail.

¹⁸⁷ For voluntary aided or controlled schools, the Trustees and/or the Diocesan (or other) authority will be party to the GBA.

THIS DOCUMENT is executed as a deed and delivered on the date stated at the beginning of this Deed.

SCHEDULE 1

SCHEDULE 1

AUTHORITY'S REQUIREMENTS

Part 1

Facilities Output Specification

SCHEDULE 1
AUTHORITY'S REQUIREMENTS
Part 2
Services Output Specification

SCHEDULE 2

SCHEDULE 2

CONTRACTOR'S PROPOSALS

Part 1

Construction Proposals

[TO BE PROVIDED BY THE PREFERRED BIDDER]

SCHEDULE 2

CONTRACTOR'S PROPOSALS

Part 2

Service Delivery Proposals

[TO BE PROVIDED BY THE PREFERRED BIDDER]

SCHEDULE 2

CONTRACTOR'S PROPOSALS

Part 3

Construction Programme and Phases

[TO BE PROVIDED BY THE PREFERRED BIDDER]

SCHEDULE 3

SCHEDULE 3

SOFT SERVICES INTERFACE PROTOCOL

[TO BE WORKED UP WITH BIDDERS DURING DIALOGUE¹⁸⁸]

¹⁸⁸ A template will be published.

SCHEDULE 4

SCHEDULE 4

SCHOOLS

School (including address)	<u>Start on Site Date</u>	Planned ICT Handover Date	Planned Services Availability Date	[Planned Post Completion Works Acceptance Date] ¹⁸⁸ ₁₈₉	Initial Amount	Periodic Rate ¹⁸⁹ ₁₉₀

¹⁸⁸₁₈₉ If required. See footnote to the definition of Planned Post Completion Works Acceptance Date

¹⁸⁹₁₉₀ Consider inserting details of how the Periodic Rate has been calculated. This may be useful for evidential purposes in the event of a challenge re recoverability of LADs.

SCHEDULE 5

SCHEDULE 5

COMPLETION REQUIREMENTS

Part 1

ICT Handover Requirements

- 1 ICT Handover Requirements shall mean that:
 - 1.1 the Works (excluding the Post Completion Works) have been provided in accordance with the Facilities Output Specification and the Construction Proposals, Good Industry Practice, Guidance, all Necessary Consents, all applicable Authorities' Policies and Legislation;
 - 1.2 the Works (excluding the Post Completion Works) have been designed, constructed, remodelled or refurbished in the forms and materials described and as approved in any planning approvals and the Facilities Output Specification and Construction Proposals;
 - 1.3 each Area (excluding any Areas that are the subject of Post Completion Works) has been completed, finished and laid out in accordance with the standards and provisions set out in the Area Data Sheets that form part of the Facilities Output Specification;
 - 1.4 the Buildings have been located on each Site, together with external hard and soft play and landscaped areas (excluding any Areas that are the subject of Post Completion Works), and with the sports and recreational facilities as shown in the Facilities Output Specification and the Construction Proposals and as approved in any planning approvals;
 - 1.5 external fencing, gates, security equipment, vehicular and pedestrian access are complete as described in the Facilities Output Specification and the Construction Proposals;
 - 1.6 the Buildings are weatherproof and watertight;
 - 1.7 the building services, the drains, the fire and intruder alarm installations and any other security related equipment comply with the Facilities Output Specification and the Construction Proposals in all material respects;
 - 1.8 the Buildings, and where relevant the Sites, are clean and tidy and all debris, surplus material and rubbish has been removed;
 - 1.9 the Contractor has provided a draft copy of the Building Manual (such copy to include the health and safety file), the contents of such draft to be to the reasonable satisfaction of the Independent Certifier and the Contractor confirms that it will be able to provide a final and complete version of the Building Manual within twenty (20) Business Days following the date upon which the Acceptance Certificate is issued, the contents of any such version of the Building Manual to be to the reasonable satisfaction of the Independent Certifier and CDM Co-ordinator;
 - 1.10 the mechanical and electrical plant and equipment have been tested on Site to ascertain compliance with the Facilities Output Specification and the Construction Proposals and meet the standards set out in the Facilities Output Specification and the Construction Proposals;
 - 1.11 the Active ICT Infrastructure Tests have been met;

- 1.12 all mechanical and electrical installation work is complete and the plant and equipment are safe for use; and
- 1.13 the Collateral Warranties have been duly executed and delivered to the Authority. ¹⁹⁰ 191

¹⁹⁰ ~~This is merely a longstop date for the provision of these documents, which should have been provided at financial close.~~

¹⁹¹ This is merely a longstop date for the provision of these documents, which should have been provided at financial close.

SCHEDULE 5

COMPLETION REQUIREMENTS

Part 2

Services Availability Requirements

- 1 Services Availability Requirements shall mean that:
 - 1.1 Subject to the provisions of clause 20.9.2, the decanting into the School shall, other than the requirements relating to the decant of Legacy ICT Equipment, have been completed in accordance with the provisions of the Decant Protocol;
 - 1.2 The Contractor has complied with its obligations pursuant to clause 11.9 (Hours of Access) and 11.10 (Live Testing) on each Business Day during the period between the ICT Handover Date and the Services Availability Date provided that:
 - 1.2.1 if the period of the Contractor's non compliance with clause 11.9 or 11.10 does not exceed 15 minutes in aggregate on any Business Day then such non compliance shall be ignored for the purposes of this Part 2 of Schedule 5;
 - 1.2.2 where the Contractor has not complied the Independent Certifier shall only be entitled to withhold the Acceptance Certificate by one Business Day for each Business Day where it has been agreed or determined that the Contractor had not complied with clause 11.9 or 11.10; and
 - 1.2.3 (except where such act or omission is the result of an act or omission of the Contractor) if the Contractor's non compliance with clause 11.9 or 11.10 is due to any act or omission of any provider of utilities or statutory undertaker (and, in each case, of any of their respective agencies, employees, contractors or other persons for whom they are responsible) where the Contractor is using all reasonable endeavours to minimise the impact of such act or omission on the performance of its obligations under this Agreement then such non compliance shall be ignored for the purposes of this Part 2 of Schedule 5.
 - 1.3 The Contractor has carried out a full clean of the School following completion of all other activities carried out during the ICT Handover Period.
 - 1.4 The Contractor has made good each Snagging Item in accordance with the Snagging Programme or otherwise provided an update on progress against the Snagging Programme, and any new items to be added to the Snagging List, such updated list to be verified by the Independent Certifier and a new Snagging List issued in accordance with clause 20.8.1.
 - 1.5 The Contractor has complied with its obligations under ~~sections [] of~~ the Soft Services Training Plan.

SCHEDULE 5

COMPLETION REQUIREMENTS

Part 3

Post Completion Works Acceptance Requirements

To be completed on a project-specific basis.

SCHEDULE 6

SCHEDULE 6

PAYMENT MECHANISM

SCHEDULE 7

SCHEDULE 7

COLLATERAL WARRANTIES¹⁹¹₁₉₂

Part 1

Warranty from the Contractor's Building Contractor

¹⁹¹ - ₁₉₂ The Contractor has two options. It can ask members of the Professional Team and subcontractors (other than first tier) to produce warranties in accordance with this schedule or it can ask them to replicate the warranties given to the Contractor/lenders, with changes made only to reflect the difference in parties and step-in priorities. Different PBSCs or consultants may choose different approaches, in which case the definition of Collateral Warranties and clause 5.1.12 will need to reflect that some warranties are in line with this schedule and others are in line with the warranties given to the Contractor/lenders. First tier subcontractors must use the warranties set out here.

~~Dated _____ 200~~

~~[CONTRACTOR'S BUILDING CONTRACTOR] (1)~~

~~[AUTHORITY] (2)~~

~~[CONTRACTOR] (3)~~

~~DUTY OF CARE DEED
relating to~~

Dated _____ 200

[CONTRACTOR'S BUILDING CONTRACTOR] (1)

[AUTHORITY] (2)

[CONTRACTOR] (3)

DUTY OF CARE DEED
relating to

THIS DEED is made on

200

BETWEEN:

- (1) ~~(1)~~ **[CONTRACTOR'S BUILDING CONTRACTOR]** (Company No. _____), whose registered office is at _____ (the **Building Contractor**);
- (2) ~~(2)~~ **[AUTHORITY]** of _____ (the **Authority**), which expression includes its permitted successors in title and assigns); and
- (3) ~~(3)~~ **CONTRACTOR** (Company No. _____), whose registered office is at _____ (the **Contractor**).

BACKGROUND

- A ~~(A)~~ —By a project agreement dated [_____] (the **Project Agreement**) the Authority has appointed the Contractor to carry out, in relation to the Sites, the provision of serviced accommodation to the Authority at each and every School as contemplated by the Project Agreement including the carrying out of the Works and the provision of the Services and the design and construction of the Works.
- B ~~(B)~~ By a design and build contract dated [_____] (the **Building Contract**) the Contractor has appointed the Building Contractor to carry out, in relation to the Sites, the design and construction of the Works.
- C ~~(C)~~ The Building Contractor is obliged under the Building Contract to give a warranty in this form in favour of the Authority.
- D ~~(D)~~ The Building Contractor and the Contractor have agreed to execute this Deed in favour of the Authority.

1 DEFINITIONS AND INTERPRETATIONS

Unless expressly defined otherwise in this Deed any defined term in this Deed shall have the same meaning given to such term in the Building Contract. ⁴⁹²₁₉₃

Intellectual Property Rights

any and all patents, trade marks, service marks, copyright, database rights, moral rights, rights in design, know how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attaching thereto which is created, brought into existence, acquired, used or intended to be used by the Building Contractor for the purpose of carrying out the Works;

Lender(s)

means any organisation providing funding to the Contractor in connection with the carrying out of the Works; and

Project Data

⁴⁹² ~~The Authority's legal advisers must review the Building Contract and ensure any defined terms used in this deed are identical to those used in the Building Contract.~~

¹⁹³ The Authority's legal advisers must review the Building Contract and ensure any defined terms used in this deed are identical to those used in the Building Contract.

- (i) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the School(s) (as defined in the Project Agreement) in each case that is used by or on behalf of the Building Contractor in connection with the provision of the Works or the performance of the Building Contractor's obligations under the Building Contract; and
- (ii) any other materials, documents or data acquired or brought into existence or used in relation to the Works or the Building Contract by or on behalf of the Building Contractor in connection with the provision of the Works or the performance of the Building Contractor's obligations under the Building Contract.

2 **OPERATIVE PROVISIONS**

In consideration of the payment of one pound (£1.00) by the Authority to the Building Contractor, receipt of which the Building Contractor acknowledges:

3 **BUILDING CONTRACTOR'S WARRANTY AND LIABILITY**

- 3.1 The Building Contractor warrants to the Authority that it has carried out and will continue to carry out its duties under the Building Contract in accordance with the Building Contract and that it has exercised and will continue to exercise, in carrying out the design of the Works, the level of skill and care reasonably to be expected from an appropriately qualified and competent professional designer providing those services in relation to a project of a similar size and scope to the Works. In particular and without limiting the generality of the foregoing the Building Contractor covenants with the Authority that it has carried out and will carry out and complete the Works in accordance with the Building Contract and duly observe and perform all its duties and obligations thereunder;
- 3.2 The Building Contractor shall have no liability under clause 3.1 or clause 11 of this Deed that is greater or of longer duration than it would have had as if in lieu of this Deed the Authority had been a party to the Building Contract as joint employer and the Building Contractor shall be entitled in any action or proceedings by the Authority to raise equivalent rights in defence of liability (except for set off or counterclaim). Upon the expiration of twelve (12) years from the date of Completion of the Works in accordance with the Project Agreement, the liability of the Building Contractor under this Deed shall cease and determine, save in relation to any claims made by the Authority against the Building Contractor where proceedings have commenced prior to such date.
- 3.3 The Building Contractor shall have no liability to the Authority in respect of any delay in the completion of the Works howsoever caused save to the extent that the liability arises under the Building Contract and the Authority shall have exercised its right to step in under clause 10 of this Deed. Any claim in relation to a delay in completion of the Works but not otherwise will be extinguished to the extent that the Building Contractor has had deducted liquidated damages under the relevant clause of the Building Contract.
- 3.4 Nothing in this Deed shall entitle the Authority to exercise its rights under this clause 3 unless:
 - 3.4.1 the Project Agreement (or the Contractor's employment under it) has been terminated; or, in the absence of such termination

3.4.2 the Contractor has not (either itself or through its supply chain (whether through the Building Contractor or an FM Contractor or otherwise)) satisfied the potential claim by the Authority under this clause 3, including addressing and/or remedying the matter or circumstance giving rise to such claim, within a reasonable time of such matter or circumstance arising,

provided that this clause 3.4 shall not apply where any delay in the exercise of the Authority's rights under Deed might otherwise lead to their becoming statute-barred.

4 **INTELLECTUAL PROPERTY**

4.1 The Building 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. The Building Contractor shall obtain all necessary licences, permissions and consents necessary for it to make the Project Data available to the Authority on these terms, for the purposes of:

4.1.1 the Authority using the Works for the provision of Educational Services (as defined in the Project Agreement) and for ancillary purposes, its duties under the Project Agreement and/or any statutory duties that the Authority may have; and

4.1.2 following termination of the Project Agreement or of the Contractor's employment under it, the design or construction of the Works and/or the operation, maintenance or improvement of the Works,

(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. The Authority will not hold the Building Contractor liable for any use it may make of the Project Data for any purpose other than the Approved Purposes.

4.2 The Building Contractor:

4.2.1 hereby grants to the Authority, free of charge, an irrevocable non-exclusive and transferable (subject to the restrictions continued in clause 7 of this Deed) licence to use the Intellectual Property Rights that are or become vested in the Building Contractor for the Approved Purposes; and

4.2.2 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 4.2.1 above to the Authority,

in both cases, solely for the Approved Purposes.

4.3 The Building Contractor warrants to the Authority that it has used the standard of skill, care and diligence as set out in clause 3.1 to see that the Project Data (save to the extent duly appointed sub-contractors have been used to prepare the same) are its own original work and that in any event their use in connection with the Works will not infringe the rights of any third party.

- 4.4 Where a claim or proceeding is made or brought against the Authority that arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Works infringes or the Works themselves infringe any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority otherwise than in accordance with this Deed, the Building Contractor shall indemnify the Authority at all times from and against all Direct Losses and Indirect Losses (as defined in the Project Agreement) arising as a result of such claims and proceedings.

5 **INSURANCE**

- 5.1 The Building Contractor hereby covenants with the Authority to:

- 5.1.1 take out and maintain professional indemnity insurance cover with a limit of indemnity that shall be a minimum of [ten million pounds (£10,000,000)^{193,194}] either each and every loss or in the aggregate^{194,195} in relation to the Works (if in the aggregate then in any one (1) year of insurance a minimum of one (1) automatic reinstatement of the aggregate indemnity limit is required) (PI Insurance) and that it will maintain such insurance with reputable insurers carrying on business in the European Union from the date hereof until twelve (12) years after Completion of the Works pursuant to the Project Agreement, provided that such insurance is generally available in the market to design and build contractors at commercially reasonable rates and terms and provided further that payment of any increased or additional premiums or more onerous terms required by insurers by reason of the Building Contractor's own claims record or other acts, omissions, matters or things peculiar to the Building Contractor will be deemed to be within the commercially reasonable rates and terms;
- 5.1.2 provide evidence (as and when reasonably required by the Authority) satisfactory to the Authority of the PI Insurance being in full force and effect from the date of the Building Contract (such evidence to include details of the cover);
- 5.1.3 provide the Authority with notice of:
- 5.1.3.1 any cancellation of the PI Insurance not less than thirty (30) days prior to the relevant cancellation date; and
- 5.1.3.2 any adverse material change to or suspension of cover relevant to the Works not less than thirty (30) days prior to such relevant change or suspension;
- 5.1.4 inform the Authority as soon as reasonably practicable of any claim under the PI Insurance in respect of the Works in excess of one million pounds (£1,000,000) and provide such information to the Authority as the Authority may reasonably require in relation to such claim and provide notice of any potential breach of the aggregate limit of the policy; and

¹⁹³⁻¹⁹⁴ Authority to check level of indemnity is sufficient in relation to the Works at each School.

¹⁹⁴⁻¹⁹⁵ If the limit of cover is "u" in the aggregate¹⁹⁵, the level of indemnity should be increased proportionately to ensure sufficient cover is available to equate to each and every loss.

5.1.5 indemnify the Authority in respect of any subrogation claim by the insurers brought in connection with any claim made under the PI Insurance.^{495,196}

6 **NOTICES**

Any notice to be given by any party will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet, provided that if any notice sent by hand or facsimile is sent after 4.45 pm on any day it will be deemed to be served on the next Business Day. Any notice sent by post will be deemed to have been duly served at the expiration of forty-eight (48) hours after the time of posting if the end of that period falls before 4.45pm on a Business Day and otherwise on the next Business Day.

7 **ASSIGNMENT**

The benefit of and the rights of the Authority under this Deed may be assigned without the consent of the Building Contractor on two (2) occasions only and the Authority will notify the Building Contractor in writing following any such assignment specifying the name and address of the assignee and the date of the assignment. The Building Contractor will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original beneficiary hereunder or by reason that the original beneficiary or any intermediate beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Sites or that the original beneficiary or any intermediate beneficiary has not suffered any, or as much, loss.

8 **AUTHORITY'S REMEDIES**

The rights and benefits conferred upon the Authority by this Deed are in addition to any other rights and remedies it may have against the Building Contractor including without prejudice to the generality of the foregoing any remedies in negligence.

9 **INSPECTION OF PROJECT DATA**

The Building Contractor's liabilities under this Deed will not be in any way reduced or extinguished by reason of any inspection or approval of the Project Data or attendance at site meetings or other enquiry or inspection which the Authority may make or procure to be made for its benefit or on its behalf.^{496,197}

^{495,196} The deletion of clause 5.1.5 is not acceptable. EFA will however agree that this clause can be amended as set out below if it is required by the Building Contractor's PI insurer provided a) a letter from the PI insurer confirming this is a condition (rather than a recommendation) that such a clause is contained in the warranty is provided b) an extract of the relevant policy wording is provided and c) there is a consequential insertion of a new clause 9.2 as set out below.

Acceptable amendment to clause 5.1.5: add to the end of the clause "but only where and to the extent that such subrogated claim relates to any default and/or negligence on the part of the Building Contractor in relation to its responsibilities under the Building Contract".

Clause 9.2: "The Building Contractor acknowledges that under and in accordance with the Project Agreement, save where otherwise expressly stated in such agreement, the Authority has placed the entire responsibility for the design of the Works upon the Contractor and that neither the giving of any approval, consent, examination, acknowledgement, knowledge of the terms of any agreement or document nor the review of any document or course of action by or on behalf of the Authority under and in accordance with such agreement, nor the failure of the same, shall unless otherwise expressly stated in such agreement, relieve the Contractor of any of its obligations or of any duty which it may have to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the approval, consent, examination, acknowledgement or knowledge."

^{496,197} A new clause 9.2 (as set out in [the](#) footnote 4-above) may only be inserted where clause 5.1.5 is amended and

STEP-IN RIGHTS IN FAVOUR OF THE AUTHORITY

- 10.1 The Building Contractor will not exercise or seek to exercise any right which may be or become available to it to terminate or treat as terminated or repudiated the Building Contract or its engagement under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to the Authority not less than twenty (20) Business Days' prior written ~~(notice (or~~ seven (7) days' prior written notice of suspension in the event of non payment under the Building Contract) notice specifying the Building Contractor's ground for terminating or treating as terminated or repudiated the Building Contract or its engagement under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the Building Contract. Within such period of notice:
- 10.1.1 the Authority may give written notice to the Building Contractor that the Authority will thenceforth become the client under the Building Contract to the exclusion of the Contractor and thereupon the Building Contractor will admit that the Authority is its client under the Building Contract and the Building Contract will be and remain in full force and effect notwithstanding any of the said grounds;
- 10.1.2 if the Authority has given such notice as aforesaid or under clause 10.3, the Authority shall accept liability for the Contractor's obligations under the Building Contract and will as soon as practicable thereafter remedy any outstanding breach by the Contractor that properly has been included in the Building Contractor's specified grounds and which is capable of remedy by the Authority; and
- 10.1.3 if the Authority has given such notice as aforesaid or under clause 10.3, the Authority will from the service of such notice become responsible for all sums properly payable to the Building Contractor under the Building Contract accruing due after the service of such notice but the Authority will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to the Contractor under the Building Contract.
- 10.2 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Authority to the Building Contractor, the Authority will not be under any obligation to the Building Contractor nor will the Building Contractor have any claim or cause of action against the Authority unless and until the Authority has given written notice to the Building Contractor pursuant to clause 10.1.1 or clause 10.3 of this Deed.
- 10.3 The Building Contractor further covenants with the Authority that if the employment of the Contractor under the Project Agreement is terminated or if the Project Agreement is terminated by the Authority the Building Contractor, if requested by the Authority by notice in writing and subject to clause 10.1.2 and clause 10.1.3, will accept the instructions of the Authority to the exclusion of the Contractor in respect of its duties under the Building Contract upon the terms and conditions of the Building Contract and will if so requested in writing enter into a novation agreement in the form set out in Appendix 1¹⁹⁷₁₉₈ to this

acceptable evidence from the PI insurers in relation to clause 5.15 is provided.

¹⁹⁷₁₉₈ A template novation deed is included at appendix 1 for Authorities to use if they wish; amendments need not be submitted as derogations.

Deed whereby the Authority is substituted for the Contractor under the Building Contract.

- 10.4 If the Building Contractor is requested to enter into a novation agreement pursuant to clause 10.3, the Contractor agrees to enter into the same at the request of the Authority.
- 10.5 Where the Building Contractor has given rights in relation to the Building Contract similar to those contained in this clause to the Lender then if both the Authority and the Lender serve notice under clause 10.1.1 or clause 10.3 or its equivalent the notice served by the Authority will not prevail over any notice served by the Lender but will prevail over any notice served by any other person.
- 10.6 The Contractor acknowledges that the Building Contractor will be entitled to rely on a notice given to the Building Contractor by the Authority under clause 10.3 as conclusive evidence that the employment of the Contractor under the Project Agreement has been terminated or that the Project Agreement has been terminated.
- 10.7 The Authority may by notice in writing to the Building Contractor appoint another person to exercise its rights under this clause 10 subject to the Authority remaining liable to the Building Contractor as guarantor for its appointee in respect of its obligations under this Deed.
- 10.8 As from the date of service of notice under clauses 10.1.1 or 10.3 to the extent that the Building Contract operates by reference to the existence and application of the Project Agreement, the Building Contract shall be administered and construed as though the Project Agreement were continuing and the Building Contract shall therefore continue, subject to amendment only as necessary to reflect the fact that the Project Agreement may in fact have been terminated and the Authority has undertaken the obligations set out in clause 10.1.2.
- 10.9 Upon request by the Authority the Building Contractor agrees to co-operate with the Authority in determining the duties performed or to be performed by the Building Contractor and to provide a copy of the Building Contract and any variations thereto and details of all monies paid and due under the Building Contract.

11 **STANDARDS OF PRODUCTS AND MATERIALS**

The Building Contractor warrants that it has only used and will only use new materials in carrying out the Works unless the Authority agrees otherwise in writing or the contrary is set out in the Authority's Requirements (as defined in the Project Agreement)) and all goods used or included in the Works shall be of satisfactory quality, and the Building Contractor warrants that it has not used or included and will not use or include in the Works any of those products and materials listed in Schedule 9 (Prohibited Materials) of the Project Agreement nor any products or materials not in conformity with relevant British or European Union standards or codes of practice or which, at the time of use, are widely known to building contractors, contractors or members of the relevant design profession within the European Union to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used.

12 **SUB-CONTRACTORS**

Following a written request from the Authority the Building Contractor will (unless it has already done so) and/ or procure that its Principal Building Sub-Contractors (as defined in the Project Agreement) and members of the Professional Team (as defined in the Project Agreement) each execute a deed of collateral warranty in the relevant form specified in the Building Contract in favour of any person in whose favour the Building Contract obliges the Building Contractor to give or procure the giving of such a warranty.

13 **SEVERABILITY**

If any term, condition or provision of this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality and enforceability of the other provisions of or any other documents referred to in this Agreement.

14 **WAIVER**

14.1 No term or provision of this Deed shall be considered as waived by any party to this Deed unless a waiver is given in writing by that party.

14.2 No waiver under clause 14.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Deed unless (and only to the extent) expressly stated in that waiver.

15 **THIRD PARTY RIGHTS**

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This clause does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

16 **GOVERNING LAW AND JURISDICTION**

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this Deed.

17 **CONTRACTOR ACKNOWLEDGEMENT**

The Contractor has entered into this Deed in order to acknowledge the arrangements effected hereby and undertakes to each of the Authority and the Building Contractor to observe the provisions of this Deed at all times and not in any way to prejudice or affect the enforcement hereof or to do or permit to be done anything which would be a breach hereof.

18 **COUNTERPARTS**

This Deed may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full and original instrument for all purposes.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above

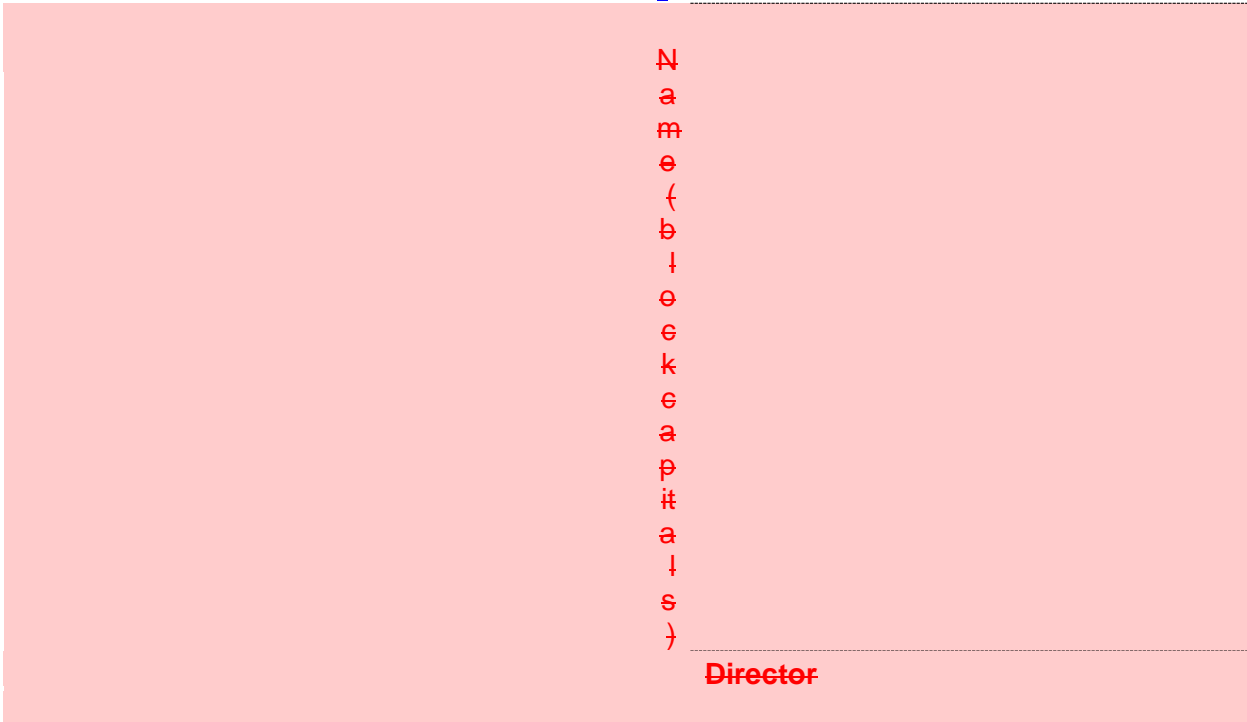
Executed as a deed, but not delivered until the first date specified on page 1, by **BUILDING CONTRACTOR** acting by a director in the presence of a witness:

Signature
Name (block capitals)
Director

Signature

Name (block capitals)

Director



Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address

Witness name
(block capitals)

Witness address
.....
.....

Executed as a deed, but not delivered)))) until the first date specified on page 1, by **CONTRACTOR** acting by a director in the presence of a witness:

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Signature

Name (block capitals)

Director

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)

Director

Witness signature

Witness name _____
(block
capitals)

Witness
address _____

~~Witness name~~ _____
~~(block capitals)~~

~~Witness address~~ _____

Executed as a deed, but not delivered)
until the first date specified on page 1, by)
AUTHORITY acting by:)
)

Authorised Signatory

Authorised Signatory

Authorised Signatory

Appendix 1

APPENDIX 1

Form of Deed of Novation^{~~198~~199}

^{~~198~~199} As this is a template deed of novation, changes do not need to be reviewed by EFA.

BETWEEN:

- (1) ~~(1)~~ **[CONTRACTOR'S BUILDING CONTRACTOR]** (Company No. _____), whose registered office is at _____ (the **Building Contractor**);
- (2) ~~(2)~~ **[AUTHORITY]** of _____ (the **Authority**), which expression includes its permitted successors in title and assigns); and
- (3) ~~(3)~~ **[CONTRACTOR]** (Company No. _____), whose registered office is at _____ (the **Contractor**).

WHEREAS

- A ~~(A)~~ By a project agreement dated [_____] (the **Project Agreement**) the Authority has appointed the Contractor to carry out in relation to [_____] (the **Sites**) the design and construction of the Works (as defined in the Project Agreement).
- B ~~(B)~~ By a design and build contract dated [_____] (the **Building Contract**) the Contractor has appointed the Building Contractor to carry out in relation to the Sites the design and construction of the Works.
- C ~~(C)~~ [The employment of the Contractor under the Project Agreement has been terminated] [the Project Agreement has been terminated by the Authority].
- D ~~(D)~~ The Contractor has transferred or agreed to transfer its interest in (or granted or agreed to grant a subordinate interest in) the Sites to the Authority.
- E ~~(E)~~ The parties have agreed to novate the Building Contract to the Authority on the terms set out below.

IT IS AGREED

1 Novation of Building Contract

The Building Contract is hereby novated from the Contractor and the Building Contractor to the Authority and the Building Contractor.

2 Release of the Contractor

The Contractor shall no longer owe any duty or obligation to the Building Contractor under or in respect of the Building Contract whether by virtue of its terms or by virtue of any breach or otherwise.

3 Release of the Building Contractor

The Building Contractor shall no longer owe any duty or obligation to the Contractor under or in respect of the Building Contract whether by virtue of its terms or by virtue of any breach or otherwise.

4 Binding of the Building Contractor to the Authority

4.1 The Building Contractor binds itself to the Authority in the terms of the Building Contract as if the Authority were and always had been named in the Building Contract in place of the Contractor.

- 4.2 The Building Contractor warrants to the Authority that prior to the date of this Deed it has performed and that it will continue to perform its duties and obligations as required by and in accordance with the terms of the Building Contract.
- 4.3 The Authority shall not be precluded from recovering any losses incurred by the Authority or the Contractor resulting from any breach of clause 4.2 by reason that (if it be the case) the acts or omissions causing such breach occurred before this Deed took effect, or that the Contractor will not incur or has not or would not have incurred any such losses. No waiver by the Contractor, either express or implied, will affect the Building Contractor's liability to the Authority pursuant to this clause.
- 4.4 Upon the expiration of twelve (12) years from the date of completion of the Works in accordance with the Building Contract, the liability of the Building Contractor under this Deed shall cease and determine, save in relation to any claims made by the Authority against the Building Contractor and notified by the Authority to the Building Contractor in writing prior thereto.

5 Binding of the Authority to the Building Contractor

The Authority binds itself to the Building Contractor in the terms of the Building Contract as if the Authority were and always had been named in the Building Contract in place of the Contractor and as if all acts and omissions of the Contractor (including any wrongful acts or omissions) under and in respect of the Building Contract were the acts and omissions of the Authority.

6 Vesting of remedies in the Authority

All rights of action and remedies vested in the Contractor against the Building Contractor under and in respect of the Building Contract shall hereupon vest in the Authority.

7 Vesting of remedies against the Authority

All rights of action and remedies vested in the Building Contractor against the Contractor under and in respect of the Building Contract shall hereinafter lie against the Authority.

8 Amendment of the Building Contract

The Authority and the Building Contractor agree that the terms of the Building Contract shall be and are varied in the manner set out in Schedule 1.

9 Affirmation of the Building Contract

Subject to the terms of this Deed the Building Contract shall remain in full force and effect.

10 Third Party Rights

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This clause does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

11 Governing Law and Interpretation

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this Deed.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above

SCHEDULE 7

COLLATERAL WARRANTIES

Part 2 ~~199~~ 200

Warranty from Principal Building Sub-Contractors

~~199~~ 200 Note that derogations to Parts 2 and 3 must be submitted on behalf of each Sub-Contractor or Consultant. It must be clear which amendment is requested by which entity. The amendments are not actually made to the form in this document but to the form of each warranty when prepared for execution.

Dated _____ 200

[PRINCIPAL BUILDING CONTRACTOR] (1)

[AUTHORITY] (2)

[CONTRACTOR'S BUILDING CONTRACTOR] (3)

~~Dated _____ 200~~

~~[PRINCIPAL BUILDING SUB-CONTRACTOR] (1)~~

~~[AUTHORITY] (2)~~

~~[CONTRACTOR'S BUILDING CONTRACTOR] (3)~~

~~DUTY OF CARE DEED
relating to~~

DUTY OF CARE DEED
relating to

BETWEEN:

- (1) ~~(1)~~ **[PRINCIPAL BUILDING SUB-CONTRACTOR]** (Company No. _____), whose registered office is at _____ (the **Principal Building Sub-Contractor**);
- (2) ~~(2)~~ **[AUTHORITY]** of [_____] (the **Authority**), ~~(which expression includes its permitted successors in title and assigns);~~ and
- (3) ~~(3)~~ **BUILDING CONTRACTOR** ((Company No. _____), whose registered office is at [_____] (the **Building Contractor**).

BACKGROUND

- A ~~(A)~~ By a project agreement dated [_____] (the **Project Agreement**) the Authority has appointed the Contractor to carry out, in relation to the Sites, the provision of serviced accommodation to the Authority at each and every School as contemplated by the Project Agreement including the carrying out of the Works and the provision of the Services and the design and construction of the Works.
- B ~~(B)~~ By a design and build contract dated [_____] (the **Building Contract**) the Contractor has appointed the Building Contractor to carry out in relation to the Sites the design and construction of the Works.
- C ~~(C)~~ The Principal Building Sub-Contractor has been appointed by the Building Contractor under a contract dated [_____] (the Subcontract)^{200,201} in relation to the [_____]^{204,202} element of the Works (the **Subcontract Works**).
- D ~~(D)~~ The Principal Building Sub-Contractor and the Building Contractor have agreed to execute this Deed in favour of the Authority.

1 DEFINITIONS AND INTERPRETATIONS

Unless expressly defined otherwise in this Deed, any defined term in this Deed shall have the same meaning given to such term in the [Building Contract/Subcontract].

Intellectual Property Rights

any and all patents, trade marks, service marks, copyright, database rights, moral rights, rights in a design, know how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attaching thereto which is created, brought into existence, acquired, used or intended to be used by the Principal Building Sub-Contractor for the purpose of carrying out the Subcontract Works;

Lender(s)

^{200,201} The Authority's legal advisers must review the Subcontract and ensure that any defined terms used in this deed are identical to those used in the Subcontract.

^{204,202} Insert details of relevant subcontract package.

any organisation providing funding to the Contractor in connection with the carrying out of the Works;²⁰²203

Project Data

- (i) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the School (as defined in the Project Agreement) in each case used by or on behalf of the Principal Building Sub-Contractor in connection with the provision of the Works or the performance of the Principal Building Sub-Contractor's obligations under the Subcontract; and
- (ii) any other materials, documents or data acquired or brought into existence or used in relation to the Works or the Subcontract by or on behalf of the Principal Building Sub-Contractor in connection with the provision of the Works or the performance of the Principal Building Sub-Contractor's obligations under the Subcontract.

2 OPERATIVE PROVISIONS

In consideration of the payment of one pound (£1.00) by the Authority to the Principal Building Sub-Contractor, receipt of which the Principal Building Sub-Contractor acknowledges:

3 PRINCIPAL BUILDING SUB-CONTRACTOR'S WARRANTY AND LIABILITY

- 3.1 The Principal Building Sub-Contractor warrants to the Authority that it has carried out and will continue to carry out its duties under the Subcontract in accordance with the Subcontract and that it has exercised and will continue to exercise, in carrying out the design of the Subcontract Works, the level of skill and care reasonably to be expected from an appropriately qualified and competent professional designer providing those services in relation to a project of a similar size and scope to the Works. In particular and without limiting the generality of the foregoing the Principal Building Sub-Contractor covenants with the Authority that it has carried out and will carry out and complete the Subcontract Works in accordance with the Subcontract and duly observe and perform all its duties and obligations thereunder;
- 3.2 The Principal Building Sub-Contractor shall have no liability under clause 3.1 or clause 11 of this Deed that is greater or of longer duration than it would have had as if in lieu of this Deed the Authority had been a party to the Subcontract as joint employer and the Principal Building Sub-contractor shall be entitled in any action or proceedings by the Authority to raise equivalent rights in defence of liability (except for set off or counterclaim). Upon the expiration of twelve (12) years from the date of Completion of the Works in accordance with the Project Agreement, the liability of the Principal Building Sub-Contractor under this Deed shall cease and determine, save in relation to any claims made by the Authority against the Principal Building Sub-Contractor where proceedings have commenced prior to such date.
- 3.3 Nothing in this Deed shall entitle the Authority to exercise its rights under this clause 3 unless:
 - 3.3.1 the Project Agreement (or the Contractor's employment under it) has been terminated; or, in the absence of such termination

²⁰²203 Note that if Lenders do not require direct warranties from Principal Building Sub-Contractors (and instead take a security assignment of the warranties given to the SPV) then this definition and related clauses will not be needed.

3.3.2 the Contractor has not (either itself or through its supply chain (whether through the Building Contractor or an FM Contractor or otherwise)) satisfied the potential claim by the Authority under this clause 3, including addressing and/or remedying the matter or circumstance giving rise to such claim, within a reasonable time of such matter or circumstance arising,

provided that this clause 3.3 shall not apply where any delay in the exercise of the Authority's rights under Deed might otherwise lead to their becoming statute-barred.

3.4 ²⁰³₂₀₄

4 INTELLECTUAL PROPERTY

4.1 The Principal Building Sub-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. The Principal Building Sub-Contractor shall obtain all necessary licences, permissions and consents necessary for it to make the Project Data available to the Authority on these terms, for the purposes of:

4.1.1 the Authority using the Works for the provision of Educational Services (as defined in the Project Agreement) and for ancillary purposes, its duties under the Project Agreement and/or any statutory duties the Authority may have; and

4.1.2 following termination of the Subcontract or of the Principal Building Sub-Contractor's employment under it, the design or construction of the Works and/or the operation, maintenance or improvement of the Works,

(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. The Authority will not hold the Principal Building Sub-Contractor liable for any use it may make of the Project Data for any purpose other than the Approved Purposes.

4.2 The Principal Building Sub-Contractor:

4.2.1 hereby grants to the Authority, free of charge, an irrevocable, non-exclusive and transferable (subject to the restrictions contained in clause 7 of this Deed) licence to use the Intellectual Property Rights which are or become vested in the Principal Building Sub-Contractor for the Approved Purposes; and

²⁰³₂₀₄ Clause 3.4 is only to be included where the Principal Building Sub-Contractor's PI insurer has provided evidence that it is a condition of the Principal Building Sub-Contractor's insurance policy that such a clause is included in the warranty. "The Principal Building Sub-Contractor's liability for losses under this Deed shall be limited to that proportion of losses which it will be just and equitable to require the Principal Building Sub-Contractor to pay having regard to the extent of the Principal Building Sub-Contractor's responsibility for the same and on the basis that the [insert names of other members of the Professional Team (as defined in the Project Agreement), the other Principal Building Sub-Contractors (as defined in the Project Agreement) and the Building Contractor] shall be deemed to have provided contractual undertakings on terms no less onerous ~~that~~_{than} this Deed to the Authority in respect of the performance of their services in connection with the Works and shall be deemed to have paid to the Authority such proportion which it would be just and equitable for them to pay having regard to the extent of their responsibility provided always that the Principal Building Sub-Contractor shall not plead or reply when in defence of any claim brought by the Authority that the Building Contractor is responsible for the design carried out by the Principal Building Sub-Contractor."

4.2.2 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 4.2.1 above to the Authority,

in both cases, solely for the Approved Purposes.

4.3 The Principal Building Sub-Contractor warrants to the Authority that he has used the standard of skill, care and diligence as set out in clause 3.1 to see that the Project Data²⁰⁴₂₀₅ (save to the extent duly appointed sub contractors have been used to prepare the same) are its own original work and that in any event their use in connection with the Works will not infringe the rights of any third party.

4.4 Where a claim or proceeding is made or brought against the Authority which arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Works infringes or the Works themselves infringe any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority otherwise than in accordance with this Deed, the Principal Building Sub-Contractor shall indemnify the Authority at all times from and against all Direct Losses and Indirect Losses (as defined in the Project Agreement) arising as a result of such claims and proceedings.

5 INSURANCE

5.1 The Principal Building Sub-Contractor hereby covenants with the Authority to:

5.1.1 take out and maintain [professional indemnity/product liability²⁰⁵₂₀₆] insurance cover with a limit of indemnity that shall be a minimum of [ten million pounds (£10,000,000)²⁰⁶₂₀₇] either each and every loss or in the aggregate²⁰⁷₂₀₈ in relation to the Subcontract Works (if in the aggregate then in any one (1) year of insurance a minimum of one (1) automatic reinstatement of the aggregate indemnity limit is required) (**[PI Insurance/Product Liability Insurance]**) and that it will maintain such insurance with reputable insurers carrying on business in the European Union from the date hereof until twelve (12) years after Completion of the Works pursuant to the Project Agreement, provided that such insurance is generally available in the market to members of the Principal Building Sub-Contractor's profession at commercially reasonable rates and terms and provided further that payment of any increased or additional premiums or more onerous terms required by insurers by reason of the Principal Building Sub-Contractor's own claims record or other acts, omissions, matters or things peculiar to the Principal Building Sub-Contractor will be deemed to be within the commercially reasonable rates and terms;

²⁰⁴₂₀₅ The Authority's legal advisers are to check that "Project Data" and "Intellectual Property Rights" etc are appropriately dropped down into the subcontract.

²⁰⁵₂₀₆ Product Liability insurance may in certain circumstances be acceptable instead of Professional Indemnity Insurance. Authority to check limits of cover are appropriate for such insurance and that the necessary changes to clause 5.1.1 are correctly made.

²⁰⁶₂₀₇ Or such other sum as the Authority acting reasonably considers appropriate having regard to the Principal Building Sub-Contractor's trade and the nature and importance of the Subcontractor's works.

²⁰⁷₂₀₈ If the limit of cover is "in the aggregate", the limit of cover should be increased proportionately to ensure sufficient cover is available to equate to each and every loss.

- 5.1.2 provide evidence (as and when reasonably required by the Authority) satisfactory to the Authority of the [PI Insurance/Product Liability Insurance] being in full force and effect from the date of the Subcontract (such evidence to include details of the cover);
- 5.1.3 provide the Authority with notice of:
 - 5.1.3.1 any cancellation of the [PI Insurance/Product Liability Insurance] not less than thirty (30) days prior to the relevant cancellation date; and
 - 5.1.3.2 any adverse material changes to or suspension of cover relevant to the Subcontract Works not less than thirty (30) days prior to the relevant change or suspension;
- 5.1.4 inform the Authority as soon as reasonably practicable of any claim under the [PI Insurance/Product Liability Insurance] in respect of the Subcontract Works in excess of one million pounds (£1,000,000) and provide such information to the Authority as the Authority may reasonably require in relation to such claim and provide notice of any potential breach of the aggregate limit of the policy; and
- 5.1.5 indemnify the Authority in respect of any subrogation claim by the insurers brought in connection with any claim made under the PI Insurance/Product Liability Insurance.²⁰⁸₂₀₉

6 NOTICES

Any notice to be given by any party hereunder will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet, provided that if any notice sent by hand or facsimile is sent after 4.45 pm on any day it will be deemed to be served on the next Business Day. Any notice sent by post will be deemed to have been duly served at the expiration of forty-eight (48) hours after the time of posting if the end of that period falls before 4.45pm on a Business Day and otherwise on the next Business Day.

²⁰⁸₂₀₉ The deletion of clause 5.1.5 is not acceptable. EFA will however agree that clauses 5.1.5 and 9.1 can be amended as set out below if it is required by the Principal Building Sub-Contractor's PI insurer provided a) a letter from the PI insurer confirming this is a condition (rather than a recommendation) that such a clause is contained in the warranty is provided b) an extract of the relevant policy wording is provided and c) there is a consequential insertion of a new clause 9.2 as set out below.

Acceptable amendment to clause 5.1.5: add to the end of the clause "but only where and to the extent that such subrogated claim relates to any default and/or negligence on the part of the Principal Building Sub-Contractor in relation to its responsibilities under the Subcontract".

New clause 9.2: "The Principal Building Sub-Contractor acknowledges that under and in accordance with the Project Agreement, save where otherwise expressly stated in such agreement, the Authority has placed the entire responsibility for the design of the Works upon the Contractor and that neither the giving of any approval, consent, examination, acknowledgement, knowledge of the terms of any agreement or document nor the review of any document or course of action by or on behalf of the Authority under and in accordance with such agreement, nor the failure of the same, shall unless otherwise expressly stated in such agreement, relieve the Contractor of any of its obligations or of any duty which it may have to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the approval, consent, examination, acknowledgement or knowledge."

7 **ASSIGNMENT**

The benefit of and the rights of the Authority under this Deed may be assigned without the consent of the Principal Building Sub-Contractor on two (2) occasions only and the Authority will notify the Principal Building Sub-Contractor in writing following any such assignment specifying the name and address of the assignee and the date of the assignment. The Principal Building Sub-Contractor will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original beneficiary hereunder or by reason that the original beneficiary or any intermediate beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Sites or that the original beneficiary or any intermediate beneficiary has not suffered any, or as much, loss.

8 **AUTHORITY'S REMEDIES**

The rights and benefits conferred upon the Authority by this Deed are in addition to any other rights and remedies it may have against the Principal Building Sub-Contractor including without prejudice to the generality of the foregoing any remedies in negligence.

9 **INSPECTION OF PROJECT DATA**

The Principal Building Sub-Contractor's liabilities under this Deed will not be in any way reduced or extinguished by reason of any inspection or approval of the Project Data or attendance at site meetings or other enquiry or inspection which the Authority may make or procure to be made for its benefit or on its behalf.²⁰⁹₂₁₀

10 **STEP-IN RIGHTS IN FAVOUR OF THE AUTHORITY**

10.1 The Principal Building Sub-Contractor will not exercise or seek to exercise any right which may be or become available to it to terminate or treat as terminated or repudiated the Subcontract or its engagement under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to the Authority not less than twenty (20) Business Days' prior written notice (and seven (7) days' prior written notice of suspension in the event of non-payment under the Subcontract) specifying the Principal Building Sub-Contractor's ground for terminating or treating as terminated or repudiated the Subcontract or its engagement under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the Subcontract. Within such period of notice:

10.1.1 the Authority may give written notice to the Principal Building Sub-Contractor that the Authority will thenceforth become the client under the Subcontract to the exclusion of the Building Contractor and thereupon the Principal Building Sub-Contractor will admit that the Authority is the client under the Subcontract and the Subcontract will be and remain in full force and effect notwithstanding any of the said grounds;

10.1.2 if the Authority has given such notice as aforesaid or under clause 10.3, the Authority shall accept liability for the Building Contractor's obligations under the Subcontract and will as soon as practicable thereafter remedy any outstanding breach by the previous client which properly has been included in the Principal Building Sub-

²⁰⁹₂₁₀ A new clause 9.2 (as set out in footnote to clause 5.1.5) may only be inserted where acceptable evidence from the PI Insurers in relation to clause 5.1.5 is provided.

Contractor's specified grounds and which is capable of remedy by the Authority; and

- 10.1.3 if the Authority has given such notice as aforesaid or under clause 10.3, the Authority will from the service of such notice become responsible for all sums properly payable to the Principal Building Sub-Contractor under the Subcontract accruing due after the service of such notice but the Authority will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to the Building Contractor under the Subcontract.
- 10.2 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Authority to the Principal Building Sub-Contractor, the Authority will not be under any obligation to the Principal Building Sub-Contractor nor will the Principal Building Sub-Contractor have any claim or cause of action against the Authority unless and until the Authority has given written notice to the Principal Building Sub-Contractor pursuant to clause 10.1.1 or clause 10.3 of this Deed.
- 10.3 The Principal Building Sub-Contractor further covenants with the Authority that if the employment of the Building Contractor under the Building Contract is terminated or if the Building Contract is terminated or the Building Contract is terminated the Principal Building Sub-Contractor, if requested by the Authority by notice in writing and subject to clause 10.1.2 and clause 10.1.3, will accept the instructions of the Authority to the exclusion of the Building Contractor in respect of its duties under the Subcontract upon the terms and conditions of the Subcontract and will if so requested in writing enter into a novation agreement in the form set out in Appendix 1²⁴⁰₂₁₁ to this Deed whereby the Authority is substituted for the Building Contractor under the Subcontract.
- 10.4 [Where the Principal Building Sub-Contractor has given rights in relation to the Subcontract similar to those contained in this clause to the Lender then if both the Authority and the Lender serve notice under clause 10.1.1 or clause 10.3 or its equivalent the notice served by the Authority will not prevail over any notice served by the Lender but will prevail over any notice served by any other person.²⁴⁴₂₁₂]
- 10.5 The Building Contractor acknowledges that the Principal Building Sub-Contractor will be entitled to rely on a notice given to the Principal Building Sub-Contractor by the Authority under clause 10.3 as conclusive evidence that the employment of the Building Contractor under the Building Contract has been terminated.
- 10.6 The Authority may by notice in writing to the Principal Building Sub-Contractor appoint another person to exercise its rights under this clause 10 subject to the Authority remaining liable to the Principal Building Sub-Contractor as guarantor for its appointee in respect of its obligations under this Deed.
- 10.7 Upon request by the Authority the Principal Building Sub-Contractor agrees to co-operate with the Authority in determining the duties performed or to be performed by the Principal Building Sub-Contractor and to provide a copy of the Subcontract and any variations thereto and details of all monies paid and due under the Subcontract.

²⁴⁰₂₁₁ Note this is a template document only.

²⁴⁴₂₁₂ Note that if Lenders do not require direct warranties from Principal Building Sub-Contractors (and instead take a security assignment of the warranties given to the SPV) then this drafting will not be needed.

10.8 As from the date of service of notice under clauses 10.1.1 or 10.3 to the extent that the Subcontract operates by reference to the existence and application of the Building Contract and/or the Project Agreement, the Subcontract shall be administered and construed as though the Building Contract and the Project Agreement were continuing and the Subcontract shall therefore continue, subject to amendment only as necessary to reflect the fact that the Building Contract and the Project Agreement may in fact have been terminated and the Authority has undertaken the obligations set out in clause 10.1.2.

11 **STANDARDS OF PRODUCTS AND MATERIALS**

11.1 The Principal Building Sub-Contractor warrants that it has not specified for use or used and it will not specify for use or use and (as appropriate) it has not authorised or approved and it will not authorise or approve the use by others, of any products or materials not in conformity with relevant British or European Union Standards or Codes of Practice or which at the time of specification are widely known to members of the Principal Building Sub-Contractor's profession within the European Union to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used.

11.2 If in the performance of its duties under the Subcontract the Principal Building Sub-Contractor becomes aware that it or any other person has specified or used, or authorised or approved the specification or use by others of any such products or materials the Principal Building Sub-Contractor will notify the Authority in writing forthwith. This clause does not create any additional duty for the Principal Building Sub-Contractor to inspect or check the work of others which is not required by the Subcontract.²⁴²₂₁₃

12 **SUB-CONTRACTORS**

Following a written request from the Authority the Principal Building Sub-Contractor will (unless it has already done so) and/ or procure that its sub-contractors execute a deed of collateral warranty in the relevant form specified in the Subcontract in favour of any person in whose favour the Subcontract obliged the Principal Building Sub-Contractor to give or procure the giving of such a warranty.

13 **SEVERABILITY**

If any term, condition or provision of this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality and enforceability of the other provisions of or any other documents referred to in this Deed.

14 **WAIVER**

14.1 No term or provision of this Deed shall be considered as waived by any party to this Deed unless a waiver is given in writing by that party.

14.2 No waiver under clause 14.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Deed unless (and only to the extent) expressly stated in that waiver.

²⁴²₂₁₃ The Authority's legal advisers to ensure that this clause 11 is included in the Subcontract.

15 **THIRD PARTY RIGHTS**

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This clause does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

16 **GOVERNING LAW AND JURISDICTION**

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

17 **BUILDING CONTRACTOR ACKNOWLEDGEMENT**

The Building Contractor has entered into this Deed in order to acknowledge the arrangements effected hereby and undertakes to each of the Authority and the Principal Building Sub-Contractor to observe the provisions of this Deed at all times and not in any way to prejudice or affect the enforcement hereof or to do or permit to be done anything which would be a breach hereof.

18 **COUNTERPARTS**

This Deed may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full and original instrument for all purposes.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above

Executed as a deed, but not delivered until the first date specified on page 1, by **PRINCIPAL BUILDING CONTRACTOR** acting by a director in the presence of a witness:

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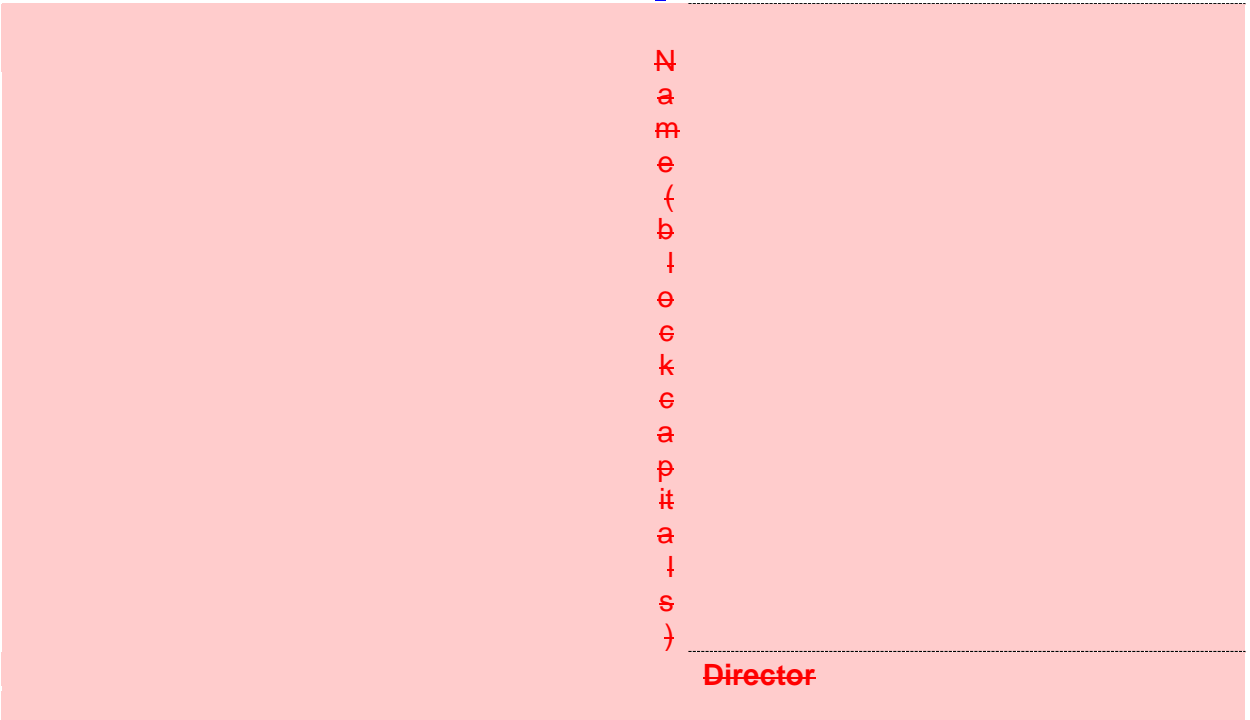
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Executed as a deed, but not delivered)
until the first date specified on page 1, by)
AUTHORITY acting by:)
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Appendix 1²⁴³

APPENDIX 2²¹⁴

Form of Deed of Novation

²¹³₂₁₄ As this is a template deed of novation, changes do not need to be reviewed by EFA.

BETWEEN:

- (1) ~~(1)~~ **[PRINCIPAL BUILDING SUB-CONTRACTOR]** (Company No. _____), whose registered office is at _____ (the **Principal Building Sub-Contractor**);
- (2) ~~(2)~~ **[AUTHORITY]** of _____ (the **Authority**), which expression includes its permitted successors in title and assigns); and
- (3) ~~(3)~~ **BUILDING CONTRACTOR** (Company No. _____), whose registered office is at _____ (the **Building Contractor**).

WHEREAS

- A ~~(A)~~ By a project agreement dated [_____] (the **Project Agreement**) the Authority has appointed the Contractor to carry out in relation to [_____] (the Sites) the design and construction of the Works (as defined in the Project Agreement).
- B ~~(B)~~ By a design and build contract dated [_____] (the **Building Contract**) the Contractor has appointed the Building Contractor to carry out in relation to the Sites the design and construction of the Works.
- C ~~(C)~~ The Principal Building Sub-Contractor has been appointed by the Building Contractor under a contract dated [_____] (the **Subcontract**) in relation to the [_____]^{244_215} element of the Works (the **Subcontract Works**).
- D ~~(C)~~ [The employment of the Building Contractor under the Building Contract has been terminated] [the Building Contract has been terminated].
- E ~~(D)~~ The Building Contractor has transferred or agreed to transfer its interest in (or granted or agreed to grant a subordinate interest in) the Sites to the Authority.
- E ~~(E)~~ The parties have agreed to novate the Subcontract to the Authority on the terms set out below.

IT IS AGREED

1 Novation of the Subcontract

The Subcontract is hereby novated from the Principal Building Sub-Contractor and the Building Contractor to the Principal Building Sub-Contractor and the Authority.

2 Release of the Principal Building Sub-Contractor

The Principal Building Sub-Contractor shall no longer owe any duty or obligation to the Building Contractor under or in respect of the Subcontract whether by virtue of its terms or by virtue of any breach or otherwise.

3 Release of the Building Contractor

The Building Contractor shall no longer owe any duty or obligation to the Principal Building Sub-Contractor under or in respect of the Subcontract whether by virtue of its terms or by virtue of any breach or otherwise.

^{244_215} Insert details of relevant subcontract works package.

4 **Binding of the Principal Building Sub-Contractor to the Authority**

- 4.1 The Principal Building Sub-Contractor binds itself to the Authority in the terms of the Subcontract as if the Authority were and always had been named in the Subcontract in place of the Building Contractor.
- 4.2 The Principal Building Sub-Contractor warrants to the Authority that prior to the date of this Deed it has performed and that it will continue to perform its duties and obligations as required by and in accordance with the terms of the Building Contract.
- 4.3 The Authority shall not be precluded from recovering any losses incurred by the Authority resulting from any breach of clause 4.2 by reason that (if it be the case) the acts or omissions causing such breach occurred before this Deed took effect, or that the Building Contractor will not incur or has not or would not have incurred any such losses. No waiver by the Building Contractor, either express or implied, will affect the Principal Building Sub-Contractor's liability to the Authority pursuant to this clause.
- 4.4 Upon the expiration of twelve (12) years from the date of completion of the Works in accordance with the Building Contract, the liability of the Principal Building Sub-Contractor under this Deed shall cease and determine, save in relation to any claims made by the Authority against the Principal Building Sub-Contractor and notified by the Authority to the Principal Building Sub-Contractor in writing prior thereto.

5 **Binding of the Authority to the Principal Building Sub-Contractor**

The Authority binds itself to the Principal Building Sub-Contractor in the terms of the Subcontract as if the Authority were and always had been named in the Subcontract in place of the Contractor and as if all acts and omissions of the Contractor (including any wrongful acts or omissions) under and in respect of the Subcontract were the acts and omissions of the Authority.

6 **Vesting of remedies in the Authority**

All rights of action and remedies vested in the Building Contractor against the Principal Building Sub-Contractor under and in respect of the Subcontract shall hereupon vest in the Authority.

7 **Vesting of remedies against the Authority**

All rights of action and remedies vested in the Principal Building Sub-Contractor against the Building Contractor under and in respect of the Subcontract shall hereinafter lie against the Authority.

8 **Amendment of the Subcontract**

The Authority and the Principal Building Sub-contractor agree that the terms of the Subcontract shall be and are varied in the manner set out in Schedule 1.

9 **Affirmation of the Subcontract**

Subject to the terms of this Deed the Subcontract shall remain in full force and effect.

10 **Third Party Rights**

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This clause does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

11 **Governing Law and Interpretation**

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above

SCHEDULE 7

COLLATERAL WARRANTIES

Part 3

Warranty from members of the Professional Team

Dated _____ 200

[CONSULTANT] (1)

[AUTHORITY] (2)

[CONTRACTOR'S BUILDING CONTRACTOR] (3)

DUTY OF CARE DEED
relating to

~~Dated _____ 200~~

~~[CONSULTANT] (1)~~

~~[AUTHORITY] (2)~~

~~[CONTRACTOR'S BUILDING CONTRACTOR] (3)~~

~~DUTY OF CARE DEED
relating to~~

BETWEEN

(1) ~~(1)~~ **THE PARTNERS IN [INSERT NAME OF PARTNERSHIP]** (being the persons listed in the Schedule hereto), whose principal place of business is at

OR

LIMITED/PLC (Company No. _____), whose registered office is at
(the **Consultant**);

(2) ~~(2)~~ **[AUTHORITY]** of _____ (the **Authority**), which expression includes its permitted successors in title and assigns); and

(3) ~~(3)~~ **[BUILDING CONTRACTOR]** (Company No. _____), whose registered office is at _____ (the **Building Contractor**).

BACKGROUND

A ~~(A)~~ By a project agreement dated [_____] (the **Project Agreement**) the Authority has appointed the Contractor to carry out, in relation to the Sites, the provision of serviced accommodation to the Authority at each and every School as contemplated by the Project Agreement including the carrying out of the Works (as defined in the Project Agreement) and the provision of the Services and design and construction of the Works.

B ~~(B)~~ By a design and build contract dated [_____] (the **Building Contract**) the Contractor has appointed the Building Contractor to carry out in relation to the Sites the design and construction of the Works.

C ~~(C)~~ The Consultant has been appointed by the Building Contractor under a [letter/deed] of appointment dated [_____] (the **Appointment**) to provide services in relation to the Works.

D ~~(D)~~ The Consultant is obliged under the Appointment to give a warranty in this form in favour of the Authority.

E ~~(E)~~ The Consultant and the Building Contractor have agreed to execute this Deed in favour of the Authority.

1 DEFINITIONS AND INTERPRETATIONS

Unless expressly defined otherwise in this Deed, any defined term in this Deed shall have the same meaning given to such term in the Appointment²⁴⁵. ²⁴⁶

Intellectual Property Rights

any and all patents, trade marks, service marks, copyright, database rights, moral rights, rights in a design, know how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attaching thereto which is created, brought into existence, acquired, used or intended to be used by the Consultant for the purpose of carrying out the Works;

Lender(s)

²⁴⁵ ~~The Authority's legal advisers must review the Appointment and ensure any defined terms used in this deed are identical to those used in the Appointment.~~

²⁴⁶ The Authority's legal advisers must review the Appointment and ensure any defined terms used in this deed are identical to those used in the Appointment.

means any organisation providing funding to the Contractor in connection with the carrying out of the Works;

Project Data

- (i) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the School (as defined in the Project Agreement) in each case that is used by or on behalf of the Consultant in connection with the provision of the Works or the performance of the Consultant's obligations under the Appointment; and
- (ii) any other materials, documents or data acquired or brought into existence or used in relation to the Works and or the Appointment by or on behalf of the Consultant in connection with the provision of the Works and or the performance of the Consultant's obligations under the Appointment.

2 OPERATIVE PROVISIONS

In consideration of the payment of one pound (£1.00) by the Authority to the Consultant, receipt of which the Consultant acknowledges:

3 CONSULTANT'S WARRANTY AND LIABILITY

- 3.1 The Consultant warrants to the Authority that it has carried out and will continue to carry out its duties under the Appointment in accordance with the Appointment and that it has exercised and will continue to exercise in the performance of those duties the reasonable skill care and diligence to be expected of a properly qualified member of its profession experienced in carrying out duties such as its duties under the Appointment in relation to works of similar scope, nature and complexity to the Works.
- 3.2 The Consultant shall have no liability under clause 3.1 or clause 11 of this Deed that is greater or of longer duration than it would have had as if in lieu of this Deed the Authority had been a party to the Appointment as joint employer and the Consultant shall be entitled in any action or proceedings by the Authority to raise equivalent rights in defence of liability (except for set off or counterclaim). Upon the expiration of twelve (12) years from the date of Completion of the Works in accordance with the Project Agreement, the liability of the Consultant under this Deed shall cease and determine, save in relation to any claims made by the Authority against the Consultant where proceedings have commenced prior to such date.
- 3.3 Nothing in this Deed shall entitle the Authority to exercise its rights under this clause 3 unless:
 - 3.3.1 the Project Agreement (or the Contractor's employment under it) has been terminated; or, in the absence of such termination;
 - 3.3.2 the Contractor has not (either itself or through its supply chain (whether through the Building Contractor or an FM Contractor or otherwise)) satisfied the potential claim by the Authority under this clause 3, including addressing and/or remedying the matter or circumstance giving rise to such claim, within a reasonable time of such matter or circumstance arising,

provided that this clause 3.3 shall not apply where any delay in the exercise of the Authority's rights under Deed might otherwise lead to their becoming statute-barred.

4 **INTELLECTUAL PROPERTY**

4.1 The Consultant 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. The Consultant shall obtain all necessary licences, permissions and consents necessary for it to make the Project Data available to the Authority on these terms, for the purposes of:

4.1.1 the Authority using the Works for the provision of Educational Services (as defined in the Project Agreement) and for ancillary purposes, its duties under the Project Agreement and/or any statutory duties which the Authority may have; and

4.1.2 following termination of the Appointment or of the Consultant's employment under it, the design or construction of the Works and/or the operation, maintenance or improvement of the Works,

(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. The Authority will not hold the Consultant liable for any use it may make of the Project Data for any purpose other than the Approved Purposes.

4.2 The Consultant:

4.2.1 hereby grants to the Authority, free of charge, an irrevocable, non-exclusive and transferable (subject to the restrictions contained in clause 8 of this Deed) licence to use the Intellectual Property Rights which are or become vested in the Consultant for the Approved Purposes; and

4.2.2 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 4.2.1 to the Authority,

in both cases, solely for the Approved Purposes.

4.3 The Consultant warrants to the Authority that it has used the standard of skill, care and diligence as set out in clause 3.1 to see that the Project Data²⁴⁷ 218 (save to the extent duly appointed sub contractors have been used to prepare

²⁴⁶ 217 The following drafting for clause 3.4 is only to be included where the Consultant's PI insurer has provided evidence that it is a condition of the Consultant's insurance policy that such a clause is included in the warranty:

"The Consultant's liability for losses under this Deed shall be limited to that proportion of losses which it will be just and equitable to require the Consultant to pay having regard to the extent of the Consultant's responsibility for the same and on the basis that the [insert names of Professional Team (as defined in the Project Agreement), the Building Contractor and Principal Building Sub-Contractors (as defined in the Project Agreement)] shall be deemed to have provided contractual undertakings on terms no less onerous than this Deed to the Authority in respect of the performance of their services in connection with the Works and shall be deemed to have paid to the Authority such proportion which it would be just and equitable for them to pay having regard to the extent of their responsibility provided always that the Consultant shall not plead or reply when in defence of any claim brought by the Authority that the Building Contractor is responsible for the design carried out by the Consultant."²⁴⁷

²⁴⁷ 218 Please check that "Project Data"²⁴⁷ and "Intellectual Property Rights"²⁴⁷ etc are appropriately dropped down into the Appointment.

the same) are its own original work and that in any event their use in connection with the Works will not infringe the rights of any third party.

- 4.4 Where a claim or proceeding is made or brought against the Authority that arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Works infringes or the Works themselves infringe any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority otherwise than in accordance with this Deed, the Consultant shall indemnify the Authority at all times from and against all Direct Losses and Indirect Losses (as defined in the Project Agreement) arising as a result of such claims and proceedings.

5 INSURANCE

- 5.1 The Consultant hereby covenants with the Authority to:

- 5.1.1 take out and maintain professional indemnity insurance cover with a limit of indemnity that shall be a minimum of [ten million pounds (£10,000,000)^{248,219}] either each and every loss or in the aggregate^{249,220} in relation to the Works (if in the aggregate then in any one (1) year of insurance a minimum of one (1) automatic reinstatement of the aggregate indemnity limit is required) (**PI Insurance**) and that it will maintain such insurance with reputable insurers carrying on business in the European Union from the date hereof until twelve (12) years after Completion of the Works pursuant to the Project Agreement, provided that such insurance is generally available in the market to members of the Consultant's profession at commercially reasonable rates and terms and provided further that payment of any increased or additional premiums or more onerous terms required by insurers by reason of the Consultant's own claims record or other acts, omissions, matters or things peculiar to the Consultant will be deemed to be within the commercially reasonable rates and terms;
- 5.1.2 provide evidence (as and when reasonably required by the Authority) satisfactory to the Authority of the PI Insurance being in full force and effect from the date of the Appointment (such evidence to include details of the cover);
- 5.1.3 provide the Authority with notice of:
- 5.1.3.1 any cancellation of the PI Insurance not less than thirty (30) days prior to the relevant cancellation date; and
- 5.1.3.2 any adverse material changes to or suspension of cover relevant to the Works not less than thirty (30) days prior to the relevant change or suspension;
- 5.1.4 inform the Authority as soon as reasonably practicable of any claim under the PI Insurance in respect of the Works in excess of one million pounds (£1,000,000) and provide such information to the

^{248,219} Or such other sum as the Authority and its insurance advisers acting reasonably consider appropriate having regard to the nature and importance of the Consultant's services, having checked that the limit of indemnity is sufficient for the Works at each School.

^{249,220} If the limit of cover is ^u in the aggregate^{2u}, the level of indemnity should be increased proportionately to ensure sufficient cover is available to equate to each and every loss.

Authority as the Authority may reasonably require in relation to such claim and provide notice of any potential breach of the aggregate limit of the policy; and

5.1.5 indemnify the Authority in respect of any subrogation claim by the insurers brought in connection with any claim made under the PI Insurance.²²⁰~~221~~

6 **LIABILITY OF PARTNERS**

Where the Consultant is a partnership, references in this Deed to the "Consultant" will be deemed to include reference to each and every present and future partner of such partnership and the liability of each and every such partner under this Deed will be deemed to be joint and several.

7 **NOTICES**

Any notice to be given by any party to this Deed will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet, provided that if any notice sent by hand or facsimile is sent after 4.45 pm on any day it will be deemed to be served on the next Business Day. Any notice sent by post will be deemed to have been duly served at the expiration of forty-eight (48) hours after the time of posting if the end of that period falls before 4.45pm on a Business Day and otherwise on the next Business Day.

8 **ASSIGNMENT**

The benefit of and the rights of the Authority under this Deed may be assigned without the consent of the Consultant on two (2) occasions only and the Authority will notify the Consultant in writing following any such assignment specifying the name and address of the assignee and the date of the assignment. The Consultant will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original beneficiary hereunder or by reason that the original beneficiary or any intermediate beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Sites or that the original beneficiary or any intermediate beneficiary has not suffered any or as much loss.

²²⁰~~221~~ The deletion of clause 5.1.5 is not acceptable. EFA will however agree that clause 5.1.5 can be amended as set out below if it is required by the Consultant's PI insurer provided a) a letter from the PI insurer confirming this is a condition (rather than a recommendation) that such a clause is contained in the warranty is provided, b) an extract of the relevant policy wording is provided and c) there is a consequential insertion of a new clause 10.2 as set out below.

Acceptable amendment to clause 5.1.5: add to the end of the clause "but only where and to the extent that such subrogated claim relates to any default and/or negligence on the part of the Consultant in relation to its responsibilities under the Appointment".

New clause 10.2: "The Consultant acknowledges that under and in accordance with the Project Agreement, save where otherwise expressly stated in such agreement, the Authority has placed the entire responsibility for the design of the Works upon the Contractor and that neither the giving of any approval, consent, examination, acknowledgement, knowledge of the terms of any agreement or document nor the review of any document or course of action by or on behalf of the Authority under and in accordance with such agreement, nor the failure of the same, shall unless otherwise expressly stated in such agreement, relieve the Contractor of any of its obligations or of any duty which it may have to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the approval, consent, examination, acknowledgement or knowledge."

9 **AUTHORITY'S REMEDIES**

The rights and benefits conferred upon the Authority by this Deed are in addition to any other rights and remedies it may have against the Consultant including without prejudice to the generality of the foregoing any remedies in negligence.

10 **INSPECTION OF PROJECT DATA**

The Consultant's liabilities under this Deed will not be in any way reduced or extinguished by reason of any inspection or approval of the Project Data or attendance at site meetings or other enquiry or inspection which the Authority may make or procure to be made for its benefit or on its behalf.

11 **STANDARDS OF PRODUCTS AND MATERIALS**

11.1 The Consultant warrants that it has exercised and will exercise reasonable skill, care and diligence in accordance with this Deed to see that it has not specified for use and it will not specify for use and (as appropriate) it has not authorised or approved and it will not authorise or approve the specification or use by others, of any products or materials not in conformity with relevant British or European Union Standards or Codes of Practice or which at the time of specification are widely known to members of the Consultant's profession within the European Union to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used.

11.2 If in the performance of its duties under the Appointment the Consultant becomes aware that it or any other person has specified or used, or authorised or approved the specification or use by others of any such products or materials the Consultant will notify the Authority in writing forthwith. This clause does not create any additional duty for the Consultant to inspect or check the work of others which is not required by the Appointment.

12 **STEP-IN RIGHTS IN FAVOUR OF THE AUTHORITY**

12.1 The Consultant will not exercise or seek to exercise any right which may be or become available to it to terminate or treat as terminated or repudiated the Appointment or its engagement under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to the Authority not less than twenty (20) Business Days' prior written notice (and seven (7) days' prior written notice of suspension in the event of non-payment under the Appointment) specifying the Consultant's ground for terminating or treating as terminated or repudiated the Appointment or its engagement under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the Appointment. Within such period of notice:

12.1.1 the Authority may give written notice to the Consultant that the Authority will thenceforth become the client under the Appointment to the exclusion of the Building Contractor and thereupon the Consultant will admit that the Authority is its client under the Appointment and the Appointment will be and remain in full force and effect notwithstanding any of the said grounds;

12.1.2 if the Authority has given such notice as aforesaid or under clause 12.3 the Authority shall accept liability for the Building Contractor's obligations under the Appointment and will as soon as practicable thereafter remedy any outstanding breach by the previous client

[which properly has been included in the Consultant's specified grounds and] which is capable of remedy by the Authority; and

- 12.1.3 if the Authority has given such notice as aforesaid or under clause 12.3 the Authority will from the service of such notice become responsible for all sums properly payable to the Consultant under the Appointment accruing due after the service of such notice but the Authority will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to the previous client under the Appointment.
- 12.2 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Authority to the Consultant, the Authority will not be under any obligation to the Consultant nor will the Consultant have any claim or cause of action against the Authority unless and until the Authority has given written notice to the Consultant pursuant to clause 12.1.1 or clause 12.3 of this Deed.
- 12.3 The Consultant further covenants with the Authority that if the employment of the Building Contractor under the Building Contract is terminated or if the Building Contract is terminated the Consultant, if requested by the Authority by notice in writing and subject to clause 12.1.2 and clause 12.1.3, will accept the instructions of the Authority to the exclusion of the Building Contractor in respect of its duties under the Appointment upon the terms and conditions of the Appointment and will if so requested in writing enter into a novation agreement in the form set out in Appendix 1 to this Deed whereby the Authority is substituted for the Building Contractor under the Appointment.
- 12.4 If the Consultant is requested to enter into a novation agreement pursuant to clause 12.3, the Building Contractor agrees to enter into the same at the request of the Authority.
- 12.5 Where the Consultant has given rights to the Lender in relation to the Appointment similar to those contained in this clause then if both the Authority and the Lender serve notice under clause 12.1.1 or clause 12.3 or its equivalent the notice served by the Authority will not prevail over any notice served by the Lender but will prevail over any notice served by any other person.
- 12.6 The Building Contractor acknowledges that the Consultant will be entitled to rely on a notice given to the Consultant by the Authority under clause 12.3 as conclusive evidence that the employment of the Building Contractor under the Building Contract has been terminated or the Building Contract has been terminated.
- 12.7 The Authority may by notice in writing to the Consultant appoint another person to exercise its rights under this clause 12 subject to the Authority remaining liable to the Consultant as guarantor for its appointee in respect of its obligations under this Deed.
- 12.8 As from the date of service of notice under clauses 12.1.1 or 12.3 to the extent that the Appointment operates by reference to the existence and application of the Project Agreement and the Building Contract, the Appointment shall be administered and construed as though the Project Agreement and Building Contract were continuing and the Appointment shall therefore continue, subject to amendment only as necessary to reflect the fact that the Project Agreement and the Building Contract may in fact have been terminated and the Authority has undertaken the obligations set out in clause 12.1.2.

13 **SUB-CONSULTANTS**

Following a written request from the Authority the Consultant will (unless it has already done so) and/or procure that its sub-consultants execute a deed of collateral warranty in the relevant form specified in the Appointment in favour of any person in whose favour the Appointment obliged the Consultant to give or procure the giving of such a warranty.

14 **SEVERABILITY**

If any term, condition or provision of this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality and enforceability of the other provisions of or any other documents referred to in this Deed.

15 **WAIVER**

15.1 No term or provision of this Deed shall be considered as waived by any party to this Deed unless a waiver is given in writing by that party.

15.2 No waiver under clause 15.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Deed unless (and only to the extent) expressly stated in that waiver.

16 **THIRD PARTY RIGHTS**

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This clause does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

17 **GOVERNING LAW AND JURISDICTION**

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

18 **BUILDING CONTRACTOR ACKNOWLEDGEMENT**

The Building Contractor has entered into this Deed in order to acknowledge the arrangements effected hereby and undertakes to each of the Authority and the Consultant to observe the provisions of this Deed at all times and not in any way to prejudice or affect the enforcement hereof or to do or permit to be done anything which would be a breach hereof.

19 **COUNTERPARTS**

This Deed may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full and original instrument for all purposes.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above

Executed as a deed, but not delivered until the first date specified on page 1, by **CONSULTANT** acting by a director in the presence of a witness:))))

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Signature
Name (block capitals)
Director

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Director

Witness
signature

Witness name
(block
capitals)

Witness
address

Witness name
(block capitals)

Witness address

Executed as a deed, but not delivered)
until the first date specified on page 1, by)
BUILDING CONTRACTOR acting by a)
director in the presence of a witness:)
)

Signature _____

Name (block capitals) _____

Director

Witness
signature _____

Witness name
(block capitals) _____

Witness address _____

Executed as a deed, but not delivered)
until the first date specified on page 1, by)
AUTHORITY acting:)
)

Signature _____

Name (block capitals) _____

**Authorised
Signatory**

Signature _____

Name (block capitals) _____

**Authorised
Signatory**

Executed as a deed, but not delivered)
until the first date specified on page 1, by)
BUILDING CONTRACTOR acting by a)
director in the presence of a witness:)

Signature

Name (block capitals)

Director

Witness
signature

Witness name

(block capitals)

Witness address

.....

.....

Executed as a deed, but not delivered)
until the first date specified on page 1, by)
AUTHORITY acting by:)
)

Signature

Name (block capitals)

Authorised
Signatory

Signature

Name (block capitals)

Authorised
Signatory

Appendix ~~4~~²²⁴ 3²²²

Form of Deed of Novation

²²⁴~~222~~ As this is a template deed of novation, changes do not need to be reviewed by EFA.

BETWEEN:

- (1) ~~(1)~~ **[CONSULTANT]** (Company No. _____), whose registered office is at _____ (the **Consultant**);
- (2) ~~(2)~~ **[AUTHORITY]** of _____ (the **Authority**), which expression includes its permitted successors in title and assigns); and
- (3) ~~(3)~~ **[BUILDING CONTRACTOR]** (Company No. _____), whose registered office is at _____ (the **Building Contractor**).

WHEREAS

- A ~~(A)~~ By a project agreement dated [_____] (the **Project Agreement**) the Authority has appointed the Contractor to carry out in relation to [_____] (the Sites) the design and construction of the Works (as defined in the Project Agreement).
- B ~~(B)~~ By a design and build contract dated [_____] (the **Building Contract**) the Contractor has appointed the Building Contractor to carry out in relation to the Sites the design and construction of the Works.
- C ~~(C)~~ The Consultant has been appointed by the Building Contractor under a [letter/deed] of appointment dated [_____] (the **Appointment**) to provide services in relation to the Works.
- ~~(C)~~ [The employment of the Building Contractor under the Building Contract has been terminated] [the Building Contract has been terminated].
- D ~~(D)~~ The Building Contractor has transferred or agreed to transfer its interest in (or granted or agreed to grant a subordinate interest in) the Sites to the Authority.
- E ~~(E)~~ The parties have agreed to novate the Appointment to the Authority on the terms set out below.

IT IS AGREED

1 **Novation of the Appointment**

The Appointment is hereby novated from the Consultant and the Building Contractor to the Consultant and the Authority.

2 **Release of the Consultant**

The Consultant shall no longer owe any duty or obligation to the Building Contractor under or in respect of the Appointment whether by virtue of its terms or by virtue of any breach or otherwise.

3 **Release of the Building Contractor**

The Building Contractor shall no longer owe any duty or obligation to the Consultant under or in respect of the Appointment whether by virtue of its terms or by virtue of any breach or otherwise.

4 **Binding of the Consultant to the Authority**

4.1 The Consultant binds itself to the Authority in the terms of the Appointment as if the Authority were and always had been named in the Appointment in place of the Building Contractor.

- 4.2 The Consultant warrants to the Authority that prior to the date of this Deed it has performed and that it will continue to perform its duties and obligations as required by and in accordance with the terms of the Appointment.
- 4.3 The Authority shall not be precluded from recovering any losses incurred by the Authority resulting from any breach of clause 4.2 by reason that (if it be the case) the acts or omissions causing such breach occurred before this Deed took effect, or that the Building Contractor will not incur or has not or would not have incurred any such losses. No waiver by the Building Contractor, either express or implied, will affect the Consultant's liability to the Authority pursuant to this clause.
- 4.4 Upon the expiration of twelve (12) years from the date of completion of the Works in accordance with the Appointment, the liability of the Consultant under this Deed shall cease and determine, save in relation to any claims made by the Authority against the Consultant and notified by the Authority to the Consultant in writing prior thereto.

5 Binding of the Authority to the Consultant

The Authority binds itself to the Consultant in the terms of the Appointment as if the Authority were and always had been named in the Appointment in place of the Building Contractor and as if all acts and omissions of the Building Contractor (including any wrongful acts or omissions) under and in respect of the Appointment were the acts and omissions of the Authority.

6 Vesting of remedies in the Authority

All rights of action and remedies vested in the Building Contractor against the Consultant under and in respect of the Appointment shall hereupon vest in the Authority.

7 Vesting of remedies against the Authority

All rights of action and remedies vested in the Consultant against the Building Contractor under and in respect of the Appointment shall hereinafter lie against the Authority.

8 Amendment of the Appointment

The Authority and the Consultant agree that the terms of the Appointment shall be and are varied in the manner set out in Schedule 1.

9 Affirmation of the Appointment

Subject to the terms of this Deed the Appointment shall remain in full force and effect.

10 Third Party Rights

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This clause does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

11 Governing Law and Interpretation

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above

SCHEDULE 7

COLLATERAL WARRANTIES

Part 4

Warranty from the Contractor's FM Contractor

Dated _____ 200

~~DATED~~ _____ ~~200~~

[FM CONTRACTOR] (1)

[AUTHORITY] (2)

[CONTRACTOR] (3)

DUTY OF CARE DEED
relating to

THIS DEED OF WARRANTY is made on the _____ day of 200

BETWEEN:

- (1) **[FM CONTRACTOR]** (Company No. _____) whose registered office is at _____ (the **FM Contractor**)
- (2) **[AUTHORITY]** of _____ (the **Authority**), (which expression includes its permitted successors in title and assigns); and
- (3) **[CONTRACTOR]** (Company No. _____) whose registered office is at _____ (the **Contractor**)

BACKGROUND

A ~~(A)~~—By a project agreement dated [_____] (the **Project Agreement**) the Authority has appointed the Contractor to carry out, in relation to the Sites, the provision of serviced accommodation to the Authority at each and every School as contemplated by the Project Agreement including the carrying out of the Works and the provision of the Services design and construction of the Works.

B ~~(B)~~—The FM Contractor has been appointed by the Contractor under a contract dated [_____] (the **FM Agreement**) to carry out the Services.

C ~~(C)~~—The FM Contractor is obliged under the FM Agreement to give a warranty in this form in favour of the Authority.

D ~~(D)~~—The FM Contractor and the Contractor have agreed to execute this Deed in favour of the Authority.

1 DEFINITIONS AND INTERPRETATIONS

Unless expressly defined otherwise in this Deed any defined term in this Deed shall have the same meaning given to such term in the FM Agreement. ²²² 223

Intellectual Property Rights

any and all patents, trade marks, service marks, copyright, database rights, moral rights, rights in design, know how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attaching thereto which is created, brought into existence, acquired, used or intended to be used by the FM Contractor for the purpose of carrying out the Services;

Lender(s)

means any organisation providing funding to the Contractor in connection with the carrying out of the Works; and

Project Data

- (i) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the School(s) (as defined in the Project Agreement) in each case that is used by or

²²² ~~The Authority's legal advisers must review the Building Contract and ensure any defined terms used in this deed are identical to those used in the Building Contract.~~

²²³ The Authority's legal advisers must review the FM Contract and ensure any defined terms used in this deed are identical to those used in the Building Contract.

on behalf of the FM Contractor in connection with the provision of [the Works and/or] the Services or the performance of the FM Contractor's obligations under the FM Agreement; and

- (ii) any other materials, documents or data acquired or brought into existence or used in relation to the Services or the FM Agreement by or on behalf of the FM Contractor in connection with the provision of the Services or the performance of the FM Contractor's obligations under the FM Agreement.

2 **OPERATIVE PROVISIONS**

In consideration of the payment of one pound (£1.00) by the Authority to the FM Contractor, receipt of which the FM Contractor acknowledges:

3 **WARRANTY**

- 3.1 The FM Contractor warrants to the Authority that it has carried out and will continue to carry out all its obligations and duties under the FM Agreement in accordance with and to the standard required by the FM Agreement, provided always that the FM Contractor has no liability hereunder which is greater or of a longer duration than that it owes to the Contractor under the FM Agreement.
- 3.2 The FM Contractor shall have no liability under clauses 3.1 and 11 of this Deed that is greater or of longer duration than it would have had, and shall be entitled in any proceedings by the Authority to rely on any limitation in the FM Agreement and to raise equivalent rights in defence of liability as it would have against the Contractor under the FM Agreement.
- 3.3 Notwithstanding anything in this Deed and notwithstanding any payments which may be made by the Authority to the FM Contractor, the Authority and the FM Contractor will not be under any obligation to each other nor will any party have any claim or cause of action against the others unless and until the Authority has given written notice to the FM Contractor pursuant to clause 7.1.1 or clause 7.3.

4 **INTELLECTUAL PROPERTY**

- 4.1 The FM 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. The FM Contractor shall obtain all necessary licences, permissions and consents necessary for it to make the Project Data available to the Authority on these terms, for any purpose whatsoever connected with the Project and such other purposes as are reasonably foreseeable, (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. The Authority will not hold the FM Contractor liable for any use it may make of the Project Data for any purpose other than the Approved Purposes unless the FM Contractor authorise such use and confirms that the Project Data is suitable for it.
- 4.2 The FM Contractor:
 - 4.2.1 hereby grants to the Authority, free of charge, an irrevocable non-exclusive and transferable (subject to the restrictions continued in clause 4.2.1 of this Deed) licence to use the Intellectual Property Rights that are or become vested in the FM Contractor for the Approved Purposes;

4.2.2 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 4.2.1 above to the Authority,

in both cases, solely for the Approved Purposes.

4.3 The FM Contractor agrees on reasonable request at any time and following reasonable written prior notice to give the Authority or those authorised by it access to the Project Data and to provide copies (including copy negatives and CAD disks) thereof at the Authority's expense.

4.4 The FM Contractor warrants to the Authority that the Project Data (save to the extent duly appointed sub-contractors have been used to prepare the same) is its own original work and that in any event their use in connection with the Project will not infringe the rights of any third party.

4.5 Where a claim or proceeding is made or brought against the Authority that arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Services infringes any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority otherwise than in accordance with this Deed, the FM Contractor shall indemnify the Authority at all times from and against all Direct Losses and Indirect Losses (as defined in the Project Agreement) arising as a result of such claims and proceedings.

5 **ASSIGNMENT**

The benefit of and the rights of the Authority under this Deed may be assigned without the consent of the FM Contractor on two (2) occasions only and the Authority will notify the FM Contractor in writing following any such assignment specifying the name and address of the assignee and the date of the assignment. The FM Contractor will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original beneficiary hereunder or by reason that the original beneficiary or any intermediate beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Sites or that the original beneficiary or any intermediate beneficiary has not suffered any, or as much, loss

6 **AUTHORITY'S REMEDIES**

The rights and benefits conferred upon the Authority by this Deed are in addition to any other rights and remedies it may have against the FM Contractor including without prejudice to the generality of the foregoing any remedies in negligence.

7 **STEP-IN RIGHTS IN FAVOUR OF THE AUTHORITY**

7.1 The FM Contractor will not exercise or seek to exercise any right which may be or becomes available to it to terminate or treat as terminated or repudiated the FM Agreement or its employment under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to the Authority not less than thirty (30) Business Days' prior written notice specifying the FM Contractor's ground for terminating or treating as terminated or repudiated the FM Agreement or its employment under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the FM Agreement. Within such period of notice:

- 7.1.1 the Authority may give written notice to the FM Contractor that the Authority will thenceforth become the client under the FM Agreement to the exclusion of the Contractor and thereupon the FM Contractor will admit that the Authority is its client under the FM Agreement and the FM Agreement will be and remain in full force and effect notwithstanding any of the said grounds;
- 7.1.2 if the Authority has given such notice as aforesaid or under clause 7.3, the Authority shall accept liability for the Contractor's obligations under the FM Agreement and will as soon as practicable thereafter remedy any outstanding breach by the Contractor including for the avoidance of doubt any non-payment of sums due to the FM Contractor that properly has been included in the FM Contractor's specified grounds pursuant to clause 7.1 (and which has been notified to the Authority) and which is capable of remedy; and
- 7.1.3 if the Authority has given such notice as aforesaid or under clause 7.3, the Authority will from the service of such notice become responsible for all sums properly payable to the FM Contractor under the FM Agreement accruing due after the service of the FM Contractor's notice but the Authority will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to the Contractor under the FM Agreement.
- 7.2 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Authority to the FM Contractor, the FM Contractor will not be under any duty to obey any direction or instruction from the Authority unless and until the Authority has given notice under clauses 7.1.1 and 7.3.
- 7.3 The FM Contractor further covenants with the Authority that if the employment of the Contractor under the Project Agreement is terminated or if the Project Agreement is terminated by the Authority the FM Contractor, if requested by the Authority by notice in writing and subject to clause 7.1.2 and clause 7.1.3, will accept the instructions of the Authority to the exclusion of the Contractor in respect of the Services upon the terms and conditions of the FM Agreement and will if so requested in writing enter into a novation agreement in the form set out in Appendix 1 to this Deed whereby the Authority is substituted for the Contractor under the FM Agreement.
- 7.4 If the FM Contractor is requested to enter into a novation agreement pursuant to clause 7.3, the Contractor agrees to enter into the same at the request of the Authority.
- 7.5 Where the FM Contractor has given rights in relation to the FM Agreement similar to those contained in this clause to the Lender then if both the Authority and the Lender serve notice under clause 7.1.1 or clause 7.3 or its equivalent the notice served by the Authority will not prevail over any notice served by the Lender but will prevail over any notice served by any other person.
- 7.6 The Contractor acknowledges that the FM Contractor will be entitled to rely on a notice given to the FM Contractor by the Authority under clause 7.3 as conclusive evidence that the Contractor's employment under the Project Agreement has been terminated or that the Project Agreement has been terminated by the Authority.

7.7 The Authority may by notice in writing to the FM Contractor appoint another person to exercise its rights under this clause 7 subject to the Authority remaining liable to the FM Contractor as guarantor for its appointee in respect of its obligations under this Deed.

8 LIMITATION

Without prejudice to the provisions of clause 7.1, the Authority shall not be entitled to take any action or proceedings against the FM Contractor pursuant to this Deed unless and until the Project Agreement has been terminated.

9 INDEPENDENT ENQUIRY CLAUSE

The liability of the FM Contractor under this Deed shall not be modified released, diminished or in any way affected by any independent inspection investigation or enquiry into any relevant matter which may be made or carried out by or for the Authority nor by any failure or omission to carry out any such inspection, investigation or enquiry nor by the appointment by the Authority of any independent firm, company, or party whatsoever to review the progress of or otherwise report to the Authority in respect of the Services nor by any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to the Authority provided always that nothing in this clause shall modify or affect any rights which the FM Contractor might have but for the existence of this clause to claim contribution from any third party whether under statute or at common law.

10 NO VARIATION TO FM AGREEMENT WITHOUT AUTHORITY'S CONSENT

The Contractor and the FM Contractor undertake with the Authority not to vary or depart from the terms and conditions of the FM Agreement without the prior written consent of the Authority (such consent to be sought in accordance with the Review Procedure where that procedure applies to the variation or departure in question), and agree that no such variation or departure made without such consent shall be binding upon the Authority, or affect or prejudice the Authority's rights hereunder, or under the FM Agreement or in any other way.

11 SEVERABILITY

If any term, condition or provision of this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality and enforceability of the other provisions of or any other documents referred to in this Agreement.

12 WAIVER

12.1 No term or provision of this Deed shall be considered as waived by any party to this Deed unless a waiver is given in writing by that party.

12.2 No waiver under clause 12.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Deed unless (and only to the extent) expressly stated in that waiver.

13 THE CONTRACTOR'S INCLUSION AS PARTY

The Contractor has agreed to be a party to this Deed for the purpose of clause 8 and for acknowledging that the FM Contractor shall not be in breach of the FM Agreement by complying with the obligations imposed on it by this Deed.

14 **COUNTERPARTS**

This Deed may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full and original instrument for all purposes.

15 **GOVERNING LAW AND JURISDICTION**

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

16 **THIRD PARTY RIGHTS**

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This clause does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

17 **NOTICES**

Any notice to be given by either party hereunder will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet, provided that if any notice sent by hand or facsimile is sent after 4.45 pm on any day it will be deemed to be served on the next Business Day. Any notice sent by post will be deemed to have been duly served at the expiration of forty-eight (48) hours after the time of posting if the end of that period falls before 4.45 pm on a Business Day and otherwise on the next Business Day.

IN WITNESS whereof this document is executed by the parties as a Deed and delivered on the date stated at the beginning of this Deed

EXECUTED as a Deed by the **FM CONTRACTOR**
acting by two of its directors or a
director and its secretary:

.....
Director

.....
Director/Secretary

EXECUTED AS A DEED by the Authority acting by two authorised signatories:

.....
Authorised Signatory

.....
Authorised Signatory

EXECUTED as a Deed by
[CONTRACTOR]
acting by two of its directors or a
director and its secretary:

.....
Director

.....
Director/Secretary

Appendix 1

APPENDIX 4

Form of Deed of Novation²²³224

²²³224 As this is a template deed of novation, changes do not need to be reviewed by EFA.

BETWEEN:

- (1) ~~(1)~~ **[CONTRACTOR'S FM CONTRACTOR]** (Company No.) whose registered office is at (the **FM Contractor**);
- (2) ~~(2)~~ **[AUTHORITY]** of (the **Authority**), which expression includes its permitted successors in title and assigns); and
- (3) ~~(3)~~ **CONTRACTOR** (Company No.) whose registered office is at (the **Contractor**).

WHEREAS

- A ~~(A)~~ By a project agreement dated [] (the Project Agreement) the Authority has appointed the Contractor to carry out in relation to [] (the **Sites**) the design and construction of the Works (as defined in the Project Agreement).
- B ~~(B)~~ The FM Contractor has been appointed by the Contractor under a contract dated [] (the **FM Agreement**) to carry out the Services.
- C ~~(C)~~ [The employment of the Contractor under the Project Agreement has been terminated] [The Project Agreement has been terminated by the Authority].
- D ~~(D)~~ The Contractor has transferred or agreed to transfer its interest in (or granted or agreed to grant a subordinate interest in) the Sites to the Authority.
- E ~~(E)~~ The parties have agreed to novate the FM Agreement to the Authority on the terms set out below.

IT IS AGREED

1 Novation of FM Agreement

The FM Agreement is hereby novated from the Contractor and the FM Contractor to the Authority and the FM Contractor.

2 Release of the Contractor

The Contractor shall no longer owe any duty or obligation to the FM Contractor under or in respect of the FM Agreement whether by virtue of its terms or by virtue of any breach or otherwise.

3 Release of the FM Contractor

The FM Contractor shall no longer owe any duty or obligation to the Contractor under or in respect of the FM Agreement whether by virtue of its terms or by virtue of any breach or otherwise.

4 Binding of the FM Contractor to the Authority

4.1 The FM Contractor binds itself to the Authority in the terms of the FM Agreement as if the Authority were and always had been named in the FM Agreement in place of the Contractor.

4.2 The FM Contractor warrants to the Authority that prior to the date of this Deed it has performed and that it will continue to perform its duties and obligations as required by and in accordance with the terms of the FM Agreement.

4.3 The Authority shall not be precluded from recovering any losses incurred by the Authority or the Contractor resulting from any breach of clause 4.2 by reason that (if it be the case) the acts or omissions causing such breach occurred before this Deed took effect, or that the Contractor will not incur or has not or would not have incurred any such losses. No waiver by the Contractor, either express or implied, will affect the FM Contractor's liability to the Authority pursuant to this clause.

5 Binding of the Authority to the FM Contractor

The Authority binds itself to the FM Contractor in the terms of the FM Agreement as if the Authority were and always had been named in the FM Agreement in place of the Contractor and as if all acts and omissions of the Contractor (including any wrongful acts or omissions) under and in respect of the FM Agreement were the acts and omissions of the Authority.

6 Vesting of remedies in the Authority

All rights of action and remedies vested in the Contractor against the FM Contractor under and in respect of the FM Agreement shall hereupon vest in the Authority.

7 Vesting of remedies against the Authority

All rights of action and remedies vested in the FM Contractor against the Contractor under and in respect of the FM Agreement shall hereinafter lie against the Authority.

8 Affirmation of FM Agreement

Subject to the terms of this Deed the FM Agreement shall remain in full force and effect.

9 Third Party Rights

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This clause does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

10 Governing Law and Interpretation

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above

EXECUTED AS A DEED by the FM Contractor acting by a Director and its Secretary/two Directors:

Director

Director/Secretary

EXECUTED AS A DEED by the Contractor acting by a Director and its Secretary/two Directors:

Director

Director/Secretary

EXECUTED AS A DEED by the Authority acting by two authorised signatories:

Authorised Signatory

Authorised Signatory

SCHEDULE 8

SCHEDULE 8

REVIEW PROCEDURE

1 REVIEW PROCEDURE

- 1.1 The provisions of this Schedule shall apply whenever any item, documents or course of action are required to be reviewed, approved or otherwise processed in accordance with the Review Procedure.
- 1.2 Each submission under the Review Procedure shall be accompanied by a copy of the 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 the Schedule 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:
- 1.2.1.1 ~~(a)~~ an item of Reviewable Design Data;
 - 1.2.1.2 ~~(b)~~ a revised Construction Programme; or
 - 1.2.1.3 ~~(c)~~ a document or proposed course of action submitted in the case of an emergency,
- ~~4.2.2~~ within ten (10) 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 1.3) "comments" as appropriate; and
- 1.2.2 ~~4.2.3~~ 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 ~~4.2~~, 1.2.1, within ten (10) 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 the Reviewable Design Data, endorsed "Level A - no comment").
- 1.3 If the Authority's Representative raises comments on any Submitted Item in accordance with this paragraph 1.3 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, 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 five (5) Business Days of such request by the Contractor, refer the matter for determination in accordance with the Dispute Resolution Procedure; or

- 1.3.2 at its own risk, and without prejudice to clause 14 (Design Development) proceed with further design or construction disregarding such comments.

2 **FURTHER INFORMATION**

- 2.1 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. If the Contractor does not submit any such information, data and documents, the Authority's Representative shall be entitled to:
 - 2.1.1 comment on the Submitted Item on the basis of the information, data and documents which have been provided; or
 - 2.1.2 object to the Submitted Item on the grounds that insufficient information, data and documents have been provided to enable the Authority's Representative to determine whether he has a legitimate basis for commenting or objecting in accordance with this Schedule.

3 **GROUND OF OBJECTION**

- 3.1 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 the paragraph above or on the grounds that the Submitted Item would (on the balance of probabilities) breach any Legislation or not be in accordance with any Necessary Consent, but otherwise may raise comments in relation to a Submitted Item only as follows:
 - 3.1.1 in relation to any Submitted Item:
 - 3.1.1.1 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;
 - 3.1.1.2 the implementation of the Submitted Item would (on the balance of probabilities) have an adverse effect upon the Soft Service Provider's ability to provide the Soft Services on the basis set out in clause 27.1 without incurring material additional expense; or
 - 3.1.1.3 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;
 - 3.1.2 in relation to any Submitted Item submitted pursuant to clause 7.1 (Ancillary Documents):
 - 3.1.2.1 the Authority's ability to perform its obligations under this Agreement would be adversely affected by the proposed course of action;
 - 3.1.2.2 the Authority's ability to provide the Educational 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;
- 3.1.2.3 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;
- 3.1.2.4 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
- 3.1.2.5 the Contractor's ability to perform its obligations under this Agreement would be materially adversely affected by the proposed course of action;
- 3.1.3 in relation to Reviewable Design Data submitted pursuant to clause 14 (Design Development):
- 3.1.3.1 the Submitted Item is not in accordance with the Authority's Requirements; or
- 3.1.3.2 the Submitted Item is not in accordance with the Construction Proposals; ~~or~~
- ~~3.1.3.3 the Submitted Item would require the Authority or a School Entity or Relevant LEA to make a change to the ICT Services Contract;~~
- 3.1.4 in relation to any proposed variation to the Construction Proposals relating to the Works:
- 3.1.4.1 the Submitted Item would increase the likelihood of deductions being made pursuant to clause 37 (Payment Provisions) and Schedule 6 (Payment Mechanism) following the relevant Services Availability Date; or
- ~~3.1.4.2 the Submitted Item would require the Authority to make a change to the ICT Services Contract; or~~
- 3.1.4.2 ~~3.1.4.3~~ save where such proposed variation is necessitated due to a Qualifying Change in Law a Compensation Event or an Authority Change, would lead to an increase in the Unitary Charge;
- 3.1.5 in relation to the submission of any revised Construction Programme on the ground that the revised Construction Programme:
- 3.1.5.1 would not (on the balance of probabilities) enable any part of the Works to be completed by the relevant ICT Handover Date;
- 3.1.5.2 would materially increase the cost or disruption to the Authority of any decanting from or within an Existing School;
- 3.1.5.3 would materially increase the disruption to the provision of Educational Services by the Authority;

- 3.1.5.4 would render the Authority unable to comply with the Decant Protocol without material additional expense or disruption; or
- 3.1.5.5 would adversely affect the delivery of services under the relevant ICT Services Contract;
- 3.1.6 in relation to the submission of any proposed revision or substitution for the Service Delivery Proposals on the grounds that:
 - 3.1.6.1 the proposed revision or substitution is not in accordance with Good Industry Practice;
 - 3.1.6.2 the performance of the relevant Services in accordance with the proposed revision or substitution would (on the balance of probabilities):
 - ~~3.1.6.2.1(a)~~ be less likely to achieve compliance with relevant parts of the Authority's Requirements;
 - ~~3.1.6.2.2(b)~~ have an adverse effect on the provision by the Authority of the Educational Services or on the safety of any users of the Sites; or
 - ~~3.1.6.2.3(c)~~ would cause the Authority to incur material additional expense; or
 - 3.1.6.3 the proposed revision or substitution would (on the balance of probabilities) result in an inferior standard of performance of the relevant Services to the standard of performance in accordance with the Service Delivery Proposals prior to such proposed revision or substitution;
- 3.1.7 in relation to the submission of any Schedule of Programmed Maintenance, any revision to any Schedule of Programmed Maintenance on the grounds that:
 - 3.1.7.1 carrying out the programmed maintenance in the period or at the times suggested would (on the balance of probabilities) interfere with the operations of the Authority or a School and such interference could be avoided or mitigated by the Contractor rescheduling the programmed maintenance;
 - 3.1.7.2 the safety of Pupils or staff or other users of the Sites would (on the balance of probabilities) be adversely affected; or
 - 3.1.7.3 the period for carrying out the programmed maintenance would (on the balance of probabilities) exceed the period reasonably required for the relevant works;
- 3.1.8 in relation to any submission to defer the replacement of any part of the Schools made pursuant to clause 23.5 (Programmed Replacement) on the grounds that:
 - ~~3.1.8.1~~ ~~3.1.8.1~~ the proposed deferral is not in accordance with Good Industry Practice;

3.1.8.2 ~~3.1.8.2~~—the performance of the relevant Services in accordance with the proposed deferral would (on the balance of probabilities):

3.1.8.2.1(a)—be less likely to achieve compliance with relevant parts of the Authority's Requirements;

3.1.8.2.2(b)—have an adverse effect on the provision by the Authority of the Educational Services or on the safety of any users of the Sites; or

3.1.8.2.3(c)—would cause the Authority to incur material additional expense;

3.1.8.3 ~~3.1.8.3~~—the proposed deferral would (on the balance of probabilities) result in an inferior standard of performance of the relevant Services to the standard of performance in accordance with the Service Delivery Proposals prior to such proposed revision or substitution; or

3.1.8.4 ~~3.1.8.4~~—would result in a decrease or worsening of the quality of the Sites;

3.1.9 in relation to Contractor Equipment submitted pursuant to clause ~~41.7.4~~11.7.5 on the grounds that: such Contractor Equipment is not in accordance with the Loose Equipment Purchase Protocol.

~~3.1.9.1~~—~~the Authority considers that the Contractor could achieve better value for money by using a different supplier; or~~

~~3.1.9.2~~—~~the items could have been provided from existing supplies owned by the Authority or Authority Related Parties or from a central or local Government purchasing entity or framework recommended by the Authority.~~

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") may 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 clause 68 (Dispute Resolution).

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.

4.3.3 ~~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 the Dispute Resolution Procedure and, save as permitted by the provisions of clause 14.3 (No Construction prior to Review), the Contractor shall not act on the Submitted Item until such matter is so determined or otherwise agreed.

4.4 ~~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 ~~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 paragraphs 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 **DOCUMENT MANAGEMENT**

5.1 The Contractor shall issue ~~[NUMBER]~~four (4) copies of all Submitted Items to the Authority's Representative 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 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

VARIATIONS

- 6.1 Subject to paragraph 6.2 and save in respect of any Small Value Changes requested by the Authority during the Works Period, no approval or comment or any failure to give or make an approval or comment under this Schedule shall constitute an Authority Change save to the extent provided in this Schedule 8.
- 6.2 If, having received comments from the Authority's Representative, the Contractor considers that compliance with those comments would amount to an Authority 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 the Dispute Resolution Procedure that an Authority Change would arise if the comments were complied with, the Authority may, if it wishes, implement the Authority Change and it shall be dealt with in accordance with Schedule 24 (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 an Authority Change shall constitute an irrevocable acceptance by the Contractor that any compliance with the Authority's comments shall be without cost to the Authority 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, subject to paragraph 6.1, be construed or regarded as an Authority Change.
- 6.4 The value of the Small Value Changes required by the Authority during the Works Period shall be such amount as set out in the Catalogue and (if not listed in the Catalogue) shall be the amount agreed in writing by the Authority and the Contractor (such payment to be determined in accordance with the Dispute Resolution Procedure if the Parties fail to agree) and where the Small Value Change has been implemented to the satisfaction of the Authority, acting reasonably, the Contractor shall provide an invoice in respect of the agreed costs of the Small Value Change following completion or implementation of the Small Value Change. All amounts payable for Small Value Changes shall be paid within fifteen (15) Business Days of receipt by the Authority of invoices presented to the Authority accompanied by relevant evidence that the Small Value Change has been carried out.

7

REVIEWABLE DESIGN DATA

[LIST TO BE INSERTED]

SCHEDULE 9

SCHEDULE 9

PROHIBITED MATERIALS

SCHEDULE 10

SCHEDULE 10

LIAISON PROCEDURE

1 PROJECT LIAISON GROUP

- 1.1 The Authority and the Contractor shall establish and maintain throughout the Contract Period a project liaison group (the **Project Liaison Group**), consisting of ~~three (3)~~ members from the Authority (or a related entity as designated by the Authority), ~~three (3)~~ members from the Contractor, a chairman (the **Chairman**), and, where a majority of the Project Liaison Group so determines, additional members (including but not limited to members from the School Entities) being properly qualified to participate in discussions relating to any particular matter, these members having no voting rights, which shall have the functions described below.
- 1.2 The Contractor and the Authority agree that for the duration of the Works the Contractor shall procure the attendance of the Building Contractor during such parts of meetings of the Project Liaison Group as the Parties shall agree. The Contractor and the Authority agree that during the Services Period the Contractor shall procure the attendance of the FM Contractor during such parts of meetings of the Project Liaison Group as the Parties shall agree.
- 1.3 Each party will have the right to make reasonable objections to the other party's proposed members or the Chairman but not so as to frustrate the rotation of the chairmanship.
- 1.4 Should the Authority and the Contractor agree that the best interests of the Project would be served by the removal of one or more members of the Project Liaison Group, they may so direct in writing and the Authority or the Contractor, as the case may be, will put forward the name of a substitute member of the Project Liaison Group.
- 1.5 The relevant person shall with the consent of the other party, such consent not to be unreasonably withheld or delayed, become a member of the Project Liaison Group as from the date of its next meeting.

2 FUNCTIONS

- 2.1 The functions of the Project Liaison Group shall be:
- 2.1.1 to provide a means for the joint review of all aspects of the performance of this Agreement;
 - 2.1.2 to provide a forum for joint strategic discussion and consideration of all aspects with regard to this Agreement including ensuring dissemination of information and consideration of the views of all the stakeholders connected with the Project;
 - 2.1.3 consideration of issues relating to:
 - 2.1.3.1 Necessary Consents;
 - 2.1.3.2 the Construction Programme;
 - 2.1.3.3 provision of the Services, including transition between the phases;
 - 2.1.3.4 Authority Changes; and

2.1.3.5 [others to be listed]; and

2.1.4 to review the terms of any contract relating to a School that the Authority or an Authority Related Party [or a Relevant LEA](#) intends to award to a third party save in respect of any contract of employment.

3 ROLE

The role of the Project Liaison Group is to make recommendations to the Authority and to the Contractor, which the Authority and the Contractor may accept or reject at their complete discretion. Neither the Project Liaison Group itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of this Agreement or to make any decision binding on the Parties. The Authority and the Contractor shall not rely on any act or omission of the Project Liaison Group, or any members of the Project Liaison Group acting in that capacity, so as to give rise to any waiver or personal bar in respect of any right, benefit or obligation of the Authority or of the Contractor under this Agreement. No discussion, review or recommendation by the Project Liaison Group shall relieve the Authority or the Contractor of any liability or vary any such liability or any right or benefit.

4 REPRESENTATIVES

The Authority and the Contractor may appoint their representatives on the Project Liaison Group and remove those representatives and appoint replacements, by written notice delivered to the other at any time. A representative on the Project Liaison Group may appoint and remove an alternate (who may be another representative of that party) in the same manner. If a representative is unavailable (and the other Parties' representative may rely on the alternate's statement that the representative is unavailable) his alternate shall have the same rights and powers as the representative.

5 PRACTICES AND PROCEDURES

Subject to the provisions of this Schedule, the members of the Project Liaison Group may adopt such procedures and practices for the conduct of the activities of the Project Liaison Group as they consider appropriate, from time to time, provided that the quorum for a meeting of the Project Liaison Group shall be [four (4)] (with at least two (2) members of the Authority and two (2) members of the Contractor present).

6 RECOMMENDATIONS

Recommendations and other decisions of the Project Liaison Group must have the affirmative vote of all those voting on the matter, which must include not less than one (1) representative of the Authority and not less than one (1) representative of the Contractor.

7 VOTING

Each member of the Project Liaison Group shall have one (1) vote.

8 CHAIRMAN

The Chairman of the Project Liaison Group shall be nominated by the Authority and by the Contractor alternately every six (6) months during the Contract Period (commencing with the Authority). The Chairman shall be in addition to each [partyParty](#)'s representatives on the Project Liaison Group. The Chairman shall not have a vote.

9 **FREQUENCY OF MEETINGS**

The Project Liaison Group shall meet at least once every [month] during the Works Period and thereafter at least once every quarter.

10 **CONVENING OF MEETINGS**

Any member of the Project Liaison Group may convene a meeting of the Project Liaison Group at any time.

11 **NOTICES OF MEETINGS**

Not less than ten (10) Business Days notice (identifying the agenda items to be discussed at the meeting) shall be given to convene a meeting of the Project Liaison Group, except that in emergencies, a meeting may be called at any time on such notice as may be reasonable in the circumstances.

12 **ATTENDANCE AT MEETINGS**

Meetings of the Project Liaison Group should normally involve the attendance (in person or by alternative) of representatives at the meeting. Where the representatives of the Project Liaison Group consider it appropriate (by affirmative vote of all those voting on the matter which must include not less than one (1) representative of the Authority and one (1) representative of the Contractor) meetings may also be held by telephone or another form of telecommunication by which each participant can hear and speak to all other participants at the same time.

13 **MINUTES**

Minutes of all decisions (including those made by telephone or other telecommunication form) and meetings of the Project Liaison Group shall be kept by the Contractor and copies circulated promptly to the Authority and the Contractor, normally within ten (10) Business Days of the making of the decision or the holding of the meeting. A full set of minutes shall be kept by the Contractor and shall be open to inspection by the Authority or the Contractor at any time, upon request.

~~[SCHEDULE 14~~
SCHEDULE 11

WARRANTED DATA

Part 1

Authority Warranted Data

[ADD ANY AUTHORITY WARRANTED DATA; DELETE IF NOT USED]]

SCHEDULE 11

WARRANTED DATA

Part 2

Contractor Warranted Data

- 1 Registered Name of Contractor:
[PREFERRED BIDDER TO COMPLETE]
- 2 Registered Office of Contractor:
[PREFERRED BIDDER TO COMPLETE]
- 3 Company Registration Number of Contractor:
[PREFERRED BIDDER TO COMPLETE]
- 4 Directors of Contractor:
[PREFERRED BIDDER TO COMPLETE]
- 5 Shareholders of Contractor (with respective shareholdings):
[PREFERRED BIDDER TO COMPLETE]
- 6 Registered Name of Holdco:
[PREFERRED BIDDER TO COMPLETE]
- 7 Registered Office of Holdco:
[PREFERRED BIDDER TO COMPLETE]
- 8 Company Registration Number of Holdco:
[PREFERRED BIDDER TO COMPLETE]

9 Directors of Holdco:

[PREFERRED BIDDER TO COMPLETE]

10 Shareholders of Holdco (with respective shareholdings):

[PREFERRED BIDDER TO COMPLETE]

SCHEDULE 12
SCHEDULE 12

ICT HANDOVER PERIOD REQUIREMENTS

Part 1

ICT Access Protocol

SCHEDULE 12
ICT HANDOVER PERIOD REQUIREMENTS
Part 2
Soft Services Training Plan

SCHEDULE 13

SCHEDULE 13

TITLE MATTERS

Part 1

Title Warranties

- 1 Save as disclosed in the Specific Title Matters the Authority warrants that for the period of this Agreement²²⁴₂₂₅:
 - 1.1 each and every Site is in the sole legal and beneficial ownership of the Authority²²⁶_{party identified in Part 2 (Specific Title Matters)};
 - 1.2 the Sites are not subject to any Adverse Rights;
 - 1.3 no one is in adverse possession of the Sites or has acquired or is acquiring any Adverse Rights affecting the Sites;
 - 1.4 there are no disputes, claims, actions, demands or complaints in respect of the Sites that are outstanding or that are expected by the Authority and that would prevent or disrupt the carrying out of the Works and/or the provision of Services; and
 - 1.5 from the Commencement Date no person, other than the Authority, the School Entity or the owner of the Site, has any right (actual or contingent) to possession, occupation or use of or interest in the Sites.

²²⁴₂₂₅ Disclosure of site-specific matters is given in the next Part of this Schedule. If a particular title matter is not disclosed, then breach of the relevant warranty will lead to a Compensation Event. The principle is that the core liability for title issues must sit with the Authority.

SCHEDULE 13

TITLE MATTERS

Part 2 ~~225~~²²⁷

Specific Title Matters

Per Site:

~~225~~²²⁷ Rather than each bidder (and its funders) being required to carry out a separate title due diligence exercise, the Authority will carry out a detailed title due diligence exercise with its legal advisers in advance of issuing tender documentation.

Accordingly, the Authority does not intend to make general disclosures (the suite of title documentation, searches and replies to enquiries) against the title warranties in Part 1 of Schedule 13. Instead the bidders will be provided with a set of very specific disclosures against those title warranties, together with specific information that the bidders will be required to take into account in their designs (e.g. the location of utilities). ~~The Authority may~~For example, to the extent that the Authority is of the opinion, having carried out title due diligence with its legal advisers, that there is a certain restrictive covenant that bidders must take into account and comply with as part of that design solution, then the Authority will disclose that specific restrictive covenant. To the extent that there is any title matter which the Authority does not disclose as part of those specific disclosures and that subsequently materialises and has an adverse impact on the Works or the Services, then the Authority will be in breach of the title warranties and the usual Compensation Event/relief from Deductions provisions will apply. The Authority may also propose specific Title Compensation Events if, as a result of its due diligence process, it has determined that there are title issues arising from its own due diligence exercise that bidders are not capable of managing.

~~This~~ As a result of this approach there will ~~avoid the~~be no need for the preparation of certificates of title either by bidders' legal advisers or by the Authority's legal advisers. Each bidder will only be required to assess the specific list of issues disclosed against the title warranties, with reliance otherwise being placed on the title warranties provided by the Authority. If a bidder reasonably considers that any of ~~those~~the specific disclosed title issues cannot be managed through the technical solution/design of a school or otherwise, it should be raised as early as possible during the competitive dialogue process and may (if necessary) result in the inclusion of an additional Title Compensation Event.

Bidders will be requested in the tender documentation to include in their financial model a pre-agreed amount per site (to be advised by the Authority) in respect of the property due diligence exercise which will be carried out by the Authority, and the selected bidder will pay this amount to the Authority's legal advisers at financial close.

SCHEDULE 13

TITLE MATTERS

Part 3

Title Compensation Events²²⁶⁻²²⁸

²²⁶⁻²²⁸ Any extra Title Compensation Events agreed are to be inserted prior to Close of Dialogue, along with any offered by the Authority (see also the footnote to clause 8.3 and to the previous Part of this schedule). The list of Title Compensation Events should simply be a list of rights and restrictions, etc. The operative drafting is contained in clause 8.3 and overlapping drafting should not be inserted here.

SCHEDULE 14

SCHEDULE 14

INSURANCES²²⁷₂₂₉

This Schedule 14 comprises five Parts:

- PART 1: Policies to be taken out by the Contractor and maintained during the Works Period
- PART 2: Policies to be taken out by the Contractor and maintained during the Services Period
- PART 3: Endorsements
- PART 4: Broker's Letter of Undertaking
- PART 5: Definitions

²²⁷₂₂₉ Amendments to Schedule 14 do not need be submitted as part of the SoPC [PF2](#) derogations ~~unless they mean that the insurance schedule would not conform substantially with the Annex to Chapter 25 of SoPC4 or where an Authority intends to agree a derogation without the support of its insurance adviser. This is because Schedule 14 is derived from the Annex to SoPC4, which is not required SoPC4drafting. Unlike~~ [SoPC4, SoPC PF2 does not include an Annex setting out Required Insurance requirements.](#)

SCHEDULE 14²²⁸₂₃₀
INSURANCES

Part 1²²⁹₂₃₁

Policies to be taken out by the Contractor and maintained during the Works Period

Common to each policy in Part 1 (unless stated otherwise):

Insureds

- 1) Authority/School Entities/owners and occupiers with an insurable interest;
- 2) Contractor;
- 3) Building Contractor;
- 4) FM Contractor;
- 5) Sub-contractors to Insureds 2, 3 and 4, of any tier;
- 6) Lenders; ~~and~~
- 7) Consultants - for their site activities only; ~~and~~
- 8) [ICT Service Provider \(Contractor's All Risks only\).](#)

each for their respective rights and interests in the Project.

1 Contractors' "All Risks" Insurance

1.1 Insured Property²³⁰₂₃₂

The permanent and temporary works (including the ICT asset works), materials (including but not limited to equipment supplied by the Authority and the ICT Service Provider), goods, plant and equipment for incorporation in the Works (other than constructional plant, tools, accommodation and equipment belonging to or the responsibility of the Contractor or the Building Contractor or its or their sub-contractors) and all other property used or for use in connection with the Works.

1.2 Coverage

"All risks" of physical loss or damage to the Insured Property unless otherwise excluded.

1.3 Sum Insured

At all times an amount not less than the full reinstatement or replacement value of the Insured Property, but not less than the value specified in the Building Contract, plus provision to include Principal Extensions as appropriate.

²²⁸₂₃₀ Subject to insurance adviser review.

²²⁹₂₃₁ Part 1 should be amended on a project-specific basis. It is important however that changes are kept to a minimum. Amendments should be approved by the Authority's insurance ~~adviser~~_{adviser}.

²³⁰₂₃₂ Authority to take advice on how ICT Assets covered during the ICT Handover Period.

1.4 Maximum Deductible

~~£[]~~²³⁴
£10,000 each and every claim occurrence increasing to £250,000 each and every occurrence in respect of DE5 (or its equivalent claims).

1.5 Territorial Limits

United Kingdom and elsewhere in the European Union, including offsite storage and whilst in transit.

1.6 Period of Insurance

From the date of the Agreement until the Services Availability Date and thereafter in respect of defects liability until expiry of the 12 months' defects liability period.²³²₂₃₃

1.7 Cover Features and Extensions²³³₂₃₄

1.7.1 Terrorism²³⁴₂₃₅.

1.7.2 Munitions of war clause.

1.7.3 Professional fees clause (including Authority's advisers' fees incurred during any period of reinstatement).

1.7.4 Debris removal clause.

1.7.5 72 hour clause.

1.7.6 European Union local authorities' clause.

1.7.7 Inventory losses, fraud and employee dishonesty.

1.7.8 Faulty design, workmanship, materials – DE5 or LEG3 wording.

1.7.9 ~~4.7.7~~ Free issue materials clause.

1.7.10 ~~4.7.8~~ [115]% increase clause.

1.7.11 ~~4.7.9~~ Additional costs of completion clause.

1.7.12 ~~4.7.10~~ Automatic reinstatement of sum insured clause.

1.7.13 ~~4.7.11~~ Plans and documents clause.

1.7.14 ~~4.7.12~~ Loss minimisation.

1.7.15 ~~4.7.13~~ Testing/commissioning period clause.

²³⁴ ~~Authority to specify. This should represent a maximum amount and not be determined solely by limits in the prevailing market.~~

²³²₂₃₃ If there are Post Completion Works, this will need to extend to cover those works and thereafter for the 12 month defects liability period.

²³³₂₃₄ Additional project-specific extensions may be appropriate for certain projects eg.: subsidence.

²³⁴₂₃₅ Throughout this Schedule 14, terrorism should be as defined at that time by ABI.

- 1.8 Principal Exclusions
 - 1.8.1 War and related perils (UK market agreed wording).
 - 1.8.2 Nuclear/radioactive risks (UK market agreed wording).
 - 1.8.3 Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds.
 - 1.8.4 Wear, tear and gradual deterioration.
 - 1.8.5 Consequential financial losses.
 - 1.8.6 Cyber risks.

2 **Delay in Start Up Insurance**

2.1 Insureds

- 2.1.1 Contractor;
- 2.1.2 Lenders; and
- 2.1.3 [~~Authority~~²³⁵₂₃₆],

each for their respective rights and interests in the Project.

2.2 Indemnity

In respect of:

- 2.2.1 loss of anticipated Revenue (as defined in Part 5 of this Schedule) during the Minimum Indemnity Period arising from a delay in completion of the Project as a result of loss or damage covered under the Contractors' All Risks' Insurance effected in accordance with paragraph 1 of Part 1 of this Schedule, including physical loss or damage which would be indemnifiable but for the application of any deductible; and
- 2.2.2 the additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of Revenue (as defined in Part 5 of this Schedule) of the Contractor which without such expenditure would have taken place, during the Minimum Indemnity Period.

2.3 **Sum Insured**

An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.

2.4 **Maximum ~~Excess~~ Deductible**

~~[~~²³⁶~~]~~ Forty-five (45) days in the aggregate per Site.

2.5 **Minimum Indemnity Period**

²³⁵₂₃₆ Where the Authority has a demonstrable insurable interest arising out of any increased cost of working, as opposed to loss of anticipated Revenue.

²³⁶ ~~Authority to specify.~~

{12} months.

2.6 **Period of Insurance**

As per the Contractors' "All Risks" Insurance, excluding the defects liability period.

2.7 **Cover Features and Extensions²³⁷**

2.7.1 Denial of access.

2.7.2 Utilities.

2.7.3 Terrorism.

2.7.4 Subrogation waiver and non-vitiating clause.

2.7.5 Professional fees.

2.7.6 Automatic reinstatement of sum insured.

[2.7.7 Suppliers' extension.](#)

[2.7.8 Payments on account.](#)

2.8 **Principal Exclusions**

To follow the Contractors' 'All Risks' Insurance, other than for consequential losses.

3 **Construction Third Party Liability Insurance²³⁸**

3.1 **Interest**

To indemnify the Insured in respect of all sums that they may become legally liable²³⁹ to pay (including claimant's costs and expenses) as damages in respect of accidental:

3.1.1 death, or bodily injury, illness, disease contracted by any person;

3.1.2 loss or damage to property;

3.1.3 interference to property or any easement right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, nuisance, loss of amenities, or any like cause,

happening during the Period of Insurance and arising out of or in connection with the Works.

3.2 **Limit of Indemnity**

²³⁷ For certain projects a supplier's extension for the premises of specified suppliers may be required.

²³⁸ Insurance should be placed on a losses occurring basis.

²³⁹ Cover should be for contractual liability, statutory liability and liability in tort.

Not less than £~~[]²⁴⁰mn~~50m in respect of any one occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution and products liability.

3.3 **Maximum Deductible**

£~~[]²⁴¹~~10,000 for each and every occurrence of property damage. (Personal injury claims will be paid in full.)

3.4 **Territorial Limits**

[United Kingdom but worldwide in respect of non-manual visits.] **OR** [Worldwide excluding USA, Canada and Australia.]

3.5 **Jurisdiction**

Worldwide excluding USA, Canada and Australia.

3.6 **Period of Insurance**

As per the Contractor's "All Risks" Insurance, including the defects liability period.

3.7 **Cover Features and Extensions**²⁴²⁻²⁴⁰

3.7.1 Munitions of war.

3.7.2 Cross liability clause.

3.7.3 Contingent motor.

3.7.4 Legal defence costs in addition.

3.7.5 Indemnity to Principals.

3.7.6 Statutory defence costs (including Corporate Manslaughter).

3.8 **Principal Exclusions**

3.8.1 Liability for death, illness, disease or bodily injury sustained by employees of the Insured.

3.8.2 Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by Legislation in respect of such vehicles.

3.8.3 Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the Insured.

3.8.4 Liability in respect of loss or damage to property in the care, custody and control of the insured but this exclusion is not to apply to all property belonging to the Authority that is in the care, custody and control of another Insured.

²⁴⁰ ~~Limit should be determined by the Authority, in conjunction with its insurance adviser, taking into account the relevant circumstances of the project.~~

²⁴¹ ~~Authority to specify.~~

²⁴² ²⁴⁰ For certain projects a legionella extension may be required. Similarly, depending on the scope and location of the project, terrorism cover may be required.

- 3.8.5 Liability arising out of technical or professional advice (given for a fee) other than in respect of death or bodily injury to persons or damage to third party property.
- 3.8.6 Losses indemnified under the insurances referred to in paragraphs 1 and 2 of this Part 1 of Schedule 14.
- 3.8.7 Liability arising from the ownership, possession or use of any aircraft or marine vessel.
- 3.8.8 Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.

[3.8.9 Cyber risks.](#)

[3.8.10 Asbestos.](#)

[3.8.11 Toxic mould.](#)

SCHEDULE 14

INSURANCES

Part 2²⁴³~~241~~

Policies to be taken out by the Contractor and maintained during the Services Period

Common to all policies in Part 2 (unless stated otherwise):

Insureds

- 1) Authority and School Entities/ owners and occupiers with an insurable interest;
- 2) Contractor;
- 3) FM Contractor;
- 4) Sub-contractors to Insureds 2 and 3, of any tier; and
- 5) Lenders,

each for their respective rights and interests in the Project.

1 Property Damage Insurance

1.1 Insured Property

Any property of whatsoever nature or description associated with the Project that is the property of the Contractor or for which the Contractor may be responsible under this Agreement including but not limited to the new facilities²⁴⁴~~242~~.

1.2 Coverage

"All risks" of physical loss or damage to the Insured Property from any cause not excluded, including machinery breakdown and computer breakdown in respect of appropriate equipment.

1.3 Sum Insured

At all times an amount not less than the total reinstatement or replacement value of the Insured Property plus provision to include other Principal Extensions as appropriate (escalated periodically as appropriate in accordance with clause 67.4 (Increase in Insured Amounts))²⁴⁵~~243~~.

1.4 Maximum Deductible

£[~~—~~²⁴⁶]10,000 each and every claim, escalated periodically as appropriate in accordance with clause 67.4 (Increase in Insured Amounts).

²⁴³~~241~~ Part 2 should be amended on a project-specific basis. It is important however that changes are kept to a minimum. Amendments should be approved by the Authority's insurance adviser.

²⁴⁴ ~~Authorities should note that this~~²⁴² This assumes that ~~this assumes that they~~ Schools, and not the Contractor, shall insure the contents of the Schools.

²⁴⁵~~243~~ It will be important for the Parties to agree an appropriate method of escalation.

²⁴⁶ ~~Authorities to specify.~~

1.5 **Territorial Limits**

United Kingdom.

1.6 **Period of Insurance**

From the first Services Availability Date or as otherwise specified in the Agreement for the duration of this Agreement and renewable on an annual basis unless agreed otherwise by the Parties.

1.7 **Cover Features and Extensions**

1.7.1 Terrorism.

1.7.2 Pollution and contamination to the Insured Property arising from an event which itself is not otherwise excluded. To include pollution or contamination resulting from accidental damage.

1.7.3 Insured Property whilst in transit.

1.7.4 Automatic reinstatement of sum insured.

1.7.5 Capital additions clause.

1.7.6 72 hour clause.

1.7.7 European Union local authorities' clause.

1.7.8 Replacement of computer records.

1.7.9 Professional fees.

1.7.10 Debris removal.

1.7.11 Repair / reinstatement basis of claims settlement with cash option for non-reinstatement.

[1.7.12 Plans and documents.](#)

[1.7.13 Temporary repairs.](#)

[1.7.14 Loss minimisation.](#)

1.8 **Principal Exclusions**

1.8.1 War and related perils (UK market agreed wording).

1.8.2 Nuclear/radioactive risks (UK market agreed wording).

1.8.3 Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds.

1.8.4 Wear, tear and gradual deterioration.

1.8.5 Consequential financial losses.

1.8.6 Cyber risks.

2 **Business Interruption Insurance**

2.1 **Insureds**

2.1.1 Contractor;

2.1.2 Lenders,

2.1.3 [Authority]²⁴⁷₂₄₄,

each for their respective rights and interests in the Project.

2.2 **Indemnity**

In respect of:

2.2.1 loss of anticipated Revenue (as defined in Part 5 of this Schedule) during the Minimum Indemnity Period arising from an interruption or interference in the operation the Project as a result of loss or damage covered under Property Damage Insurance effected in accordance with paragraph 1 of Part 2 of this Schedule 14 including physical loss or damage which would be indemnifiable but for the application of any deductible; and

2.2.2 the additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of Revenue (as defined in Part 5 of this Schedule) of the Contractor which without such expenditure would have taken place, during the Minimum Indemnity Period.

2.3 **Sum Insured**

An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.

2.4 **Maximum ~~Excess~~ Deductible**

~~[²⁴⁸] days.~~
£10,000 each and every claim, escalated periodically as appropriate in accordance with clause 67.4 (Increase in Insured Amounts).

2.5 **Minimum Indemnity Period**

~~[12]~~ months.

2.6 **Period of Insurance**

From the Services Availability Date for the duration of this Agreement and renewable on an annual basis unless agreed otherwise by the Parties.

²⁴⁷₂₄₄ Include if the Authority has a demonstrable insurable interest.

²⁴⁸ ~~Authorities to specify.~~

2.7 **Cover Features and Extensions**²⁴⁹₂₄₅

- 2.7.1 Denial of access.
- 2.7.2 Utilities.
- 2.7.3 Terrorism.
- 2.7.4 Subrogation waiver and non vitiation clause.
- 2.7.5 Accountants Clause.
- 2.7.6 Automatic reinstatement of Sum Insured and Indemnity Period.

2.7.7 Suppliers extension.

2.8 **Principal Exclusions**

To follow the Contractors' 'All Risks' Insurance, other than for consequential losses.

3 **Third Party Public and Products Liability Insurance**²⁵⁰₂₄₆

3.1 **Interest**

To indemnify the Insured in respect of all sums that they may become legally liable²⁵¹₂₄₇ to pay (including claimant's costs and expenses) as damages in respect of accidental:

- 3.1.1 death, or bodily injury, illness, death, disease contracted by any person;
- 3.1.2 loss or damage to property; or
- 3.1.3 interference to property or any easement right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, nuisance, loss of amenities, or any like cause,

happening during the Period of Insurance and arising out of or in connection with the Project and the provision of the Services.

3.2 **Limit of Indemnity**

Not less than £~~[]~~²⁵²_{50m} (escalated periodically as appropriate in accordance with clause 67.4 (Increase in Insured Amounts))²⁵³₂₄₈ in respect of any one occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution and products liability.

²⁴⁹₂₄₅ For certain projects additional extensions may be required: infectious disease, specified suppliers.

²⁵⁰₂₄₆ Insurance should be maintained on a losses occurring basis.

²⁵¹₂₄₇ Cover should be for contractual liability, statutory liability and liability in tort.

²⁵² ~~Limit should be determined by the Authority in conjunction with its insurance adviser, taking into account the relevant circumstances of the project.~~

²⁵³₂₄₈ It will be important for the parties to agree an appropriate method of escalation.

3.3 **Maximum Deductible**

£~~[~~²⁵⁴~~]~~10,000 for each and every occurrence of property damage, escalated periodically as appropriate. (Personal injury claims will be paid in full.)

3.4 **Territorial Limits**

[United Kingdom but worldwide in respect of non-manual visits.] **OR** [Worldwide excluding USA, Canada and Australia.]

3.5 **Jurisdiction**

Worldwide excluding USA, Canada and Australia.

3.6 **Period of Insurance**

From the first Services Availability Date or as otherwise specified in this Agreement for the duration of this Agreement and renewable on an annual basis unless agreed otherwise by the Parties.

3.7 **Cover Features and Extensions**²⁵⁵₂₄₉

3.7.1 Munitions of war.

3.7.2 Cross liability clause.

3.7.3 Contingent motor liability.

3.7.4 Subrogation waiver and non vitiating clause.

[3.7.5 Contractual liability.](#)

[3.7.6 Indemnity to Principals.](#)

[3.7.7 Statutory defence costs \(including Corporate Manslaughter\).](#)

3.8 **Principal Exclusions**

3.8.1 Liability for death, illness, disease or bodily injury sustained by employees of the Insured.

3.8.2 Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by Legislation in respect of such vehicles.

3.8.3 Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the Insured.

3.8.4 Liability in respect of loss or damage to property in the care, custody and control of the insured but this exclusion is not to apply to all property belonging to the Authority that is in the care, custody and control of another Insured.

3.8.5 Liability arising out of technical or professional advice (given for a fee) other than in respect of death or bodily injury to persons or damage to third party property.

²⁵⁴ [Authorities to specify.](#)

²⁵⁵ [249](#) For certain projects additional extensions/top-up cover may be required eg. legionella, terrorism.

- 3.8.6 Liability arising from the ownership, possession or use of any aircraft or marine vessel.
- 3.8.7 Liability arising from seepage and pollution unless caused by a sudden, identifiable, unintended and unexpected occurrence.
- 3.8.8 Liability arising from the Authority's activities as a local education authority.
- 3.8.9 Losses under the insurances referred to in paragraphs 1 and 2 of this Part 2 of Schedule 14.

[3.8.10 Cyber risks.](#)

[3.8.11 Asbestos.](#)

[3.8.12 Toxic mould.](#)

SCHEDULE 14

INSURANCES

Part 3

Endorsements²⁵⁶₂₅₀

Unless the context otherwise requires defined terms set out in the following endorsements shall have the meaning set out in the Project Agreement.

Endorsement 1

Cancellation

This policy shall not be cancelled or terminated before the original expiry date is to take effect except in respect of non-payment of premium.

The insurer shall by written notice advise the Authority:

- (a) at least 30 Business Days before any such cancellation or termination is to take effect
- (b) at least 30 Business Days before any reduction in limits or coverage or any increase in deductibles is to take effect; and
- (c) of any act or omission or any event of which the insurer has knowledge and which might invalidate or render unenforceable in whole or in part this policy

Endorsement 2

Multiple Insured/Subrogation/Non-Vitiation Clause

Each of the Parties comprising the insured shall for the purpose of this policy be considered a separate co-insured entity, insured on a composite basis, with the words "the insured" applying to each as if they were separately and individually insured provided that the total liability of the insurers under each section of this policy to the insured collectively shall not (unless the policy specifically permits otherwise) exceed the limit of indemnity or amount stated to be insured under that section or policy. Accordingly, the liability of the insurers under this policy to any one insured shall not be conditional upon the due observance and fulfilment by any other insured party of the terms and conditions of this policy or of any duties imposed upon that insured party relating thereto, and shall not be affected by any failure in such observance or fulfilment by any such other insured party.

It is understood and agreed that any payment or payments by insurers to any one or more of the insureds shall reduce, to the extent of that payment, insurers' liability to all such parties arising from any one event giving rise to a claim under this policy and (if applicable) in the aggregate.

Insurers shall be entitled to avoid liability to or (as may be appropriate) claim damages from any insured party in circumstances of fraud misrepresentation non-disclosure or material breach of warranty or condition of this policy (each referred to in this clause as a "Vitiating Act") committed by that insured party save where such misrepresentation non-disclosure or breach of warranty or condition was committed innocently and in good faith.

²⁵⁶₂₅₀ The endorsements drafted in this Part 3 is recommended drafting. Whilst the Parties should endeavour to obtain cover in accordance with these wordings, it is recognised that in practice the actual wording may differ. Whilst this is in principle acceptable, it will be important for the Authority's insurance adviser to verify that the principal provisions as set in this Part 3 are achieved and the best terms reasonably available in the market at the time obtained.

For the avoidance of doubt it is however agreed that a Vitiating Act committed by one insured party shall not prejudice the right to indemnity of any other insured who has an insurable interest and who has not committed the Vitiating Act.

Insurers hereby agree to waive all rights of subrogation and/or recourse which they may have or acquire against any insured party (together with their employees and agents) except where the rights of subrogation or recourse are acquired in consequence of a Vitiating Act in which circumstances insurers may enforce such rights against the insured responsible for the Vitiating Act notwithstanding the continuing or former status of the vitiating party as an insured.

Notwithstanding any other provision of this policy or any other document or any act and/or omission by any insured party insurers agree that:

- (1) no party other than the Authority has any authority to make any warranty, disclosure or representation in connection with this policy on behalf of the Authority;
- (2) where any warranty, disclosure or representation is required from the Authority in connection with this policy insurers will contact the Authority in writing (in accordance with Endorsement 3 to the Agreement) and set out expressly the warranty, disclosure and/or representation required within a reasonable period of time from the Authority (regarding itself); and
- (3) save as set out in a request from insurers to the Authority in accordance with (2) above, the Authority shall have no duty to disclose any fact or matter to insurers in connection with this policy save to the extent that for the Authority not to disclose a fact or matter would constitute fraudulent misrepresentation and/or fraudulent non-disclosure.

Endorsement 3

Communications

All notices or other communications under or in connection with this policy shall be given to each insured (and the Authority) in writing or by facsimile. Any such notice will be deemed to be given as follows:

- (a) if in writing, when delivered
- (b) if by facsimile, when transmitted but only if, immediately after transmission, the sender's facsimile machine records a successful transmission has occurred.

The address and facsimile number of the Authority for all notices under or in connection with this policy are those notified from time to time by the Authority for this purpose to the Contractor's insurance broker at the relevant time. The initial address and facsimile number of the Authority is as follows:

1 ~~4.~~ The Authority:

Address:

Facsimile No: []

Attention: *TBC*

It is further agreed that a notice of claim given by the Authority or any other insured shall in the absence of any manifest error be accepted by the insurer as a valid notification of a claim on behalf of all insureds.

Endorsement 4

Loss Payee (applicable only to the Physical Damage Policies)

All proceeds of this policy shall be payable without deduction or set-off to the Joint Insurance Account.

Endorsement 5

Primary Insurance

It is expressly understood and agreed that this policy provides primary cover for the insured parties and that in the event of loss destruction damage or liability covered by this policy which is covered either in whole or in part under any other policy or policies of insurance effected by or on behalf of any of the insured parties the insurers will indemnify the insured parties as if such other policy or policies of insurance were not in force and the insurers waive their rights of recourse if any against the insurers of such other policy or policies of insurance.

Endorsement 6

Claims Negotiation Rights

Notwithstanding any claim conditions contained herein insurers agree that the Authority has the right to settle and negotiate any claims received from third parties subject to prior consent of insurers. If an Authority takes or fails to take any action as a direct result of which insurers' liability is increased then the liability of insurers to provide an indemnity is reduced to such an extent.

Endorsement 7

Ringfencing

The level of any indemnity available to an insured party under this policy in relation to any claim(s) concerning the Project shall not be affected and/or reduced by any claim(s) unrelated to the Project.

SCHEDULE 14

INSURANCES

Part 4

Broker's Letter of Undertaking

Any one of the following three broker's letters of undertaking should be used.

Broker's Letter of Undertaking [A]

To: [] Council

Dear Sirs

Agreement dated on or about [] entered into between [] (the "Contractor") and [] Council (the "Authority") (the "Agreement")

- 1 We refer to the Agreement. Unless the context otherwise requires, terms defined in the Agreement shall have the same meaning in this letter.
- 2 We act as insurance broker to the Contractor in respect of the Required Insurances and in that capacity we confirm that the Required Insurances which are required to be procured pursuant to clause 65 and ~~schedule~~Schedule 14 of the Agreement:
 - 2.1 where appropriate name you and such other persons as are required to be named pursuant to the Agreement for their respective interests;
 - 2.2 are, in our reasonable opinion as insurance brokers, as at today's date, in full force and effect;
 - 2.3 all premiums due to date in respect of the Required Insurances are paid and the Required Insurances are, to the best of our knowledge and belief, placed with insurers which, as at the time of placement, are reputable and financially sound. We do not, however, make any representations regarding such insurers' current or future solvency or ability to pay claims; and that
 - 2.4 the endorsements set out in Part 3 to Schedule 14 of the Agreement are as at today's date in full force and effect in respect of the Required Insurances.
- 3 We further confirm that the attached cover notes confirm this position.
- 4 Pursuant to instructions received from the Contractor and in consideration of your approving our appointment [or continuing appointment] as brokers in connection with the Required Insurances, we hereby undertake in respect of the interests of the Authority in relation to the Required Insurances:
 - 4.1 **Notification Obligations**
 - 4.1.1 to notify you at least thirty (30) days prior to the expiry of any of the Required Insurances if we have not received instructions from the Contractor to negotiate renewal and in the event of our receiving instructions to renew, to advise you promptly of the details thereof;
 - 4.1.2 to notify you at least thirty (30) days prior to ceasing to act as brokers to the Contractor unless, due to circumstances beyond our control, we are unable to do so in which case we shall notify you as soon as practicable; and
 - 4.1.3 to pay into the Joint Insurance Account without set off or deduction of any kind for any reason all payments in respect of claims received by us from insurers in relation to the Required Insurances specified in Clause 65.2 of the Agreement.

4.2 **Advisory Obligations**

- 4.2.1 to notify you as soon as practicable of any default in the payment of any premium for any of the Required Insurances;
- 4.2.2 to notify you if any insurer cancels or gives notification of cancellation of any of the Required Insurances, at least thirty (30) days before such cancellation is to take effect or as soon as reasonably practicable in the event that notification of cancellation takes place less than thirty (30) days before it is to take effect;
- 4.2.3 to notify you as soon as reasonably practicable of any act or omission, breach or default of the Contractor or any other insured under the Required Insurances of which those of our employees directly involved with the placement or administration of the Insurances become aware and which acting reasonably they consider may invalidate any Insurance or render it void, avoidable or unenforceable in whole or in part or which may otherwise materially impact on the extent of cover provided under the Required Insurances; and;
- 4.2.4 in accordance with our duty to the Contractor to notify the Contractor of its pre-contractual duties of disclosure to insurers including the duty to disclose all information that would be considered material in the context of such duty.

4.3 **Disclosure Obligations**

- 4.3.1
 - (i) disclose to insurers all information and any fact, change of circumstance or occurrence made available to us by the Contractor; or
 - (ii) disclose, with the approval of the Contractor (such approval not to be unreasonably withheld), all information and any fact, change of circumstance or occurrence made available to us by the Authority,

which in our reasonable opinion is material to the risks insured against under the Required Insurances and which properly should be disclosed to insurers in accordance with the insurers' relevant policy terms and conditions as soon as reasonably practicable after we are in receipt from the Contractor of such information or of the approval of the Contractor in respect of such information and become aware of such information, fact, change of circumstance or occurrence whether prior to inception or renewal or otherwise; and

- 4.3.2 to treat as confidential all information so marked or otherwise stated to be confidential and supplied to us by or on behalf of the Contractor or the Authority and not to disclose such information, without the prior written consent of the supplier of the information, to any third party other than those persons who, in our reasonable opinion have a need to have access to such information from time to time, and for the purpose of disclosure to the insurers or their agents in respect of the Required Insurances in discharge of our obligation set out at clause 4.3.1 of this letter. Our obligations of confidentiality shall not conflict with our duties owed to the

Contractor and shall not apply to disclosure required by an order of a court of competent jurisdiction, or pursuant to any applicable law, governmental or regulatory authority having the force of law or to information which is in the public domain.

4.4 **Administrative Obligations**

- 4.4.1 to hold copies of all documents relating to or evidencing the Required Insurances, including but without prejudice to the generality of the foregoing, insurance slips, contracts, policies, endorsements and copies of all documents evidencing renewal of the Required Insurances, payment of premiums and presentation and receipt of claims;
- 4.4.2 to supply to the Authority and/or its insurance advisers (or the Authority's or its insurance advisers' authorised representatives) promptly on written request copies of the documents set out in clause 4.4.1 of this letter, and to the extent available, to make available to such persons promptly upon the Authority's request the originals of such documents;
- 4.4.3 to administer the payment of premiums due pursuant to the Required Insurances such that, in so far as we hold appropriate funds, all such premiums shall be paid to insurers in accordance with the terms of the Required Insurances;
- 4.4.4 to administer the payment of claims from insurers in respect of the Insurances (the "Insurance Claims") including:
 - (i) negotiating settlement of Insurance Claims presented in respect of the Required Insurances;
 - (ii) collating and presenting all information required by insurers in relation to Insurance Claims presented in respect of the Required Insurances, and
 - (iii) insofar as it is relevant and practicable, liaising with and reporting to the Authority throughout the settlement, payment and administration of such Insurance Claims.
- 4.4.5 to advise the Authority promptly upon receipt of notice of any material changes which we are instructed to make in the terms of the Required Insurances and which, if effected, in our opinion as Insurance Brokers would result in any material reduction in limits or coverage or in any increase in deductibles, exclusions or exceptions;
- 4.4.6 to advise the Authority in advance of any lapse or non renewal of any policy maintained in respect of the Required Insurances;
- 4.4.7 to use our reasonable endeavours to have endorsed on each and every policy evidencing the Required Insurances (when the same is issued) endorsements substantially in the form set out in part 3 to schedule 14 of the Agreement.

4.5 **Insurance Cost Reporting Procedures**

4.5.1 to prepare following request, at the expense of the Contractor, a Joint Insurance Cost Report on behalf of both the Contractor and the Authority in accordance with the Insurance Review Procedure as set forth in Section [] of the Agreement. We shall ensure that the information in the Joint Insurance Cost Report is fairly represented, based on the information available to us.

5 **Notification Details**

5.1 Our obligations at clause 4 of this letter to notify or inform you shall be discharged by providing the requisite information in hard copy to:

[_____] Council
[Address]

[_____] Council

[Address]

6 **General**²⁵⁷₂₅₁

6.1 For the avoidance of doubt, the undertakings and confirmations given in this letter relate solely to the Required Insurances. They do not apply to any other insurances and nothing in this letter should be taken as providing any undertakings or confirmations in relation to any insurance (other than the Required Insurances) that ought to have been placed or may at some future date be placed by ourselves or by other brokers.

6.2 Following termination of our appointment as broker to the Contractor, on written notice to the Authority we are released from all ongoing obligations set forth in this letter.

6.3 Nothing in this letter shall prejudice insurers' right to cancel the Required Insurances in accordance with their terms and the undertakings and confirmations set out in this letter are given subject to such right.

6.4 This letter is given by us on the instructions of the Contractor and with the Contractor's full knowledge and consent as to its terms as evidenced by the Contractor's signature below. Accordingly, the Contractor hereby waives any potential liability we might otherwise have had to it arising from actions taken by us to comply with the terms of this letter (including, without limitation, any particular liability relating to any conflict of interest).

6.5 This letter shall be governed by and construed in accordance with English law.

Yours faithfully

For and on behalf of [Contractor's broker]

²⁵⁷₂₅₁ Broker may limit liability on individual projects.

For and on behalf of the [Authority]

For and on behalf of the [Contractor]

Broker's Letter of Undertaking [B]

To: The Authority

Dear Sirs

Agreement dated [] entered into between [] Limited (the "Contractor") and [] (the "Authority") (the "Agreement")

- 1 We refer to the Agreement. Unless the context otherwise requires, terms defined in the Agreement shall have the same meaning in this letter
- 2 We act as insurance broker to the Contractor in respect of the Required Insurances and in that capacity we confirm that the Required Insurances which are required to be procured pursuant to clause 65 and ~~schedule~~[Schedule](#) 14 of the Agreement:
 - 2.1 where appropriate name you and such other persons as are required to be named pursuant to the Agreement for their respective interests;
 - 2.2 are, in our reasonable opinion as insurance brokers, as at today's date, in full force and effect;
 - 2.3 all premiums due to date in respect of the Required Insurances are paid and the Required Insurances are, to the best of our knowledge and belief, placed with insurers which, as at the time of placement, are reputable and financially sound. We do not however make any representations regarding such insurers' current or future solvency, or ability to pay claims; and that
 - 2.4 the endorsements set out in Part 3 to Schedule 14 of the Agreement which is attached hereto are in our reasonable opinion as at today's date in full force and effect in respect of the Required Insurances.
- 3 We further confirm that the attached cover notes confirm this position.
- 4 Pursuant to instructions received from the Contractor and in consideration of your approving our appointment [or continuing appointment] as brokers in connection with the Required Insurances, we hereby undertake in relation to the Required Insurances:
 - 4.1 **Notification Obligations**
 - 4.1.1 to notify you at least thirty (30) days prior to the expiry of any of the Required Insurances if we have not received instructions from the Contractor to negotiate renewal and in the event of our receiving instructions to renew, to advise you promptly of the details thereof;
 - 4.1.2 to notify you at least thirty (30) days prior to ceasing to act as brokers to the Contractor unless, due to circumstances beyond our control, we are unable to do so in which case we shall notify you as soon as practicable; and
 - 4.1.3 to pay into the Joint Insurance Account without set off or deduction of any kind for any reason all payments in respect of claims received by us from insurers in relation to the Required Insurances specified in clause 65 of the Agreement.

4.2 **Advisory Obligations**

- 4.2.1 to notify you as soon as reasonably practicable of any default in the payment of any premium for any of the Required Insurances;
- 4.2.2 to notify you if any insurer cancels or gives notification of cancellation of any of the Required Insurances to us, at least thirty (30) days before such cancellation is to take effect or as soon as reasonably practicable in the event that notification of cancellation takes place less than thirty (30) days before it is to take effect;
- 4.2.3 to notify you as soon as reasonably practicable of any act or omission, breach or default of which we have been notified which in our reasonable opinion would either, invalidate or render unenforceable in whole or in part any of the Required Insurances or, would otherwise materially impact on the extent of cover provided under the Required Insurances; and
- 4.2.4 in accordance with our duty to the Contractor to notify the Contractor of its pre-contractual duties of disclosure to insurers, including the duty to disclose all information that would be considered material in the context of such duty.

4.3 **Disclosure Obligations**

- 4.3.1 subject to the prior written consent of the Contractor (and we undertake to notify you as soon as reasonably practicable if such consent is withheld) to disclose to insurers all information provided to those of our employees directly involved with the placement of the Required Insurances in our capacity as insurance broker to the Contractor, including any fact, change of circumstance or occurrence notified to such employees, which in our reasonable opinion is material to the risks insured against under the Required Insurances and which properly should be disclosed to insurers, or in accordance with the policy terms and conditions of the relevant Required Insurance, as soon as reasonably practicable after we are in receipt of such information, fact, change of circumstance or occurrence whether prior to inception or renewal or otherwise.
- 4.3.2 to treat as confidential all information so marked or otherwise stated to be confidential and supplied to us by or on behalf of the Contractor or the Authority and not to disclose such information, without the prior written consent of the supplier, to any third party other than those persons who, in our reasonable opinion have a need to have access to such information from time to time, and for the purpose of disclosure to the insurers or their agents in respect of the Required Insurances. Our obligations of confidentiality shall not conflict with our duties owed to the Contractor and shall not apply to disclosure required by an order of a court of competent jurisdiction, or pursuant to any applicable law, governmental or regulatory authority having the force of law or to information which is in the public domain.

4.4 **Administrative Obligations**

- 4.4.1 to hold copies of all documents relating to or evidencing the Required Insurances, including but without prejudice to the generality of the foregoing, insurance slips, contracts, policies, endorsements and copies of all documents evidencing renewal of the Required Insurances, payment of premiums and presentation and receipt of claims;
- 4.4.2 to supply to the Authority and/or its insurance advisers (or the Authority's or its insurance advisers' authorised representatives) promptly on written request copies of the documents set out in clause 4.4.1 of this letter, and to the extent available, to make available to such persons promptly upon the Authority's request the originals of such documents;
- 4.4.3 to administer the payment of premiums due pursuant to the Required Insurances such that, in so far as we hold appropriate funds, all such premiums shall be paid to insurers in accordance with the terms of the Required Insurances;
- 4.4.4 [to administer the payment of claims from insurers in respect of the Insurances (the "Insurance Claims") including:
- (i) negotiating settlement of Insurance Claims presented in respect of the Required Insurances;
 - (ii) collating and presenting all information required by insurers in relation to Insurance Claims presented in respect of the Required Insurances, and
 - (iii) in so far as it is relevant and practicable, liaising and reporting to the Authority throughout the settlement, payment and administration of such Insurance Claims]]²⁵⁸²⁵²
- 4.4.5 to advise the Authority as soon as reasonably practicable upon receipt of notice of any material changes which we are instructed by the Contractor to make in the terms of the Required Insurances and which, if effected, in our reasonable opinion as Insurance Brokers would result in any material reduction in limits or coverage or increase in deductibles, exclusions or exceptions; and
- 4.4.6 to use our reasonable endeavours to have endorsed on each and every policy evidencing the Required Insurances (when the same is issued) endorsements substantially in the form set out in part [●] to schedule [●] of the Agreement.

²⁵⁸ ²⁵² Section 4.4.4 to be amended on a project-specific basis, so as to comply with any claims procedure agreed with the Insured before the letter is signed.

4.5 **Insurance Cost Reporting Procedures**

4.5.1 to prepare, at the expense of the Contractor, a Joint Insurance Cost Report on behalf of both the Contractor and the Authority in accordance with the Insurance Review Procedure as set forth in [] of the Agreement. We shall ensure that the information in the Joint Insurance Cost Report is fairly represented, based on the information available to us.²⁵⁹₂₅₃

5 **Notification Details**

5.1 Our obligations at clause 4 of this letter to notify or inform you shall be discharged by providing the requisite information in hard copy to:

_____ [] Authority

[] Authority

6 Save insofar as we have given agreements or representations in this letter, it is to be understood by the Authority that they may not rely on any advice which we have given to the Contractor, and we do not represent that the Required Insurances are suitable or sufficient to meet the needs of the Authority which must take steps and advice of its own as it considers necessary in order to protect its own position.

7 The representations and obligations set out in this letter are subject to our continuing appointment as insurance brokers to the Contractor in relation to the Required Insurances concerned, and following termination of such appointment our immediate release from all our obligations set out in this letter to the extent those obligations arise on or after the termination, and subject to any right of lien we may have over the policy and policy documents regarding the Required Insurances, arising through common law or otherwise.

8 Our aggregate liability to any persons companies or organisation who acts in reliance on this letter, or on any other broker's letter of undertaking issued by us in respect of the Required Insurances for this Project, for any and all matters arising from them and the contents thereof shall in any and all events be limited to the sum of £[], even if we are negligent. We do not limit liability for our fraud.

9 This letter is given by us on the instructions of the Contractor and with their full knowledge and consent as to its terms.

Yours faithfully

For and on behalf of [Contractor's broker]

We consent to the giving of this Letter of Undertaking by our insurance brokers

²⁵⁹₂₅₃ This provision under clause 4.5 is only Required Drafting (and may not be altered-) where the Authority has agreed to give the Contractor price protection in relation to increases in insurance costs.

For and on behalf of
[Contractor]

Broker's Letter of Undertaking [C]

The Authority

Dear Sirs

Agreement dated [] entered into between [] Limited (the "Contractor") and [] (the "Authority") (the "Agreement")

- 1 We refer to the Agreement. Unless the context otherwise requires, terms defined in the Agreement shall have the same meaning in this letter.
- 2 We act as insurance broker to the Contractor in respect of the insurances (which are defined in clause [] and schedule [] of the Agreement attached hereto as Appendix A) evidenced by the cover notes attached hereto as Appendix B ("Required Insurances") and in that capacity we confirm that the Required Insurances:
 - 2.1 where appropriate name you and such other persons as are required to be named pursuant to the Agreement for their respective interests;
 - 2.2 are, to the best of our knowledge and belief (after making all reasonable enquiries), as at today's date, in full force and effect; and that
 - 2.3 all premiums due as at today's date in respect of the Required Insurances are paid and the Required Insurances are, to the best of our knowledge and belief, placed with insurers which, as at the time of placement, are reputable and financially sound. We do not, however, make any representations regarding such insurers' current or future solvency or ability to pay claims; and that
 - 2.4 the endorsements set out in Part 3 to Schedule [] of the Agreement attached hereto as Appendix C are to the best of our knowledge and belief as at today's date in full force and effect.
- 3 We further confirm that the cover notes attached hereto as Appendix B confirm this position.
- 4 Pursuant to instructions received from the Contractor and in consideration of your approving our appointment or continuing appointment as brokers in connection with the Required Insurances, we hereby undertake in respect of the interests of the Authority in relation to the Required Insurances:
 - 4.1 **Notification Obligations**
 - 4.1.1 to notify you at least thirty (30) days prior to the expiry of any of the Required Insurances if we have not received instructions from the Contractor to negotiate renewal and in the event of our receiving instructions to renew, to advise you as soon as reasonably practicable, and in any event within three (3) working days, of the details thereof;
 - 4.1.2 to notify you at least thirty (30) days prior to ceasing to act as brokers to the Contractor unless, due to circumstances beyond our control, we are unable to do so in which case we shall notify you as soon as reasonably practicable and in any event within 3 working days; and
 - 4.1.3 to pay into the Joint Insurance Account without set off or deduction of any kind or for any reason, all payments in respect of claims received by us from insurers in relation to the Required Insurances

specified in Clause [24.5] of the Agreement attached hereto as Appendix D.

4.2 Advisory Obligations

- 4.2.1 to notify you as soon as reasonably practicable, and in any event within 3 working days, of any default in the payment of any premium by the Contractor to us for any of the Required Insurances;
- 4.2.2 to notify you if any insurer cancels or gives notification of cancellation of any of the Required Insurances, at least thirty (30) days before such cancellation is to take effect or as soon as reasonably practicable in the event that notification of cancellation takes place less than thirty (30) days before it is to take effect;
- 4.2.3 to notify you as soon as reasonably practicable of any act or omission, breach or default of the Contractor of which those of our employees directly involved with the placement or administration of the Relevant Insurances becomes actually aware in their capacity as brokers to the Contractor which acting reasonably they consider may invalidate or render unenforceable in whole or in part any of the Required Insurances or which may otherwise materially impact on the extent of cover provided under the Required Insurances; and
- 4.2.4 in accordance with our duty to the Contractor, to advise the Contractor of its duties of disclosure to insurers including:
 - (i) the types of facts, circumstances and beliefs that should generally be disclosed to insurers; and
 - (ii) the obligation not to misrepresent any facts, matters or beliefs to insurers.

4.3 Disclosure Obligations

- 4.3.1 subject to the prior written consent of the Contractor (and we undertake to notify you as soon as reasonably practicable if such consent is withheld) to disclose to insurers all information made available to those of our employees directly involved with the placement of the Relevant Insurances in their capacity as brokers to the Contractor and any fact, change of circumstances or occurrence made known to such employees which in our reasonable opinion is material to the risks insured against under the Required Insurances and which properly should be disclosed to insurers (in accordance with the Contractor's duty of disclosure to insurers) as soon as practicable after we are in receipt of such information; and become aware of such information, fact, change of circumstance or occurrence whether prior to inception or renewal or otherwise; and
- 4.3.2 to treat as confidential all information so marked or otherwise stated to be confidential and supplied to us by or on behalf of the Contractor or the Authority and not to disclose such information, without the prior written consent of the supplier, to any third party other than those persons who, in our reasonable opinion have a need to have access to such information from time to time, and for the purpose of disclosure to the insurers or their agents in respect

of the Required Insurances in discharge of our obligation set out at clause 4.3.1 of this letter. Our obligations of confidentiality shall not conflict with our duties owed to the Contractor and shall not apply to disclosure required by an order of a court of competent jurisdiction, or pursuant to any applicable law, governmental or regulatory authority having the force of law or to information which is in the public domain.

4.4 **Administrative Obligations**

- 4.4.1 to hold copies of all documents relating to or evidencing the Required Insurances, including but without prejudice to the generality of the foregoing, insurance slips, contracts, policies, endorsements and copies of all documents evidencing renewal of the Required Insurances, payment of premiums and presentation and receipt of claims;
- 4.4.2 subject to our lien over the Policies for premiums and/or commissions due, to supply to the Authority and/or its insurance advisers (or the Authority's authorised representatives) as soon as reasonably practicable, on written request copies of the documents set out in clause 4.4.1 of this letter, and to the extent available, to make available to such persons as soon as reasonably practicable, upon the Authority's request the originals of such documents;
- 4.4.3 to administer the payment of premiums due pursuant to the Required Insurances such that, in so far as we hold appropriate cleared funds from the Contractor, all such premiums shall be paid to insurers in accordance with the terms of the Required Insurances;
- 4.4.4 to administer the payment of claims from insurers in respect of the Insurances (the "Insurance Claims") including:
 - (i) negotiating settlement of Insurance Claims presented in respect of the Required Insurances;
 - (ii) collating and presenting all information required by insurers in relation to Insurance Claims presented in respect of the Required Insurances, and
 - (iii) insofar as it is relevant and practicable, liaising with and reporting to each Authority throughout the settlement, payment and administration of such Insurance Claims. [Broker to ensure this section 4.4.4 complies with claims procedure agreed with Insured before signing letter.]
- 4.4.5 to advise the Authority as soon as reasonably practicable upon receipt of notice of any material changes from the Contractor which we are instructed to make in the terms of the Required Insurances and which, if effected, in our reasonable opinion as insurance brokers would result in any material reduction in limits or coverage or in any material increase in deductibles, exclusions or exceptions; and

4.4.6 to advise the Authority in advance, to the extent we are actually aware of in advance, of any material change to the terms of, or any lapse, non-renewal and/or cancellation of Required Insurances.

4.5 **Insurance Cost Reporting Procedures**

4.5.1 to prepare following request, at the expense of the Contractor, a Joint Insurance Cost Report on behalf of both the Contractor and the Authority in accordance with the Insurance Review Procedure as set forth in [] of the Agreement attached hereto as Appendix E. We shall ensure that the information in the Joint Insurance Cost Report is fairly represented, based on the information available to us.

5 **Notification Details**

5.1 Our obligations at clause 4 of this letter to notify or inform you shall be discharged by providing the requisite information in hard copy to:

____ [] Authority

[] Authority

- 6 The undertakings given and obligations set out in this letter are given subject to any liability we may incur to you arising out of or in connection with this letter whether in contract, tort (including but not limited to negligence) or otherwise being limited in aggregate to £[].
- 7 All liability we may incur to you, whether in contract, tort (including but not limited to negligence) or otherwise for loss of profit, loss of savings, loss of opportunity or any indirect or consequential loss is hereby expressly excluded.
- 8 No limit of liability shall apply in the case of death or personal injury caused by our negligence, or in respect of any loss caused by our fraud.
- 9 The undertakings given and obligations set out in this letter are given subject to insurers right to cancel the Relevant Insurances, are given solely in our capacity as broker to the Contractor, relate only to the Relevant Insurances and are subject to our continuing appointment as broker to the Contractor. Following termination of such appointment, we are, for the avoidance of doubt and without prejudice to your accrued rights, released from all our ongoing obligations set out in this letter.
- 10 You may not rely on any advice which we have given to the Contractor and we do not represent that any of the Relevant Insurances are suitable or sufficient to meet your needs and you must take steps and advice of your own as you consider necessary in order to protect your own position.
- 11 In the event that this letter is disclosed to any third party, any and all liability howsoever arising to such third party is hereby expressly excluded to the extent permitted in law.
- 12 No person, except you, has any rights arising out of this letter under the Contract (Rights of Third Parties) Act 1999.
- 13 This letter shall be governed by and construed in all respects in accordance with the laws of England and Wales.
- 14 This letter is given by us at the request of the Contractor and with the Contractor's full knowledge and consent as to its terms, who confirms that we are authorised to give and comply with the undertakings and acknowledges that compliance with the undertakings may be in conflict with the interests of the Contractor, as evidenced by the Contractor's signature below.

Yours faithfully

For and on behalf of [Contractor's broker]

Accepted for and on behalf of the Contractor

SCHEDULE 14

INSURANCES

Part 5

Definitions

The following definitions apply to the terms used in this Schedule 14:

Revenue

the projected Unavoidable Fixed Costs and Senior Debt Service Costs of the Contractor;

Senior Debt Service Costs

the interest and debt service costs incurred in respect of the Senior Financing Agreements, less:

- (a) sums which are in arrears; and
- (b) all sums reserved by the Contractor and which the Contractor is entitled to use to make such payments, without breaching the Senior Financing Agreements (disregarding any changes to such amounts or dates that have not been approved by the Authority other than changes giving rise to an Additional Permitted Borrowing); and

Unavoidable Fixed Costs

the fixed costs incurred by the Contractor which first fall due for payment by the Contractor during the period of indemnity but excluding:

- (a) costs which could have reasonably been mitigated or avoided by the Contractor;
- (b) payments to the Contractor's Associated Companies;
- (c) payments which are not entirely at arm's length;
- (d) payments to holders of equity in the Contractor, subordinated debt holders and any other financing costs other than Senior Debt Service;
- (e) indirect losses suffered or allegedly suffered by any person;
- (f) fines, penalties or damages for unlawful acts, breaches of contract or other legal obligations;
- (g) payments the Contractor can recover under contract or in respect of which the Contractor has a remedy against another person in respect of the same liability;
- (h) payments to the extent that the Contractor has available to it:
 - ~~(i)~~ (i) reserves which the Contractor can draw upon without breaching the Senior Financing Agreement;
 - ~~(ii)~~ (ii) standby or contingent facilities or funds of senior debt or equity which the Contractor is entitled to have available; and
 - ~~(iii)~~ (iii) payments representing any profits of the Project (to the extent not already excluded in (e) above).

SCHEDULE 15

SCHEDULE 15

AUTHORITIES' POLICIES

SCHEDULE 16

SCHEDULE 16

FINANCING AGREEMENTS

Part 1

Initial Financing Agreements

[LIST TO BE PROVIDED BY PREFERRED BIDDER]

Part 2

Senior Financing Agreements

[LIST TO BE PROVIDED BY PREFERRED BIDDER]

Part 3

Subordinated Financing Agreements

[LIST TO BE PROVIDED BY PREFERRED BIDDER]

SCHEDULE 17

SCHEDULE 17

PROJECT DOCUMENTS AND ANCILLARY DOCUMENTS

Part 1

Project Documents

Document	Parties

Part 2

Ancillary Documents

Document	Parties

SCHEDULE 18
SCHEDULE 18

[AUTHORITY PLANNING CONDITIONS]

SCHEDULE 19

SCHEDULE 19

NOT USED

SCHEDULE 20

SCHEDULE 20

EQUALITY REQUIREMENTS

1 Racial discrimination and the promotion of race equality

1.1 The Contractor (including its agents and employees) shall not, and shall procure that any Contractor Related Party shall not:

1.1.1 discriminate directly or indirectly, or by way of victimisation or harassment, against any person on ~~Prohibited Employment Grounds~~the grounds in Section 4 of the Equality Act 2010; and/or

~~1.1.2 discriminate directly or indirectly or by way of victimisation or harassment against any person on Prohibited Grounds; and/or~~
1.1.2 ~~1.1.3~~ contravene Sections 39, ~~108—109 and~~108, 109, 111 ~~—and~~ 112 of the Equality Act 2010 and Section 24A of the Equality Act 2006 (or any of them);;

~~where appropriate.~~

1.2 The Contractor (including its agents and employees) shall, and shall procure that any Contractor Related Party shall, for purposes of ensuring compliance with paragraphs 1.1.1 ~~to 1.1.3, and 1.1.2~~ in relation to staff engaged in the provision of Works or Services, observe as far as possible the provisions of:

~~1.2.1 the Commission for Racial Equality's Code of Practice in Employment;~~

1.2.1 ~~1.2.2~~ the Disability Equality and Human Rights Commission's Statutory Code of Practice on Employment and Occupation and the Code of Practice on the Disability Equality Duty; and;

1.2.2 the Equality and Human Rights Commission's Code of Practice on Services, Public Functions and Associations;

1.2.3 the Equality and Human Rights Commission's Code of Practice on Equal Pay; and

1.2.4 ~~1.2.3~~ any other relevant code of practice introduced by a commission or other body set up by Parliament to promote, monitor and enforce ~~Equalities Legislation, the Equality Act 2010.~~

including, but not limited to, those provisions recommending the adoption, implementation and monitoring of an equal opportunities policy.

1.3 The Contractor shall, and shall procure that any Contractor Related Party shall, in performing its/their obligations under this Agreement, comply (to the extent permitted by law) with the provisions of Sections 149 and 150 of the Equality Act 2010 as if they were a body within the meaning of Schedule 19 to the Equality Act 2010.

1.4 [Where in connection with this Agreement the Contractor (including its agents and employees) or any Contractor Related Party ~~are~~is required to carry out work on the Authority's premises or alongside the Authority's employees on any

other premises, they shall comply with the Authority's own employment policy and codes of practice relating to discrimination and equal opportunities.]²⁶⁰₂₅₄

- 1.5 The Contractor shall, and shall procure that any Contractor Related Party shall, notify the Authority's Representative forthwith in writing as soon as it becomes aware of any investigation of or proceedings brought against the Contractor or any Contractor Related Party under the Equalities Legislation.
- 1.6 Where any investigation is undertaken by a person or body empowered to conduct such investigation and/or proceedings are instituted in connection with any matter relating to the Contractor's performance of its obligations under this agreement being in contravention of the ~~Equalities Legislation~~, Equality Act 2010, the Contractor shall, and shall procure that any Contractor Related Party shall, free of charge:
 - 1.6.1 provide any information requested in the timescale allotted;
 - 1.6.2 attend any meetings as required and permit any of its staff to attend;
 - 1.6.3 promptly allow access to and investigation of any documents or data deemed to be relevant;
 - 1.6.4 allow itself and any of its staff to appear as witness in any ensuing proceedings; and
 - 1.6.5 co-operate fully and promptly in every way required by the person or body conducting such investigation during the course of that investigation.

²⁶⁰₂₅₄ The Authority may require this as an additional obligation where it wishes to ensure compliance with its own discrimination and employment policies and codes of practice.

SCHEDULE 21
SCHEDULE 21

COMMERCIALLY SENSITIVE INFORMATION

Part 1

Commercially Sensitive Contractual Provisions

Column 1 - Commercially Sensitive Contractual Provisions	Column 2 - For period ending on date below:

SCHEDULE 21

COMMERCIALLY SENSITIVE INFORMATION

Part 2

Commercially Sensitive Material

Column 1 - Commercially Sensitive Material	Column 2 - For period ending on date below:

SCHEDULE 22

SCHEDULE 22

DECANT PROTOCOL ²⁶⁴₂₅₅

1 **Introduction and Interpretation**

1.1 ~~1.1~~—A recommended decant sequence is provided in this method statement. Any actions set out in this method statement, unless stated otherwise, are to be performed by the Contractor.

1.2 ~~1.2~~—In this Schedule any reference to a School, Schools, an Existing School or Existing Schools shall, where the context requires be construed as including the school entity or entities located in the School or Existing School (as the case may be).

2 **Buildings**

2.1 Each Existing School may have a number of areas to deal with, outside classrooms, single and multi storey blocks, isolated buildings etc, some with long winding corridors and different levels within each block. Each of these areas will be tackled on their own merits and their priority listing would be to generally start from the top of each building, and work down to the ground floor as the decant process progresses.

2.2 Within the Existing Schools where lifts are present within the buildings these will be utilised to remove boxed items to the ground floor; the lifts in the Schools will not be permitted to be utilised to move boxed items.

3 **Access**

The schools will only be approached by designated vehicular routes.

Drivers will carry out their duties within the school areas and drive along the designated route between the Existing School and the School and will be instructed on a variety of issues, namely:

3.1 to drive at a safe speed, taking cognisance of the weather, speed and use of the road by others including pedestrians.

3.2 to reverse only in the presence of a second employee.

3.3 to comply with all speed limits.

4 **Crates**

4.1 Crates, sealing tape and labels for use by the School will be delivered in accordance with the timetable at paragraph 16 of this Schedule 22.

4.2 An area within the Existing School shall be identified by the Authority for the short term storage of the empty crates upon delivery.

4.3 Guidance will be provided in the use of the crates, labels and tape.

²⁶⁴₂₅₅ The Decant Protocol is template only. It needs to be amended to suit the Project. The parties need to consider decant of legacy loose furniture and equipment early on in the ICT Handover Period to allow for installation of loose ICT equipment by the ICT Installer (along with installation and commissioning of Legacy ICT Equipment by the Contractor).

4.4 The Contractor shall allow for the provision of sufficient crates to move all the Initial Authority Equipment (total weight of each crate when packed shall not exceed [24kg]). The crates will be rigid plastic with lids stackable six high (or similar). Any equipment which can not fit into a crate will be labelled by the School and moved by the Contractor.

5 **Labelling**

It is recommended to the School that colour coded labels should be used for designated areas of both the Existing School and the School. This is crucial to the success of the decant process when receiving and distributing crates within the School. Coloured labels will be supplied. The Authority will inform the staff in advance of the dates detailed in the timetable (as may be varied in accordance with this Agreement) to promote an efficient move and to prevent double handling.

6 **Initial Authority Equipment**²⁶²₂₅₆

For the purposes of this Agreement, all equipment (other than ICT equipment) and items stored in crates, labelled or prepared for removal from the Existing School²⁶³₂₅₇ to the School, together with the Initial New Authority Equipment (which shall also be labelled for removal from the Existing School) in accordance with this Schedule 22 shall comprise Initial Authority Equipment.

7 **Legacy ICT Equipment**

The Contractor will carry out the following activities [complete re: decant of Legacy ICT Equipment²⁵⁸].

8 **Redundant Items of Equipment**

The School will be provided with new equipment in accordance with the Area Data Sheets. Any items of equipment redundant within the Existing School not removed by the Authority in the agreed period of [two] weeks as detailed within paragraph 15.3 (Removal of existing school items of equipment) detailed below, will be removed by the Contractor during the Post Completion Works Phase.

9 **Protection**

The Contractor shall identify the external entry doors to those parts of the School offering valuable space to receive inbound crates. The flooring of these areas will be protected using hardboard. The hardboard will be laid and removed at the start and completion of the decant process. All relevant doors and passageways will also be protected as necessary.

10 **Identification of Porters**

Porters carrying out their duties within the confines of the Schools will be clearly identifiable as staff of the removals firm by wearing hi-viz vest or similar. If these persons are required to perform these duties during the School Day then security clearance must be obtained in accordance with the Project Agreement.

²⁶²₂₅₆ Details to be worked up.

²⁶³₂₅₇ This is the Initial Legacy Authority Equipment.

²⁵⁸₂₅₈ TBC

11 **Report Times on Site**

- 11.1 Porters will arrive on site and remain on site during periods agreed with the School/ Authority (8am – 6pm minimum).
- 11.2 The Authority will be responsible for the control of opening and closing of the Existing School buildings during the decant. Access to and from the Existing School buildings during the decant out- with the School Day shall not be unreasonably withheld by the Authority and both Parties acknowledge the requirement to work together to achieve the dates detailed within the Decant Protocol timetable.

Discussion will be required if the Authority/School intimates that the School 'will close' at a time which may be contradictory to the work schedule. Guidance will be required at an early date and before the start date of a specific task.

12 **Contractor's Sole Point of Contact ("Migration Manager")**

- 12.1 A Migration Manager will be appointed by the Contractor. He will be the sole point of contact for the Contractor for the decant. The Authority will designate a corresponding School Representative in accordance with clause 12.2 (Representatives) of this Agreement and the decant timescales, who will be solely responsible for direct liaison with the Migration Manager and the issue of any instructions.
- 12.2 It is to be agreed that all instructions, deviations from agreed plans etc, will be conveyed through the Migration Manager for instruction thereafter to the Site Foreman and his staff. It must be acknowledged by all Parties that no approach can be made directly to any Porter to alter his work practices or schedule to accommodate a task not designated in a particular system of undertaking at that time.

13 **Packing and Preparation**

- 13.1 The crates will be packed and securely sealed by the School / Authority. Crates will be labelled to identify where in the School they are to be deposited.
- 13.2 The majority of items for packing by the School will consist of stationery, text books and may include small, lightweight teaching aid items and will include sports equipment in the form of balls, rackets, bats and the like.
- 13.3 Glassware and fragile instruments should be wrapped in bubble wrap, which will be provided by the Contractor and transferred by the Contractor.
- 13.4 Photocopiers and any other leased equipment will be disconnected and removed by the leasing companies responsible for this specific equipment, (or School direct if owned).

14 **The Move**

- 14.1 The decant process is to be carried out in accordance with the Decant Protocol timetable.
- 14.2 A sufficient number of vehicles, (including where deemed appropriate by the Contractor mechanical moving equipment) and labour to undertake the decant process within the specified period, will be provided.
- 14.3 Care in the handling of all crates will be provided and tidiness on site will be considered an essential part of that process.

15 **Schedule of Decant Process / Sign-off Procedure**

- 15.1 To achieve a systematic and economical decant the following procedure shall be undertaken:
- 15.2 One floor at a time will be completely 'boxed up' and cleared out of the Existing School before commencing onto lower floors, regardless of where it is going in the School. The Migration Manager along with the School Representative referred to in paragraph 11.1 of this Schedule 22 will upon completion of each floor check and sign off each area.
- 15.3 Upon the delivery of the last crate[s] to the correct locations in School, the Decant Protocol will be deemed complete (other than as set out in paragraph 15 below).

16 **Post Decant Activities**

For the avoidance of doubt, the following activities will occur after completion of the decant process:

16.1 **Unpacking**

The School/Authority shall be responsible for the unpacking of crates.

16.2 **Removal of empty Crates**

Following the unpacking of the crates, the School/Authority will make available the empty crates by the date highlighted in the Decant Protocol timetable. The Contractor will collect the empty containers from an agreed central storage location and remove from site on the date highlighted in the Decant Protocol timetable.

16.3 **Removal of existing school items of Equipment**

Within a period of [two] weeks following the relevant Services Availability Date, the Authority shall be entitled to remove from the Existing School any Excluded Equipment.

16.4 **Recommissioning of Legacy ICT Equipment**

[The Contractor will provide a number of engineer days for school-specific configuration of Legacy ICT Equipment. We will set up a minimum integration support package, which will be dependent on school size.]

17 **Decant Protocol Timetable**

17.1

	School 1	School 2	School 3	School 4
Empty crates delivered to the Existing School by the Contractor				

	School 1	School 2	School 3	School 4
Empty crates packed by the Existing School				
Filled crates transported from the Existing School to the School by the Contractor				
Planned ICT Handover Date				
Planned Services Availability Date				
Empty crates made available by the Authority				
Empty crates removed by the Contractor				

17.2 The dates in this timetable shall be varied by an agreement of the Parties (acting reasonably) in the event that there is a material delay to the relevant Planned ICT Handover Date or Planned Services Availability Date.

SCHEDULE 23

SCHEDULE 23

PERMIT ACCESS TO WORK PROTOCOL

SCHEDULE 24
SCHEDULE 24

CHANGE PROTOCOL

Part 1

Definitions

Affordable

means within the revenue resource parameters determined by the Authority and notified in writing by it to the Contractor as available for a proposed High Value Change;

Approval Criteria

has the meaning given to it in paragraph 4.4 of Part 4 of this Schedule 24;

Authority Change

means, as the case may be, a Small Value Change, Medium Value Change or High Value Change;

Authority Notice of Change

means, as the case may be, a Small Value Change Notice, a Medium Value Change Notice or a High Value Change Notice;

Calculation Date

means the relevant date for the purposes of calculating the Incurred Change Management Fee in accordance with Part 4 of this Schedule 24;

Capital Cost

means in relation to any High Value Change the cost of carrying out the design, construction and commissioning of that High Value Change;

Catalogue of Small Works and Services and Catalogue^{264_259}

means the schedule setting out the prices and time periods for Small Value Changes and the Small Works Rates as is set out in Appendix 1 Part 1 to this Schedule 24, as shall be amended from time to time in accordance with paragraph 6 of Part 2 of this Schedule 24;

Catalogue Price

means the total cost (excluding VAT) of carrying out a Small Value Change as set out in the Catalogue;

Change

means a change in the Works, the Facilities and/or Services or additional Works and/or Services or a change in the Authorities' Policies or the removal of a School pursuant to [clause 18.3B.5 (Judicial Proceedings) or]^{265_260} Part 6 of this Schedule 24 that may be made under clause 60 (Authority and Contractor Changes) or this Schedule 24;

Change Management Fee

means the fee calculated in accordance with paragraph 9 of Part 4;

Contractor Change

means a Change that is initiated by the Contractor by submitting a Contractor Notice of Change to the Authority;

Contractor Notice of Change

^{264_259} The Catalogue should contain prices for the initial implementation works only and not pricing of an ongoing lifecycle requirement.

^{265_260} Delete if clause 18.3B is not used.

has the meaning given to it in paragraph 1 of Part 5 of this Schedule 24;

Elective Services Catalogue

means the schedule setting out prices [and, where relevant, time periods] for Elective Services as is set out in Appendix 3 to this schedule 24, as shall be amended from time to time in accordance with paragraph 5 of Part 7 of this Schedule 24;

Elective Services Catalogue Price

means the cost (excluding VAT) of carrying out Elective Services as set out in the Elective Services Catalogue;

Elective Services Notice

has the meaning given to it in paragraph 1 of Part 7 of this Schedule 24;

Elective Services Removal Notice

has the meaning given to it in paragraph 6 of Part 7 of this Schedule 24;

Estimate

has the meaning given to it in paragraph 2.5.1 of Part 3 of this Schedule 24;

High Value Change

means a Change requested by the Authority that, in the reasonable opinion of the Authority, is likely either to cost in excess of £{100,000} (indexed) or to require an adjustment to the Unitary Charge that is {2}% or more of the Unitary Charge in the relevant Contract Year provided that the Parties may agree that such a Change should instead be processed as a Medium Value Change^{266,261};

High Value Change Notice

has the meaning given to it in paragraph 1 of Part 4 of this Schedule 24;

High Value Change Proposal

has the meaning given to it in paragraph 2.1.1 of Part 4 of this Schedule 24;

High Value Change Requirements

has the meaning given to it in paragraph 2.1.2 of Part 4 of this Schedule 24;

High Value Change Stage 2 Submission

has the meaning given to it in paragraph 4.1.1 of Part 4 of this Schedule 24;

Incurred Change Management Fee

means the amounts actually incurred or payable by or on behalf of the Contractor up to the Calculation Date in respect of matters identified by the Contractor pursuant to paragraphs 3.2.4 and/or 4.3.7 of Part 4 of this Schedule as falling within the Change Management Fee (and not already reimbursed by the Authority);

Medium Value Change

means a Change requested by the Authority which is not a Small Value Change or a High Value Change provided that the Parties may agree that such a Change should instead be processed as either a Small Value Change or as a High Value Change^{267,262};

Medium Value Change Notice

has the meaning given to it in paragraph 1 of Part 3 of this Schedule 24;

²⁶⁶⁻²⁶¹ This is because a Change may be more straightforward in nature but, due to its volume, be prima facie classed as a High Value Change. It may be more appropriate to agree to deal with it as a Medium Value Change.

²⁶⁷⁻²⁶² As above, a Change may be a very straightforward, but high-volume, Change; it may be more appropriate to deal with it as a Small Value Change. On the other hand, a Medium Value Change might (if particularly complex) merit being processed as a High Value Change.

Partial Termination Lifecycle Profile

the amounts profiled to be spent by the Contractor on the replacement or renewal of Lifecycle Assets at a School which is the subject of a Partial Termination Authority Notice of Change as shown in the Base Case [in row []] as at the Commencement Date;

Partial Termination Lifecycle Spend

the actual amount spent by the Contractor on the replacement or renewal of Lifecycle Assets at a School which is the subject of a Partial Termination Authority Notice of Change;

Partial Termination Lifecycle Surplus

the Partial Termination Lifecycle Profile less the Partial Termination Lifecycle Spend to the extent that the result is a positive number (if the result is a negative number, the Partial Termination Lifecycle Surplus shall be deemed to be zero);

Permitted Small Value Change

~~(a)~~ (a) [list of specific types of Changes to be allowed]; and

~~(b)~~ (b) any other Small Value Change that ~~occurs after the relevant Services Availability Date~~ and:

- i. consists of minor works;
- ii. only affects the interior of the Buildings;
- iii. does not affect any of the mechanical and electrical equipment of the Buildings;
- iv. does not involve any interference with the service media in the Buildings; and
- v. will not conflict with any Programmed Maintenance; and
- vi. will not prejudice any of the Required Insurances;

Permitted Small Value Change Notice

a notice given by the Authority or the School Entity in accordance with paragraph 1.2 of Part 2 (Small Value Changes) of this Schedule 24;

Small Value Change

means a Change which is either:

- (a) listed in the Catalogue of Small Works and Services; or
- (b) is not so listed, but has an individual cost not exceeding five thousand pounds (£5,000) (indexed), or as otherwise agreed from time to time, except for any request that would (if implemented) increase the likelihood of the Contractor failing to meet the Authority's Requirements or materially and adversely affect the Contractor's ability to perform its obligations under this Agreement,

provided that the Parties may agree that such a Change should instead be processed as either a Medium Value Change;

Small Value Change Notice

means a request for a Small Value Change in the form set out in Appendix 1 Part 2 to this Schedule;

Small Works Rates

means the rates to be applied in respect of any request from the Authority for a Small Value Change set out in limb (b) of that definition;

Stage 1 Approval

has the meaning given to it in paragraph 3.5 of Part 4 of this Schedule 24

Stage 1 Approved Project

has the meaning given to it in paragraph 3.5 of Part 4 of this Schedule 24;

Target Cost

has the meaning given to it in paragraph 2.1.1 of Part 4 of this Schedule 24; and

Whole Life Cost

means in relation to any High Value Change, the estimated and (to the extent that such information is available) the actual cost of operating and maintaining that High Value Change over its intended design life (consistent with the Contractor's Proposals).

SCHEDULE 24

CHANGE PROTOCOL

Part 2

Small Value Changes

1 Small Value Change Notice

- 1.1 Subject to paragraph 1.2 of this Part 2, where a Small Value Change is required by the Authority or the School Entity during the Services Period, the Authority or the School Entity shall submit to the Contractor a Small Value Change Notice. Prior to the Services Period any Small Value Change shall be addressed as part of the Works and accommodated through the Review Procedure.
- 1.2 If the Authority or a School Entity wishes [during the Services Period](#) to carry out a Permitted Small Value Change the Authority shall send the Contractor a notice at least five (5) Business Days prior to the date on which it proposes to start to implement the Change setting out the nature of the proposed Change in sufficient detail to enable the Contractor to satisfy itself that the proposed Change constitutes a Permitted Small Value Change. The Contractor may notify the Authority within three (3) Business Days of receipt of a Permitted Small Value Change Notice that it does not agree that the proposed Change constitutes a Permitted Small Value Change and, unless the parties otherwise agree, the Authority must not take any steps to carry out the proposed Change unless it has referred the dispute to the Dispute Resolution Procedure and it has been determined that the proposed Change is a Permitted Small Value Change.
- 1.3 If the Authority or a School Entity carries out a Permitted Small Value Change the Authority shall or shall procure that the School Entity uses Good Industry Practice when carrying out the Permitted Small Value Change.

2 Contractor Response and Authority Confirmation

- 2.1 Within five (5) Business Days of receipt of the Small Value Change Notice, the Contractor shall confirm in writing to the Authority or the School Entity as relevant and in accordance with this Part 2:
- 2.1.1 the cost of implementing the required Small Value Change;
- 2.1.2 the time period for implementing the Small Value Change; and
- 2.1.3 when it is proposed the Small Value Change is to be carried out.
- 2.2 Where the Small Value Change is listed in the Catalogue, the cost of carrying out that Small Value Change shall not exceed the Catalogue Price and the time period for implementing the Small Value Change shall not exceed the time specified in the Catalogue.
- 2.3 Where the Small Value Change is not listed in the Catalogue, the cost of implementing the required Small Value Change shall be calculated by reference to paragraph 3 of this Part 2.
- 2.4 Other than the costs referred to in paragraphs 2.2 and 2.3 of this Part 2 the Contractor shall make no charge to the Authority for processing, implementing or managing a Small Value Change.

- 2.5 The Authority or the School Entity may object in writing within five (5) Business Days of receipt of the Contractor's confirmation pursuant to paragraph 2.1 of this Part 2 to any part of that confirmation and in such circumstances the Parties shall act reasonably to agree as soon as practicable how the Small Value Change is to be implemented. In the absence of any such notification, the Contractor shall proceed with the Small Value Change in question in accordance with the terms of its confirmation.

3 **Small Value Changes not contained in the Catalogue**

For the purposes of paragraph 2.3 of this Part 2, the cost of implementing any Small Value Change which is not set out in the Catalogue shall be calculated on the basis that:

- 3.1 wherever practicable the Contractor shall procure that such works are carried out by an existing on-site and suitably qualified Contractor or Contractor Related Party employee and no labour element shall be charged to the Authority in respect of such works. Where such Small Value Change is not carried out by an existing on-site and suitably qualified Contractor or Contractor Related Party employee, the cost of the labour element shall be calculated in accordance with the Small Works Rates or, where such rates are not applicable, in accordance with rates which are fair and reasonable; and
- 3.2 the materials element shall be charged at the cost of materials to the Contractor or to the contractor carrying out the work (net of all discounts) and there shall be no management fee, margin, overhead, contingency or other cost applied in relation thereto.

4 **Implementation**²⁶⁸₂₆₃

- 4.1 The Contractor shall implement the required Small Value Change so as to minimise any inconvenience to the Authority and the School Entity and within the timescales specified in the confirmation provided pursuant to paragraph 2.1 of this Part 2 (or agreed by the Parties pursuant to paragraph 2.5 of this Part 2).
- 4.2 The Contractor shall notify the Authority or the School Entity as relevant when it believes the Small Value Change has been completed.
- 4.3 Where the Contractor has either:
- 4.3.1 failed to provide a response pursuant to paragraph 2.1 of this Part 2 within fifteen (15) Business Days of the date of the Small Value Change Notice; or
- 4.3.2 has provided a response pursuant to paragraph 2.1 of this Part 2 but has failed to fully implement the Small Value Change within ten (10) Business Days of the date that has been determined or agreed in accordance with paragraph 4.1 of this Part 2 as being the date on which the Small Value Change should have been implemented,

then the Authority or the School Entity may notify the Contractor that the Small Value Change Notice is withdrawn and, following such notification, may procure the implementation of the Small Value Change without further recourse to the Contractor.

²⁶⁸₂₆₃ A failure on the part of the Contractor to respond to a Small Value Change Notice or to implement the Small Value Change shall trigger a deduction under the Payment Mechanism.

5 **Payment**

- 5.1 Where the Small Value Change has been implemented to the satisfaction of the Authority acting reasonably:
- 5.1.1 prior to the Service Period, the Authority shall make a payment to the Contractor within fifteen (15) Business Days of an invoice presented to the Authority in respect of the costs of the Small Value Change following completion or implementation of the relevant Small Value Change; and
 - 5.1.2 during the Service Period, the Contractor shall include the costs of the Small Value Change in the next report submitted pursuant to clause 37.2 (Report and Invoice) of this Agreement following completion or implementation of the relevant Small Value Change provided that if the Contractor has received no response from the Authority the Small Value Change shall be deemed (for the purposes only of payment) to have been implemented and the Contractor shall be entitled to include the costs of the Small Value Change in the next report.
- 5.2 All amounts payable for Small Value Changes shall be invoiced and paid in accordance with the procedure described in clause 37 (Payments) of this Agreement.

6 **Update of Catalogue**

- 6.1 From the Commencement Date the Catalogue shall be that set out in Part 1 of Appendix 1 to this Schedule 24²⁶⁹₂₆₄ and, subject to paragraph 6.2 of this Part 2, the rates set out therein (including the Small Works Rates referred to in paragraph 6.2.4 of this Part 2) shall be Indexed on each anniversary of the Commencement Date.
- 6.2 On the date which is twenty (20) Business Days before each third anniversary of the Commencement Date, the Contractor shall provide the Authority with a revised and updated Catalogue which:
- 6.2.1 includes in the Catalogue unit prices for any Small Value Change or any Medium Value Change which has occurred and which is not already included in the Catalogue or any other Change which does not affect the risk profile of the Project which the Parties anticipate could occur during the life of the Project;
 - 6.2.2 includes time periods for the carrying out of any works or implementation of any Change for the matters referred to in paragraph 6.2.1 of this Part 2;
 - 6.2.3 reviews the unit pricing for the works and services in the Catalogue to ensure that unit rates continue to provide value for money with reference to prices prevailing for similar items in the market at the time; and

²⁶⁹₂₆₄ The original Catalogue should, where possible, use the same pricing elements as the lifecycle profile.

- 6.2.4 updates the schedule of Small Works Rates to ensure that unit rates continue to provide value for money with reference to rates prevailing for similar services in the market at the time²⁷⁰₂₆₅.
- 6.3 Within ten (10) Business Days of the submission by the Contractor of the updated Catalogue pursuant to paragraph 6.2 of this Part 2, the Authority shall confirm in writing whether or not it agrees that the updated Catalogue shall constitute the Catalogue for the purposes of this Agreement;
- 6.4 If the Authority does not agree with the Contractor's proposed amendments to the Catalogue pursuant to paragraph 6.2 of this Part 2, the Parties shall meet and endeavour, in good faith, to agree any amendments to the Catalogue. Any dispute shall be referred to the Dispute Resolution Procedure. Twenty (20) Business Days following the submission by the Contractor pursuant to paragraph 6.2 of this Part 2 or, if applicable, ten (10) Business Days following resolution of any dispute in respect of that submission, the Contractor shall issue to the Authority an updated Catalogue which shall set out the agreed or determined amendments and shall constitute the Catalogue for the purposes of this Agreement.
- 6.5 Following the completion of a Small Value Change that is not listed in the Catalogue, the Parties, acting reasonably, shall discuss whether it is appropriate for the Catalogue to be updated to include such Small Value Change and on what terms.

7 **Documentation and Monitoring**

- 7.1 No due diligence (whether funder, legal, technical, insurance or financial) shall be required in relation to Small Value Changes unless otherwise agreed between the Parties.
- 7.2 No changes shall be made to this Agreement or any Project Document as a result of a Small Value Change, unless otherwise agreed between the Parties.
- 7.3 Where it is agreed that an adjustment of the Unitary Charge is required, the Base Case shall be adjusted to give effect to such Small Value Changes once each Contract Year on a date to be agreed between the Parties and all relevant Small Value Changes that have occurred in the preceding Contract Year shall be aggregated together into a single cumulative adjustment in accordance with clause 73 of this Agreement (Financial Adjustments).
- 7.4 The Contractor shall keep a record of all Small Value Changes processed, completed and outstanding and shall provide the Authority with a copy of that record whenever reasonably required by the Authority.

8 **Disputes**

Any dispute may be referred by either Party to the Dispute Resolution Procedure, but the Contractor shall, nevertheless, be required to carry out or implement the Small Value Change within the prescribed timescales notwithstanding the dispute, where such dispute concerns the cost of the Small Value Change.

²⁷⁰₂₆₅ At the three year reviews the Contractor should review pricing to ensure the rates continue to provide value for money with reference to prices prevailing in the market. The Contractor must produce evidence of value testing of the revised pricing.

SCHEDULE 24

CHANGE PROTOCOL

Part 3

Medium Value Changes

1 Medium Value Changes

The Authority has the right to propose Medium Value Changes in accordance with this Part 3. If the Authority requires a Medium Value Change, it must serve a notice (a Medium Value Change Notice) on the Contractor in accordance with paragraph 2 of this Part 3. The Contractor shall be entitled to refuse a Medium Value Change that:

- 1.1 requires the Works and/or the Services to be performed in a way that infringes any law or is inconsistent with Good Industry Practice;
- 1.2 would cause any Necessary Consent to be revoked (or would require a new consent to be obtained to implement the relevant change in the Works and/or the Services which, after using reasonable efforts, the Contractor has been unable to obtain);
- 1.3 would materially and adversely affect the Contractor's ability to deliver the Works and /or Services (except those Works and/or Services which have been specified as requiring to be amended in the Medium Value Change Notice) in a manner not compensated for pursuant to this Part 3;
- 1.4 would materially and adversely affect the health and safety of any person;
- 1.5 would, if implemented, materially and adversely change the nature of the Project (including its risk profile);
- 1.6 the Authority does not have the legal power or capacity to require implementation of;
- 1.7 is the subject of a Medium Value Change Notice that cannot reasonably be complied with; or
- 1.8 would if implemented adversely affect the enforceability or priority of the security held by or on behalf of the existing Senior Lenders.

2 Medium Value Change Notice

The Medium Value Change Notice shall:

- 2.1 set out the change in the 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 of this Part 3 (Contractor's Estimate);
- 2.2 set out whether, in respect of any additional works, the Contractor is expected to provide soft services, facilities management services and lifecycle maintenance services in respect of such additional works;
- 2.3 set out the timing of the additional works or services required by the Authority;
- 2.4 set out details of the Authority's budgetary constraints and/or affordability thresholds; and

- 2.5 require the Contractor to provide to the Authority within fifteen (15) Business Days of receipt of the Medium Value Change Notice:
- 2.5.1 an estimate of the likely effects of the proposed variation (the **Estimate**);
 - 2.5.2 confirmation as to when the Estimate is to be provided to the Authority (provided that the Contractor shall use all reasonable endeavours to obtain such information as is required expeditiously) provided that if the Authority does not believe the proposal from the Contractor is reasonable, the Parties shall seek to agree the time period, failing which any dispute as to what is an appropriate period for submission of the Estimate may be referred to the Dispute Resolution Procedure; or
 - 2.5.3 notification in writing if the Contractor or the Senior Lenders believe that any of the circumstances outlined in paragraph 1 of this Part 3 apply.

3 **Contractor's Estimate**

Other than where a notice is served under paragraph 2.5.3 of this Part 3 the Contractor shall as soon as practicable and in any event within the time period agreed or determined pursuant to paragraph 2.5 of this Part 3, the Contractor shall deliver to the Authority the Estimate. The Estimate shall include the opinion of the Contractor on:

- 3.1 a detailed timetable for implementation of the Medium Value Change;
- 3.2 whether relief from compliance with obligations is required, including the obligations of the Contractor to achieve the Start on Site Date, each Planned ICT Handover Date, each Planned Services Availability Date, to complete the Post Completion Works before the relevant Planned Post Completion Works Acceptance Date and to meet the requirements set out in the Authority's Requirements during the implementation of the Medium Value Change;
- 3.3 an outline of the proposed design solution and design, including an appropriate analysis/risk appraisal and, to the extent relevant, the impact on whole life costings;
- 3.4 any impact on the provision of the Works and/or the Services including whether the proposed change is in contravention of paragraph 1 of this Part 3;
- 3.5 any amendment required to this Agreement and/or any Project Document, Ancillary Document or Financing Agreement as a result of the Medium Value Change;
- 3.6 any Estimated Change in Project Costs that results from the Medium Value Change;
- 3.7 any Capital Expenditure that is required or no longer required as a result of the Medium Value Change;
- 3.8 any Necessary Consents that are required;
- 3.9 its suggested payment schedule for the Change based on milestones where relevant;

- 3.10 costs and details of (i) any other approvals required and/or due diligence permitted pursuant to paragraph 12 of this Part 3 and (ii) any third party costs (that is, external costs of the Contractor and its sub-contractors, including but without limitation the costs of consultants and advisers) to be incurred pursuant to paragraph 7.2 of this Part 3;
- 3.11 the method of implementation and the proposed method of certification of any construction or operational aspects of the Works or the Services required by the proposed Medium Value Change if not covered by the procedures specified in clause 20 (Notification of Services Availability); and
- 3.12 any other information requested by the Authority in the Medium Value Change Notice.

4 **Costing of the Estimate**

In computing the Estimated Change in Project Costs and/or the Capital Expenditure, the Contractor shall apply the following principles wherever applicable:

- 4.1 the unit cost of any construction or installation works or associated preliminaries (excluding any temporary or demolition works, professional fees, contingencies, overheads and profit margins) required to implement the Medium Value Change shall be the equivalent unit rates set out in Part 1 of Appendix 2 of this Schedule 24, uplifted using the [DTI Pubsec] index for construction cost inflation in the period between the Commencement Date and the date the Medium Value Change is to be commenced. If the Contractor can demonstrate to the satisfaction of the Authority, acting reasonably, that any such works are specified to a higher quality as compared to the Works, then the unit rates may be increased to reflect such increase in quality;
- 4.2 any lifecycle replacement and maintenance associated with additional works (or changes to the Works) shall be consistent with the lifecycle and maintenance profile of the Facilities envisaged in Schedule 2 (Contractor's Proposals) including (without limitation) in terms of the replacement cycles for equipment provided that the Contractor shall reflect improvements in technology that can optimise whole life costs for the Authority. The unit costs to be applied to the pricing of the lifecycle maintenance shall be the equivalent unit rates set out in Part 2 of Appendix 2 of this Schedule 24 (indexed). If any such additional works are specified to a higher quality as compared to the Works, then the unit lifecycle replacement and maintenance costs shall be (in real terms) lower;
- 4.3 any professional fees, contingencies, overheads and/or profit margins charged by any consultant, sub-contractor or supplier in respect of construction and/or installation and/or lifecycle and/or service provision shall be the equivalent rates set out in Part 3 of Appendix 2 of this Schedule 24. If the Contractor can demonstrate to the satisfaction of the Authority, acting reasonably, that 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 of Appendix 2 of this Schedule 24, then the Authority shall agree to amend the rates set out in Part 3 of Appendix 2 of this Schedule 24 to reflect current market rates;
- 4.4 the unit cost of any extension of, or change to, any Service (either in scope or area), taking into account the capacity of existing labour resources, shall be consistent with the equivalent unit rates set out in Part 4 of Appendix 2 to this Schedule 24 ~~(as updated from time to time as a result of any Market Testing)~~ (indexed). If the Contractor can demonstrate, to the satisfaction of the Authority, acting reasonably, that as a result of the Medium Value Change,

the relevant Service will be of a higher quality than required by the relevant Service Specification then the Authority shall agree to increase such rates to reflect any increase in quality;

- 4.5 other than as referred to in paragraphs 4.1 to 4.4 of this Part 3 no charge shall be made in respect of the Contractor's time, or that of any Contractor Related Party spent processing, managing or monitoring the Medium Value Change (or proposed Medium Value Change) (and no additional mark up or management fee shall be applied by the Contractor); and
- 4.6 where elements of the Medium Value Change are not addressed by paragraphs 4.1 to 4.5 of this Part 3, they shall be costed on a fair and reasonable basis reflecting the then current market rates.

5 **Standards of provision of the Estimate**

In providing the Estimate the Contractor shall:

- 5.1 use reasonable endeavours to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
- 5.2 demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, reasonably foreseeable Changes in Law at that time have been taken into account by the Contractor; and
- 5.3 demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Medium Value Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under paragraphs 3.6 (Contractor's Estimate) and/or 3.8 (Contractor's Estimate) of this Part 3; and
- 5.4 provide written evidence of the Contractor's compliance with paragraphs 4 and 5.1 of this Part 3.

6 **Determination of the Estimate**

As soon as practicable after the Authority receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. If the Parties cannot agree on the contents of the Estimate, the matter may be referred to the Dispute Resolution Procedure to determine if the Estimate represents a fair and reasonable approach to implementing the Medium Value Change in all respects.

7 **Confirmation or Withdrawal of the Medium Value Change Notice**

- 7.1 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to the Dispute Resolution Procedure, the Authority shall:
 - 7.1.1 confirm in writing to the Contractor the Estimate (as modified); or
 - 7.1.2 withdraw the Medium Value Change Notice.
- 7.2 If, in any Contract Year, the Authority has either not confirmed an Estimate (as modified) within twenty (20) Business Days of the contents of the Estimate having been agreed or determined in accordance with the foregoing provisions of this Part 3 or has withdrawn a Medium Value Change Notice on an aggregate of 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:

- 7.2.1 the Contractor has used all reasonable endeavours to submit a reasonably priced Estimate;
- 7.2.2 the Contractor made available, with the Estimate, to the Authority a cost break down of the Estimate including and in accordance with paragraph 3.11 of this Part 3 an estimate of third party costs to be incurred by the Authority in the event the Medium Value Change Notice is withdrawn or deemed to be withdrawn; and
- 7.2.3 the Authority has:
 - 7.2.3.1 approved the estimate of third party costs referred to in paragraph 7.2.2 of this Part 3 and the type of third party prior to any third party costs being incurred; and
 - 7.2.3.2 agreed that, given the nature of the proposed Medium Value Change, it is reasonable to expect the relevant third party to incur costs in preparing the Estimate on the basis of the extent of the proposed change to the Services or the Works and the work required in submitting an accurate Estimate in compliance with this paragraph 7.2.

8 Implementation of the Medium Value Change

- 8.1 Where the Authority has confirmed the Estimate in accordance with paragraph 7.1 of this Part 3 the Contractor shall implement the required Medium Value Change in accordance with the Estimate and so as to minimise any inconvenience to the Authority and to the delivery of Educational Services.
- 8.2 The Contractor shall notify the Authority when it believes the Medium Value Change has been completed.
- 8.3 Where the Contractor has either:
 - 8.3.1 failed to provide a response pursuant to paragraph 2.5 of this Part 3 within fifteen (15) Business Days of the date of the Medium Value Change Notice;
 - 8.3.2 has provided an Estimate in accordance with paragraph 3 of this Part 3 but has failed to fully implement the Medium Value Change within ten (10) Business Days of the date set out in the Estimate as confirmed in accordance with paragraph 7.1 of this Part 3 as being the date on which the Medium Value Change should have been implemented; or
 - 8.3.3 where it is determined pursuant to paragraph 6 of this Part 3 that the Contractor has failed to submit a fair and reasonable Estimate,

then the Authority may notify the Contractor that the Medium Value Change Notice is withdrawn and, following such notification, may procure the implementation of the Medium Value Change without further recourse to the Contractor.

9 **Certification of the Medium Value Change**

- 9.1 Where the Medium Value Change is implemented at a School before the Services Availability Date for that School, the procedure set out at clause 20 of this Agreement (Notification of Services Availability) shall apply to the Works which are the subject of the Medium Value Change at the same time as the School in question is subject to that procedure.
- 9.2 Where the Medium Value Change is implemented at a School after the Services Availability Date for that School, and constitutes additional or varied Works, the procedure set out and agreed in the Estimate for certifying the completion of the Medium Value Change shall apply to determine whether the Medium Value Change has been completed appropriately.²⁷⁴₂₆₆
- 9.3 Where the Medium Value Change constitutes additional or varied Services, the Payment Mechanism shall apply to determine whether the Medium Value Change has been properly implemented.

10 **Method of Payment of Authority Contribution**

- 10.1 The Authority and the Contractor shall agree:
 - 10.1.1 a payment schedule in respect of the payment of a sum reflecting the amount and timing of the costs to be incurred by the Contractor in carrying out the Medium Value Change to the extent borne by the Authority; and
 - 10.1.2 where payment for part of a Medium Value Change reflects the carrying out of, or specific progress towards, an element within the Medium Value Change, an objective means of providing evidence confirming that the part of the Medium Value Change corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,

(such payment and evidence to be determined in accordance with the Dispute Resolution Procedure in the event of the Authority and the Contractor failing to agree its terms);
- 10.2 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 the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Medium Value Change has been carried out; and
- 10.3 If payment is not made in accordance with paragraph 10.2 of this Part 3, the Authority shall pay interest to the Contractor on the amount unpaid from the date fifteen (15) Business Days after receipt of the relevant invoice until paid at the Prescribed Rate.

11 **Adjustment to Unitary Charge**

Any adjustment to the Unitary Charge that is necessary due to the implementation of a Medium Value Change shall be calculated in accordance with clause 73 (Financial Adjustments), together with any adjustment that is necessary pursuant to any Small

²⁷⁴₂₆₆ Again, a failure on the part of the Contractor to respond to a Medium Value Change Request or to implement the Medium Value Change shall trigger a deduction under the Payment Mechanism.

Value Changes made under Part 2 of this Schedule that have not already been taken account of.

12 Due Diligence

12.1 The Contractor shall procure that the Senior Lenders shall not:

12.1.1 (in any event) withhold or delay any consents that are required pursuant to the Senior Financing Agreements to a Medium Value 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 1.1 to 1.8 of this Part 3 apply; or

12.1.2 carry out any due diligence (whether funder, legal, technical, insurance, or financial) in relation to the carrying out of any Medium Value Change unless either:

12.1.2.1 the Medium Value Change in question would result in an adjustment to the Unitary Charge in excess of one percent (1%); or

12.1.2.2 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 1.1 to 1.8 of this Part 3 apply.

12.2 Where not prohibited by paragraph 12.1 of this Part 3, the Senior Lenders may carry out legal, financial, insurance and/or technical due diligence on any proposal for a Medium Value Change. In the event that such due diligence is permitted and required, the Parties shall agree a budget for the due diligence provided that the costs shall in no case exceed ~~{5%}~~ of the overall value of the Medium Value 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.

12.3 It is acknowledged that Changes (particularly where they involve a change to the Works or the Facilities) may require authorisation from the insurers under the Required Insurances. The Contractor shall notify the relevant insurance broker immediately upon any material Medium Value Change being agreed (materiality being judged in relation to the size and nature of the scope of the Medium Value Change).

13 Project Documentation

13.1 Unless the Parties otherwise agree, no changes to the Project Documents or Ancillary Documents shall be made as a result of a Medium Value Change.²⁷²~~267~~

13.2 The Contractor shall, no later than one (1) month following completion of the Change, update the As-built Drawings and the operating and maintenance manuals as necessary to reflect the Change.

²⁷²~~267~~ A separate Deed of Amendment may be necessary to document the changes. This can be addressed by the Parties at the time of the Change and be developed through the estimate process.

SCHEDULE 24

CHANGE PROTOCOL

Part 4

High Value Changes

1 High Value Changes

The Authority has the right to propose High Value Changes in accordance with this Part 4. If the Authority requires a High Value Change, it must serve a notice (a **High Value Change Notice**) on the Contractor in accordance with paragraph 2 of this Part 4. The Contractor shall be entitled to refuse a High Value Change that:

- 1.1 requires the Works and/or the Services to be performed in a way that infringes any law or is inconsistent with Good Industry Practice;
- 1.2 would cause any Necessary Consent to be revoked (or would require a new consent to be obtained to implement the relevant change in the Works and/or the Services which, after using reasonable efforts, the Contractor has been unable to obtain);
- 1.3 would materially and adversely affect the Contractor's ability to deliver the Works and /or Services (except those Works and/or Services which have been specified as requiring to be amended in the High Value Change Notice) in a manner not compensated pursuant to this Part 4;
- 1.4 would materially and adversely affect the health and safety of any person;
- 1.5 would, if implemented, materially and adversely change the nature of the Project (including its risk profile);
- 1.6 is the subject of a High Value Change Notice that cannot reasonably be complied with;
- 1.7 the Authority does not have the legal power or capacity to require implementation of; or
- 1.8 would if implemented adversely affect the enforceability or priority of the security held by or on behalf of the existing Senior Lenders.

2 High Value Change Notice

- 2.1 Where the Authority wishes to propose a High Value Change, the Authority shall:
 - 2.1.1 submit a written request for the Contractor to produce outline proposals for any High Value Change (a **High Value Change Proposal**), including indicative funding proposals, setting out the maximum available capital and/or revenue the Authority is able to commit to that High Value Change (the **Target Cost**).
 - 2.1.2 identify any requirements in relation to the High Value Change that must be satisfied as part of the High Value Change Proposal (the **High Value Change Requirements**); and
 - 2.1.3 identify how the Authority shall assess whether the High Value Change Stage 2 Submission offers it value for money.

- 2.2 The Parties may agree written protocols with express reference to this Part 4 which explain or clarify any aspects of the High Value Change approval procedure set out in this Part 4 and such protocols shall be read as if incorporated into this Part 4 (including accelerated procedures with reduced requirements for High Value Changes of relatively low values).
- 2.3 Without prejudice to the generality of paragraph 2.2 of this Part 4, the Parties shall:
- 2.3.1 within five (5) Business Days of receipt by the Contractor of any High Value Change Notice, discuss and review the nature of the High Value Change, including a discussion as to which of the items set out in paragraph 3.2 of this Part 4 are appropriate to be included within the High Value Change Proposal; and
- 2.3.2 within five (5) Business Days of a High Value Change Proposal becoming a Stage 1 Approved Project, discuss and review the nature of the Stage 1 Approved Project, including a discussion as to which of the items set out in paragraph 4.3 of this Part 4 are appropriate to be included within the High Value Change Stage 2 Submission.

3 High Value Change Proposal

- 3.1 The Contractor shall notify the Authority in writing as soon as practicable and in any event within fifteen (15) Business Days after having received the High Value Change Notice if in its opinion and/or in the opinion of the Senior Lenders, acting pursuant to the terms of the Senior Financing Agreements, any of the circumstances outlined in paragraph 1 of this Part 4 apply. If no such notice is served, the Contractor shall (within thirty (30) Business Days of its request issued in accordance with paragraph 2 of this Part 4) submit either a High Value Change Proposal to the Authority or shall provide confirmation as to when the High Value Change Proposal will be provided to the Authority (provided that the Contractor shall use all reasonable endeavours to obtain such information as is required expeditiously). If the Authority does not believe the proposed time period from the Contractor is reasonable, the Parties shall seek to agree the time period, failing which any dispute as to what is an appropriate period for submission of the High Value Change Proposal may be referred to the Dispute Resolution Procedure.
- 3.2 Save where agreed by the Parties to the contrary, all High Value Change Proposals will contain at least the following information in sufficient detail to enable the Authority to make an informed decision under paragraph 3.4 of this Part 4:
- 3.2.1 a description of the High Value Change, with evidence of how the High Value Change meets the High Value Change Requirements;
- 3.2.2 an outline of the proposed building solution and design including an appropriate analysis/risk appraisal of, in each case to the extent relevant (if at all), the preferred investment solution contemplated in terms of new build, refurbishment, whole life costings;
- 3.2.3 a fixed Change Management Fee for the High Value Change;
- 3.2.4 an estimated programme for submission of the High Value Change Stage 2 Submission together with the implementation of the High Value Change;

- 3.2.5 whether relief from compliance with obligations is required, including the obligations of the Contractor to achieve the Start on Site Date, each Planned ICT Handover Date, each Planned Services Availability Date [to complete the Post Completion Works before the relevant Planned Post Completion Works Acceptance Date] and meet the requirements set out in the Authority's Requirements during the implementation of the High Value Change;
- 3.2.6 any impact on the provision of the Works and/or the Services;
- 3.2.7 any amendment required to this Agreement and/or any Project Document, Ancillary Document or Financing Agreement as a result of the High Value Change;
- 3.2.8 any Estimated Change in Project Costs that results from the High Value Change;
- 3.2.9 an outline of how the Contractor proposes to finance the High Value Change;
- 3.2.10 the Contractor's suggested payment schedule for the Change, based on milestones where relevant;
- 3.2.11 any Necessary Consents that are required;
- 3.2.12 costs and details of any other approvals required or due diligence permitted pursuant to paragraph 13 of this Part 4;
- 3.2.13 the proposed method of certification of any construction or operational aspects of the Works or the Services required by the proposed High Value Change if not covered by the procedures specified in clause 20 (Notification of Services Availability);
- 3.2.14 a value for money assessment explaining why the Contractor's proposals represent value for money taking into account both the proposed Capital Cost and Whole Life Cost; and
- 3.2.15 if the Contractor reasonably believes that there is a substantial risk that it will not be able to obtain any necessary planning consent the High Value Change Protocol shall contain a statement to that effect along with evidence to support this belief.

3.3 **Liaison between the Contractor, the Authority and relevant end users**

In developing a High Value Change Proposal the Contractor shall liaise with the Authority and relevant end users (being such persons or organisations as the Contractor in consultation with the Authority considers appropriate). The Authority shall provide to the Contractor such information as to its requirements as the Contractor may reasonably require and shall assist the Contractor in the review of any draft designs in relation to the High Value Change Proposal. Any and all information and other input or feedback provided by the Authority to the Contractor shall, unless expressly stated otherwise by the Authority, be provided without warranty and shall be without prejudice to the Authority's rights under this Part 4.

3.4 **Consideration of a High Value Change Proposal by the Authority**

The Authority will consider in good faith each High Value Change Proposal put forward by the Contractor and the Authority will not unreasonably withhold or delay its consent to a High Value Change Proposal. If, acting reasonably, the Authority finds that any material aspects of the High Value Change Proposal are unsatisfactory to it, it shall notify the Contractor of the same and offer reasonable assistance to the Contractor to enable it to address such deficiencies and resubmit the High Value Change Proposal as soon as reasonably practicable. If the Contractor addresses such deficiencies to the Authority's satisfaction, acting reasonably, paragraph 3.5 of this Part 4 shall apply.

3.5 **Authority response to a High Value Change Proposal**

If the Authority approves a High Value Change Proposal (subject to any amendments to it agreed with the Contractor), then it shall be a "Stage 1 Approved Project" or be referred to as having received "Stage 1 Approval", as the context requires.

3.6 **Contractor's costs in relation to a High Value Change Proposal that is not approved**

If a High Value Change Proposal submitted in accordance with this paragraph 3 does not become a Stage 1 Approved Project then the Contractor's costs in relation to the proposal shall be borne by the Contractor unless the Authority has either not responded to the High Value Change Proposal pursuant to paragraph 3.4 and/or is in material breach of its obligations under paragraph 3.4, in which case the Authority shall reimburse the Contractor's reasonable and proper costs.

4 **Stage 2 Approval**

4.1 **Development of a High Value Change Stage 2 Submission**

4.1.1 Within ten (10) Business Days of a High Value Change Proposal having become a Stage 1 Approved Project, the Parties shall seek to agree the time period within which the Contractor shall develop the Stage 1 Approved Project into a detailed submission (the High Value Change Stage 2 Submission). If the Parties are unable to agree a reasonable time period for such submission any dispute may be referred to the Dispute Resolution Procedure.

4.1.2 Following agreement or determination of what is an appropriate time period for submission by the Contractor of the High Value Change Stage 2 Submission pursuant to paragraph 4.1.1 of this

Part 4, the Contractor shall proceed regularly and diligently to produce and submit the same to the Authority in accordance with the agreed or determined time period.

4.2 Liaison between the Contractor, the Authority and relevant end users

In developing a High Value Change Stage 2 Submission the Contractor shall continue to liaise with the Authority and relevant end users (being such persons or organisations as the Authority in consultation with the Contractor considers appropriate). The Authority shall provide to the Contractor such information as to its requirements necessary to enable the Contractor to submit a full and complete High Value Change Stage 2 Submission and any such other information as the Contractor may reasonably require and shall assist the Contractor in the review of any draft designs in relation to the Stage 1 Approved Project and in the development of other aspects of the High Value Change Stage 2 Submission (but not where this would involve the Authority incurring additional material expense). Any and all information and other input or feedback provided by the Authority to the Contractor shall be provided without warranty and shall be without prejudice to the Authority's rights under this Part 4.

4.3 Content requirements in relation to a High Value Change Stage 2 Submission

Save where the Parties agree otherwise, in relation to the relevant Stage 1 Approved Project, the Contractor shall procure that a High Value Change Stage 2 Submission shall include (but not be limited to):

- 4.3.1 draft(s) of the relevant Project Document(s) identifying (if relevant) any material changes or amendments proposed in respect of the relevant Stage 1 Approved Project, together with the reasons for any such changes or amendments proposed. This shall include full details of which provisions of the relevant Project Documents shall apply to the High Value Change so that it is implemented in equivalent manner and to an equivalent standard as required in respect of the Works and/or Services as appropriate;
- 4.3.2 detailed design solutions (to RIBA Level D);
- 4.3.3 appropriate plans and drawings;
- 4.3.4 relevant detailed planning permissions and any other relevant planning approvals and Necessary Consents (or such lesser confirmation or information in relation to planning as may be agreed with the Authority);
- 4.3.5 a proposed revised Base Case including the detailed price estimates for the Stage 1 Approved Project;
- 4.3.6 an explanation (together with appropriate supporting evidence) as to why the High Value Change Stage 2 Submission meets the Approval Criteria (as defined in paragraph 4.4 of this Part 4);
- 4.3.7 confirmation (or details of any requested variations to (with supporting justification)) of the Change Management Fee referred in paragraph 3.2.4 of this Part 4;

- 4.3.8 the proposed method of certification of any construction or operational aspects of the Works or the Services required by the proposed High Value Change if not covered by the procedures specified in clause 20 (Notification of Services Availability);
- 4.3.9 a value for money assessment explaining why the Contractor's proposals represent value for money taking into account both the proposed Capital Cost and Whole Life Cost;
- 4.3.10 a timetable and method statement setting out how the relevant High Value Change will be delivered which shall include (but not be limited to):
 - 4.3.10.1 proposals for the effective management of the building programme;
 - 4.3.10.2 proposals (if appropriate) for the decanting of pupils so that teaching is not disrupted;
 - 4.3.10.3 details of the Sub-Contractors together with evidence and explanation of the value testing undertaken by the Contractor in relation to the High Value Change;
 - 4.3.10.4 a completed risk register showing the potential risks identified in relation to the delivery of the High Value Change the occurrence of which are capable of adversely affecting the time for completion, cost and/or quality of the project, the probability of such risks occurring and a financial estimate of the most likely consequences of each risk occurring together with the prioritisation of all continuing risks and an action plan in respect of, and risk owners for, all risks prioritised as serious risks;
- 4.3.11 any surveys and investigations and associated reports that are reasonably necessary to ascertain (in relation to Changes involving the construction of additional buildings) information as to the nature, location and condition of the relevant land (including hydrological, geological, geotechnical and sub-surface conditions) together with information relating to archaeological finds, areas of archaeological, scientific or natural interest and (in relation to the refurbishment of any existing buildings) information on the condition and quality of existing structures and, in particular, the presence of any latent defects.

4.4 **Approval Criteria**

For the purposes of this Part 4, Approval Criteria means the criteria against which any Stage 1 Approved Project is to be judged by the Authority in determining whether it achieves Stage 2 Approval. The criteria are:

- 4.4.1 whether the costs of the Stage 1 Approved Project are within the Target Cost notified to the Contractor by the Authority;
- 4.4.2 whether it has been demonstrated that the Stage 1 Approved Project provides value for money assessed in accordance with the measures identified by the Authority in accordance with paragraph 2.1.3 of this Part 4;

- 4.4.3 whether the Authority, acting reasonably, is satisfied that the High Value Change Stage 2 Submission meets the Authority Requirements;
 - 4.4.4 whether any material changes or amendments to the relevant Project Document(s) as detailed pursuant to paragraph 4.3.1 of this Part 4 are acceptable to the Authority, acting reasonably; and
 - 4.4.5 whether the High Value Change Stage 2 Submission contains all the information required pursuant to paragraph 4.3 of this Part 4 (or as otherwise agreed by the Parties).
- 4.5 Submission of the High Value Change Stage 2 Submission to the Authority and consideration of that submission by the Authority
- 4.5.1 The Contractor shall submit its High Value Change Stage 2 Submission to the Authority. The Authority will consider in good faith High Value Change Stage 2 Submissions put forward by the Contractor and the Authority will not unreasonably withhold or delay its consent to a High Value Change Stage 2 Submission. The Authority shall be entitled to call for such reasonable information as it considers appropriate to enable it to decide whether the High Value Change Stage 2 Submission meets the Approval Criteria. The Contractor shall reply promptly to all such requests for further information and assistance. If, acting reasonably, the Authority finds that any material aspects of the High Value Change Stage 2 Submission are unsatisfactory to it, it shall notify the Contractor of the same and offer reasonable assistance to the Contractor to address such deficiencies. If the Contractor addresses such deficiencies to the Authority's satisfaction, acting reasonably, paragraph 4.5.2.1 of this Part 4 shall apply. If the Contractor is unable to resolve such deficiencies to the satisfaction of the Authority (acting reasonably) paragraph 4.5.2.2 of this Part 4 shall apply.
 - 4.5.2 As soon as reasonably practicable after the submission to it of a High Value Change Stage 2 Submission the Authority shall give written notice of whether it:
 - 4.5.2.1 approves the relevant Stage 1 Approved Project (in which case the Stage 1 Approved Project shall be referred to as having received "Stage 2 Approval" or as being a "Stage 2 Approved Project" or an "Approved Project" as the context requires); or
 - 4.5.2.2 rejects the Stage 1 Approved Project:
 - (i) ~~(i)~~ subject to paragraph 4.5.2.2(ii)(1), on the grounds that the High Value Change Stage 2 Submission in relation to the relevant Stage 1 Approved Project has failed to meet one or more of the Approval Criteria in which case (subject to resubmission under paragraph 4.5.3) paragraph 4.6 shall apply;
 - (ii)
 - (iii) ~~(ii)~~

- (1) because, as a result of any change to the Target Cost referred to in paragraph 2, the Stage 1 Approved Project is not in fact Affordable despite the High Value Change Stage 2 Submission being within the Target Cost referred to in paragraph 2.1.1 of this Part 4; or
- (2) otherwise on grounds other than those set out in paragraph 4.5.2.2(i) or 4.5.2.2(ii)(1) of this Part 4,

in which case paragraph 4.7 shall apply.

4.5.3 If the Authority rejects the High Value Change Stage 2 Submission on the grounds set out in paragraph 4.5.2.2(i):

4.5.3.1 the Authority and the Contractor will work together to address the reasons for such failure and attempt in good faith to produce a revised High Value Change Stage 2 Submission which the Contractor shall re-submit to the Authority as soon as reasonably practicable after the rejection of the original submission and in any event within thirty (30) Business Days of the rejection (the Resubmission Longstop Date);

4.5.3.2 the re-submission pursuant to paragraph 4.5.3.1 shall be treated as a High Value Change Stage 2 Submission. If:

(i) ~~(i)~~ the resubmitted High Value Change Stage 2 Submission is rejected by the Authority on the grounds set out in paragraph 4.5.2.2(i) (subject to having been through the Dispute Resolution Procedure under paragraphs 4.8 and 4.9 (if applicable) of this Part 4); or

(ii) ~~(ii)~~ no resubmission of the High Value Change Stage 2 Submission is made on or before the Resubmission Longstop Date,

then the relevant Stage 1 Approved Project shall be treated as having been properly rejected and the provisions of paragraph 4.6 of this Part 4 shall apply and neither the Authority nor the Contractor shall have any further obligations in relation to the relevant High Value Change referred to in the High Value Change Stage 2 Submission; and

4.5.3.3 ~~4.5.3.3~~ for the avoidance of doubt if the Authority rejects the Stage 1 Approved Project pursuant to paragraph 4.5.2.2(i) because the Contractor has failed to meet one or more of the Approval Criteria and the sole reason for that failure is that any planning consent identified by the Contractor (in compliance with paragraph 3.2.15 of this Part 4) has not been obtained then the provisions of paragraph 4.7 of this Part 4 shall apply, provided that the Contractor has used all reasonable endeavours to obtain the planning consent.

4.6 **If a High Value Change Stage 2 Submission is properly rejected by the Authority**

Where this paragraph 4.6 applies (as set out in paragraph 4.5.2.2(i), paragraph 4.5.3.2 and paragraph 4.9 of this Part 4):

- 4.6.1 the Authority shall not be required to reimburse or compensate the Contractor in respect of any costs relating to the High Value Change including the Change Management Fee; and
- 4.6.2 subject to clause 60.2 of this Agreement (No Alterations), the Authority shall be entitled to procure the High Value Change required under the relevant High Value Change Stage 2 Submission outside the terms of this Agreement.

4.7 **If a High Value Change Stage 2 Submission is improperly rejected by the Authority**

Where this paragraph 4.7 applies (as set out in paragraph 4.5.2.2(ii), paragraph 4.8.2 and paragraph 5.2.1.2 and paragraph 5.2.2)):

- 4.7.1
 - 4.7.1.1 subject to paragraph 4.7.1.2, the Incurred Change Management Fee in relation to the relevant High Value Change will be paid by the Authority within ten (10) Business Days of the date on which the Contractor receives written notice of the rejection or the date of the deemed rejection (as the case may be) with the date of the rejection or the deemed rejection (as the case may be) being the Calculation Date for the purposes of calculating the amount of the Incurred Change Management Fee (unless a different Calculation Date is expressly stated in this Part 4 in relation to the circumstances giving rise to the entitlement of the Contractor to be paid the Incurred Change Management Fee);and
 - 4.7.1.2 if the Parties are unable to agree the amount of the Incurred Change Management Fee for the purposes of paragraph 4.7.1.1 the matter shall be resolved by reference to the Dispute Resolution Procedure; and
- 4.7.2 the Authority shall not be entitled to procure the High Value Change required under the relevant High Value Change Stage 2 Submission outside the terms of this Agreement²⁷³₂₆₈ (save that this shall not apply to the extent the High Value Change related solely to the provision of additional services which were not already part of the Services).

²⁷³₂₆₈ The Authority has the right under Cl. 60.2 to make Alterations. Alterations have limited impact on the buildings.

Dispute resolution

- 4.8 If the Authority rejects a High Value Change pursuant to the provisions of paragraph 4.5.3.2(i) of this Part 4, the Contractor shall be entitled to refer the matter for consideration under the Dispute Resolution Procedure within ten (10) Business Days after receiving written notice of the Authority's decision. If, following a referral to the Dispute Resolution Procedure, it is agreed or determined that the High Value Change rejected by the Authority pursuant to paragraph 4.5.3.2(i) of this Part 4 met the Approval Criteria the Authority shall either:
- 4.8.1 declare that the relevant High Value Change has received Stage 2 Approval and that High Value Change shall proceed; or
 - 4.8.2 declare that its rejection of the relevant High Value Change be treated as an improper rejection and that the provisions of paragraph 4.7 of this Part 4 shall apply.
- 4.9 If, following a referral to the Dispute Resolution Procedure under paragraph 4.8, it is agreed or determined that the High Value Change did not meet the Approval Criteria, the provisions of paragraph 4.6 of this Part 4 shall apply.
- 4.10 If the Authority rejects a High Value Change Proposal either Party may refer the matter to the Dispute Resolution Procedure to determine whether the High Value Change Proposal comprised a fair and reasonable response to the High Value Change Notice. If it is agreed or determined that the High Value Change Proposal was not a fair and reasonable response, paragraph [4.75.9](#) of Schedule 6 (Payment Mechanism) shall apply. If it is agreed or determined that the High Value Change Proposal was a fair and reasonable response no deductions shall be payable under Schedule 6 (Payment Mechanism) in relation to the High Value Change Proposal but, for the avoidance of doubt, the Authority shall not be obliged to accept the High Value Change Proposal and paragraph 3.6 of this Part 4 shall still apply.

5 Time periods for approval

- 5.1 Each High Value Change Proposal and each High Value Change Stage 2 Submission shall be valid for a period of three (3) months from the date of its submission by the Contractor.
- 5.2 If by the end of the three (3) month period referred to in paragraph 5.1 of this Part 4 the Authority has not:
- 5.2.1 in relation to a High Value Change Proposal, approved or rejected that High Value Change Proposal in accordance with the procedures set out in this Part 4:
 - 5.2.1.1 the Contractor shall be entitled to withdraw the High Value Change Proposal at the end of that period; and
 - 5.2.1.2 the Contractor shall not be entitled to any costs relating to the High Value Change Proposal unless the Authority has either not responded to the High Value Change Proposal and/or is in material breach of its obligations in paragraph 3.4 of this Part 4 in which case paragraph 4.7 of this Part 4 shall apply;

- 5.2.2 in relation to a High Value Change Stage 2 Submission, approved or rejected that High Value Change Stage 2 Submission in accordance with the procedures set out in this Part 4 (or has not given any notification of the Authority's response to the High Value Change Stage 2 Submission or has given written notice to the Contractor withdrawing or cancelling the High Value Change to which the High Value Change Stage 2 Submission relates) then the High Value Change Stage 2 Submission shall be deemed to have been improperly rejected by the Authority and paragraph 4.7 shall apply.

6 **Co-operation of the Authority**

The Authority will co-operate with the Contractor in relation to any High Value Change Stage 2 Submission being developed by the Contractor, including (without limitation) promptly providing:

- 6.1 written confirmation of the Target Cost and/or High Value Change Requirements or any change to such Target Cost and/or High Value Change Requirements; and
- 6.2 any information reasonably required by the Contractor to enable it to satisfy the requirements of paragraph 4.3 of this Part 4.

7 **Changes to the High Value Change Requirements**

- 7.1 If the High Value Change Requirements or Approval Criteria are subject to any material variation in relation to a High Value Change by the Authority after the High Value Change Proposal has been submitted then:

7.1.1 the Contractor and the Authority shall negotiate in good faith as to the implications on the High Value Change Proposal or High Value Change Stage 2 Submission (as the case may be) and shall seek to agree changes thereto to accommodate the variation (including any change to the Target Cost and/or to the Change Management Fee);

7.1.2 if agreement has not been reached pursuant to paragraph 7.1.1 of this Part 4 within twenty (20) Business Days (or such longer period as the Parties may agree) then:

7.1.2.1 the Contractor shall be entitled by notice in writing to the Authority to withdraw the High Value Change Proposal or the High Value Change Stage 2 Submission (as the case may be) and to be paid the Incurred Change Management Fee with the Calculation Date being the date of the change notified by the Authority; and

7.1.2.2 the Authority shall not be entitled to procure the High Value Change without recommending and complying with the procedure in this Part 4 in relation to that High Value Change (and any non-compliance with this paragraph 7.1.2.2 shall be deemed to be in breach of clause 60.2 of this Agreement (No Alterations)).

- 7.2 The Authority may, at any time, give notice in writing to the Contractor that it proposes to cancel a High Value Change without completing the process set out in paragraphs 3 to 5 of this Part 4 in which case the Authority shall pay the Contractor the Incurred Change Management Fee in respect of the cancelled High Value Change with the Calculation Date being the date of such notice.

8 **Information and notifications by the Authority to the Contractor and cooperation of the Authority**

8.1 The Authority shall notify the Contractor as soon as it becomes aware of any matter which may have a reasonably foreseeable material adverse effect on the viability of any High Value Change including any:

8.1.1 planning issues likely to cause a material delay in the anticipated programme for the High Value Change or material cost increases;

8.1.2 changes to funding which the Authority receives or to the way in which funding may be applied, either or both of which may affect whether a High Value Change is affordable.

8.2 The Authority shall provide reasonable assistance to the Contractor in relation to the procurement by the Contractor of all relevant Necessary Consents,

PROVIDED THAT this paragraph 8 shall not apply to the Authority to the extent it is exercising its functions as a Local Planning Authority or Highways Authority.

9 **Change Management Fee**

9.1 A proposed fixed management fee for each High Value Change must be submitted by the Contractor as part of the High Value Change Proposal and, once agreed, shall be the Change Management Fee for the High Value Change. The Change Management Fee submitted pursuant to paragraph 3.2.4 of this Part 4 shall include a breakdown of the proposed amount by reference to the following categories of costs (without any double counting between the amounts under paragraphs 9.1.1 to 9.1.8 of this Part 4):

9.1.1 the time incurred by or on behalf of the Contractor in project managing the development and procurement of the High Value Change Proposal and High Value Stage 2 Submission, which shall:

9.1.1.1 be based on actual time spent (validated by timesheet records);

9.1.1.2 be calculated at the daily rates as set out in Part 3 of Appendix 2 of this Schedule 24; and

9.1.1.3 not include any mark-up or profit cost or additional overheads;

9.1.2 design costs

9.1.3 legal advice

9.1.4 financial advice

9.1.5 technical advice;

9.1.6 surveys;

9.1.7 fees in connection with obtaining any relevant Necessary Contracts; and

9.1.8 other costs the Contractor shall be required to incur, acting reasonably, to finalise its High Value Change Stage 2 Submission,

in each case applying the Schedule of Rates where appropriate and otherwise applying current market rates on a fair and reasonable basis.

10 **Implementation of the High Value Change**

The Contractor shall implement any High Value Change approved by the Authority so as to minimise any inconvenience to the Authority and to the provision of Educational Services and in accordance with:

- 10.1 the High Value Change Stage 2 Submission (subject to any amendments to it agreed by the Parties);
- 10.2 subject to paragraph 10.1 of this Part 4, the provisions of Part 3 (Transitional Arrangements) of this Agreement (to the extent the High Value Change involves design and construction), amended as appropriate to apply to the High Value Change; and
- 10.3 subject to paragraph 10.1 of this Part 4, the provisions of clause 22 (Principal Obligations) of this Agreement (to the extent the High Value Change involves provision of Services).

11 **Method of Payment of Authority Contribution**

11.1 This paragraph 11 shall apply where an Approved Project provides that the High Value Change shall be funded in whole or part other than by adjustment of the Unitary Charge.

11.2 The Authority and the Contractor shall agree:

11.2.1 a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by the Contractor in carrying out the High Value Change to the extent borne by the Authority; and

11.2.2 where payment for part of a High Value Change reflects the carrying out of, or specific progress towards, an element within the High Value Change, an objective means of providing evidence confirming that the part of the High Value Change corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,

(such payment and evidence to be determined in accordance with the Dispute Resolution Procedure in the event of the Authority and the Contractor failing to agree as to its terms).

11.3 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 the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the High Value Change has been carried out.

11.4 If payment is not made in accordance with paragraph 11.3 of this Part 4, the Authority shall pay interest to the Contractor on the amount unpaid from the date fifteen (15) Business Days after receipt of the relevant invoice until paid at the Prescribed Rate.

12 **Adjustment to Unitary Charge**

Any adjustment to the Unitary Charge which is necessary as a result of the implementation of a High Value Change shall be calculated in accordance with clause 73 (Financial Adjustments), together with any adjustment that is necessary pursuant to any Small Value Changes made under Part 2 of this Schedule and/or any Medium Value Changes made under Part 3 of this Schedule 24 that have not already been taken account of.

13 **Due Diligence**

13.1

13.1.1 Where the Authority is funding the High Value Change, the Contractor shall procure that the Senior Lenders shall not withhold or delay any consents which are required pursuant to the Senior Financing Agreements to such High Value 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 1.1 to 1.8 of this Part 4 apply.

13.1.2 Where the Authority is not funding the High Value Change, the Contractor shall procure that the Senior Lenders shall not unreasonably withhold or delay any consents which are required pursuant to the Senior Financing Agreements to such High Value 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 1.1 to 1.8 of this Part 4 apply.

13.2 The Parties agree that the Senior Lenders may carry out legal, financial, insurance and technical due diligence on any proposal for a High Value Change. The Parties shall agree a budget for the due diligence provided that the costs shall in no case exceed the lower of (i) {5%} of the overall value of the High Value Change in question (ii) or {fifty thousand pounds (£50,000)} unless, in either case, 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 the conclusion of the process in paragraph 4 of this Part 4 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.

13.3 It is acknowledged that High Value Changes (particularly where they involve a change to the Works or the Facilities) may require authorisation from the insurers under the Required Insurances. The Contractor shall notify the relevant insurance broker immediately upon any material High Value Change being agreed (materiality being judged in relation to the size and nature of the scope of the High Value Change).

13.4 The Parties agree that paragraph 13.1 of this Part 4 shall not apply to consent from the Senior Lenders to provide any additional funding for the relevant High Value Change, which shall be in their absolute discretion.

14 **Project Documentation**

14.1 The only changes to the Project Documents or Ancillary Documents to be made as a result of a High Value Change shall be those identified in the High Value

Change Stage 2 Submission (subject to any amendments to it agreed by the Parties).

- 14.2 The Contractor shall, on completion of the Change, update the As-built Drawings and the operating and maintenance manuals as necessary to reflect the Change.

SCHEDULE 24

CHANGE PROTOCOL

Part 5

Contractor Changes

- 1 If the Contractor wishes to introduce a Contractor Change, it shall serve a notice containing the information required pursuant to paragraph 2 of this Part 5 (a **Contractor Notice of Change**) on the Authority.
- 2 The Contractor Notice of Change shall:
 - 2.1 set out the proposed Contractor Change in sufficient detail to enable the Authority to evaluate it in full;
 - 2.2 specify the Contractor's reasons for proposing the Contractor Change;
 - 2.3 indicate any implications of the Contractor Change, including but not limited to its impact on the Soft Services;
 - 2.4 indicate what savings, if any, will be generated by the Contractor Change, including:
 - 2.4.1 whether a revision of the Unitary Charge is proposed (and, if so, give details of such proposed revision, taking account of paragraph 8 of this Part 5); or
 - 2.4.2 whether such savings will be paid by a lump sum;
 - 2.5 if the Contractor Change is required as a result of a Qualifying Change in Law,
 - 2.5.1 indicate what sums, if any, will be payable by the Authority; and
 - 2.5.2 contain the information required by clause 59.2 (Qualifying Change in Law) of the Project Agreement;
 - 2.6 indicate whether there are any critical dates by which a decision by the Authority is required; and
 - 2.7 request the Authority to consult with the Contractor with a view to deciding whether to agree to the Contractor Change and, if so, what consequential changes the Authority requires as a result.
- 3 The Authority shall evaluate the Contractor Notice of Change in good faith, taking into account all relevant issues, including whether:
 - 3.1 a revision of the Unitary Charge will occur;
 - 3.2 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);
 - 3.3 the Contractor Change will interfere with the relationship of the Authority [and/or any relevant School Entity](#) with third parties;
 - 3.4 the Contractor Change may affect the quality of the Soft Services and/or increase the cost incurred in the delivery of the Soft Services;

3.5 ~~the Contractor Change may adversely affect the general day-to-day operation of the School;~~

3.6 ~~3.5~~ the financial strength of the Contractor is sufficient to perform the Works and/or Services after implementation of the Contractor Change;

3.7 ~~3.6~~ the value and/or life expectancy of any of the Schools and/or Assets is reduced; or

3.8 ~~3.7~~ the Contractor Change materially affects the risks or costs to which the Authority is exposed.

- 4 As soon as practicable after receiving the Contractor Notice of Change, the Parties shall meet and discuss the matters referred to in it, including in the case of a Qualifying Change in Law those matters referred to in clause 59.3 (Parties to Discuss) of this Agreement. During discussions, subject to paragraph 9 of this Part 5, the Authority may propose modifications to, or accept or reject, the Contractor Notice of Change.
- 5 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:
- 5.1 shall enter into any documents to amend this Agreement or any relevant Project Document which are necessary to give effect to the Contractor Change;
- 5.2 subject to paragraph 7 of this Part 5, the Unitary Charge shall be revised in accordance with clause 73 (Financial Adjustments); and
- 5.3 the Contractor Change shall be implemented within the period specified by the Authority in its notice of acceptance.
- 6 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 the Contractor Notice of Change.
- 7 Unless the Authority's written acceptance expressly agrees to an increase in the Unitary Charge or that the Contractor should be entitled to relief from any of its obligations, there shall be no increase in the Unitary Charge or relief granted from any obligations as a result of a Contractor Change.
- 8 If the 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 Unitary Charge such that any cost savings (following deduction of costs reasonably incurred by the Contractor in implementing such Contractor Change) shall be shared on the basis of ~~{50}~~ per cent (~~{50%}~~) of the saving being retained by the Contractor and ~~{50}~~ 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 Unitary Charge pursuant to clause 73 (Financial Adjustments).
- 9 The Authority shall not reject a Contractor Change that is required in order to conform to a Change in Law. The costs of introducing a Contractor Change resulting from a Qualifying Change in Law (including any resulting revision of the Unitary Charge) shall be dealt with in accordance with clause 59 (Change in Law) and, to the extent not dealt with therein, all costs shall be borne by the Contractor.

SCHEDULE 24

CHANGE PROTOCOL

Part 6

Partial Termination

- 1 Provided that the Authority's right under this paragraph 1 of this Part 6 shall not be exercised more than [x²⁷⁴₂₆₉] times during the Contract Period, at any time following the date that falls ten (10) years after the final Services Availability Date the Authority may serve notice of its intention to remove a School from this Agreement by way of a High Value Change Notice (a **Partial Termination Authority Notice of Change**) in accordance with this paragraph 1 and with paragraph 2 of this Part 6.
- 2 The Authority's right under paragraph 1 of this Part 6 may only be exercised by the Authority where a Partial Termination Event has arisen. No change of status of a School or a School Entity will trigger a partial termination under this Part 6.
- 3 Subject to paragraphs 4 and 5 of this Part 6, where the Authority has served a Partial Termination Authority Notice of Change, the provisions of paragraphs 2 to 14 of Part 4 of this Schedule 24 shall apply save that the Contractor shall include in its High Value Change Proposals details of the ~~amount that is standing to the credit of the Maintenance Reserve Account (as defined in the Senior Credit Agreement), or that would have been standing to the credit of that account had the Contractor complied with its obligations under the Senior Credit Agreement that relate to the Schedule of Programmed Maintenance for the affected School~~Partial Termination Lifecycle Surplus. The Contractor shall not be entitled to serve a notice under paragraph 3.1 of Part 4 of this Schedule 24 in respect of any Partial Termination Authority Notice of Change.
- 4 Proposals delivered by the Contractor under paragraph 3.1 of Part 4 of this Schedule 24 relating to a Partial Termination Authority Notice of Change shall be calculated on the basis that the partial termination shall be carried out on the basis that:
 - 4.1 the Base Case Equity IRR shall be adjusted by [x²⁷⁵₂₇₀]% relative to a "no better no worse" position in accordance with clause 73.3; and
 - 4.2 the Unitary Charge shall other than as set out in paragraph 4.1 of this Part 6 be adjusted so as to leave the Contractor in a "no better no worse" position in accordance with clause 73.3.
- 5 In the event that a High Value Change Proposal pursuant to a Partial Termination Authority Notice of Change is confirmed by the Authority in accordance with paragraph 4.5.2 of Part 4 of this Schedule 24:
 - 5.1 the adjustment to the Unitary Charge under paragraph 12 of Part 4 of this Schedule 24 shall be carried out on the basis that the Base Case Equity IRR shall be adjusted by [x²⁷⁶₂₇₁]% relative to a "no better no worse" position in accordance with clause 73.3;
 - 5.2 the Contractor shall promptly pay to the Authority half of the ~~monies standing to the credit of the Maintenance Reserve Account (as defined in the Senior~~

²⁷⁴₂₆₉ The number of schools that may be removed from a project is to be agreed on a project-specific basis.

²⁷⁵₂₇₀ Bidders are to bid x, i.e. the discount on equity payout from a "no better no worse" position.

²⁷⁶₂₇₁ Bidders are to bid x, i.e. the discount on equity payout from a "no better no worse" position.

~~Credit Agreement), or that would have been standing to the credit of that account had the Contractor complied with its obligations under the Senior Credit Agreement, that relate to the Schedule of Programmed Maintenance for the affected School~~[Partial Termination Lifecycle Surplus](#); and

- 5.3 the levels of caps under the Schedule 6 (Payment Mechanism) shall be amended as necessary to reflect that the Contractor will following a High Value Change in accordance with this Part 6 use a smaller portion of the Unitary Charge to pay the FM Sub-Contractor.

SCHEDULE 24

CHANGE PROTOCOL

Part 7

Elective Services

1 Elective Services Notice

Where any Elective Service is required by the Authority or a School Entity during the Services Period, the Authority or the relevant School Entity shall submit to the Contractor a notice (an **Elective Services Notice**), such notice to be submitted at least fifteen (15) Business Days prior to the date on which it proposes the Contractor should start to deliver the Elective Service. The Contractor agrees that, in the event of any conflict between instructions of the Authority and instructions of a School Entity pursuant to this Part 7, the instructions of the Authority shall prevail.

2 Contractor Response and Authority Confirmation

2.1 Within five (5) Business Days of receipt of an Elective Services Notice, the Contractor shall confirm in writing to the Authority or the School Entity, copied to the Authority as relevant and in accordance with this Part 7:

2.1.1 the cost of implementing the required Elective Service; and

2.1.2 the time period for implementing the Elective Service.

2.2 The cost of implementing an Elective Service shall not exceed the relevant Elective Services Catalogue Price and the time period for implementing the Elective Service shall not exceed the time specified in the Elective Service Catalogue (where relevant).

2.3 Other than the costs referred to in paragraphs 2.2 of this Part 7 the Contractor shall make no charge for processing, implementing or managing any Elective Service.

2.4 The Authority or the School Entity may object in writing within five (5) Business Days of receipt of the Contractor's confirmation pursuant to paragraph 2.1 of this Part 7 to any part of that confirmation and in such circumstances the Parties shall act reasonably to agree as soon as practicable how the Elective Service is to be implemented. In the absence of any such objection, the Contractor shall proceed with the Elective Service in question in accordance with the terms of its confirmation.

3 Implementation

3.1 The Contractor shall implement the required Elective Service so as to minimise any inconvenience to the Authority and the relevant School Entity and within the timescales specified in the confirmation provided pursuant to paragraph 2.1 of this Part 7 (or agreed by the Parties pursuant to paragraph 2.4 of this Part 7).

3.2 The Contractor shall notify the Authority or the School Entity as relevant when delivery of the Elective Service has commenced.

3.3 Where the Contractor has either:

3.3.1 failed to provide a response pursuant to paragraph 2.1 of this Part 7 within fifteen (15) Business Days of the date of the Elective Services Notice; or

3.3.2 has provided a response pursuant to paragraph 2.1 of this Part 7 but has failed to fully implement the Elective Service within ten (10) Business Days of the date that has been determined or agreed in accordance with paragraph 2.1 of this Part 7 as being the date on which the Elective Service should have been implemented,

then the Authority or the School Entity may notify the Contractor that the Elective Service Notice is withdrawn and, following such notification, may procure the delivery of the Elective Service without further recourse to the Contractor.

4 Payment

4.1 Where the Elective Service has been implemented to the satisfaction of the Authority and relevant School Entity (acting reasonably), the Contractor shall include the costs of the Elective Service in the next report submitted pursuant to clause 37.2 (Report and Invoice) of this Agreement following completion or implementation of the relevant Elective Service provided that if the Contractor has received no response from the Authority or the School Entity (as applicable) the Elective Service shall be deemed (for the purposes only of payment) to have been implemented and the Contractor shall be entitled to include the costs of the Elective Service in the next report.

4.2 All amounts payable for Elective Services shall be invoiced and paid in accordance with the procedure described in clause 37 (Payments) of this Agreement²⁷².

5 Update of Elective Services Catalogue

5.1 From the Commencement Date the Elective Services Catalogue shall be that set out in Appendix 3 to this Schedule 24 and, subject to paragraph 5.2 of this Part 7, the rates set out therein shall be Indexed on each anniversary of the Commencement Date.

5.2 On the date which is forty (40) Business Days before each third anniversary of the Commencement Date, the Contractor shall provide the Authority and the School Entities with a revised and updated Elective Services Catalogue that:

5.2.1 includes in the Elective Services Catalogue unit prices for any Elective Services which has been requested and which are not already included in the Catalogue;

5.2.2 includes time periods (where relevant) for the implementation of any Elective Services for the matters referred to in paragraph 5.2.1 of this Part 7;

5.2.3 updates the unit pricing for the services in the Elective Services Catalogue to ensure that unit rates continue to provide value for money with reference to prices prevailing for similar items in the market at the time.²⁷³

²⁷² We may consider allowing the Contractor to invoice the School Entity direct for Elective Services.

²⁷³ At the three year reviews the Contractor should review pricing to ensure the rates continue to provide value for money with reference to prices prevailing in the market. The Contractor must produce evidence of value testing of the revised pricing.

5.3 Within twenty (20) Business Days of the submission by the Contractor of the updated Elective Services Catalogue pursuant to paragraph 5.2 of this Part 7, the Authority shall confirm in writing whether or not it agrees that the updated Elective Services Catalogue shall constitute the Elective Services Catalogue for the purposes of this Agreement;

5.4 If the Authority does not agree with the Contractor's proposed amendments to the Elective Services Catalogue pursuant to paragraph 5.2 of this Part 7, the Parties shall meet and endeavour, in good faith, to agree any amendments to the Elective Services Catalogue. Any dispute shall be referred to the Dispute Resolution Procedure. Twenty (20) Business Days following the submission by the Contractor pursuant to paragraph 5.2 of this Part 7, or, in the event of a dispute, ten (10) Business Days following resolution of any dispute in respect of that submission, the Contractor shall issue to the Authority an updated Elective Services Catalogue, which shall set out the agreed or determined amendments and shall constitute the Elective Services Catalogue for the purposes of this Agreement.

6 Removal of Elective Services

If Authority or School Entity wishes to any terminate the Contractor's obligation to deliver any Elective Service the Authority or the relevant School Entity shall send the Contractor a notice (an **Elective Services Removal Notice**) at least ten (10) Business Days prior to the date on which it wishes the Contractor to stop delivery of any Elective Service.

7 Documentation and Monitoring

7.1 No due diligence (whether funder, legal, technical, insurance or financial) shall unless otherwise agreed between the Parties be required in relation to Elective Services.

7.2 No changes shall unless otherwise agreed between the Parties be made to this Agreement or any Project Document as a result of any Elective Services.

7.3 The Contractor shall keep a record of all Elective Services that have been implemented, and shall provide the Authority with a copy of that record whenever required by the Authority.

8 Disputes

Any dispute may be referred by either Party to the Dispute Resolution Procedure, but the Contractor shall, nevertheless, be required to carry out or implement the Elective Service within the prescribed timescales notwithstanding the dispute, where such dispute concerns the cost of the Elective Service.

SCHEDULE 24

CHANGE PROTOCOL

Appendix 1, Part 1

Catalogue

SCHEDULE 24

CHANGE PROTOCOL

Appendix 1, Part 2

Small Value Change Notice

SCHEDULE 24

CHANGE PROTOCOL

Appendix 2, Part 1

Unit Cost for Construction or Installation Costs

SCHEDULE 24

CHANGE PROTOCOL

Appendix 2, Part 2

Unit Costs for Lifecycle Maintenance

SCHEDULE 24

CHANGE PROTOCOL

Appendix 2, Part 3

Consultant, Sub-Contractor or Supplier Fees

SCHEDULE 24

CHANGE PROTOCOL

Appendix 2, Part 4

Unit Costs for Labour Rates

[SCHEDULE 25

SCHEDULE 24

CHANGE PROTOCOL

Appendix 3

Elective Services Catalogue

- 1 Portable Appliance Testing (PAT) in accordance with the Health and Safety Regime, all Guidance and Legislation.
- 2 Disposal of hazardous waste from the Schools' science and technology laboratories.
- 3 Provision of "suite-d" keys; key replacement.
- 4 Replacement of access passes.
- 5 Provision of additional training to School Entities and their Soft Services Providers.
- 6 [MORE TO BE ADDED BY BIDDERS.]

SCHEDULE 25

[UTILITIES AGREEMENTS]

The Corporate Seal of the Secretary of State for Education, herewith affixed, is authenticated by:

.....
Authorised by the Secretary of State

THE COMMON SEAL of }
[CONTRACTOR] LIMITED was }
affixed in the presence of: }

~~Director/Company Secretary~~

Director/Company Secretary

Document comparison by Workshare Professional on 05 June 2013 16:31:21

Input:	
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Description	PSBP Project Agreement 060613
Rendering set	standard

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<u>Insertion</u>	
Deletion	
Moved from	
<u>Moved to</u>	
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Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

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Deletions	1964
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Moved to	12
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