



Department for Levelling Up,  
Housing & Communities



**European Union**

European Regional  
Development Fund

**DRAFT: THIS IS NOT AN OFFER**

# Example European Regional Development Fund Capital Funding Agreement

March 2019

This document is a draft of the standard European Regional Development Fund funding agreement used for Capital projects. This document is provided for illustrative purposes only. The terms on which a Grant Recipient is offered funding may be subject to change and will include additional project specific conditions.

**[Deed of Grant]**

**Funding Agreement**

between

**The Secretary of State for Levelling Up, Housing and Communities**

and

**[insert Grant Recipient]**

Project Name: **[Insert Project Name]**

Project Number: **[insert Project Number]**

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SCHEDULE 1 THE PROJECT SPECIFIC CONDITIONS

SCHEDULE 2 EXPENDITURE PROFILES

SCHEDULE 3 TARGETS

SCHEDULE 4 UNDERPERFORMANCE METHODOLOGY

SCHEDULE 5 APPLICATION

SCHEDULE 6 THE PLAN

SCHEDULE 7 PROJECT SPECIFICATIONS

[SCHEDULE 8 DEED OF COVENANT]

[SCHEDULE 9 LEGAL CHARGE]

[SCHEDULE 10 DEED OF PRIORITY]

[SCHEDULE 11 DEED OF GUARANTEE]

[SCHEDULE 12 CERTIFICATE OF TITLE]

## PARTIES

1. **THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES** whose principal address is 2 Marsham Street, London SW1P 4DF (**the Secretary of State**); and
2. **[INSERT GRANT RECIPIENT DETAILS] [(INSERT REGISTERED NUMBER IF APPLICABLE)]** of **[INSERT ADDRESS] (Grant Recipient)**.

## BACKGROUND

The Commission of the European Union ('European Commission') has adopted the Operational Programme for England, setting out its contribution to the Union strategy for smart, sustainable and inclusive growth and the achievement of economic, social and territorial cohesion;

The Secretary of State as the managing authority for the Operational Programme pursuant to Article 123(1) of Regulation 1303 wishes to offer the Grant and the Grant Recipient agrees to accept the Grant on the terms and conditions of this Funding Agreement.

This Funding Agreement serves as the document described in Article 125(3)(c) of Regulation 1303, setting out the conditions for support for the operation concerned and the specific requirements concerning the products or services to be delivered under the operation, the financing plan and the time-limit for execution.

## IT IS AGREED THAT:

### 1 DEFINITIONS

In this Funding Agreement the following words and phrases shall have the following meanings:

**"Agreed Activity End Date"** means the date specified as such in the Project Specific Conditions and being the date that all of the Project Activities shall be finished and complete including the Works.

**"Agreed Financial Completion Date"** means the date specified as such in the Project Specific Conditions and being the date that all of the expenditure will have been defrayed.

**"Agreed Project Practical Completion Date"** means the date specified as such in the Project Specific Conditions and being the date by which the Targets shall be achieved.

**["Agreed Project Works Completion Date"** means the date specified as such in the Project Specific Conditions and being the date by which the Works being delivered as part of the Project Activities shall have been certified as practically/substantially complete pursuant to the construction contract.]

**"Application"** means the application for Grant (and any annexures thereto) which is contained in Schedule 5.

**"Approved Use"** means use of an Asset as set out in the Project Specific Conditions.

**“Asset”** means an asset which may be either a Fixed Asset or a Major Asset as appropriate in the relevant context and **“Assets”** shall be construed accordingly.

**“Asset Register Template”** means the asset register template notified to the Grant Recipient.

**“Audit”** means an audit/monitoring verification carried out pursuant to Articles 125 and 127 of Regulation 1303 by the Secretary of State in its role as ‘managing authority’ or the Government Internal Audit Agency in its role as ‘audit authority’, or any audit by the European Commission, European Court of Auditors or, where relevant, the National Audit Office.

**["BREEAM Certificate”** means a certificate issued by a company or assessor authorised for that purpose by the Building Research Establishment in respect of the buildings constructed as part of the Project following the date the Works have been certified as practically complete pursuant to the construction contract confirming that such buildings comply fully with the requirements of the relevant Building Research Establishment Environmental Assessment Method standard prevailing at the date of registration of the Project with the Building Research Establishment.]

**“Calculation Date”** means the earlier of:

- i. 5 years after the practical completion of the improvements to the Fixed Asset which have been funded through the Grant; or
- ii. the date when the Grant Recipient disposes of their remaining interest(s) in the Fixed Asset.

**“Capital Contribution Rate”** means the percentage rate in respect of Eligible Capital Expenditure and is specified in the Project Specific Conditions.

**“Capital Maximum Sum”** means the maximum amount of Grant payable in respect of Eligible Capital Expenditure and is specified in the Project Specific Conditions.

**["Capital Maximum Sum for the Less Developed Region”** means the maximum amount of Grant payable in respect of Eligible Capital Expenditure for the Less Developed Category of Region and is specified in the Project Specific Conditions.]

**["Capital Maximum Sum for the More Developed Region”** means the maximum amount of Grant payable in respect of Eligible Capital Expenditure for the More Developed Category of Region and is specified in the Project Specific Conditions.]

**["Capital Maximum Sum for the Transition Region”** means the maximum amount of Grant payable in respect of Eligible Capital Expenditure for the Transition Category of Region and is specified in the Project Specific Conditions.]

**["Civil Engineering Environmental Quality Assessment and Liability Scheme Certificate”** means a certificate issued by a company or assessor authorised for that purpose by the Civil Engineering Environmental Quality Assessment and Liability Scheme in respect of the engineering works carried out as part of the Project following the date the Works have been certified as practically/substantially complete pursuant to the construction contract confirming that such works comply fully with the requirements of the relevant Civil Engineering Environmental Quality Assessment and Liability Scheme standard prevailing of registration of the Project with the Civil Engineering Environmental Quality Assessment and Liability Scheme]

[**“Certificate of Title”** means a certificate of title evidencing the Grant Recipient’s title to the Site of the Works, the form of which is attached at Schedule 12]

**“Change”** means in relation to the Project as defined in the Application any of the following changes (in accordance with clause 9):-

- (a) a change in the Ownership, Control and Nature of Business of the Grant Recipient;
- (b) a change in the nature or purpose of the Project or in the delivery of the Project, as set out in the Application;
- (c) any change to the Eligible Expenditure;
- (d) any change to the Expenditure Profile;
- (e) any change to any of the Key Milestone Dates;
- (f) any change to any of the Targets;
- (g) any material change to the Project Specifications (that is, more than merely trivial and inconsequential in its consequences).

**“Committed”** means in relation to any Match Funding, either:-

- (a) funding (which shall constitute all or any part of the Match Funding requirement contained in this Funding Agreement) which has been committed to the Grant Recipient in writing pursuant to which a third party makes available an amount to the Grant Recipient and which shall not be subject to any conditions precedent or conditions subsequent which are (in the opinion of the Secretary of State acting reasonably) unacceptable; or
- (b) funding which shall constitute all or any part of the Match Funding requirement contained in this Funding Agreement which shall be provided from the Grant Recipient’s own resources the availability of which shall be evidenced to the Secretary of State.

**“Completion”** means completion of the Project Activities to the satisfaction of the Secretary of State.

**“Completed Project”** means a Project that has been physically completed or fully implemented and in respect of which all related payments have been made by the Grant Recipient and the corresponding public contribution has been paid to the Grant Recipient.

**“Conditions”** means the terms and conditions upon which the Grant is payable as contained in clauses 1 to 27 of the main body of this Funding Agreement and the Project Specific Conditions at Schedule 1.

**“Confidential Information”** means all Personal Data and any information, however it is conveyed, that relates to the business, affairs, developments, trade secrets, know-how, personnel, and suppliers of the owner of the Confidential Information, including all intellectual property rights, together with all information derived from any of the above, and any other information clearly designated as being confidential (whether or

not it is marked "confidential") or which ought reasonably be considered to be confidential.

**“Consents”** includes any approval, authorisation, consent, exemption, licence, permit, permission or registration by of or from any governmental or other authority or any person including but not limited to consents required from the Grant Recipient's landlord (if any), any adjoining owner or any mortgagee of the Site or from the local planning authority in relation to the Project or any part thereof or otherwise required to enable the same to be lawfully carried out and maintained.

**“Contracting Authority”** means any contracting authority as defined in Regulation 3 of the Public Contracts Regulations 2006 or Regulation 2 of the Public Contracts Regulations 2015 (as amended) other than the Secretary of State.

**“Contribution Rate”** means the percentage rate of Eligible Expenditure at which Grant is paid as contained in the Project Specific Conditions and may be the Capital Contribution Rate and/or the Revenue Contribution Rate.

**“Correction”** means an amount to be repaid or withheld from the Grant payable as determined following the finding of an Irregularity and calculated, where relevant, by reference to the published guidelines on flat-rate corrections, for example as set out in the National European Structural and Investment Fund Procurement Requirements and the Guidelines for Determining Financial Corrections.

**“Crown Body”** means any Secretary of State, office or agency of the Crown.

**“Data”** means:-

- (a) the data, text, drawings, diagrams, images or sounds (together with any database made up of any of these) which are embodied in any electronic, magnetic, optical or tangible media, and which are: (i) supplied to the Grant Recipient by or on behalf of the Secretary of State; or (ii) which the Grant Recipient is required to generate, process, store or transmit pursuant to this Funding Agreement; or
- (b) any Personal Data for which the Secretary of State or the Grant Recipient is the Data Controller.

**“Data Controller”** shall have the same meaning as set out in the Data Protection Legislation

**“Data Loss Event”** means any event that results, or may result, in unauthorised access to Personal Data held by the Processor under this Agreement, and/or actual or potential loss and/or destruction of Personal Data in breach of this Agreement, including any Personal Data Breach.

**Data Protection Legislation”** means: (i) the General Data Protection Regulation (Regulation (EU) 2016/679), the Law Enforcement Directive (Directive (EU) 2016/680) and any applicable national implementing Laws as amended from time to time (ii) the Data Protection Act 2018 to the extent that it relates to processing of personal data and privacy; (iii) all applicable Law about the processing of personal data and privacy including where applicable the guidance and codes of practice issued by the Information Commissioner as may be in force from time to time.



**“Data Protection Impact Assessment”** means: an assessment by the Controller of the impact of the envisaged processing on the protection of Personal Data.

**“Data Subject”** shall have the same meaning as set out in the Data Protection Legislation

**“Data Subject Request”** means a request made by, or on behalf of, a Data Subject in accordance with rights granted pursuant to the Data Protection Legislation to access their Personal Data.

**[“Deed of Covenant”** means a deed in the form attached in Schedule 8 relating to the Approved Use of the Fixed Assets.]

**[“Deed of Guarantee”** means a deed in the form attached in Schedule [11]]

**[“Deed of Priority”** means the deed in the form attached at Schedule [10] agreeing the order of priority in respect of the Legal Charge and the Permitted Security.]

**“Delivery Partner”** means a third party that (in collaboration with the Grant Recipient) shall deliver the Project, itself defray expenditure to be claimed and carry out the Project Activities in accordance with clause 4 and which third party is not intended by either party to be providing services or works under a contract for services or works.

**“Disposal”** means the disposal, sale, transfer or the grant of any estate or interest in any Asset including a Lease Disposal, where relevant in the context, and includes the creation of any charge, legal mortgage, debenture, lien or other encumbrance and any contract for a disposal and **“Dispose”** shall be construed accordingly.

**“Eligibility Rules”** means the rules governing eligibility of expenditure for payment of European Regional Development Fund contained in:

Regulation 1301;

Regulation 1303; and

The National European Regional Development Fund Eligibility Rules.

**“Eligible Capital Expenditure”** means the expenditure set out in the profile at Schedule 2.

**“Eligible Expenditure”** means expenditure in relation to this Project that complies in all respects with the Eligibility Rules.

**“Eligible Revenue Expenditure”** means the expenditure set out in the profile at Schedule 2.

**“Environmental Information Regulations”** means the Environmental Information Regulations 2004 (SI No 2004/3391) together with any guidance and/or codes of practice issued by the ‘Information Commissioner’ (as referred to therein) or relevant Government Department in relation to these regulations.

**“Event of Default”** means an event or circumstance as defined by clause 12.1.

**“Excess Profit”** means the payment calculated on the Calculation Date in accordance with paragraph 8.7.

**“Expenditure”** means either capital expenditure or revenue expenditure (as appropriate in the context).

**“Expenditure Profile”** means the information provided by the Grant Recipient detailing the spend forecast for the carrying out of the Project Activities and defrayal of expenditure including the Start Date and the Agreed Financial Completion Date and which is contained in Schedule 2.

**“Final Payment Date”** means the date of the final payment of Grant to the Grant Recipient.

**“Financial Year”** means the calendar year.

**“Fixed Asset”** means any Asset which consists of land and/or buildings, plant, machinery or other thing that is, or is to be, fixed to any land and which is to be acquired, developed, enhanced, constructed and/or installed as part of the Project.

**“Funding Agreement”** means this agreement including the Schedules.

**“Grant”** means the grant of European Regional Development Fund payable pursuant to this Funding Agreement up to the Maximum Sum as set out in the Project Specific Conditions.

**“Grant Claim”** means a claim for Grant using the Secretary of State System on line facility.

**“Grant Recipient Equipment”** means the hardware, computer and telecoms devices and equipment made available by the Grant Recipient or its sub-contractors (but not hired, leased or loaned from the Secretary of State) for the provision of the Project Activities.

**“Grant Recipient Personnel”** means all employees, agents, consultants and contractors of the Grant Recipient and/or of any sub-contractor.

**“Grant Recipient Software”** means software which is owned by or licensed to the Grant Recipient, including software which is or will be used by the Grant Recipient for the purposes of complying with its obligations pursuant to this Funding Agreement.

**“Grant Recipient System”** means the information and communications technology system used by the Grant Recipient in performing its obligations under this Funding Agreement including the Grant Recipient Software, Grant Recipient Equipment and related cabling (but excluding the Secretary of State System).

**“Guidance Note on Revenue Generating Projects”** means the guidance published from time to time by the Secretary of State and contained on the Website, the version subsisting at the date of this Funding Agreement being ESIF-GN-1-004 ERDF Guidance on Revenue Generating Projects v1 (published September 2015).

**“Guidelines for Determining Financial Corrections”** means the Guidelines for determining financial corrections to be made to expenditure co financed by the Structural and Investment Funds from time to time in force and notified to the Grant Recipient by the Secretary of State and which (those subsisting on the date of this Funding Agreement) are:-

- Commission Decision C(2013) 9527 19.12.2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management for non-compliance with the rules on public procurement.

**“Information Communications and Technology Environment”** means the Secretary of State System and the Grant Recipient System.

**“Information”** has the meaning given in the Freedom of Information Act 2000.

**“Information Commissioner”** has the meaning given in the Freedom of Information Act 2000.

**“Instalment Period”** means the period referred to in the Project Specific Conditions.

**“Intellectual Property Right”** means all patents, know-how, registered trademarks, registered designs, utility models, applications and rights to apply for any of the foregoing unregistered design rights, unregistered trademarks, rights to prevent passing off for unfair competition and copyright, database rights, topography rights and any other rights in any invention discovery or process in each case in the United Kingdom and all other countries in the world and together with all renewals and extensions.

**“Interpretative Communication”** means the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02)

**“Irregularity”** means any breach of European Union law, or of national law relating to its application resulting from an act or omission by a Grant Recipient or a Delivery Partner (and/or its agents and subcontractors), which has, or would have, the effect of prejudicing the budget of the European Union by charging an unjustified item of expenditure to the budget of the European Union.

**“Key Milestone Dates”** means those milestones to achieve the Project which are contained in the Project Specific Conditions.

**“Law”** means any applicable law, statute, bye-law, regulation, order, regulatory policy, guidance or industry code, rule of court or directives or requirements of any Regulatory Body, delegated or subordinate legislation or notice of any Regulatory Body.

**“Lease Disposal”** means the grant of a Market Rent Lease.

**["Legal Charge”** means the legal charge to be taken over any Fixed Asset, the form of which is in Schedule [9].]

**["Less Developed Region”** means the geographical areas as defined under Regulation (EU) No 1303/2013 Article 90 and comprising of the areas identified in the Glossary published by the Secretary of State and contained on the Website being the *Glossary for 2014-2020 European Structural and Investment Funds*. The areas within the Less Developed Region covered by this specific Grant Funding Agreement are set out in Schedule 2.]

**“Long Lease”** means a lease [for a term equal to or exceeding [99] years] granted at a premium and reserving either a peppercorn or a nominal rent but which is not a Market Rent Lease.

**“Losses”** means all costs, charges, fees, expenses, fines and losses (including, loss of profit, loss of reputation) and all interest penalties and legal and other professional costs and expenses.

**“Major Asset”** means an Asset which is not a Fixed Asset but has a value as at the date of this Funding Agreement (or date of acquisition if the acquisition is funded (in whole or in part) by this Grant) of at least £5,000.00 (five thousand pounds).

**“Malicious Software”** means any software program or code intended to destroy, interfere with, corrupt, or cause undesired effects on program files, data or other information, executable code or application software macros, whether or not its operation is immediate or delayed, and whether the malicious software is introduced wilfully, negligently or without knowledge of its existence.

**“Market Rent Lease”** means any lease which is granted at a full market rent namely not for a nominal rent or at a significant undervalue.

**“Market Value”** means the sale value of the Fixed Asset at the Calculation Date as defined in the Practice Statement Number PS3.2 of the Royal Institute of Chartered Surveyors Appraisal and Valuation Standards (as varied from time to time) based on the assumption that the Fixed Asset is sold on the open market with:

- (a) with a good and marketable title;
- (b) free from all charges and other encumbrances over the land; and
- (c) with the benefit of any subsisting leases,

and excluding any Proceeds.

**“Match Funding”** means the contribution to the Project to meet the balance of Eligible Expenditure not supported by Grant and the Match Funding details are contained in the Project Specific Conditions.

**[“Match Funding Longstop Date”** means the last date by which the Grant Recipient is to provide evidence to the Secretary of State that any Match Funding listed as indicative is fully Committed.]

**“Material Breach”** means a breach of this Funding Agreement (including an anticipatory breach) which is not minimal or trivial in its consequences as further set out in clause 12.

**“Maximum Sum”** means the maximum amount of Grant to be provided by the Secretary of State for the support of the Project and includes the Capital Maximum Sum and the Revenue Maximum Sum.

**[“More Developed Region”** means the geographical areas as defined under Regulation (EU) No 1303/2013 Article 90 and comprising of the areas identified in the Glossary published by the Secretary of State and contained on the Website being the *Glossary for 2014-2020 European Structural and Investment Funds*. The areas within the More Developed Region covered by this specific Grant Funding Agreement are set out in Schedule 2.]

**“National European Regional Development Fund Document Retention Guidance”** means the guidance published from time to time by the Secretary of State

and contained on the Website, the version subsisting at the date of this Funding Agreement being ESIF-GN-1-008 ERDF Document Retention Guidance v1 (published February 2016)..

**“National European Regional Development Fund Eligibility Rules”** means the National Eligibility Rules published from time to time by the Secretary of State and contained on the Website, the version subsisting at the date of this Funding Agreement being ESIF-GN-1-012 National ERDF Eligibility Rules v1 (published 20 March 2015).

**“National European Regional Development Fund Publicity Guidance”** means the guidance on publicity and the branding guidelines for European Regional Development Fund published from time to time by the Secretary of State on the Website, the version subsisting at the date of this Funding Agreement being ESIF-GN-1-005 ESIF Branding and Publicity Requirements v7 (published 25 July 2017).

**“National European Regional Development Fund State Aid Law Guidance”** means the guidance published from time to time by the Secretary of State and contained on the Website, the version subsisting at the date of this Funding Agreement being ESIF-GN-1-006 ERDF State Aid Law Guidance v2 (published 7 January 2016).

**“National European Structural and Investment Funds Procurement Requirements”** means the requirements published from time to time by the Secretary of State and contained on the Website, the version subsisting at the date of this Funding Agreement being ESIF-GN-1-001 ESIF national Procurement Requirements v5 (published 20 February 2017)

**“National Rules”** means the national rules set out in [chapter 6] of the National European Structural and Investment Funds Procurement Requirements as published from time to time.

**“Not Eligible”** means expenditure that is not Eligible Expenditure.

**“Ownership, Control and Nature of Business”** shall be construed in accordance with section 840 of the Income and Corporation Taxes Act 1988 and section 1162 of the Companies Act 2006 and for the avoidance of doubt shall include an evaluation of dominant influence and shadow directorships in the Grant Recipient from time to time.

**“Parties”** means the Secretary of State and the Grant Recipient.

**“Permitted Security”** any charge, legal mortgage, debenture, lien or other encumbrance over any Asset which has been approved by the Secretary of State the details of which are set out fully in the Project Specific Conditions at Schedule 1.

**“Personal Data”** shall have the same meaning as set out in the Data Protection Legislation

**“Plan”** means the plan attached at Schedule 6.

**“Planned Disposal”** means a Lease Disposal of any Fixed Asset (or any part of the Fixed Asset) or the grant of a licence to occupy by the Grant Recipient which is intended as a planned step in the implementation of the Project, was referred to as such in the Application, and the details of which are set out fully in the Project Specific Conditions at Schedule 1;

**“Preliminary Expenditure”** means Eligible Expenditure in relation to site investigation works, site surveys, environmental appraisals and/or feasibility studies carried out in relation to the Project.

**“Prescribed Manner”** means where provision is made for any matter or value to be ascertained or any dispute to be determined "in the Prescribed Manner" the same shall be determined:

- (a) by agreement between the Secretary of State and the Grant Recipient; or
- (b) in default of such agreement by an independent chartered surveyor or (as appropriate) independent valuer to be appointed by agreement between the Secretary of State and the Grant Recipient or, in the absence of such agreement, to be nominated upon the application of the Secretary of State or the Grant Recipient by the President (or other appropriate officer) of the Royal Institution of Chartered Surveyors; and

- (c) any such independent chartered surveyor or independent valuer shall:

act as an expert;

afford to the Secretary of State and the Grant Recipient a reasonable opportunity to make representations (but not so as to prejudice the expert's right to reach his decision solely on the basis of his own expertise); and

determine who shall bear the fees and expenses of the expert and the costs of his appointment.

**“Proceeds”** means all proceeds received or receivable from a Disposal of the Fixed Asset (or part thereof) prior to the Calculation Date and all proceeds received or receivable in respect of the rental of the Fixed Asset prior to the Calculation Date.

**“Process”** has the meaning given to it under the Data Protection Legislation

**“Procurement Law”** includes, but is not restricted to EC Directives 2004/18/EC, 2004/17/EC and 2007/66/EC, the Public Contracts Regulations 2006 (SI No 5/2006), as amended, Directive 2014/24/EU the Public Contracts Regulations 2015 and the Utilities Contracts Regulations 2006 (SI No 6/2006), as amended, and includes the Interpretative Communication , the Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union’.

**“Project”** means the project fully described in the Application.

**“Project Activities”** means all activities to be carried out in implementing the Project and includes any Works to be carried out in relation to any Fixed Assets.

**“Project Specifications”** means the drawings and specifications describing the Works which are contained in Schedule 7 and which have been approved by the Secretary of State in writing, or such revised drawings and specifications as the Secretary of State may from time to time approve in accordance with the provisions of this Funding Agreement.

**“Project Specific Conditions”** means those conditions which are specific to the Project and are contained in Schedule 1.

**“Project Specific Eligible Expenditure”** means Eligible Expenditure which is specific to this Project and is contained in Schedule 2.

**“Project Change Request Form”** means the prescribed form for the purpose of requesting consent to a Change determined from time to time by the Secretary of State.

**“Public Sector Financial Assistance”** includes all funding received or receivable by the Grant Recipient from public sector bodies including for this purpose funding from the European Commission, government bodies (whether national or local) or bodies in receipt of lottery funds from the National Lottery Distribution Fund pursuant to the National Lotteries Acts 1993 and 1998.

**“Regulation 480”** means Commission Delegated Regulation (EU) No 480/2014 of 3 March 2014 supplementing Regulation 1303.

**“Regulation 821”** means Commission Implementing Regulation (EU) No 821/2014 of 28 July 2014 supplementing Regulation 1303.

**“Regulation 1301”** means Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013, on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal, as amended.

**“Regulation 1303”** means Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 which sets out common provisions on the Structural and Investment Funds, as amended.

**“Regulatory Bodies”** means those government departments and regulatory, statutory and other entities, committees and bodies which, whether under statute, rules, regulations, codes of practice or otherwise, are entitled to regulate, investigate, or influence the matters dealt with in this Funding Agreement or any other affairs of the Secretary of State and "Regulatory Body" shall be construed accordingly.

**“Revenue Contribution Rate”** means the percentage rate in respect of Eligible Revenue Expenditure as is specified the Project Specific Conditions at Schedule 1.

**“Revenue Maximum Sum”** means the maximum amount of Grant payable in respect of Eligible Revenue Expenditure as is specified in the Project Specific Conditions.

**[“Revenue Maximum Sum for the Less Developed Region”** means the maximum amount of Grant payable in respect of Eligible Revenue Expenditure for the Less Developed Category of Region and is specified in the Project Specific Conditions.]

**[“Revenue Maximum Sum for the More Developed Region”** means the maximum amount of Grant payable in respect of Eligible Revenue Expenditure for the More Developed Category of Region and is specified in the Project Specific Conditions.]

**[“Revenue Maximum Sum for the Transition Region”** means the maximum amount of Grant payable in respect of Eligible Revenue Expenditure for the Transition Category of Region and is specified in the Project Specific Conditions.]

**“Secretary of State System”** means the Secretary of State’s computing environment (consisting of hardware, software and/or telecommunications networks or equipment) used by the Secretary of State or the Grant Recipient in connection with this Funding

Agreement which is owned by or licensed to the Secretary of State by a third party and which interfaces with the Grant Recipient System or which is necessary for the Secretary of State to comply with the terms of this Funding Agreement.

**“Site”** means the land comprising [ ] hectares shown for the purpose of identification only edged in red on the Plan including any part thereof and also includes any estate or interest therein.

**“Small to Medium Sized Enterprise” or “SME”** means a small to medium sized enterprise as set out in the ‘General Block Exemption Regulation’ (Commission Regulation (EU) No 651/2014).

**“State Aid Law”** means the law embodied in Articles 107 -109 of Section 2, Title VII, of the Common Rules on Competition, Taxation and Approximation of Laws- Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union’.

**“Start Date”** means the date specified as such in the Project Specific Conditions being the earliest date that expenditure incurred by the Grant Recipient in relation to the Project that can be Eligible Expenditure.

**“Structural and Investment Funds”** means together the European Regional Development Fund (ERDF) and the European Social Fund (ESF).

**“Structural and Investment Funds Regulations”** means Regulation 1301, Regulation 1303 and any delegated acts or implementing acts adopted under those Regulations.

**“Sub-processor”** means any third Party appointed to process Personal Data related to this Agreement on behalf of the Grant Recipient

**“Sustainable Development”** means social progress which recognises the needs of everyone, effective protection of the environment, prudent use of natural resources and economic development that is inclusive, efficient and stable.

**“Targets”** means the outputs and results identified and detailed in the milestone table contained in the Project Specific Conditions and those specified in Schedule 3 as defined in ESIF-GN-1-002 ERDF output Indicators Definition Guidance v6 (published 27 June 2018) and contained on the Website.

**“Third Party Software”** means software which is owned or licensed by any third party which is or will be used by the Grant Recipient for the purposes of this Funding Agreement.

**“Transaction List”** means the transaction checklist relevant to a particular Grant Claim as determined by the Secretary of State.

**[“Transition Region”** means the geographical areas as defined under Regulation (EU) No 1303/2013 Article 90 and comprising of the areas identified in the Glossary published by the Secretary of State and contained on the Website being the *Glossary for 2014-2020 European Structural and Investment Funds*. The areas within the Transition Region covered by this specific Grant Funding Agreement are set out in Schedule 2.]



**“Useful Economic Life”** means the period of years following the Agreed Financial Completion Date that any Asset shall be used for the Approved Use as set out in Schedule 1.

**“Website”** means the national website for the European Regional Development Fund Programme in England: <https://www.gov.uk/european-growth-funding>.

**“Working Day”** means any day from Monday to Friday (inclusive) which is not Christmas Day, Good Friday or a statutory bank holiday in England.

**“Works”** means any works of construction and/or demolition and/or any Works in relation to a Fixed Asset which are described in the Project Specifications and which form part of Project Activities

## **2 INTERPRETATION**

In this Funding Agreement:

- 2.1** reference to any statute or legislation shall include any statutory extension or modification, amendment or re-enactment of such statutes and include all instruments, orders, bye-laws and regulations for the time being made, issued or given thereunder or deriving validity therefrom, and all other legislation of the European Union that is directly applicable to the United Kingdom;
- 2.2** reference to any clause, sub-clause, paragraph, sub-paragraph or schedule without further designation shall be construed as a reference to the clause, sub-clause, paragraph, sub-paragraph or schedule to this Funding Agreement so numbered;
- 2.3** reference to 'this Funding Agreement' includes any variations made from time to time pursuant to these terms;
- 2.4** reference to “Published” by the Secretary of State shall include an electronic version contained on the Website;
- 2.5** reference to “including” shall be construed so as not to limit the generality of any words or expressions in connection with which it is used;
- 2.6** reference to “determined” or “determine” means, unless the contrary is indicated a determination made at the discretion of the person making it;
- 2.7** where the consent approval or agreement of the Secretary of State required pursuant to the terms of this Funding Agreement, it shall not be construed as having been given unless provided in writing;
- 2.8** words importing one gender shall include both genders and the singular shall include the plural and vice versa;
- 2.9** the Guidelines for Determining Financial Corrections and the National European Regional Development Fund Eligibility Rules shall have the same force and effect as if expressly set out in the body of this Funding Agreement;
- 2.10** the headings in this Funding Agreement shall not affect its interpretation;
- 2.11** In the event of a conflict between the following elements comprising this Funding Agreement the priority shall prevail in the following descending order:

The conditions set out in the Project Specific Conditions at Schedule 1;

The conditions set out in the main body of this Funding Agreement;

The Application.

### **3 GRANT**

**3.1** In consideration of the Parties' respective obligations contained in this Funding Agreement the Secretary of State offers the Grant and the Grant Recipient accepts the Grant up to the Maximum Sum on the terms and conditions of this Funding Agreement.

**3.2** Grant will only be paid in respect of Eligible Expenditure.

**3.3** Eligible Expenditure excludes:-

payments made by the Grant Recipient (or Delivery Partners) that are Not Eligible;

payments that are the subject of an Irregularity or a suspected Irregularity.

**3.4** Subject to entering into this Funding Agreement Eligible Expenditure that has been defrayed on or after the Start Date may be claimed pursuant to this Funding Agreement. For the avoidance of doubt the reference to Grant and the provisions of this Funding Agreement shall apply to all claims and Expenditure beginning on the Start Date. If the Funding Agreement is not entered into for any reason there shall be no expectation of Grant and any expenditure incurred in that case shall be entirely for the account and at the risk of the applicant.

### **4 THE APPLICATION AND ACCEPTANCE OF GRANT TERMS**

**4.1** The Grant Recipient warrants to the Secretary of State that the Application is accurate in all respects having made proper and full enquiry in relation to the same. The Secretary of State has based its decision to offer and pay the Grant (and has relied) upon the representations made by the Grant Recipient in the Application and in all documents and information provided as part of the appraisal process. No disclaimer or other statement that precludes the right of any person to rely upon the Application or any other document that forms part of the Application, or has a similar effect, shall apply with respect to the Secretary of State or affect the Secretary of State's right to enforce any provision of the Funding Agreement.

**4.2** For the avoidance of doubt, clause 4.1 is intended to ensure that:-

(a) no disclaimer of liability for the contents of the Application affects the Secretary of State's right to recover any sum under this Funding Agreement; and

(b) there is reserved to the Secretary of State (notwithstanding clause 27.12) any rights of action or remedies for any mistake, negligent misstatement, misrepresentation or error of judgment made in the Application upon which the Secretary of State has relied in agreeing to provide Grant to the Grant Recipient.

**4.3** The Grant Recipient accepts and agrees to all of the terms having made full and proper enquiry before giving the warranties contained in this Funding Agreement.

**4.4** The Grant Recipient acknowledges that the Grant has been offered to it to carry out the Project Activities specified within the Application and achieve the Targets within

the time limits set out in this Funding Agreement and the Key Milestone Dates set out in the table contained in the Project Specific Conditions.

**4.5** The Grant Recipient may with the consent of the Secretary of State task a Delivery Partner to carry out certain of the Project Activities provided that such shall not in any way reduce any of the obligations or liability of the Grant Recipient under this Funding Agreement. If Consent is given the Delivery Partner shall be named in the Project Specific Conditions.

**4.6** For the avoidance of doubt the Grant Recipient shall be liable for the acts of its Delivery Partner including any Corrections resulting therefrom.

## **5 GRANT CLAIMS**

### **5.1 Amount of Grant payable**

- (a) The total amount of Grant payable in respect of Eligible Capital Expenditure will be either the Capital Maximum Sum, or an amount calculated by applying the Capital Contribution Rate to the actual Eligible Capital Expenditure, whichever is the lower.
- (b) The total amount of Grant payable in respect of Eligible Revenue Expenditure will be either the Revenue Maximum Sum, or an amount calculated by applying the Revenue Contribution Rate to the actual Eligible Revenue Expenditure, whichever is the lower.
- (c) The total amount of Grant paid to the Grant Recipient shall not exceed the Maximum Sum.
- (d) [The total amount of Grant payable in respect of Eligible Revenue Expenditure for the Less Developed Category of Region shall not exceed the Revenue Maximum Sum for the Less Developed Region].
- (e) [The total amount of Grant payable in respect of Eligible Revenue Expenditure of the More Developed Region shall not exceed the Revenue Maximum Sum for the More Developed Region].
- (f) [The total amount of Grant payable in respect of Eligible Revenue Expenditure for the Transition Category of Region shall not exceed the Revenue Maximum Sum for the Transition Region].
- (g) [The total amount of Grant payable in respect of Eligible Capital Expenditure for the Less Developed Category of Region shall not exceed the Capital Maximum Sum for the Less Developed Region].
- (h) [The total amount of Grant payable in respect of Eligible Capital Expenditure of the More Developed Region shall not exceed the Capital Maximum Sum for the More Developed Region].
- (i) [The total amount of Grant payable in respect of Eligible Capital Expenditure for the Transition Category of Region shall not exceed the Capital Maximum Sum for the Transition Region].

### **5.2 Match Funding Arrangements**

- (a) The payment of Grant is conditional upon the receipt by the Grant Recipient of the Match Funding or the Match Funding being Committed.
- (b) The Match Funding shall be compliant with the provisions of the Eligibility Rules.
- (c) The Grant Recipient shall notify the Secretary of State in writing immediately of any failure by the Grant Recipient or a third party to make a contribution due under the Match Funding, or any circumstance that affects or might affect the payment or availability of Match Funding.

### **5.3 Conditions Precedent to the payment of Grant**

The Secretary of State will not make the first payment of Grant and/or any subsequent payment of Grant unless all of the following preconditions have been complied with:-

- (a) the relevant Grant Claim is made on the Secretary of State System on line facility;
- (b) the expenditure is Eligible Expenditure;
- (c) the Grant Recipient has satisfied the Secretary of State that the Grant Recipient has sufficient Match Funding Committed at the Start Date to achieve Completion of the Project by the Agreed Activity End Date;
- (d) the Grant Recipient has satisfied the Secretary of State that the Grant Recipient has all funding needed to pay for expenditure in relation to the Project which is Not Eligible Expenditure;
- (e) that Eligible Expenditure has been defrayed (that is that Eligible Expenditure has been incurred and that payment has been made by the Grant Recipient or a Delivery Partner) in respect of any Eligible Expenditure to which a Grant Claim relates;
- (f) any Preliminary Expenditure which is Eligible Expenditure has been used in accordance with any conditions relating to it;
- (g) [a Certificate of Title in respect of the ownership of the Site and the Grant Recipient's estate or interest therein (being either the freehold estate or a Long Lease) has been issued to the Secretary of State by a firm of solicitors acceptable to the Secretary of State;] **OR** [the Grant Recipient has procured an opinion letter (from its in-house advisers or a firm of Solicitors appointed by it) in a form confirmed as being acceptable to the Secretary of State, as to the title to any Fixed Asset]
- (h) [the Grant Recipient has entered into the Deed of Covenant and entered a restriction on title at the Land Registry and provided evidence of the same];
- (i) the Grant Recipient shall have supplied to the Secretary of State and the Secretary of State shall have approved the Project Specifications and the Secretary of State shall have satisfied itself that the Works to which the Grant Claim relates have been carried out;
- (j) [the provisions of clause 8.5 below in respect of the Legal Charge have been complied with in full];

- (k) [the Deed of Guarantee has been executed simultaneously with this Funding Agreement.]
- (l) the Conditions have been fully complied with provided that the Secretary of State may waive in whole or in part any Condition/s without prejudicing the Secretary of State's right to require subsequent fulfilment of such Condition/s

provided always that the payment of a Grant Claim shall not operate as a waiver of any of the obligations in this clause 5.3 or exclude the right for the Secretary of State to exercise any of its rights under this Funding Agreement.

#### **5.4 Grant Claims Procedure**

- (a) The Grant Recipient shall make all Grant Claims in arrears, for each Instalment Period.
- (b) The Grant Recipient shall provide a forecast of the amount of Grant to be claimed for an Instalment Period in accordance with paragraph (c) by the 7<sup>th</sup> Working Day of the month following the end of the Instalment Period for which the Grant Claim will be made.
- (c) Except for the final Grant Claim, each Grant Claim is to be submitted by the 20<sup>th</sup> Working Day of the month following the end of the Instalment Period for which the Grant Claim is made.
- (d) The first Grant Claim made at the end of the first Instalment Period shall relate to all Eligible Expenditure incurred and paid by the Grant Recipient from the Start Date. Subsequent Grant Claims shall relate to all Eligible Expenditure incurred and paid by the Grant Recipient in an Instalment Period.
- (e) Each Grant Claim is to be submitted using the Secretary of State System on line facility. Each Grant Claim shall include accounting documents of verifiable value (which shall include the Transaction List) in such format and detail as may be acceptable to the Secretary of State relating to the amount claimed in such Grant Claim.
- (f) The Secretary of State will normally pay a Grant Claim within 40 Working Days of receipt, but this is subject to:
  - (i) The Grant Recipient submitting a forecast in accordance with paragraph (b) above;
  - (ii) The Grant Claim being submitted by the deadline referred to in paragraph (c) above; and
  - (iii) the Grant Recipient satisfactorily meeting any request for further particulars about the Eligible Expenditure specified in the Grant Claim or any other details provided for in the Grant Claim.
- (g) The time for payment of the Grant Claim shall not be of the essence. The Secretary of State shall have no liability to the Grant Recipient for any Losses caused by a delay in the payment of a Grant Claim howsoever arising.

- (h) The Grant Recipient must notify the Secretary of State promptly if at any time it becomes aware that it is unable to make a Grant Claim in accordance with the Expenditure Profile.
- (i) A progress report in respect of the Project must be submitted with each Grant Claim, and at such other times as the Secretary of State may notify to the Grant Recipient.
- (j) By submitting a Grant Claim the Grant Recipient warrants to the Secretary of State that there is no Event of Default or Material Breach subsisting by reference to the facts and circumstances existing on each such date.

## **5.5 Retention of Grant**

Without prejudice to any other provision of this Funding Agreement the Secretary of State will retain [10 ]% of the Grant which shall not be released unless and until the following events have occurred:-

- (a) Completion of the Project Activities;
- (b) the Secretary of State has received, and is satisfied with, the final monitoring report following the final monitoring visit;
- (c) all audit issues outstanding are resolved; and

provided always that the release of the retention shall not operate as an acknowledgement or waiver and shall not preclude the Secretary of State from exercising any of its rights under this Funding Agreement.

## **6 THE EXPENDITURE PROFILE**

**6.1** If in any Financial Year ("the relevant year") there is a shortfall in the amount of Eligible Expenditure by reference to the amount planned in the Expenditure Profile, the Secretary of State will be under no obligation to pay Grant for any additional Eligible Expenditure in the following year or any later Financial Year.

**6.2** If in any Financial Year (the "relevant year") there is an overspend in the amount of Eligible Expenditure by reference to the amount planned in the Expenditure Profile, the Secretary of State will be under no obligation to pay Grant in the following year or any later Financial Year which was overspent in any relevant year.

## **7 DECOMMITMENT OF EUROPEAN REGIONAL DEVELOPMENT FUND RESOURCES**

**7.1** The Grant Recipient acknowledges that the financial consequences that flow from a departure from the Expenditure Profile in any financial year could include the loss of European Regional Development Fund resources allocated for the Operational Programme (if in that year there is under-spending for the Operational Programme as a whole).

**7.2** If during any Financial Year of the Operational Programme the Secretary of State is reasonably satisfied that there will be a shortfall in Eligible Expenditure and that the Grant Recipient will be unable to make up that shortfall then, the Secretary of State may reduce the Grant allocated for the Project and use the amount of the reduction for any other purpose of the Operational Programme. The amount to be re-allocated under

these circumstances is determinable by the Secretary of State, but may not exceed the amount of the anticipated shortfall in Eligible Expenditure.

- 7.3** Where the right reserved in clause 7.2 arises under circumstances that also entitle the Secretary of State to exercise the rights reserved in clause 12, the right reserved to the Secretary of State in clause 7.2 is exercisable in addition and without prejudice to the exercise of the rights reserved to the Secretary of State in clause 12.

## **8 PROVISIONS RELATING TO ANY ASSETS**

### **8.1 Inventory of the Assets**

Using the Asset Register Template the Grant Recipient must establish and maintain an inventory of all of the Assets. The provisions of clause 14.5 shall apply to all Assets.

### **8.2 Change of use of any Asset**

- (a) The Grant Recipient covenants with the Secretary of State that it will not use any Asset for any purpose other than the Approved Use throughout the Useful Economic Life of the Asset.
- (b) During the Useful Economic Life of each Asset, the Grant Recipient shall not cease to use the Fixed Asset or the Major Asset, or any part of the Asset for the Approved Use without the prior written consent of the Secretary of State. If consent is given, it may be subject to any conditions which the Secretary of State may wish to impose. Such conditions may include repayment by the Grant Recipient to the Secretary of State of all or part of the Grant paid to the Grant Recipient under this Funding Agreement.

### **8.3 Disposal of any Asset**

The conditions of this clause 8.3 shall apply throughout the Useful Economic Life of any Asset:

- (a) In respect of any Planned Disposal, the Grant Recipient need not seek the prior written consent of the Secretary of State to such Planned Disposal, provided the Grant Recipient can demonstrate that the disposal meets the definition of a Planned Disposal as agreed in accordance with this Funding Agreement [and provided that the Grant Recipient has procured from the disponent a deed of covenant in favour of the Secretary of State in similar terms to the Deed of Covenant in accordance with clause 8.4(b) below].
- (b) Further to clause 8.3(a) above, where the Grant Recipient intends to make a Planned Disposal the Grant Recipient shall notify to the principal contact listed at paragraph 2 of the Project Specific Conditions at Schedule 1 of the Funding Agreement and any other party nominated by the Secretary of State in good time prior to such Planned Disposal, supplying evidence that such disposal meets the definition of a Planned Disposal as set out herein, and the Secretary of State shall promptly supply to the Grant Recipient a letter addressed to the relevant Land Registry consenting to the disposal.
- (c) [In respect of any Disposal which is not a Planned Disposal (including any Lease Disposal which is not a Planned Disposal), the Grant Recipient must not, during the Useful Economic Life of an Asset, dispose of any interest in any Asset without the prior written consent of the Secretary of State.] [The Grant Recipient

must not Dispose of any interest in any Asset without the prior written consent of the Secretary of State.] If the Secretary of State grants consent to a Disposal, such consent may be subject to satisfaction of certain conditions, to be determined by the Secretary of State.

- (d) Where the Grant Recipient Disposes of any interest in any Asset without the prior written consent of the Secretary of State, then the proceeds of the Disposal (limited to the total amount paid by the Secretary of State to the Grant Recipient under this Funding Agreement) shall be held on trust by the Grant Recipient for the benefit of the Secretary of State.
- (e) The liability under clause 0 is separate from the liability to comply with any decision of the Secretary of State under clause 12 to require repayment of the whole or any part of the amount paid of the Grant, to the Grant Recipient (but subject to clause 27.12 below).
- (f) The Grant Recipient shall provide to the Secretary of State as part of the progress report referred to in clause 0 information in relation to any Disposals which it either intends to make or has made with the prior written consent of the Secretary of State at the date of such progress report.

#### **8.4 [Deed of Covenant and Restriction on Title**

In order to protect the Approved Use and the Secretary of State's interest in any Fixed Asset the following provisions regarding the change of use/disposal of any Fixed Asset shall apply:

- (a) The Grant Recipient shall execute a Deed of Covenant in relation to the Approved Use. Where a Fixed Asset includes a freehold or leasehold interest in land and/or buildings then within 10 Working Days of the date of the Funding Agreement the Grant Recipient will apply to the Land Registry to register the Deed of Covenant and a restriction on the registers of title in the terms set out in the Deed of Covenant, and the Grant Recipient shall supply, within 5 Working Days of completion of registration of the application, a copy of the updated registered title to the Fixed Asset to the principal contact listed at paragraph 2 of the Project Specific Conditions at Schedule 1 of the Funding Agreement and to any other party nominated by the Secretary of State.
- (b) Without prejudice to clause 8.3, as a condition of any Disposal of the whole or any part of any Fixed Asset during the Useful Economic Life of such Asset, the Grant Recipient shall procure that the disponent executes a deed of covenant in similar terms to the Deed of Covenant whereby the Grant Recipient and any successor in title covenants to use the Fixed Assets for the Approved Use only, during the Useful Economic Life of the Fixed Asset.]

#### **8.5 [Legal Charge**

- (a) The Recipient shall, as a condition precedent to the payment of any instalment of Grant, execute a Legal Charge in favour of the Secretary of State in the form contained in Schedule [9] (subject to appropriate adjustments to be made by the Secretary of State) over any Fixed Asset or Assets to secure:
  - (i) repayment of Grant pursuant to all or any of clauses 8.2(b), 8.3(d), 12.3, 12.7, 12.8 and 12.9; and



- (ii) payment of Excess Profit where applicable.
- (b) The Grant Recipient must take all such steps as are necessary to complete and register the Legal Charge within the appropriate priority period at Companies House and at the Land Registry and the Grant Recipient shall, within 5 Working Days of completion of registration of the Legal Charge, supply a copy of the updated registered title to the Fixed Asset to the principal contact listed at paragraph 2 of the Project Specific Conditions at Schedule 1 of the Funding Agreement and to any other party nominated by the Secretary of State ]

## 8.6 Project Works

The Grant Recipient agrees with the Secretary of State that:

- (a) it shall not carry out any Project Activities upon the Site without having obtained all necessary Consents for such activities and in particular shall not carry out any Works constituting development for which planning permission is required under the Town and Country Planning Act 1990 without having obtained detailed planning consent for such Works, and shall if requested by the Secretary of State produce to it such documents or copy documents as the Secretary of State may require to demonstrate satisfaction of its obligations under this paragraph;
- (b) it shall at all times throughout the Project comply with all Consents including the relevant Planning Consent;
- (c) it shall prior to the submission of any planning application, submit a copy to the Secretary of State for approval;
- (d) it shall permit the Secretary of State and its authorised representatives to attend any Project meetings including any Site meetings with the Grant Recipient's building contractor;
- (e) it shall permit the Secretary of State and its authorised representatives to visit the Site upon reasonable notice to view the Works throughout the lifetime of the Project;
- (f) it shall use all reasonable endeavours to ensure that the construction and operation of the Project reflect the overall principles of Sustainable Development;
- (g) it shall ensure that the Works comply with Building Research Establishment Environmental Assessment Method requirements by undertaking a Design and Procurement assessment and a post construction review. Each assessment shall achieve as a minimum [a "very good"] [an "excellent"] standard and the Grant Recipient will keep the Secretary of State fully informed as to the progress of the procedure. The Grant Recipient shall supply the Secretary of State with certified copies of the relevant Building Research Establishment Environmental Assessment Method Certificate as soon as it is received by the Grant Recipient and in any event within six months of Completion.
- (h) [it shall ensure that the Works comply with the Civil Engineering Environmental Quality Assessment and Liability Scheme (CEEQUAL) requirements by submitting in a timely fashion a Civil Engineering Environmental Quality Assessment and Liability Scheme assessment registration form to the Civil Engineering Environmental Quality Assessment and Liability Scheme and using

a qualified Civil Engineering Environmental Quality Assessment and Liability Scheme assessor to monitor the Project and liaise with the verifier appointed by Civil Engineering Environmental Quality Assessment and Liability Scheme for obtaining a Civil Engineering Environmental Quality Assessment and Liability Scheme Whole Project Award. The Project shall achieve as a minimum an ["excellent"] Whole Project Award and the Grant Recipient will keep the Department for Levelling Up, Housing and Communities informed as to the progress in relation thereto.]

## 8.7 Excess Profit

- (a) The end value is [£ ] ("End Value") this being the estimated sale value of the Fixed Asset at the date of practical completion based on the assumption that the Fixed Asset is sold on the open market:

with a good and marketable title;

free from all charges and other encumbrances over the land; and

with the benefit of any subsisting leases

and includes an uplift of [ ]% which represents the expected profit.

- (b) On the Calculation Date, any Excess Profit shall become payable.

- (c) The Excess Profit shall be calculated using the formula:

$$50\% \times ((P + MV) - (EV + V))$$

Where:

"P" means all Proceeds

"MV" means the Market Value of the Disposal of the Grant Recipient's interests in the Fixed Asset.

"EV" means the End Value.

"V" means reasonable costs of valuation

- (d) Where the product of the calculation is a positive amount, this shall be recoverable as a contractual debt, with interest, unless paid to the Secretary of State within 20 Working Days of the Calculation Date. Where the product of the calculation is a negative amount, no payment is required.
- (e) Market Value and Proceeds shall exclude any fixtures and fittings which were not included within the State Aid eligible costs calculation and that have been installed by the Grant Recipient at their own cost and rental sums which can be demonstrated to be directly attributable to such fixtures and fittings.
- (f) Where there is any dispute about the parts of the Fixed Asset supported through the Grant, the parties shall refer to the State Aid eligible costs calculation for the Project.

- (g) If the parties cannot agree the Market Value, then this will be determined in the Prescribed Manner.
- (h) In this clause “Disposal” means the sale or long lease of the Fixed Asset, or any part of thereof, by the Grant Recipient and Disposes shall be construed accordingly.

## **9 CHANGES TO THE PROJECT**

**9.1** All Changes must be approved by the Secretary of State prior to the relevant Change being deemed to be effective. The Grant Recipient shall request the Change on a Project Change Request Form. The Secretary of State shall either agree to the change request or reject the change request within 60 days of the date of the Project Change Request Form.

**9.2** Until such time as a Change is made in accordance with this clause, the parties shall, unless otherwise agreed in writing, continue to perform this Funding Agreement in compliance with its terms before such Change.

## **10 LEGISLATION, ESIF PROCUREMENT REQUIREMENTS, AND STATE AID LAW**

### **10.1 General**

- (a) The Grant Recipient must comply and secure compliance with the Structural and Investment Funds Regulations and the Grant Recipient hereby warrants that it shall not act or omit to act in any way that may cause the Grant Recipient, a Delivery Partner or the Secretary of State to breach the Structural and Investment Funds Regulations.
- (b) Further to clause 10.1(a) the Grant Recipient shall ensure that in accordance with Article 6 of Regulation 1303, the Project complies with applicable European Union law and the national law relating to its application.

### **10.2 State Aid Law**

- (a) The Grant Recipient has undertaken its own independent assessment of the compatibility of the Project with State Aid Law and confirms to the Secretary of State that the Project is structured so it is compliant with State Aid Law. Where the Secretary of State has provided its views on any aspect of State Aid Law, the Grant Recipient confirms that it has considered this information alongside all other sources of State Aid Law available at the time of entering into this Funding Agreement (including regulations and decisions published on the European Commission website) in undertaking its own assessment of the Project's compliance. The Secretary of State has taken into account the Grant Recipient's representations on State Aid Law compliance in deciding to offer the Grant.
- (b) The Grant Recipient shall procure and maintain the necessary expertise and resources to deliver the Project in accordance with the State Aid Law for the full term of the Project. The Grant Recipient agrees to maintain appropriate records of compliance with the State Aid Law and agrees to take all reasonable steps to assist the Secretary of State to comply with State Aid Law requirements and respond to any investigation(s) instigated by the European Commission into the Project or by the European Court of Auditors.

- (c) A finding of State Aid non-compliance in respect of the Project by the European Commission or a Court of competent jurisdiction may lead to Grant Recipient being ordered to repay the Grant with interest in accordance with the European Commission's reference rates.

### **10.3 ESIF Procurement Requirements**

- (a) The Grant Recipient warrants that it has provided full details of all contracts for goods, works or services which will form part of the Project and for which it will claim reimbursement.
- (b) Where the Grant Recipient is a 'contracting authority' within the meaning of Procurement Law the Grant Recipient warrants that:
  - (i) In relation to any contracts listed at Annex 4a of the Application, it has complied with, and where relevant, has secured that its Delivery Partners have complied with all applicable Procurement Law in force at the date the procurement was commenced in relation to the Project; and
  - (ii) In relation to any contracts listed at Annex 4b of the Application, it shall comply with, and where relevant, shall secure that its Delivery Partners shall comply with, all applicable Procurement Law in force at the date of commencement of the procurement process in relation to the Project.

Provided that where, having regard to the Interpretative Communication, the contract awards do not have a sufficient connection with the functioning of the Internal Market, the Grant Recipient warrants that it has complied with or shall comply with clause 10.4 below.

### **10.4 National Rules**

Where:

- (a) the Grant Recipient is not a 'contracting authority' subject to Procurement Law in relation to the Project; or
- (b) it is a contracting authority and the contract award does not have a sufficient connection to the 'Internal Market'

the Grant Recipient warrants that:

- (i) In relation to any contracts listed at Annex 4a of the Application, it has ensured that its processes met, and where relevant, has secured that its Delivery Partners have ensured that their processes met, with the National Rules published at the date of the Application; and
- (ii) In relation to any contracts listed at Annex 4b of the Application, it shall comply with, and where relevant, shall secure that its Delivery Partners shall comply with the relevant version of the National Rules published at the date of commencement of the procurement process.

It is the Grant Recipient's sole responsibility to ensure compliance with the Regulations.

## **11 PUBLICITY**

**11.1** The Grant Recipient shall, and shall procure that its Delivery Partners and sub-contractors at all times comply with:-

- (a) Articles 115 and Annex XII of Regulation 1303; and
- (b) Chapter II and Annex II of Regulation 821.

**11.2** The Secretary of State has published the National European Regional Development Fund Publicity Guidance to assist the Grant Recipient to comply with the Regulations referred to in the paragraph above. This guidance is not compulsory and does not have to be followed as a condition of this Funding Agreement. It is the Grant Recipient's sole responsibility to ensure compliance with the Regulations.

**11.3** The obligations in this clause shall continue after this Funding Agreement is terminated.

**11.4** The Grant Recipient hereby gives consent to the Secretary of State to publicise in the press or any other medium the Grant and the details of the project using any information gathered from the Application or the monitoring of the Project Activities.

## **12 EVENTS OF DEFAULT, MATERIAL BREACH AND RIGHTS RESERVED FOR BREACH OF THE FUNDING AGREEMENT**

### **12.1 Events of Default**

- (a) An Event of Default is the occurrence of any of the following:-
- (b) the Grant Recipient fails to comply with the Conditions;
- (c) the Project Activities are not commenced by the date which is 3 months after the Start Date;
- (d) the expenditure is not claimed in line with the Expenditure Profile.
- (e) Completion of the Project Activities has not been achieved by the Agreed Activity End Date;
- (f) a Change is made to the Project without the prior written approval of the Secretary of State, as required by clause 9;
- (g) the Approved Use of any Asset has ceased without the prior written consent of the Secretary of State;
- (h) the European Commission or a European Court requires any Grant paid to be recovered by reason of a breach of State Aid Law;
- (i) the Grant Recipient fails to comply with the provisions of the exemption or scheme (referred to in the Project Specific Conditions) under State Aid Law that applies to the Project and the Grant;
- (j) any report or certificate made by the Grant Recipient's auditor or reporting accountant is unsatisfactory (where, for example, the report or certificate refers to a fundamental uncertainty or disagreement, or contains a material

qualification, or states that the auditor or accountant is unable to form an opinion about any item, or reports that any amount is not correctly stated in the accounts or records examined);

- (k) the Grant Recipient owes any sum to the Secretary of State under an agreement for the financial support of any other project or activities;
- (l) if the Grant Recipient is a Small to Medium-sized Enterprise, but it ceases to be a Small to Medium-sized Enterprise, and it is a requirement arising out of State Aid Law that the Grant Recipient remains as a Small to Medium-sized Enterprise;
- (m) an encumbrancer takes possession or a receiver or administrative receiver or manager or sequestrator is appointed of the whole or any part of the undertaking assets rights or revenues of the Grant Recipient or a distress or other process is levied or enforced upon any of the assets rights or revenues of the Grant Recipient and any such action is not lifted or discharged within 10 Working Days;
- (n) a petition is presented (other than a petition which, in the opinion of the Secretary of State, is frivolous or vexatious and which is withdrawn or stayed within 10 Working Days) to, or any order is made by, any competent court for the appointment of an administrator in relation to the Grant Recipient;
- (o) the Grant Recipient is, or is adjudicated or found to be, insolvent or stops or suspends payment of its debts or is (or is deemed to be) unable to or admits inability to pay its debts as they fall due or proposes or enters into any composition or other arrangement for the benefit of its creditors generally or proceedings are commenced in relation to the Grant Recipient under any law regulation or procedure relating to reconstruction or adjustment of debts;
- (p) any petition is presented by any person (other than a petition which, in the opinion of the Secretary of State, is frivolous or vexatious and which is withdrawn or stayed within 10 Working Days) or any order is made by any competent court or any resolution is passed by the Grant Recipient for its winding-up or dissolution or for the appointment of a liquidator of the Grant Recipient.
- (q) any Irregularity on the part of the Grant Recipient has been identified in connection with the Project, or the European Commission or any other Regulatory Body otherwise requires the Secretary of State to recover any amount paid under this Funding Agreement.”

## **12.2 Material Breach**

A Material Breach is a breach of this Funding Agreement as defined in clause 1 above including but not limited to the occurrence of any of the following:-

- (a) any information given or representation made in the Application or in any correspondence, report or other document submitted to the Secretary of State relating to this Project or under this Funding Agreement is found to be incorrect or incomplete to an extent which the Secretary of State considers to be material;
- (b) any fraud has been committed by the Grant Recipient and/or its employees in connection with the Project;

- (c) a breach of the warranties by the Grant Recipient contained in and given pursuant to this Funding Agreement.
- (d) the Grant Recipient in breach of clause 8.3 makes a Disposal of any Asset without the prior written consent of the Secretary of State;
- (e) the Grant Recipient fails to materially comply with the Conditions;
- (f) the activities carried out by the Grant Recipient are distinct or different from the description set out in the Application having regard also to the intended function of the Project Activities and the end beneficiaries of the Project.

### **12.3 Rights reserved for the Secretary of State in relation to an Event of Default**

Where, the Secretary of State determines that an Event of Default or a Material Breach has or may have occurred, the Secretary of State may by written notice to the Grant Recipient take any one or more of the following actions:

- (a) suspend the payment of Grant for such period as the Secretary of State shall determine; and/or
- (b) reduce the Maximum Sum in which case the payment of Grant shall thereafter be made in accordance with the reduction and notified to the Grant Recipient; and/or
- (c) cease to make payments of Grant to the Grant Recipient under this Funding Agreement and (in addition) require the Grant Recipient to repay to the Secretary of State the whole or any part of the amount of Grant previously paid to the Grant Recipient; and/or
- (d) terminate this Funding Agreement.

### **12.4 Opportunity for the Grant Recipient to remedy an Event of Default**

- (a) If the Secretary of State gives written notice to the Grant Recipient pursuant to clause 0 to suspend payment of Grant, such notice shall specify the relevant Event of Default and give the Grant Recipient an opportunity to rectify the relevant Event of Default within such period as the Secretary of State shall determine to be reasonable and as shall be set out in such written notice (or such extended period as the Secretary of State shall thereafter determine).
- (b) The written notice referred to in clause 12.4(a) above may include a requirement for the Grant Recipient to provide specified information to the Secretary of State to assist him to determine whether the default has been rectified to his satisfaction.
- (c) Where the rectification of the default requires a Change the procedure under clause 9 shall be followed.
- (d) The Secretary of State shall not by reason of the occurrence of an Event of Default which is, in the opinion of the Secretary of State, capable of remedy, exercise its rights under either clause 0 or clause 0 unless the Grant Recipient has failed to rectify the default pursuant to clause 0 within such period referred to in clause 0 to the satisfaction of the Secretary of State.

## **12.5 Continued rights of actions or remedies of the Secretary of State**

The exercise by the Secretary of State of its rights under clause 12.3 shall be without prejudice to any other right of action or remedy of the Secretary of State in respect of any breach by the Grant Recipient of the provisions of this Funding Agreement.

## **12.6 Cessation of entitlement to Grant**

If the Secretary of State exercises its right under clause 0 the Secretary of State shall give written notice to the Grant Recipient that the Secretary of State is ceasing to make payment of Grant and from the date of such notice the Secretary of State shall cease to be under any obligation to pay any amount of Grant to the Grant Recipient under the Funding Agreement.

## **12.7 Liability to meet demand for repayment of Grant and Covenant to Pay**

- (a) Where the Secretary of State requires the Grant Recipient to repay any amount of Grant, the Grant Recipient shall repay the amount concerned within 20 Working Days of receiving the demand for repayment. The liability to meet such a demand shall be enforceable as a contractual debt.
- (b) Where the Secretary of State makes a determination to recover any amount of Grant, it may recover the amount concerned by withholding or deducting the amount from any sum due from the Secretary of State to the Grant Recipient under this Funding Agreement or under any funding agreement for the support of any other project or activities by the European Regional Development Fund, or under any other agreement with the Secretary of State.
- (c) The Secretary of State may require interest to be paid on any amount repayable by the Grant Recipient in accordance with the rates published in the Official Journal of the European Union from time to time.

## **12.8 Reduction in grant for underperformance**

- (a) This clause applies where the Secretary of State determines that the Grant Recipient has underperformed against the Targets specified in Schedule 3 to such degree that in a reduction in Grant may be made in accordance with the underperformance weightings and methodology set out in Schedule 4.
- (b) Where this clause applies, the Secretary of State shall give written notice to the Grant Recipient specifying the Targets it has underperformed against and giving the Grant Recipient an opportunity to rectify that underperformance within such period as the Secretary of State shall determine to be reasonable and as shall be set out in such written notice (or such extended period as the Secretary of State shall thereafter determine).
- (c) The written notice referred to in the paragraph above may include a requirement for the Grant Recipient to provide specified information to the Secretary of State to assist him to determine whether that underperformance has been rectified to his satisfaction.
- (d) Where the rectification of the underperformance requires a Change the procedure under clause 9 shall be followed.



- (e) Where the Grant Recipient fails to rectify the underperformance to the Secretary of State's satisfaction within the specified time period, the Secretary State may by written notice to the Grant Recipient, reduce the amount of Grant allocated to the Project by an amount calculated in accordance with the underperformance weightings and methodology set out in Schedule 4.
- (f) Where the amount of Grant is reduced under this clause, the Secretary of State shall either require the Grant Recipient to repay to the Secretary of State the whole or any part of the amount of Grant previously paid to the Grant Recipient and/or shall offset it from a future Grant Claim, as appropriate.

## 12.9 Corrections

- (a) Notwithstanding any other provision in this Funding Agreement the Secretary of State may impose a Correction. If a Correction is imposed a notice will be sent to the Grant Recipient setting out the Irregularity that the Secretary of State considers has occurred together with the level of Correction imposed having regard to any applicable guidelines and/or the value of the Grant Claim to the extent that the Irregularity applies to it.
- (b) If a Correction is imposed the Grant Recipient shall either pay the amount or agree to the Correction being offset from a future Grant Claim as the case may be. The Secretary of State shall be at liberty to offset an amount of Grant in anticipation of a Correction pending the final outcome of any discussions or representations made by the Secretary of State and/or the Grant Recipient in respect of the Correction.
- (c) The Grant Recipient shall be at liberty to make representations in writing to the Secretary of State setting out the reasons it considers that the Correction should be adjusted together with evidence in sufficient detail to enable the Secretary of State to reconsider the requirement for the Correction provided always that the Secretary of State's decision shall be final and binding.

## 12.10 Exclusion of Liability

- (a) Neither party shall be liable to the other party (so far as permitted by law) for indirect special or consequential loss or damage in connection with this Funding Agreement which shall include, without limitation, any loss of or damage to profit, revenue, contracts, anticipated savings, goodwill or business opportunities whether direct or indirect.
- (b) Each party shall at all times take all reasonable steps to minimise and mitigate any loss or damage for which the relevant party is entitled to bring a claim against the other party pursuant to this Funding Agreement.
- (c) With respect to other claims so far as permitted by law the Secretary of State shall under no circumstances whatever be liable to the Grant Recipient whether in contract, tort (including negligence), breach of statutory duty, or otherwise for any Losses arising under or in connection with this Funding Agreement that would exceed the amount of the Maximum Sum less any amount of Grant Paid.
- (d) Any clause limiting the Grant Recipient's liability does not apply in relation to a Correction that is applied in accordance with the terms of this Funding Agreement.

### **13 ASSIGNMENT OR CHARGING OF THE FUNDING AGREEMENT**

- 13.1** The Grant Recipient may not, without the prior written consent of the Secretary of State, assign its rights under the Funding Agreement or charge the benefit of the Funding Agreement or novate the rights and liabilities of the Funding Agreement to a third party.
- 13.2** If the Grant Recipient wishes to assign, charge or novate its rights and liabilities under the Funding Agreement, it will give as much notice as possible of its proposals to the Secretary of State and will provide a full account of relevant circumstances and such further particulars as the Secretary of State shall request concerning the party to which the Funding Agreement is proposed to be assigned, novated or charged.
- 13.3** The Secretary of State shall determine as to whether or not to give consent to an assignment or novation or charging of the Funding Agreement or as to any conditions to be imposed.
- 13.4** If the Secretary of State consents to an assignment, charge or novation, then the Secretary of State may notify the Grant Recipient that the documentation giving effect to the assignment, charge or novation is to be approved by the Secretary of State and copies of all completed documents supplied to the Secretary of State upon completion of the same.

### **14 MONITORING PROGRESS AND REPORTING/ NOTIFICATIONS**

#### **14.1 Submission of progress reports**

- (a) The Grant Recipient must send to the Secretary of State, at such intervals as the Secretary of State shall notify in writing to the Grant Recipient, a report on progress made towards the achievement of the Targets. Without prejudice to any provision of any of this Funding Agreement conferring a remedy for failure to achieve any of the Targets, this obligation shall subsist until the Targets have been achieved or, if earlier, until the end of the Useful Economic Life of the Assets.
- (b) The Grant Recipient must provide such additional information in such format as the Secretary of State may at any time require. This includes information about the progress of the Project Activities, the achievement of the Targets and any other information required to enable the Secretary of State to meet its reporting obligations and other obligations under State Aid Law and the Structural and Investment Funds Regulations.
- (c) The Grant Recipient warrants the accuracy of the reports and information it gives pursuant to this clause 14 and further warrants that it has diligently made full and proper enquiry of the subject matter pertaining to the reports and information given.

#### **14.2 Project Assessment**

- (a) The Grant Recipient shall undertake a summative assessment of the Project.
- (b) The summative assessment shall be undertaken according to the Secretary of State's common framework and methodology which the Secretary of State shall provide to the Grant Recipient.

- (c) The summative assessment must be completed and supplied to the Secretary of State at least three months before the final Grant Claim is submitted in accordance with clause 5.4.
- (d) For the avoidance of doubt, the Secretary of State will not make a payment in respect of the final Grant Claim until a satisfactory summative assessment report produced in conformity with the Secretary of State's common framework and methodology has been received.
- (e) Subject to clause 5.1(c), the maximum amount of Grant payable to the Grant Recipient in respect of the summative assessment is as specified in the Project Specific Conditions and shall not exceed 1% of the Project Specific Eligible Expenditure or £100,000, whichever is the lower.

### **14.3 Notification by the Grant Recipient**

The Grant Recipient shall notify the Secretary of State in writing:-

- (a) as soon as practicable thereafter firstly in the event of any Change in the information on costs (whether actual or estimated) of carrying out the Project Activities contained in the Application and secondly of any event which materially affects the continued accuracy of such information;
- (b) as soon as practicable thereafter, in the event of the receipt of any other public sector financial assistance or guarantees of other public sector financial Assistance or other funding obtained by the Grant Recipient in relation to the Project, or an offer of the same, in respect of any aspect of the Project or the Project Activities (or any part of it or them);
- (c) as soon as practicable thereafter, of any event which might adversely affect the carrying out and/or Completion of the Project Activities or any part of them;
- (d) prior to any proposed Disposal or any charging of any Asset during its Useful Economic Life;
- (e) prior to any change of use of any Asset from the Approved Use during its Useful Economic Life;
- (f) as soon as practicable thereafter, of any event which might adversely affect the delivery of the Project by the Agreed Activity End Date;
- (g) within 5 Working Days of any Disposal, details of that Disposal of the whole or any part of the Assets up to that date, together with details and evidence of the consideration obtained and (if required by the Secretary of State) together with copies of all relevant documentation; and
- (H) forthwith, on the occurrence of an Event of Default.

### **14.4 Records**

- (a) The Grant Recipient shall provide the Secretary of State with such information and documentation as the Secretary of State may require in connection with the Project from the date of the Funding Agreement to the date on which the Grant Recipient has fulfilled all its obligations under this Funding Agreement.

- (b) The Grant Recipient shall comply with and assist the Secretary of State to comply with the requirements for an audit trail under the Structural and Investment Funds Regulations including (but not limited to) the detailed minimum requirements under Article 25 of Regulation 480.
- (c) This Grant Recipient shall keep a record of all Eligible Expenditure, all quotes, tenders and procurement practices, all financial contributions made towards the Project and all income generated by the Project.
- (d) The Grant Recipient will provide to the Secretary of State such information as is available as to the number of persons employed in connection with the Project and such other information as may be requested by the Secretary of State as to the benefits derived from the provision of funding for the Project.
- (e) The Grant Recipient must comply with the requirements of the Secretary of State regarding the keeping of records available on the Secretary of State Website.

#### **14.5 Retention of documents**

- (a) Without prejudice to any other provision of this Funding Agreement and the Grant Recipient's obligations pursuant to State Aid Law, the Grant Recipient will ensure that all documents relating to the Project and its implementation and financing are retained for a two year period from 31 December following the submission of the accounts to the European Commission in which the final expenditure for the Completed Project is included, in order that these may be made available to the European Commission and European Court of Auditors upon request in accordance with Article 140 of Regulation 1303.
- (b) The Secretary of State shall notify the Grant Recipient of the start date of the two year period referred to in the paragraph above.
- (c) In addition to the obligation under paragraph (a) above, the Grant Recipient shall ensure that all documents relating to the Project and its implementation and financing are retained as necessary in order to demonstrate compliance with any applicable State Aid law, the Structural and Investment Funds Regulations and the obligations under this Funding Agreement. The Secretary of State has published the National European Development Fund Document Retention Guidance in order to assist the Grant Recipient to determine how long documents should be retained for in order to demonstrate compliance.
- (d) The Grant Recipient will make available the documents relating to the Project and its implementation and financing if and when required to do so by the Secretary of State, the European Court of Auditors, the European Commission auditors, the National Audit Office (and also their respective auditors).
- (e) The documents referred to in this clause shall be kept and made available either in the form of the originals or certified true copies of the originals or on commonly accepted data carriers including electronic versions of original documents or documents existing in electronic version only. The National European Development Fund Document Retention Guidance provides guidance on commonly accepted data carriers and the procedure for certifying conformity with original documents.

- (f) Where documents exist in electronic form only, the computer systems used shall meet accepted security standards which ensure that the documents held meet with national legal requirements and can be relied upon for audit purposes. The equipment and software used to store the documents shall be retained and kept functional for a two year period from 31 December following the submission of the accounts in which the final expenditure for the Completed Project is included.

#### **14.6 Conflicts of interest and financial irregularities**

- (a) The Grant Recipient, any Delivery Partner and all officers, employees and other persons engaged or consulted by the Grant Recipient in connection with the Project shall not be in a position where there is a conflict of interest. The Grant Recipient is required to have formal procedures obliging all such persons to declare any actual or potential personal or financial interest in any matter concerning the Project, and to be excluded from any discussion or decision-making relating to the matter concerned. Any such conflicts must be reported to the Secretary of State in writing.
- (b) If the Grant Recipient has any grounds for suspecting any financial impropriety in the use of any amount paid under the Funding Agreement, it must notify the Secretary of State immediately, explain what steps are being taken to investigate the suspicion, and keep the Secretary of State informed about the progress of the investigation. For these purposes “financial impropriety” includes fraud or other impropriety; mismanagement; use of Grant for improper purposes; and failure to comply with requirements in the Structural and Investment Funds Regulations relating to the control and propriety of project expenditure.
- (c) The Secretary of State shall be entitled to interview employees of the Grant Recipient if fraud or other financial irregularity is suspected by the Secretary of State on the part of the Grant Recipient, its employees or agents in connection with the Project.

### **15 ACCOUNTING RECORDS AND SUPPORTING EVIDENCE AND AUDIT**

- 15.1** The Grant Recipient shall and shall procure that a Delivery Partner shall maintain full and accurate accounts and documentary evidence for the Project on an open book basis and the Grant Recipient will and shall Procure that a Delivery Partner will permit the Secretary of State and persons authorised by the Secretary of State to inspect audit and take copies of all reports books accounting records and vouchers which the Secretary of State properly considers relevant to the Project.
- 15.2** The Grant Recipient shall and shall procure that a Delivery Partner shall maintain either a separate accounting system or an adequate accounting code for all transactions relating to the operation without prejudice to national accounting rules.
- 15.3** The Grant Recipient shall and shall procure that a Delivery Partner shall comply with the Secretary of State’s audit monitoring and reporting requirements for grant recipients.
- 15.4** The Grant Recipient shall and shall procure that a Delivery Partner shall provide the Secretary of State with such other information as the Secretary of State may require in connection with the Project and the Project Activities.

- 15.5** The Grant Recipient shall and shall procure that a Delivery Partner shall cooperate fully and promptly with an Audit.
- 15.6** Where the Project has been selected for Audit and the Secretary of State requires information from the Grant Recipient in order to respond to findings made in the draft Audit report, the Secretary of State shall write to the Grant Recipient with a list of requested information.
- 15.7** The Grant Recipient shall provide the Secretary of State with the requested information within 14 days of receiving the request unless permission for an extension of time is granted in writing by the Secretary of State.
- 15.8** The Grant Recipient acknowledges that failure to provide the requested information within the timeframe specified in clause 15.7 above may result in an Irregularity being found in relation to the Project which requires reimbursement to the budget of the European Union.
- 15.9** Without prejudice to any other provision of this Funding Agreement, where the Grant Recipient has been notified that the Project has been selected for Audit and
- (a) the Grant Recipient has previously failed to comply fully and promptly with an Audit; or
  - (b) an Irregularity has previously been found in relation to the Project,
- the Secretary of State may, at his discretion, withhold payment of Grant until a subsequent Audit has been completed to the Secretary of State's satisfaction.

## **16 CONFIDENTIALITY**

- 16.1** Except to the extent set out in this clause 16 or where disclosure is expressly permitted elsewhere in this Funding Agreement, each party shall:-
- (a) treat the other party's Confidential Information as confidential and safeguard it accordingly; and
  - (b) not disclose the other party's Confidential Information to any other person without the owner's prior written consent.
- 16.2** Clause 16.1 shall not apply to the extent that:
- (a) such disclosure is a requirement of Law placed upon the party making the disclosure, including any requirements for disclosure under the Freedom of Information Act 2000, 'Code of Practice on Access to Government Information' or the Environmental Information Regulations;
  - (b) such information was in the possession of the party making the disclosure without obligation of confidentiality prior to its disclosure by the information owner;
  - (c) such information was obtained from a third party without obligation of confidentiality;
  - (d) such information was already in the public domain at the time of disclosure otherwise than by a breach of this Funding Agreement; or

- (e) it is independently developed without access to the other party's Confidential Information.
- 16.3** The Grant Recipient may only disclose the Secretary of State's Confidential Information to the Grant Recipient Personnel who are directly involved in the Project and who need to know the information, and shall ensure that such Grant Recipient Personnel are aware of and shall comply with these obligations as to confidentiality.
- 16.4** The Grant Recipient shall not, and shall procure that the Grant Recipient Personnel do not, use any of the Secretary of State's Confidential Information received otherwise than for the purposes of this Funding Agreement.
- 16.5** Nothing in this Funding Agreement shall prevent the Secretary of State from disclosing the Grant Recipient's Confidential Information:
- (a) to any Crown body or any other Contracting Authority. All Crown Bodies or Contracting Authorities receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other Crown Bodies or other Contracting Authorities on the basis that the information is confidential and is not to be disclosed to a third party which is not part of any Crown body or any Contracting Authority;
  - (b) to any consultant, contractor or other person engaged by the Secretary of State;
  - (c) (where such Confidential Information is contained in the Application, any Grant Claim or any progress report submitted in respect of the Project), to any member of a Local Enterprise Partnership European Structural and Investment Fund Sub-Committee for the purpose of monitoring and evaluating the Project, subject to clause 16.7.
  - (d) to a person receiving technical assistance in accordance with Regulation 1303 for the purpose of monitoring and evaluating the Project.
  - (e) to enable the Secretary of State to meet its reporting obligations and other obligations under State Aid Law and the Structural and Investment Funds Regulations for the purpose of clause 14.1(b) of this Funding Agreement;
  - (f) for the purpose of any Audit pursuant to clause 15 of this Funding Agreement;
  - (g) for the purpose of the examination and certification of the Secretary of State's accounts; or
  - (h) for any examination pursuant to Section 6(1) or Section 7ZA of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Secretary of State has used its resources.
- 16.6** The Secretary of State shall use all reasonable endeavours to ensure that any Crown Body, government department, Contracting Authority, external auditor, employee, third party or Sub-contractor to whom the Grant Recipient's Confidential Information is disclosed pursuant to clause 16.5 is made aware of the Secretary of State's obligations of confidentiality.
- 16.7** The Secretary of State may agree not to disclose specified Confidential Information contained in the Application, any Grant Claim or progress report to a member of the Local Enterprise Partnership European and Structural Investment Sub-Committee

where the Grant Recipient has requested in writing that such information be withheld, including where it is considered to be commercially sensitive.

- 16.8** Notwithstanding the foregoing the Grant Recipient hereby consents to the Secretary of State using and disclosing (including to the press) any techniques, ideas or know-how gained during the performance of the Project Activities and/or Funding Agreement. The Grant Recipient warrants to the Secretary of State that neither the Intellectual Property Rights nor any publication by the Secretary of State of the project related know-how will infringe, in whole or in part, any Intellectual Property Right of any other person and agrees to indemnify and hold the Secretary of State harmless against any and all claims, demands and proceedings arising directly or indirectly out of the Secretary of State's publication or use of the Project Related Know-how where this gives rise to or is alleged to give rise to an infringement of third party Intellectual Property Rights.

## **17 THE SECRETARY OF STATE DATA**

- 17.1** The Grant Recipient shall not delete or remove any proprietary notices contained within or relating to the Secretary of State Data.
- 17.2** The Grant Recipient shall not store, copy, disclose, or use the Secretary of State Data except as necessary for the performance by the Grant Recipient of its obligations under this Funding Agreement or as otherwise expressly authorised in writing by the Secretary of State.
- 17.3** The Grant Recipient shall take responsibility for preserving the integrity of the Secretary of State Data and preventing the corruption or loss of the Secretary of State Data.
- 17.4** If at any time the Grant Recipient suspects or has reason to believe that the Secretary of State Data has or may become corrupted, lost or sufficiently degraded in any way for any reason, then the Grant Recipient shall notify the Secretary of State immediately and inform the Secretary of State of the remedial action the Grant Recipient proposes to take.

## **18 DATA PROTECTION**

- 18.1** With respect to the parties' rights and obligations under this Funding Agreement, the parties agree that both the Secretary of State and the Grant Recipient are Data Controllers with independently determined purposes and means of processing Personal Data. The parties shall use the Personal Data for the following independent purposes:
- (a) The Secretary of State shall use the Personal Data for the purpose of assessing the Grant Recipient's compliance with its obligations under this Funding Agreement; and
  - (b) The Grant Recipient shall use the Personal Data for purpose of complying with its obligations under this Funding Agreement.
- 18.2** The Grant Recipient and the Secretary of State shall comply at all times with the Data Protection Legislation.
- 18.3** The Grant Recipient shall comply at all times with the Data Protection Legislation and shall not perform its obligations under this Funding Agreement in such a way as to



cause the Secretary of State to breach any of its applicable obligations under the Data Protection Legislation.

## **19 SECURITY REQUIREMENTS**

- 19.1** The Grant Recipient shall, as an enduring obligation throughout the term of this Funding Agreement, use the latest versions of anti-virus definitions available from an industry accepted anti-virus software vendor to check for and delete Malicious Software from the Information Communications and Technology Environment.
- 19.2** Notwithstanding clause 19.1, if Malicious Software is found, the parties shall co-operate to reduce the effect of the Malicious Software and, particularly if Malicious Software causes loss of operational efficiency or loss or corruption of the Secretary of State Data, assist each other to mitigate any losses and to restore the Project Activities to their desired operating efficiency.
- 19.3** Any cost arising out of the actions of the parties taken in compliance with the provisions of clause 19.2 shall be borne by the parties as follows:
- (a) by the Grant Recipient where the Malicious Software originates from the Grant Recipient Software, the Third Party Software or the Secretary of State Data (whilst the Secretary of State Data was under the control of the Grant Recipient); and
  - (b) by the Secretary of State if the Malicious Software originates from the Secretary of State Software or the Secretary of State Data (whilst the Secretary of State Data was under the control of the Secretary of State).

## **20 GRANT RECIPIENT WARRANTIES**

The Grant Recipient warrants, represents and undertakes for the duration of the term of this Funding Agreement that:-

- (a) it has and will continue to hold all necessary (if any) regulatory approvals from the Regulatory Bodies necessary to perform the Grant Recipient's obligations under this Funding Agreement;
- (b) it has and will continue to have all necessary rights in and to the Grant Recipient Software or any Third Party Software and/or the Intellectual Property Rights, or any other materials made available by the Grant Recipient and/or the sub-contractors to the Secretary of State necessary to perform the Grant Recipient's obligations under this Funding Agreement;
- (c) in performing its obligations under this Funding Agreement, all Software used by or on behalf of the Grant Recipient will:
  - (i) be currently supported versions of that Software; and
  - (ii) perform in all material respects in accordance with its specification,
- (d) as at the Start Date all statements and representations in the Grant Recipient's Application are to the best of its knowledge, information and belief, true and accurate and that it will advise the Secretary of State of any fact, matter or circumstance of which it may become aware which would render any such statement, representation to be false or misleading; and

- (e) it shall at all times comply with Law in carrying out its obligations under this Funding Agreement;
- (f) It has the power and authority to execute, deliver and perform its obligations under this Funding Agreement and no limit on its powers will be exceeded as a result of the acceptance of the Funding or any of the terms pursuant to this Funding Agreement;
- (g) there has been no adverse change in the Grant Recipient's business, assets or financial condition since the submission of the Application to the Secretary of State and that the Application is true in all respects on the date of this Funding Agreement;
- (h) no regulatory investigation by any United Kingdom or European Union authorities has been commenced or is pending in respect of the Project or the Grant Recipient, or if there has been a regulatory investigation, it has been concluded to the satisfaction of the Secretary of State.

## **21 NOTICES**

**21.1** Any notice demand or communication to be given or served under this Funding Agreement shall be in writing.

**21.2** Subject to any other term of this Funding Agreement, any notice demand or communication to be given or served under this Funding Agreement upon the Secretary of State shall be given or served:

- (a) by personal delivery or by sending it by pre-paid recorded postal delivery to the address specified in the Funding Agreement for the attention of the [insert contract manager details] 2014-2020 ERDF Programme or to such other address as may from time to time be notified by the Secretary of State;
- (b) by e-mail to the e-mail address specified in the Project Specific Conditions or such other address as may from time to time be notified by the Secretary of State; or
- (c) where directed to do so by the Secretary of State, using the Secretary of State's System on line facility, in accordance with the terms of use of that facility.

**21.3** Any notice demand or communication to be served upon the Grant Recipient, shall be given or served:

- (a) by personal delivery or by sending it by pre-paid recorded postal delivery to the address specified in this Funding Agreement or such other address as may from time to time be notified by the Grant Recipient to the Secretary of State;
- (b) by e-mail to the e-mail address specified in the Project Specific Conditions or to such other address as may from time to time be notified by the Secretary of State; or
- (c) using the Secretary of State's System on line facility.

**21.4** Any such notice shall (where sent by post) be deemed to have been served and received on the second working day following the day of posting and where delivered personally be deemed to have been given when delivery is made. An email or notice

given using the Secretary of State's on line facility shall be deemed delivered when sent unless an error message is received.

- 21.5** If the Grant Recipient shall comprise more than one person the service of any notice demand request or other communication on any one of such persons shall constitute good service on all of them.

## **22 VALUE ADDED TAX**

- 22.1** The payment of the Grant by the Secretary of State under the Funding Agreement is believed to be outside the scope of Value Added Tax but if any Value Added Tax shall become chargeable all payments shall be deemed to be inclusive of all Value Added Tax and the Secretary of State shall not be obliged to pay any additional amount by way of Value Added Tax.

- 22.2** All sums or other consideration payable to or provided by the Grant Recipient to the Secretary of State at any time shall be deemed to be exclusive of all Value Added Tax payable and where any such sums become payable or due or other consideration is provided the Grant Recipient shall at the same time or as the case may be on demand by the Secretary of State in addition to such sums or other consideration pay to the Secretary of State all the Value Added Tax so payable upon the receipt of a valid Value Added Tax invoice.

## **23 GOOD FAITH AND COOPERATION**

The Grant Recipient covenants with the Secretary of State that:-

- (a) it shall at all times act with the utmost good faith towards the Secretary of State and will at all times co-operate fully with the Secretary of State;
- (b) it will comply with all the Secretary of State's reasonable requirements in relation to the Project from time to time; and
- (c) it will not do anything which will put the Secretary of State in breach of any of its obligations in relation to the Operational Programme.

## **24 INSURANCE**

- 24.1** The Grant Recipient covenants with the Secretary of State that it will ensure that it maintains at all times adequate insurance cover with an insurer of good repute to cover all claims and liabilities under this Funding Agreement or any other claims or demands which may be brought or made against it by any person suffering any injury damage or loss in connection with the Project.
- 24.2** The Grant Recipient shall take out and maintain or procure the maintenance of a policy of 'all risks' insurance to cover the full reinstatement or replacement cost of any Works forming part of the Project Activities and shall procure that the Secretary of State's interest is noted on such insurance policy.

## **25 CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

A person who is not party to this Funding Agreement shall not have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Funding Agreement.

## **26 JURISDICTION**

This Funding Agreement shall be governed by and construed in accordance with the law of England and each party submits to the exclusive jurisdiction of the English Courts.

## **27 MISCELLANEOUS**

- 27.1** Nothing in this Funding Agreement shall constitute a partnership or joint venture between the parties to this Funding Agreement or constitute the Grant Recipient as the agent of the Secretary of State for any purpose whatsoever, and the Grant Recipient shall ensure that any Delivery Partner is made aware of this.
- 27.2** A certificate by the Secretary of State as to any sum payable under this Funding Agreement to the Grant Recipient shall be (save in the case of manifest error) conclusive evidence of the matter to which it relates and shall contain reasonable details of the basis of determination.
- 27.3** If at any time any of the provisions of this Funding Agreement become illegal, invalid or unenforceable in any respect under any law or regulation of any jurisdiction, neither the legality validity nor enforceability of the remaining provisions of this Funding Agreement shall be in any way affected or impaired as a result.
- 27.4** No failure or delay on the part of the Secretary of State in exercising any right or power and no course of dealing between the parties to this Funding Agreement shall operate as a waiver nor shall any single or partial exercise of any right power or remedy of the Secretary of State prevent any other or further or other exercise of it or the exercise of any other right power or remedy of the Secretary of State. The rights and remedies available to the Secretary of State under this Funding Agreement are cumulative and are in addition to and not in substitution for any other rights or remedies which the Secretary of State would otherwise have, however arising.
- 27.5** Nothing contained in or done under this Funding Agreement and no consents given by the Secretary of State shall prejudice the Secretary of State's rights, powers or duties and/or obligations in the exercise of its functions or under any statutes, bye-laws, instruments orders or regulations.
- 27.6** Nothing in this Funding Agreement nor any other document shall impose any obligation or liability on the Secretary of State with respect to any actions of or obligations or liabilities assumed or incurred by the Grant Recipient or its agents, contractors or employees whether under contract, statute or otherwise.
- 27.7** Any approval by the Secretary of State or any person on behalf of the Secretary of State pursuant to this Funding Agreement of any matter submitted by the Grant Recipient for approval shall not be deemed to be an Acknowledgment by the Secretary of State of the correctness or suitability of the contents of the subject of the approval or consent.
- 27.8** The fact that the Secretary of State or its representatives have supplied or received any documents or information or attended any meeting shall not in itself imply approval of any matters raised in any such document, information or meeting or relieve the Grant Recipient of any obligation or liability in respect of the Project Activities or otherwise.
- 27.9** Nothing in this Funding Agreement shall affect the coming into force or the continuance in force of any provision of this Funding Agreement which is expressly or by implication

to come into force or continue in force upon termination or expiry of this Funding Agreement.

**27.10** This Funding Agreement contains all the terms which the Secretary of State has agreed in relation to the subject matter of this Funding Agreement and supersedes any prior written or oral agreements representations or understandings between the Secretary of State and the Grant Recipient.

**27.11** No term of this Funding Agreement is intended to confer a benefit on, or to be enforceable by, any person who is not a party to this Funding Agreement

**27.12** Notwithstanding any other provisions of this Funding Agreement, the Secretary of State shall not be entitled to be reimbursed or to recover any monies that it has paid under this Funding Agreement to the extent that it has already been compensated or reimbursed in respect of that same amount pursuant to this Funding Agreement.

## **ACCEPTANCE**

This Funding Agreement has been entered into [as a Deed] on the date stated at the beginning of it.

### **[EITHER OPTION A: UNDER HAND**

Signed for and behalf of

**SECRETARY OF STATE FOR LEVELLING  
UP, HOUSING )  
AND COMMUNITIES )**

Authorised Signatory: \_\_\_\_\_

Print Name: \_\_\_\_\_

Signed for and on behalf of

**[Insert Grant Recipient]**

Authorised Signatory: \_\_\_\_\_

Print Name: \_\_\_\_\_

**[OR OPTION B: 'UNDER SEAL':**

**EXECUTED** as a Deed by **THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES:**

The Corporate Seal of the Secretary of State for Levelling Up, Housing and Communities hereunto affixed and authenticated in the presence of:

Authorised Signatory: \_\_\_\_\_

Print Name: \_\_\_\_\_

**[n.b GRANT RECIPIENT TO CONFIRM CORRECT EXECUTION CLAUSE WHERE SIGNING AS A DEED]**

**SCHEDULE 1**

**SCHEDULE 2 EXPENDITURE PROFILES**

**SCHEDULE 3 TARGETS**

**SCHEDULE 4 UNDERPERFORMANCE METHODOLOGY**

**SCHEDULE 5 APPLICATION**

**SCHEDULE 6 THE PLAN**

**SCHEDULE 7 PROJECT SPECIFICATIONS**

**[SCHEDULE 8 DEED OF COVENANT]**

**[SCHEDULE 9 LEGAL CHARGE]**

**[SCHEDULE 10 DEED OF PRIORITY]**

**[SCHEDULE 11 DEED OF GUARANTEE]**

**[SCHEDULE 12 CERTIFICATE OF TITLE]**