



# hub

Building better local  
services together

**AGREEMENT**

**between**

**HIGHLAND HEALTH BOARD**

**and**

**GRAMPIAN HEALTH BOARD**

**and**

**HUB NORTH SCOTLAND (FWT) LIMITED**

**FORRES HEALTH AND CARE CENTRE, WOODSIDE FOUNTAIN HEALTH  
CENTRE AND TAIN HEALTH CENTRE PROJECT (THE FWT BUNDLE  
PROJECT)**

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**BETWEEN:**

- (1) **HIGHLAND HEALTH BOARD** of Assynt House, Beechwood Park, Inverness IV2 3BW ("Authority A");
- (2) **GRAMPIAN HEALTH BOARD** of Summerfield House, 2 Eday Road, Aberdeen AB15 6RE ("Authority B"); and
- (3) **HUB NORTH SCOTLAND (FWT) LIMITED** (registered under number SC441943) whose registered office is Miller House, 2 Lochside View, Edinburgh Park, Edinburgh EH12 9DH ("Sub-hubco").

**WHEREAS:**

- (A) Authority A wishes to develop one and Authority B wishes to develop two primary care health centres in each case to improve the efficiency of the services provided by the respective Authorities.
- (B) Pursuant to the Territory Partnering Agreement for the hub North Territory, the Authorities issued a new project request in respect of the Project to which hubco submitted its stage 1 submission and stage 2 submission as required by the approval process for new projects detailed therein.
- (C) Following approval by the Authorities of hubco's stage 2 submission, the Authorities have appointed Sub-hubco (a subsidiary of hubco) to design, build, finance and provide certain maintenance services in connection with Woodside Health Centre, Tain Health Centre and Forres Health Centre (the "Project").
- (D) The Project has been approved by the Scottish Government Directorate for Health, Finance and Information.
- (E) This Agreement is entered into under the Scottish Government's hub initiative.
- (F) This Agreement is excluded from the application of Part II of the Housing Grants, Construction and Regeneration Act 1996 by operation of paragraph 4 of the Construction Contract (Scotland) Exclusion Order 1998 (SI 1998/686).
- (G) The Authorities are constituted in Scotland under the National Health Service (Constitution of Health Boards) (Scotland) Order 1974 (SI 1974/267) as amended by the National Health Service (Constitution of Health Boards) (Scotland) Amendment Order 2003 (S.S.I. 2003/217) and National Health Service (Constitution of Health Boards) (Scotland) Amendment Order 2006 (S.S.I. 2006/32) pursuant to Section 2 of the National Health Service (Scotland) Act 1978 as amended by Section 28 of the National Health Service and Community Care Act 1990.

**NOW IT IS HEREBY AGREED** as follows:

**PART 1: GENERAL**

**1 DEFINITIONS AND INTERPRETATION**

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

**1A SEVERAL LIABILITY OF PROCURING AUTHORITIES**

- 1A.1 Whereas each of Authority A and Authority B are an "**Authority**", references in this Agreement to the "Authority" shall, unless expressly stated otherwise, mean:
- 1A.1.1 Authority A where the circumstances in question relate to:
- 1A.1.1.2 the application of any Clause or Schedule Part; or
- 1A.1.1.3 any act, breach or omission,
- in either case solely affecting Authority A or any of the Authority A Matters;
- 1A.1.2 Authority B where the circumstances in question relate to:
- 1A.1.1.2 the application of any Clause or Schedule Part; or
- 1A.1.1.3 any act, breach or omission,
- in either case solely affecting Authority B or any of the Authority B Matters;
- 1A.1.3 each of Authority A and Authority B acting severally and individually in all other cases (including for the avoidance of doubt Clause 5.3 (*Authority's Undertaking*)).
- 1A.2 All obligations and liabilities of the Authority under this Agreement shall be owed and discharged by Authority A and Authority B severally and therefore Authority A shall, unless expressly stated otherwise, have no liability in respect of obligations (including any obligations relating to payment, Relief Events, Delay Events, Compensation Events, Force Majeure Events, Changes, Changes in Law and/or Excusing Causes) relating to Authority B or the Authority B Matters and vice versa.
- 1A.3 No act, breach or omission (including any default or waiver) of Authority A or the Authority A Representative shall bind or impose any liability on Authority B and vice-versa.
- 1A.4 Where any Clause or Schedule Part requires any adjustment to the "Annual Service Payments" such references shall mean:
- 1A.4.1 the Authority A Annual Service Payment to the extent that the adjustment relates to Authority A and/or any of the Authority A Matters; or
- 1A.4.2 the Authority B Annual Service Payment to the extent that the adjustment relates to Authority B and/or any of the Authority B Matters.
- 1A.5 Unless expressly stated otherwise, references in this Agreement to the "Authority's Representative" shall mean:
- 1A.5.1 the Authority A Representative where any Submitted Item, submission, consent or approval required relates solely to Authority A and/or the Authority A Matters;
- 1A.5.2 the Authority B Representative where any Submitted Item, submission, consent or approval required relates solely to Authority B, and/or the Authority B Matters; and
- 1A.5.3 each of the Authority A Representative and the Authority B Representative acting individually and severally in all other cases.

- 1A.6 Following the occurrence of a Relevant Event and/or the amendment of the Financial Model, Authority A and Authority B (acting together) may give Sub-hubco notice of a change to the relevant Proportions and such change shall become effective in accordance with Clause 64.4.
- 1A.7 References in this Agreement to Authority A and Authority B or the Authority A Representative and Authority B Representative "acting together" means that the consent of both Authorities or Authority Representatives is required.

## 2 EXECUTION AND DELIVERY OF DOCUMENTS

On or prior to execution of this Agreement:

- 2.1 Sub-hubco shall deliver to each Authority the documents referred to in Section 1 (*Documents to be delivered by Sub-hubco*) of Schedule Part 2 (*Completion Documents*) (unless the requirement to deliver any such document to an Authority is waived by that Authority by written notice to Sub-hubco); and
- 2.2 Authority A and Authority B (acting together) shall deliver to Sub-hubco the documents referred to in Section 2 (*Documents to be delivered by the Authority*) of Schedule Part 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by Sub-hubco by written notice to the Authority).

## 3 COMMENCEMENT AND DURATION

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

## 4 PROJECT DOCUMENTS

### Ancillary Documents

- 4.1 Sub-hubco shall perform its obligations under, and observe all of the provisions of, the Project Documents to which it is a party and shall not:
- 4.1.1 terminate or agree to the termination of all or part of any Ancillary Document;
  - 4.1.2 make or agree to any material variation of any Ancillary Document;
  - 4.1.3 in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Ancillary Document; or
  - 4.1.4 enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Ancillary Document,

unless the proposed course of action (and any relevant documentation) has been submitted to the Authority A Representative and the Authority B Representative for their review (acting together) under Schedule Part 8 (*Review Procedure*) and either:



- (a) there has been no objection in accordance with paragraph 3 of Schedule Part 8 (*Review Procedure*) within twenty (20) Business Days of receipt by each Authority's Representative of the submission of the proposed course of action (and any relevant documentation), or such shorter period as may be agreed by the parties; or
- (b) Sub-hubco is acting in accordance with the comments of Authority A and Authority B (acting together) as provided in paragraph 4.2 of Schedule Part 8 (*Review Procedure*),

and, in the circumstances specified in Clause 4.1.1, Sub-hubco has complied with Clause 57 (*Assignment and Sub-contracting*).

Provided that, where the Ancillary Document in question is a Construction Contract, the proposed course of action (and any relevant documentation) shall only be required to be submitted to the relevant Authority Representative.

### **Changes to Funding Agreements and Refinancing**

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

### **Delivery**

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

#### **Funding Default**

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

## **5 THE PROJECT OPERATIONS**

### **Scope**

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

### **General standards**

- 5.2 Sub-hubco shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed:
- 5.2.1 subject to Clause 11.1A, in compliance with all Law and Consents (including without limitation the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents;
  - 5.2.2 in a manner that is not likely to be injurious to health or to cause damage to property;
  - 5.2.3 in a manner consistent with the Quality Plans;

- 5.2.4 except to the extent expressly stated to the contrary in the Authority's Construction Requirements or the Service Level Specification, in compliance with all applicable NHS Requirements;
- 5.2.5 in a manner consistent with the Authority discharging its statutory duties and other functions undertaken by it as the same may be notified to Sub-hubco from time to time; and
- 5.2.6 in so far as not in conflict with an express obligation of Sub-hubco under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on Sub-hubco under this Agreement, in accordance with Good Industry Practice.

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

### **Authority's Undertaking**

5.3 The Authority undertakes to Sub-hubco that it shall:

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

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

## **Co-operation**

- 5.4 Sub-hubco agrees to co-operate with each Authority, and each Authority agrees to co-operate with Sub-hubco, at its own expense, in the fulfilment of the purposes and intent of this Agreement. To avoid doubt, no party shall be under any obligation to perform any of the other's obligations under this Agreement.
- 5.5 Without prejudice to the generality of Clause 5.4, Sub-hubco and the Authority shall liaise with a view to ensuring that the requirements of The NHS and You and any other NHS requirement relating to customer service and satisfaction which may from time to time supplement or replace The NHS and You are met in respect of the operation of the relevant Facilities.

## **6 GENERAL OBLIGATIONS AND RESPONSIBILITIES OF SUB-HUBCO**

### **Other business**

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

### **Sub-hubco Parties**

- 6.2 Subject to the provision of Clause 30.1.7, Sub-hubco shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Sub-hubco Party. Sub-hubco shall, as between itself and the Authority, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all Sub-hubco Parties. All references in this Agreement to any act, default, omission, breach or negligence of Sub-hubco shall be construed accordingly to include any such act, default, omission, breach or negligence of a Sub-hubco Party.

### **Safety**

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

## **7 AUTHORITY'S DATA**

### **No liability**

- 7.1 No Authority shall be liable to Sub-hubco for and Sub-hubco shall not seek to recover from any Authority (or from any Authority Party) any damages, losses, costs, liabilities or expenses which may arise (whether in contract, delict or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, Sub-hubco, the Independent Tester or any Sub-hubco Party.

### **No warranty**

- 7.2 No Authority gives any warranty or undertaking of whatever nature in respect of the Disclosed Data and, specifically (but without limitation), no Authority warrants that the Disclosed Data represents all of the information in its possession or power

(either during the conduct of the tender process for the Project or at the time of execution of this Agreement) relevant or material to or in connection with the Project or the obligations of Sub-hubco under this Agreement or under any of the Project Documents. In addition, no Authority shall be liable to Sub-hubco in respect of any failure to disclose or make available to Sub-hubco (whether before, on or after the execution of this Agreement) any information, documents or data, nor any failure to review or to update the Disclosed Data, nor any failure to inform Sub-hubco (whether before, on or after execution of this Agreement) of any inaccuracy, error, omission, defects or inadequacy in the Disclosed Data.

### **Sub-hubco investigation**

7.3 Sub-hubco acknowledges and confirms that:

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

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

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

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

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

7.4 Nothing contained in this Clause 7 shall have the effect of preventing Sub-hubco from making any claim against an Authority based on any breach by the relevant Authority of the provisions of Clauses 9.2A.1, 9.2A.2, 9.3.1 or 9.3.2 on the grounds that the Disclosed Data may contain information that is relevant to the title to any one or more of the Sites and that has not been specifically disclosed to Sub-hubco as part of the Reserved Rights, the Title Conditions, the Ancillary Rights and/or the Additional Rights (as appropriate).

## **8 REPRESENTATIVES**

### **Representatives of Authority A and Authority B**

8.1 The Authority A Representative shall be [REDACTED] and the Authority B Representative shall be [REDACTED] or such other persons appointed pursuant to this Clause. An Authority's Representative shall exercise the functions and powers of Authority A (in the case of the Authority A Representative) and Authority B (in the case of the Authority B Representative) in relation to the relevant Project

Operations which are identified in this Agreement as functions or powers to be carried out by the relevant Authority's Representative. The Authority's Representative shall also exercise such other functions and powers of the relevant Authority under this Agreement as may be notified to Sub-hubco from time to time.

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

#### **Representative of Sub-hubco**

- 8.7 Sub-hubco's Representative shall be [REDACTED] or such other person appointed pursuant to Clause 8.8. Sub-hubco's Representative shall have full authority to act on behalf of Sub-hubco for all purposes of this Agreement. Except as previously notified in writing before such act by Sub-hubco to the Authority, the Authority and the Authority's Representative shall be entitled to treat any act of Sub-hubco's Representative in connection with this Agreement as being expressly authorised

by Sub-hubco and no Authority nor any Authority's Representative shall be required to determine whether any express authority has in fact been given.

- 8.8 Sub-hubco may by notice to the Authority change Sub-hubco's Representative. Where Sub-hubco wishes to do so it shall by written notice to the Authority propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Authority (not to be unreasonably withheld or delayed).
- 8.9 Sub-hubco's Key Works Personnel are identified in Schedule Part 3 (*Key Works Personnel*). Sub-hubco shall, as far as it is within Sub-hubco's control, ensure that such persons retain their involvement in the relevant Works and, in particular, will not, for the duration of the relevant Works, require or request any of them to be involved in any other project on behalf of Sub-hubco or any of the Shareholders or its or their Associated Companies if, in the reasonable opinion of the relevant Authority, this would adversely affect the Project.

## PART 2: LAND ISSUES

### 9 TITLE TO THE PREMISES

- 9.1 The Head Leases will be granted subject only to the relevant Title Conditions and the relevant Reserved Rights and any rights of way which are apparent from a visual inspection of the Sites as at the Commencement Date.
- 9.2 Without prejudice to the requirements of Clause 29.4, Sub-hubco shall notify the Authority in writing as soon as reasonably practicable after becoming aware of any claim asserted by a third party in relation to the Sites.

#### Access During Construction

- 9.2A Notwithstanding the grant of the relevant Sub-Lease, from the Commencement Date until the relevant Phase Actual Completion Date or (if earlier) the Termination Date:

- 9.2A.1 Authority A shall grant to Sub-hubco and Sub-hubco Parties, or procure that Sub-hubco and Sub-hubco Parties are granted:

9.2A.1.1 access to the Authority A Site; and

9.2A.1.2 the Ancillary Rights set out in Section 3C of Schedule Part 5,

in each case subject only to the Reserved Rights referred to in Section 1B of Schedule Part 5, the Title Conditions set out in Section 1A of Schedule Part 5 and the Authority's rights under this Agreement and solely for the purpose of implementing Phase 1 and carrying out Sub-hubco's Pre-Completion Commissioning insofar as the same relate to Phase 1; and

- 9.2A.2 Authority B shall grant to Sub-hubco and Sub-hubco Parties, or procure that Sub-hubco and Sub-hubco Parties are granted:

9.2A.2.1 access to each of the Authority B Sites; and

9.2A.2.2 the Ancillary Rights set out in Sections 1C and 2C of Schedule Part 5 (as applicable),

in each case subject only to the relevant Reserved Rights referred to in Sections 2B and 3B of Schedule Part 5 (as applicable), the relevant Title Conditions set out in Sections 2A and 3A of Schedule Part 5 (as applicable) and the Authority's rights under this Agreement and solely for the purpose of implementing Phase 2 and Phase 3 and carrying out Sub-hubco's Pre-Completion Commissioning insofar as the same relate to Phase 2 and Phase 3.

#### Access Following Construction

- 9.3 After occurrence of the relevant Phase Actual Completion Date, and notwithstanding the grant of the relevant Sub-Lease:

9.3.1 Authority A shall grant to Sub-hubco and Sub-hubco Parties, or procure that Sub-hubco and Sub-hubco Parties are granted access to the Authority A Site (subject only to the Reserved Rights referred to in Section 1B of



Schedule Part 5, the Title Conditions set out in Section 1A of Schedule Part 5 and the provisions of this Agreement) and solely for the purposes of:

- 9.3.1.1 carrying out the Project Operations in relation to the Authority A Facilities;
  - 9.3.1.2 remedying Defects and carrying out Snagging Matters relating to Phase 1 or exercising its rights under Clause 23.15 in relation to the Authority A Facilities; and
  - 9.3.1.3 exercising the Ancillary Rights set out in Section 1C of Schedule Part 5; and
- 9.3.2 Authority B shall grant to Sub-hubco and Sub-hubco Parties, or procure that Sub-hubco and Sub-hubco Parties are granted access to each of the Authority B Sites (in each case subject only to the Reserved Rights referred to in Sections 2B and 3B of Schedule Part 5 (as applicable), the relevant Title Conditions set out in Sections 2A and 3A of Schedule Part 5 (as applicable) and the provisions of this Agreement) and solely for the purposes of:
- 9.3.2.1 carrying out the Project Operations in relation to the relevant Authority B Facility;
  - 9.3.2.2 remedying Defects and carrying out Snagging Matters relating to Phase 2 and Phase 3 or exercising its rights under Clause 23.15 in relation to the relevant Authority B Facilities; and
  - 9.3.2.3 exercising the Ancillary Rights set out in Sections 2C and 3C of Schedule Part 5 (as applicable).

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

- 9.4 The rights referred to at Clause 9.2A and Clause 9.3 (*Access Following Construction*) are personal to Sub-hubco and Sub-hubco Parties.

#### **Grant of the Head Leases**

- 9.5 The relevant Authority shall procure that the Scottish Ministers will grant and Sub-hubco will accept the relevant Head Leases incorporating the following provisions:
- 9.5.1 the date of entry under the Head Leases shall be the Commencement Date and the Head Leases shall endure until the expiry of the Project Term; and
  - 9.5.2 the rent payable under the Head Leases shall be £1 per annum (if asked).
- 9.6 On the Commencement Date:
- 9.6.1 the relevant Authority shall deliver to Sub-hubco the relevant Head Lease validly executed by the Scottish Ministers;

9.6.2 Sub-hubco shall validly execute the relevant Head Leases and exhibit to the relevant Authority signed Land Registration Forms 2, 3 and 4 in respect of the tenant's interest;

9.6.3 the Head Leases shall be binding on the Scottish Ministers and Sub-hubco from the Commencement Date irrespective of whether they are validly executed on that date.

9.7 On the Commencement Date, the relevant Authority shall exhibit to Sub-hubco:

9.7.1 Form 12/13 Reports brought down as near as practicable to the Commencement Date (including personal searches against the Scottish Ministers and the relevant Authority) and showing no entries which would prevent the Scottish Ministers granting the relevant Head Leases and in addition the relevant Authority shall deliver to Sub-hubco such documents and evidence as the Keeper may require to enable the Keeper to issue a Land Certificate in the name of Sub-hubco as the registered proprietor of Sub-hubco's interest in the whole of the relevant Site and, provided that the relevant Head Lease is registered in the Land Register of Scotland within 14 days of the Commencement Date or if later, 14 days from receipt of the relevant Head Lease validly executed by the Scottish Ministers, containing no exclusion of indemnity in terms of section 12(2) of the Land Registration (Scotland) Act 1979 and no entry, deed or diligence prejudicial to Sub-hubco's interest other than such as are created by or against Sub-hubco or have been disclosed to and accepted by Sub-hubco prior to the Commencement Date. DECLARING that Sub-hubco shall not be entitled to object to any exclusion of indemnity, entry, deed or diligence which does not prevent or restrict Sub-hubco from carrying out Project Operations in accordance with this Agreement; and;

9.7.2 a letter of consent from the holder of any standard security or floating charge over the Scottish Ministers interest in the relevant Site

but no letter of obligation will be delivered.

#### **Registration of the Head Lease**

9.8 If the transaction is notifiable for SDLT purposes, Sub-hubco will:

9.8.1 submit (by electronic submission at the option of Sub-hubco) to HMRC within five (5) Business Days after the date of substantial performance (as defined in Section 44 of the Finance Act 2003) a completed and signed form (SDLT1) (with Sub-hubco's Representative's address selected as the response to question 58) together with any applicable supplementary forms; and

9.8.2 pay the SDLT (if any) due and payable within 30 days of the said date of substantial performance.

- 9.9 If prior to the issue of the relevant Land Transaction Return Certificate (SDLT5) or electronic submission receipt (as the case may be) HMRC rejects Sub-hubco's SDLT application, Sub-hubco will without delay:
- 9.9.1 provide the relevant Authority with a copy of any such rejection and other relevant correspondence; and
  - 9.9.2 correct the application and resubmit it with a remittance for the correct amount of the SDLT to HMRC and generally do everything necessary to procure the issue of the Land Transaction Return Certificate (SDLT5) or electronic submission receipt (as the case may be).
- 9.10 Within five (5) Business Days after receipt from HMRC, Sub-hubco will deliver to the relevant Authority's Representative the relevant Land Transaction Return Certificate (SDLT5) or electronic submission receipt (as the case may be) issued by HMRC.
- 9.11 Sub-hubco will within five (5) Business Days after receipt of the last of the relevant SDLT5 and the relevant executed Head Lease from the Authority (validly signed by the Scottish Ministers) submit the relevant Head Lease and the relevant SDLT5 to the Keeper for registration in the Land Register and the Books of Council and Session for preservation and execution.
- 9.12 Sub-hubco undertakes that if it breaches the terms of the obligations to pay registration dues and SDLT in Clauses 9.6 and 9.8 to 9.10 inclusive it will indemnify the relevant Authority in respect of any and all loss suffered by the Scottish Ministers and/or the relevant Authority by virtue of such breach.
- 9.13 Sub-hubco will deliver to the relevant Authority within five (5) Business Days after receipt from the Keeper (1) a copy of the Keeper's acknowledgement showing the title number to be allocated to the title sheet for Sub-hubco's interest and (2) a copy of the Land Certificate for that interest, with a colour copy of the title plan(s).
- 9.14 Neither Sub-hubco nor any Sub-hubco Party shall be entitled to any compensation on the expiry or earlier determination of the Head Leases save as set out in this Agreement.

#### **Title/Completion**

- 9.15 Without prejudice to any other provision of this Agreement, the Head Leases shall be granted subject to but, where applicable with the benefit (to the extent the Scottish Ministers are capable of transferring the same) of:
- 9.15.1 all notices, orders, proposals or requirements whatsoever affecting or relating to the relevant Site or any part thereof given or made by any government department or by any statutory undertaker or by any public local authority or other competent authority at any time after the Commencement Date;
  - 9.15.2 all actual or proposed charges, orders, proposals, restrictions, agreements, notices or other matters whatsoever affecting or relating to the relevant Site or any part thereof or any building or other structure thereon or any part thereof under the Planning

Act or any other statutory regulation at any time after the Commencement Date; and

9.15.3 the relevant Title Conditions and the relevant Reserved Rights.

#### **Grant of the Sub-Lease**

9.16 Sub-hubco will grant and the relevant Authority will procure that the Scottish Ministers accept the relevant Sub-Lease incorporating the following provisions:

9.16.1 the date of entry under the relevant Sub-Lease shall be the Commencement Date and the Sub-Leases shall endure until the expiry of the Project Term; and

9.16.2 the rent payable under the Sub-Leases shall be £1 per annum (if asked).

9.17 On the Commencement Date:

9.17.1 Sub-hubco shall validly execute the Sub-Leases and deliver the same to the Authority's Representative;

9.17.2 the Authority shall procure that the Scottish Ministers validly execute each Sub-Lease and exhibit to Sub-hubco signed Land Registration Forms 2 and 4 in respect of the tenant's interest;

and

9.17.3 the relevant Sub-Lease shall be binding on the Scottish Ministers and Sub-hubco from the Commencement Date irrespective of whether it is validly executed on that date.

9.17.4 On the Commencement Date Sub-hubco shall exhibit to the relevant Authority:

9.17.4.1 Form 12/13 Reports brought down as near as practicable to the relevant Commencement Date and showing no entries adverse to Sub-hubco's interest in the part of the relevant Site the subject of the relevant Sub-Lease and in addition Sub-hubco shall deliver to the Authority such documents and evidence as the Keeper may require to enable the Keeper to issue a Land Certificate in the name of the Scottish Minister's interest in the whole of the part of the relevant Site the subject of the relevant Sub-Lease and (subject as aftermentioned) provided that the relevant Sub-Lease is registered in the Land Register of Scotland within 14 days of the Commencement Date, containing no exclusion of indemnity in terms of section 12(2) of the Land Registration (Scotland) Act 1979. Provided that the relevant Sub-Lease is registered in the Land Register of Scotland within 14 days of the Commencement Date, the Land Certificate to be issued to the Scottish Ministers will disclose no entry, deed or diligence prejudicial to the

Scottish Ministers interest other than such as (i) are created by or against the Scottish Ministers or disclosed to the Scottish Ministers prior to the Commencement Date or (ii) are contained in the Land Certificate issued in respect of Sub-hubco's relevant head lease interest; and

9.17.4.2 a letter of consent from the holder of any standard security or floating charge over Sub-hubco's interest in the part of the relevant Site the subject of the relevant Sub-Lease,

but no letter of obligation will be delivered.

#### **Registration of the Sub-Lease**

- 9.18 If the transaction is notifiable for SDLT purposes, the relevant Authority will submit to HMRC within five (5) Business Days after the earlier of (1) the date of substantial performance (as defined in Section 44 of the Finance Act 2003) and (2) the last date of execution of the Sub-Lease a completed and signed form (SDLT1) (with the Authority's Representative's address selected as the response to question 58) together with any applicable supplementary forms and pay the SDLT (if any) due and payable.
- 9.19 If prior to the issue of a Land Transaction Return Certificate (SDLT5) HMRC rejects the Authority's SDLT application, the relevant Authority will without delay:
- 9.19.1 provide Sub-hubco with a copy of any such rejection and other relevant correspondence; and
  - 9.19.2 correct the application and resubmit it with a remittance for the correct amount of the SDLT to HMRC and generally do everything necessary to procure the issue of the Land Transaction Return Certificate (SDLT5).
- 9.20 Within five (5) Business Days after receipt from HMRC, the relevant Authority will deliver to Sub-hubco's Representative the relevant Land Transaction Return Certificate (SDLT5) issued by HMRC.
- 9.21 The relevant Authority will within five (5) Business Days after receipt of the relevant SDLT5 and the executed Sub-Lease from Sub-hubco submit the relevant Sub-Lease and the SDLT5 to the Keeper for registration in the Land Register and the Books of Council and Session for preservation and execution.
- 9.22 The relevant Authority undertakes that if it breaches the terms of the obligations to pay registration dues and SDLT in Clauses 9.17.1, 9.17.2 and 9.18 to 9.20 inclusive it will indemnify Sub-hubco in respect of any and all loss suffered by Sub-hubco directly by virtue of such breach.
- 9.23 The relevant Authority will deliver to Sub-hubco within five (5) Business Days after receipt from the Keeper (1) a copy of the Keeper's acknowledgement showing the title number to be allocated to the title sheet for the relevant Authority's interest and (2) a copy of the Land Certificate for that interest, with a colour copy of the title plan(s).

- 9.24 Neither the relevant Authority nor any Authority Party shall be entitled to any compensation on the expiry or earlier determination of the Sub-Lease save as set out in this Agreement.

### Extent of Rights

- 9.25 Notwithstanding the terms of Clauses 9.2A and 9.3 or any other rights granted under this Agreement, the Authority shall (if it is the heritable proprietor of the relevant Site), or (if it is not the heritable proprietor of the relevant Site) shall procure that the heritable proprietor of the relevant Site shall, enter into such wayleaves, deeds of servitude or other similar agreements with any third party that Sub-hubco or any Sub-hubco Party may require to be granted in favour of or by any third party, in order to exercise its rights or perform its obligations under this Agreement. The Authority shall enter into (or, where appropriate, shall procure that the heritable proprietor of the relevant Site shall enter into) any such wayleave, deed of servitude or other similar agreement, as soon as reasonably practicable after Sub-hubco has provided to the Authority all relevant information in connection therewith provided always that Sub-hubco has obtained at its own cost the prior agreement of the third party in terms acceptable to the Authority (acting reasonably). Sub-hubco shall reimburse the Authority for all costs and expenses reasonably and properly incurred by the Authority (and/or the heritable proprietor of the Site) in connection with entering into such wayleaves, deeds of servitude or other similar agreements at the request of Sub-hubco.

- 9.26 Each Authority shall procure that Sub-hubco and Sub-hubco Parties are able to exercise the relevant Additional Rights during the Project Term for the purposes of carrying out the Project Operations.

- 9.27 Each Authority shall have the right to occupy the relevant Facilities and to provide (or procure the provision by Community Services Providers of) Community Services from the relevant Facilities, with effect from the relevant Phase Completion Date.

- 9.28 Authority A shall be responsible for procuring the discharge of the obligations identified in Section 4 (*Authority A Property Actions*) of Schedule Part 5 [REDACTED]

- 9.29 Sub-hubco shall be obliged to carry out <sup>and complete</sup> the Forres Football Pitch Works in accordance with the requirements of the Forres Licence for Works. Sub-hubco shall have no obligation in respect of the Forres Football Pitch Works beyond compliance with this Clause 9.29. Notwithstanding the provisions of Clause 17.12, no Certificate of Practical Completion may be issued in respect of Phase 3 unless the Forres Football Pitch Works have been so carried out <sup>and completed or deemed</sup>

- to be completed in accordance with the requirements of the Forres Licence for Works.*
- 9.30 Authority A's rights under this Agreement shall include a right for Authority A and its Authority Parties to access the Tain Site for the purpose of discharging the Authority's obligations under clause 9.28 in relation to the Tain Service Road.

- 9.31 Sub-hubco shall procure that:

- 9.31.1 all Project Operations carried out at each Site by or on behalf of Sub-hubco (whether before, during or after the completion of the relevant Works) shall be carried out in a manner which does not breach any of the relevant Title Conditions and/or the relevant Reserved Rights; and

- 9.31.2 there shall be no action, or omission to act by Sub-hubco or a Sub-hubco Party, which shall give rise to a right for any person to obtain title to any Site or any part of them.

10 **THE SITE**

- 10.1 The condition of each Site shall be the sole responsibility of Sub-hubco. Accordingly (without prejudice to any other obligation of Sub-hubco under this Agreement), Sub-hubco shall be deemed to have:
- 10.1.1 carried out a Ground Physical and Geophysical Investigation and to have inspected and examined each Site and its surroundings and (where applicable) any existing structures or works on, over or under each Site;
  - 10.1.2 satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of each Site, the load bearing and other relevant properties of each Site, the risk of injury or damage to property affecting each Site, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution of the Works;
  - 10.1.3 satisfied itself as to the extent and adequacy of each Site and of the rights of access to and through each Site granted hereunder and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside each Site) without prejudice to Sub-hubco's rights under Clause 9.2A, Clause 9.3 and the Head Leases.
  - 10.1.4 satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties; and
  - 10.1.5 satisfied itself as to the conditions, burdens, restrictions and reservations set out in the relevant Title Conditions and the relevant Reserved Rights.
- 10.2 To avoid doubt, Sub-hubco accepts full responsibility for all matters referred to in Clause 10.1 Sub-hubco shall:
- 10.2.1 not be entitled to make any claim against any Authority of any nature whatsoever save, if applicable, as expressly provided in Clause 29 (*Delay Events*), on any grounds including (without limitation) the fact that incorrect or insufficient information on any matter relating to a Site was given to it by any person, whether or not an Authority or an Authority Party; and
  - 10.2.2 be responsible for, and hold the relevant Authority harmless from, cleaning up and/or otherwise dealing with any Contamination at the relevant Site so that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with, at its own cost, any applicable Laws and any Consents, orders, notices or directions of any

regulatory body (whether made against an Authority or Sub-hubco).

## 11 CONSENTS & PLANNING APPROVAL

11.1 Sub-hubco shall be responsible for:

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

11.1.2 subject to Clause 11.1A, implementing each Consent within the period of its validity in accordance with its terms.

11.1A The Authority shall be responsible for implementing the relevant Authority Planning Conditions.

11.2 In the event that:

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

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

11.2.3 Sub-hubco is not entitled in its own name to claim under that scheme but an Authority is so entitled,

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

11.3 Either Authority B or Sub-hubco shall, on becoming aware of a Planning Challenge, notify the other and those parties shall consult and generally co-operate with each other in good faith with a view to mitigating the effects of the Planning Challenge. Such consultation shall include discussion as to the likelihood of the Planning Challenge being successfully defended, whether either such party or both such parties should take any action to seek to resist the Planning Challenge and/or whether an application for a new Planning Permission should be submitted (in which case Clause 11.8 shall apply). Without prejudice to the foregoing generality, Sub-hubco shall, within 10 Business Days of receipt of a written request, provide Authority B with an estimate of:

11.3.1 the costs and liabilities and other consequences that Sub-hubco considers are likely to arise if the Works are suspended and recommenced following determination of the Planning Challenge; and/or

11.3.2 the costs that Sub-hubco considers are likely to be incurred in respect of an application for a new Planning Permission.



Authority B shall reimburse Sub-hubco for any costs reasonably and properly incurred by it in complying with this Clause 11.3 (including taking such action as Authority B may direct it to take to seek to resist the Planning Challenge) within 20 Business Days of receipt of a valid invoice therefor. Authority B shall be entitled, at any time, to request a breakdown of costs incurred and/or an estimate of costs likely to be incurred by Sub-hubco in complying with this Clause 11.3.

- 11.4 Authority B and Sub-hubco shall each:
- 11.4.1 provide to the Relevant Authority all relevant evidence and information that is available to Sub-hubco and/or Authority B and that may be lawfully disclosed to the Relevant Authority and employed by it in the effective defence of the Planning Challenge; and
  - 11.4.2 co-operate with the Relevant Authority in the provision of witnesses in the defence of the Planning Challenge.
- 11.5 Sub-hubco shall continue to discharge its obligations under this Agreement save to the extent that:
- 11.5.1 Sub-hubco, as a consequence of the Planning Challenge, is prevented by Law or any interim order of a Relevant Authority from progressing the relevant Authority B Works (which shall include an Adverse Planning Decision); and/or
  - 11.5.2 Sub-hubco is instructed by Authority B pursuant to Clause 11.7 to suspend the carrying out of the Works.
- 11.6 To the extent that Sub-hubco is prevented from progressing the relevant Authority B Works as a consequence of an event listed in Clause 11.5, such event shall be deemed to be a Delay Event and a Compensation Event.
- 11.7 Without prejudice to Clause 29.10, the Authority shall be entitled at any time following a Planning Challenge to instruct Sub-hubco, in writing, to suspend the carrying out of any of the relevant Authority B Works to which the Planning Approval relates. Such instruction shall cease to have effect upon a Planning Challenge Dismissal being notified by Authority B to Sub-hubco.
- 11.8 Authority B shall be entitled at any time following a Planning Challenge to instruct Sub-hubco to apply for a new Planning Permission for the relevant Authority B Works and Authority B may, without prejudice to Clause 11.9, issue an Authority Change Notice varying this Agreement, the relevant provisions of the Authority's Construction Requirements and the relevant provisions of the Service Level Specification if and to the extent necessary to allow Sub-hubco to proceed with the relevant Authority B Works in accordance with the requirements of the new Planning Permission.
- 11.9 In the event that a Planning Challenge results in an Adverse Planning Decision, Authority B shall as soon as reasonably practicable either:
- 11.9.1 serve a notice under Clause 42.1 requiring termination of this Agreement; or

- 11.9.2 issue an Authority Change Notice removing the affected Facilities from the scope of this Agreement and varying the relevant provisions of the Authority's Construction Requirements to remove those requirements relating to the affected Facilities to which the Adverse Planning Decision relates; or
  - 11.9.3 issue an Authority Change Notice instructing Sub-hubco to proceed with an application for a new Planning Permission in respect of the Facilities affected and (if and to the extent necessary) varying the relevant provisions of the Authority's Construction Requirements and/or the relevant provisions of Sub-hubco's Proposals in a manner that satisfies the grounds on which the Planning Challenge was successful; or
  - 11.9.4 issue an Authority Change Notice varying this Agreement, the relevant provisions of the Authority's Construction Requirements and the relevant provisions of the Service Level Specification if and to the extent necessary to allow Sub-hubco to proceed with the relevant Authority B Works in accordance with the requirements of a new Planning Permission obtained prior to the Adverse Planning Decision as referred to in Clause 11.8 above.
- 11.10 If a new Planning Permission is obtained pursuant to an instruction issued under Clause 11.9.2 Authority B shall issue an Authority Change Notice varying this Agreement, the relevant provisions of the Authority's Construction Requirements and the relevant provisions of the Service Level Specification if and to the extent necessary to allow Sub-hubco to proceed with the Works in accordance with the requirements of the new Planning Permission.
- 11.11 Authority B shall not be entitled to withdraw an Authority Change Notice issued under Clause 11.8, Clause 11.9 or Clause 11.10.

## PART 3: DESIGN AND CONSTRUCTION

### 12 THE DESIGN CONSTRUCTION AND COMMISSIONING PROCESS

#### Overall Responsibility

- 12.1 Sub-hubco shall carry out the Works:
- 12.1.1 so as to procure satisfaction of the Authority's Construction Requirements;
  - 12.1.2 in accordance with the relevant Sub-hubco's Proposals; and
  - 12.1.3 in accordance with the terms of this Agreement.
- 12.2 To avoid doubt, the obligations in Clauses 12.1.1, 12.1.2 and 12.1.3 are independent obligations. In particular:
- 12.2.1 the fact that Sub-hubco has complied with the relevant Sub-hubco's Proposals shall not be a defence to an allegation that Sub-hubco has not satisfied the Authority's Construction Requirements; and
  - 12.2.2 the fact that Sub-hubco has satisfied the Authority's Construction Requirements shall not be a defence to an allegation that Sub-hubco has failed to comply with the relevant Sub-hubco's Proposals.

#### Design responsibility

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

#### Corporate Identity and Signage

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

by the Scottish Government Health Directorate (or any successor Department) in relation to such matters whether by Executive Letter or otherwise.

#### **Authority design approval**

- 12.5 The Authority confirms that, as at the date of this Agreement, it has reviewed Sub-hubco's Proposals and that, subject to any qualifications and/or comments notified by that Authority to Sub-hubco set out in Section 9 of Schedule Part 6 such proposals satisfy that Authority's requirements in respect of Operational Functionality, so far as can reasonably be determined given the level of detail of Design Data which has been disclosed to that Authority.
- 12.6 Sub-hubco shall develop and finalise the design and specification of the Works and the relevant Authority shall review the Reviewable Design Data in accordance with Schedule Part 8 (*Review Procedure*) and the provisions of this Clause 12.6:
- 12.6.1 Sub-hubco shall submit the Reviewable Design Data and the design of any Changes developed in accordance with the procedure set out in Schedule Part 16 (*Change Protocol*) to the relevant Authority's Representative for review under Schedule Part 8 (*Review Procedure*). Sub-hubco shall not commence or permit the commencement of construction of the part or parts of the relevant Facilities to which such Reviewable Design Data relates until it has submitted the appropriate Reviewable Design Data and either it is confirmed by that Authority's Representative that Sub-hubco is entitled to proceed with construction in accordance with paragraph 3.3 of Schedule Part 8 (*Review Procedure*) or Sub-hubco is:
- (a) disputing the status of such Reviewable Design Data pursuant to paragraph 1.3.1 or paragraph 4.3 of Schedule Part 8 (*Review Procedure*); and
  - (b) proceeding at risk pursuant to paragraph 1.3.2 of Schedule Part 8 (*Review Procedure*).
- 12.6.2 with effect from the date at which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with Schedule Part 8 (*Review Procedure*), such Approved RDD Item shall for the purposes of this Agreement be deemed to have satisfied the requirements of the relevant Authority in the manner and to the extent set out in, Table A in Appendix 1 of Schedule Part 8 (*Review Procedure*);
- 12.6.3 Sub-hubco shall allow an Authority's Representative, at any time, a reasonable opportunity to view any items of Design Data, which shall be made available to that Authority's Representative as soon as practicable following receipt of any written request from that Authority's Representative; and
- 12.6.4 Sub-hubco shall procure that the Contractor establishes and maintains a computerised design database which Sub-hubco and the Authority's Representative may access remotely by computer to view drawings comprised within the Design Data (including Reviewable Design Data) and electronically store

and/or print copies of such Design Data. In the event of an Authority's Representative being unable to access such design database, Sub-hubco shall procure that it is made available for inspection by that Authority's Representative, or any other person authorised by that Authority's Representative.

#### **Rectification of Sub-hubco's Proposals**

12.7 Without prejudice to Clause 12.1, if it should be found that the relevant Sub-hubco's Proposals do not fulfil the Authority's Construction Requirements, Sub-hubco shall at its own expense, and in accordance with Clause 12.8 below, amend Sub-hubco's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:

12.7.1 Sub-hubco's Proposals shall satisfy the Authority's Construction Requirements; and

12.7.2 following the amendment or rectification, the structural, mechanical and electrical performance of the Facilities will be of an equivalent standard of performance to that set out in Sub-hubco's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made).

12.8 Where Clause 12.7 applies, Sub-hubco shall submit its proposal for amending Sub-hubco's Proposals and rectifying the Works (or any part affected) to the relevant Authority's Representative for review under Schedule Part 8 (*Review Procedure*) and shall not amend Sub-hubco's Proposals or commence or allow the commencement of the rectification of the Works (or any part affected) until it is permitted to proceed in accordance with Schedule Part 8 (*Review Procedure*).

### **13 RIGHT OF ACCESS OF AUTHORITY'S REPRESENTATIVE**

#### **Access to the Sites**

13.1 Sub-hubco shall procure that:

13.1.1 subject to complying with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the relevant Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time, an Authority's Representative shall have unrestricted access at all reasonable times during normal working hours to:

(a) view the Works at the relevant Site on reasonable prior notice appropriate to the circumstances, provided that:

(i) the notice procedures in this Clause 13.1.1(a) shall not apply to the right of access for an Authority's Representative and his staff and visitors to the office and

other facilities provided at the relevant Site for his use; and

(ii) at the request of the relevant Authority's Representative, this shall extend to a right of access for representatives of any relevant Community Service Providers;

(b) subject to obtaining the consent of the relevant manufacturer or supplier (which Sub-hubco agrees to use all reasonable endeavours to obtain), visit any site or workshop where materials, plant or equipment are being manufactured, prepared or stored for use in the relevant Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the relevant Works;

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

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

#### **Increased monitoring**

13.2 If, following any viewing, visit or inspection made pursuant to Clause 13.1.1, it is discovered that there are defects in the Works or that Sub-hubco has failed to comply with the Authority's Construction Requirements or the relevant Sub-hubco's Proposals, the relevant Authority's Representative may (without prejudice to any other right or remedy available to that Authority) by notice to Sub-hubco increase the level of monitoring of Sub-hubco until such time as Sub-hubco shall have demonstrated to the satisfaction of that Authority that it is capable of performing and will perform all its obligations to that Authority under this Agreement. Sub-hubco shall compensate that Authority for any reasonable additional costs incurred as a result of such increased monitoring.

#### **Right to Open Up**

13.3 Subject to Clause 13.4, an Authority's Representative shall have the right at any time prior to the relevant Phase Actual Completion Date to request Sub-hubco to open up and inspect any part or parts of the Works relating to the relevant Phase where that Authority's Representative reasonably believes that such part or parts of the Works relating to the relevant Phase is or are defective and Sub-hubco shall comply with such request.

13.4 Prior to exercising his right pursuant to Clause 13.3 above, that Authority's Representative shall notify Sub-hubco of his intention to exercise such right, setting out detailed reasons.

13.5 If, following the exercise by that Authority's Representative of his right pursuant to Clause 13.3, the inspection shows that the relevant part or parts of the relevant Works are not defective then Clause 29.3.4 shall apply.

- 13.6 If, following the exercise by that Authority's Representative of his right pursuant to Clause 13.3, the inspection shows that the relevant part or parts of the relevant Works is or are defective, Sub-hubco shall rectify and make good such Defect(s) and any consequence of such rectification and/or making good Defect(s) shall be carried out by Sub-hubco at no cost to that Authority and Sub-hubco shall not be entitled to any extension of time in relation to such rectification and making good of the relevant Works.
- 13.7 If, following the exercise by that Authority's Representative of his right pursuant to Clause 13.3, that Authority's Representative is of the opinion that the inspection shows that the relevant part or parts of the relevant Works is or are defective and Sub-hubco does not agree with such opinion, the matter shall be determined between Sub-hubco and the relevant Authority in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).
- 13.8 Without prejudice to the rights of an Authority's Representative pursuant to this Clause 13 (*Right of Access of Authority's Representative*) the parties acknowledge that the exercise of such rights shall not in any way affect the obligations of Sub-hubco under this Agreement save as expressly set out in this Clause 13 (*Right of Access of Authority's Representative*).

#### **Safety during Construction**

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

### **14 PROGRAMME AND DATES FOR COMPLETION**

#### **Dates for Completion**

- 14.1 Sub-hubco shall complete each Phase by the relevant Phase Completion Date. Without prejudice to Clauses 40 (*Sub-hubco Event of Default*), 42 (*Authority Voluntary Termination*), 46 (*Compensation on Termination*) and 47 (*Consequences of Termination*) no Authority shall be entitled to claim liquidated or general damages in respect of any delay which elapses between the relevant Phase Completion Date and the relevant Phase Actual Completion Date.

#### **The Programme**

- 14.2 Any Programme submitted in accordance with the provisions set out below shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail so as to enable the relevant Authority's Representative to monitor the progress including all commissioning activities and likely future progress of the relevant Phase.
- 14.3 The initial Programmes are set out at Schedule Part 7 (*The Programmes*). Any change to a Programme shall only be made in accordance with this Clause 14 (*Programme and Dates for Completion*) and Schedule Part 8 (*Review Procedure*). Sub-hubco shall promptly submit to the relevant Authority's Representative a copy of any version of that Programme varied in accordance with this Clause 14 (*Programme and dates for Completion*) and Schedule Part 8 (*Review Procedure*).
- 14.4 If it appears to an Authority's Representative at any time that the actual progress of the relevant Phase has significantly fallen behind the relevant Programme, then that Authority's Representative shall be entitled to require Sub-hubco to submit to

that Authority's Representative a report identifying the reasons for the delay and, unless the event causing the delay is still subsisting and it is not possible to predict with any certainty when the delay might come to an end, require Sub-hubco (at the relevant Authority's option):

14.4.1 to produce and submit to that Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*) a revised relevant Programme showing the manner and the periods in which the relevant works comprised in the Phase will be carried out to ensure completion; and/or

14.4.2 to produce and submit to that Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*) a revised relevant Programme showing the steps which are to be taken to eliminate or reduce the delay.

### **Early completion**

14.5 Notwithstanding that a Phase may have been completed in accordance with this Agreement, the relevant Phase Actual Completion Date may only occur on a date on or after the relevant Phase Completion Date unless the relevant Authority, in its absolute discretion, agrees otherwise in writing.

14.6 Sub-hubco shall notify the relevant Authority's Representative if at any time the actual progress of a Phase is significantly ahead of the relevant Programme such that Sub-hubco anticipates that the relevant Phase Actual Completion Date could occur earlier than the relevant Phase Completion Date in which case that Authority's Representative shall be entitled to require Sub-hubco to produce and submit to that Authority's Representative a revised relevant Programme showing the manner and the periods in which the relevant works comprised in the Phase will be carried out and what the revised date for completion would be to enable:

14.6.1 the relevant Authority to consider (at its absolute discretion) whether to agree an earlier date for completion if requested by Sub-hubco to do so; and

14.6.2 Sub-hubco and the relevant Authority to consider what modifications (if any) will be required to this Agreement in order to accommodate such earlier date for completion if agreed to by the relevant Authority pursuant to Clause 14.5.

## **15 INDEPENDENT TESTER**

### **Appointment**

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

### **Changes to terms of appointment**

15.2 Neither an Authority nor Sub-hubco shall without the other's prior written approval (not to be unreasonably withheld or delayed):



- 15.2.1 terminate, repudiate or discharge the Independent Tester Contract or treat the same as having been terminated, repudiated or otherwise discharged;
  - 15.2.2 waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Tester; or
  - 15.2.3 vary the terms of the Independent Tester Contract or the service performed or to be performed by the Independent Tester.
- 15.3 The parties shall comply with and fulfil their respective duties and obligations arising under or in connection with the Independent Tester Contract.

#### **Co-operation**

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

#### **Replacement**

- 15.5 If the Independent Tester's appointment is terminated otherwise than for full performance, the parties shall liaise and co-operate with each other in order to appoint, in accordance with this Clause 15.5, a replacement consultant to act as the Independent Tester as soon as reasonably practicable. The identity of any such replacement shall be as agreed by the parties and the terms of his appointment shall, unless otherwise agreed, be as set out in the Independent Tester Contract.
- 15.6 If the parties fail to agree the identity and/or terms of a replacement Independent Tester in accordance with Clause 15.5 within ten (10) Business Days of the original Independent Tester's appointment being terminated then such disagreement shall be referred for resolution in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

### **16 EQUIPMENT**

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

### **17 PRE-COMPLETION COMMISSIONING AND COMPLETION**

- 17.1 Not less than seven (7) months before the relevant Phase Completion Date, the relevant Authority shall provide Sub-hubco with a draft of the relevant Final Commissioning Programme for the relevant Phase as jointly developed by that Authority and Sub-hubco, in accordance with the provisions of Clause 17.2 and Clause 17.3. Sub-hubco shall provide the relevant Authority with comments on the relevant draft Final Commissioning Programme for the relevant Phase

submitted to it within four (4) months. Sub-hubco and the relevant Authority shall, within twenty (20) Business Days of receipt by the relevant Authority of Sub-hubco's comments agree the terms of the relevant Final Commissioning Programme for the relevant Phase provided that an Authority may by prior notice to Sub-hubco change the scope and time of the relevant Authority's Commissioning and reimburse Sub-hubco its reasonable costs incurred as a result of such change in scope or time. If Sub-hubco and the relevant Authority are unable to agree the relevant Final Commissioning Programme for the relevant Phase or the change in scope or time of the relevant Authority's Commissioning by three (3) months before the relevant Phase Completion Date, the matter shall be referred for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

- 17.2 The Final Commissioning Programme for each Phase shall be in accordance with the relevant Outline Commissioning Programme and shall impose no greater or more onerous obligations on the relevant Authority than those set out in the relevant Outline Commissioning Programme (unless otherwise agreed by that Authority in its absolute discretion). The Final Commissioning Programme shall then replace the relevant Outline Commissioning Programme.
- 17.3 Each Final Commissioning Programme shall describe the steps necessary, the party responsible for taking each of such steps and the timing and sequence of each of such steps to ensure insofar as relevant for the Phase:
- 17.3.1 that Sub-hubco's Pre-Completion Commissioning and the relevant Authority's Commissioning will not delay the relevant Phase Actual Completion Date from occurring by the relevant Phase Completion Date; and
- 17.3.2 that Sub-hubco's Post Completion Commissioning and the relevant Authority's Post Completion Commissioning are completed by the relevant Commissioning End Date.
- 17.4 The parties shall procure that the steps that they are responsible for carrying out and completing pursuant to the relevant Final Commissioning Programme for the relevant Phase include, in the case of Sub-hubco's activities, the activities described at paragraph 7.30 of sub-section C of the Authority's Construction Requirements.
- 17.5 Sub-hubco shall notify the Independent Tester and the relevant Authority's Representative of the date when Sub-hubco (acting reasonably) considers that a Phase will be complete in accordance with the Authority's Construction Requirements, the Completion Criteria and this Agreement not less than three (3) months prior to such anticipated completion. Such notification shall trigger the activities of the Independent Tester under this Clause.
- 17.6 The parties each undertake to co-operate with the Independent Tester to ensure that the Independent Tester is familiar with all necessary aspects of the Project for the purposes of its role as described in this Clause.

#### **Commissioning prior to Completion Date**

- 17.7 Sub-hubco shall insofar as relevant for each Phase:

17.7.1 undertake Sub-hubco's Pre-Completion Commissioning in accordance with the relevant Final Commissioning Programme; and

17.7.2 permit the relevant Authority to undertake the Authority's Commissioning including permitting specialist contractors engaged by the Authority to deliver and install equipment on such dates as agreed between the relevant Authority and Sub-hubco, in accordance with the relevant Final Commissioning Programme,

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

17.8 Sub-hubco shall give written notice to the Independent Tester and the relevant Authority of the commencement of Sub-hubco's Pre-Completion Commissioning in relation to a Phase and shall ensure that the Independent Tester and the relevant Authority's Representative are invited to witness all of, and are provided with all information they may reasonably require in relation to, Sub-hubco's Pre-Completion Commissioning of the relevant Phase and that the Independent Tester is invited to comment on Sub-hubco's Pre-Completion Commissioning of the relevant Phase.

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

#### **Pre-Completion Inspection**

17.10 Sub-hubco shall give the Independent Tester and the relevant Authority's Representative not less than twenty (20) Business Days' notice and not more than thirty (30) Business Days' notice of the date upon which Sub-hubco considers that a Phase will be complete and the tests on completion required for the relevant Phase to be performed in accordance with the relevant Final Commissioning Programme for the relevant Phase will be carried out. Following receipt of the notice specified in this Clause 17.10 (*Pre-Completion Inspection*) the relevant Authority's Representative and the Independent Tester shall be entitled to inspect the relevant Phase on the date or dates reasonably specified by Sub-hubco in accordance with this Clause 17.10 (*Pre-Completion Inspection*), and to attend any of the tests on completion. Sub-hubco shall, if so requested, accompany the Authority's Representative and the Independent Tester on any such inspection.

#### **Pre-Completion matters**

17.11 Sub-hubco and the relevant Authority shall procure that the Independent Tester, within three (3) Business Days of any inspection made pursuant to Clause 17.10 (*Pre-Completion Inspection*), notifies Sub-hubco and the relevant Authority of any

outstanding matters (including, without limitation, the repetition of any of the tests on completion which are required to be carried out and passed in accordance with the relevant Final Commissioning Programme for the relevant Phase) which are required to be attended to before the relevant Phase can be considered to be complete in accordance with the Authority's Construction Requirements, the relevant Sub-hubco's Proposals and the Completion Criteria. Sub-hubco shall attend to such matters and shall, if necessary, give the Independent Tester further notices in accordance with Clause 17.10 (*Pre-Completion Inspection*) (but dealing only with matters raised in the notification under this Clause 17.11 (*Pre-Completion Matters*)) so that the procedures in Clause 17.10 (*Pre-Completion Inspection*) and this Clause 17.11 (*Pre-Completion Matters*) are repeated as often as may be necessary to ensure that all outstanding matters in relation to the relevant Phase are attended to.

#### **Phase Completion Certificate**

- 17.12 Pursuant to the terms of the Independent Tester Contract, Sub-hubco and the relevant Authority shall procure that the Independent Tester, when he is satisfied that the relevant Phase is complete in accordance with the Completion Criteria, issues a Certificate of Practical Completion in respect of that Phase to that effect to the relevant Authority and to Sub-hubco.
- 17.13 Without prejudice to Clauses 17.14 and 17.17, the issue of the Certificate of Practical Completion in respect of a Phase shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence (but only for the purpose of ascertaining the relevant Payment Commencement Date), that the relevant Phase was complete in accordance with the Completion Criteria on the date stated in the relevant Certificate of Practical Completion.
- 17.14 The Independent Tester shall issue the Certificate of Practical Completion in relation to a Phase notwithstanding that there are Snagging Matters. Where there are Snagging Matters, Sub-hubco and the relevant Authority shall procure that the Independent Tester shall, within five (5) Business Days of the date of issue of the relevant Certificate of Practical Completion, issue a Snagging Notice which shall specify the Snagging Matters and an estimate of the cost of rectifying such Snagging Matters.
- 17.15 Following the issue of a Snagging Notice, Sub-hubco shall, in consultation with the relevant Authority's Representative and in such manner as to cause as little disruption as reasonably practicable to the relevant Authority's Post Completion Commissioning and the relevant Authority's use of the relevant Facilities, rectify all Snagging Matters within twenty (20) Business Days of the issue of the Snagging Notice.
- 17.16 If, within twenty (20) Business Days of the issue of the Snagging Notice, Sub-hubco has failed to rectify the Snagging Matters specified in the Snagging Notice the relevant Authority may by itself (or engage others to) carry out the works necessary to rectify the Snagging Matters, at the risk and cost of Sub-hubco.
- 17.17 The issue of the Certificate of Practical Completion in respect of a Phase shall in no way affect the obligations of Sub-hubco under this Agreement including in respect of any Defects.

#### **As-built specification**

- 17.18 As soon as it is available, after the issue of the Certificate of Practical Completion in relation to a Phase to the extent relating to that Phase, Sub-hubco shall provide to the relevant Authority a copy of the as-built building specification, together with all as-built drawings.

## 18 POST COMPLETION COMMISSIONING

### Commissioning

- 18.1 Sub-hubco and the relevant Authority shall, within ten (10) Business Days following the relevant Phase Actual Completion Date, respectively undertake and complete Sub-hubco's Post-Completion Commissioning and the relevant Authority's Post Completion Commissioning, in accordance with the Final Commissioning Programme for that Phase. Sub-hubco and the relevant Authority shall, at all times, and in particular in the period between the relevant Phase Actual Completion Date and the relevant Actual Commissioning End Date for the relevant Phase, use reasonable endeavours to assist the other party to ensure compliance with the relevant Final Commissioning Programme for the relevant Phase.

### Information

- 18.2 Sub-hubco shall ensure that an Authority's Representative is provided with all the information he may reasonably require in relation to the relevant Sub-hubco's Post-Completion Commissioning and the relevant Authority shall ensure that Sub-hubco is provided with all information Sub-hubco may reasonably require in relation to the relevant Authority's Post Completion Commissioning.
- 18.3 If an Authority's Representative, acting reasonably, makes any comment in relation to the carrying out of any relevant Sub-hubco's Post-Completion Commissioning, such comments shall be taken into account by Sub-hubco and if Sub-hubco, acting reasonably, makes any comment in relation to the carrying out of the relevant Authority's Post Completion Commissioning, such comment shall be taken into account by that Authority.
- 18.4 On the completion of the relevant Sub-hubco's Post-Completion Commissioning and the relevant Authority's Post Completion Commissioning for a Phase the Independent Tester shall issue a Commissioning Completion Certificate for that Phase.

### Operational Manuals

- 18.5 Sub-hubco shall make available on each Site to the relevant Authority's Representative:
- 18.5.1 at least six (6) weeks prior to the anticipated relevant Phase Actual Completion Date, one electronic copy to the relevant Authority for each relevant Site of a draft operation and maintenance manual in connection with the relevant Phase in sufficient detail to allow the relevant Authority to plan for the safe and efficient operation of the relevant Facilities;
  - 18.5.2 on or before the relevant Phase Actual Completion Date, one paper copy and one electronic copy to the relevant Authority for each relevant Site of a final draft operation and maintenance manual in connection with the relevant Phase in sufficient detail

to allow the relevant Authority to operate and use the relevant Facilities safely and efficiently;

18.5.3 within four (4) weeks following each Phase Actual Completion Date, the principal operation and maintenance manual in connection with the relevant Phase,

in each case including all manufacturers' instructions relating to Equipment installed by Sub-hubco.

18.6 Sub-hubco shall provide to the relevant Authority such information after each Phase Actual Completion Date as relates to any Snagging Matters or rectification of Defects in relation to the relevant Phase at the relevant Facilities as is reasonably necessary to allow for the updating of any of the items listed in Clause 18.5.

18.7 On termination of this Agreement (howsoever arising) prior to the provision by Sub-hubco in accordance with Clause 18.5 of the items listed therein, Sub-hubco shall within ten (10) Business Days of such termination provide a copy of any operating and maintenance manual applicable to the relevant Facilities not yet provided (completed as appropriate to the date of termination) to the relevant Authority.

## 19 FOSSILS AND ANTIQUITIES

### Property

19.1 As between an Authority and Sub-hubco, all fossils, antiquities, and other objects having artistic, historic or monetary value and human remains which may be found on or at a Site are or shall become, upon discovery, the absolute property of the relevant Authority.

### Discovery

19.2 Upon the discovery of any such item during the course of a Phase, Sub-hubco shall:

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

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

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

## **Action**

- 19.3 The relevant Authority shall procure that the relevant Authority's Representative promptly, and in any event within ten (10) Business Days of receipt of notice pursuant to Clause 19.2.1, issues an instruction to Sub-hubco specifying what action the relevant Authority's Representative requires Sub-hubco to take in relation to such discovery.
- 19.4 Sub-hubco shall promptly and diligently comply with any instruction issued by the relevant Authority's Representative referred to in Clause 19.3 above (except and to the extent that such instruction constitutes an Authority Change pursuant to Clause 19.6 below in which case the provisions of Schedule Part 16 (*Change Protocol*) shall apply), at its own cost.
- 19.5 If directed by the relevant Authority's Representative, Sub-hubco shall allow representatives of the relevant Authority to enter the relevant Site for the purposes of removal or disposal of such discovery provided that such entry shall be subject to the relevant Authority complying with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the relevant Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.
- 19.6 If, in relation to such discovery, the relevant Authority requires Sub-hubco to carry out works (being any work of alteration, addition, demolition or extension or variation in a Phase) which are not works which would be necessary for the purpose of compliance with Law or any Consents, it must issue an Authority Change Notice in accordance with the provisions of Schedule Part 16 (*Change Protocol*).

## PART 4: QUALITY ASSURANCE

### 20 QUALITY ASSURANCE

#### Quality Plans and Systems

- 20.1 Sub-hubco shall procure that all aspects of the Project Operations are the subject of quality management systems in accordance with the provisions of this Clause 20 (*Quality Assurance*).
- 20.2 The quality management systems referred to in Clause 20.1 above shall be reflected in appropriate quality plans, the standard of which shall be consistent with BS EN ISO 9001 or 9002 (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them).
- 20.3 Without limitation to the generality of Clause 20.2, there shall be:
- 20.3.1 a Design Quality Plan for each Phase;
  - 20.3.2 a Construction Quality Plan for each Phase; and
  - 20.3.3 a Services Quality Plan for the Services,
- provided that the Design Quality Plan and the Construction Quality Plan for each Phase may be incorporated into one document.
- 20.4 Sub-hubco shall procure that the Project Operations are carried out in compliance with the relevant Quality Plan. All Quality Plans applicable to Phase 1 shall be submitted to the Authority A Representative and all Quality Plans applicable to Phase 2 and/or Phase 3 shall be submitted to the Authority B Representative for their review in accordance with Schedule Part 8 (*Review Procedure*) and Sub-hubco shall not be entitled to implement or procure the implementation of any Quality Plan unless Sub-hubco is entitled to proceed with such implementation pursuant to Schedule Part 8 (*Review Procedure*).
- 20.5 Sub-hubco shall implement the quality management systems referred to in Clause 20.1 and shall procure that:
- 20.5.1 the Contractor implements the relevant Design Quality Plan;
  - 20.5.2 the Contractor implements the relevant Construction Quality Plan;
  - 20.5.3 each Service Provider implements the Services Quality Plan for each Service being provided by that Service Provider.
- 20.6 Where any aspect of the Project Operations is performed by more than one contractor or subcontractor, then the provisions of this Clause 20 (*Quality Assurance*) (in so far as relevant or appropriate to the activities to be performed by such contractor or subcontractor) shall apply in respect of each of such contractors or subcontractors, and references in this Clause 20 (*Quality Assurance*) to the "**Contractor**" or the "**Service Provider**" shall be construed accordingly. To avoid doubt, this Clause shall not be construed as requiring subcontractors of the Contractor or the Service Provider to have their own quality plans but only to



comply with the relevant Design Quality Plan and the relevant Construction Quality Plan or the relevant aspects of the Services Quality Plan (as the case may be).

- 20.7 Sub-hubco shall from time to time submit to the relevant Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*) any changes to any Quality Plan required for such Quality Plan to continue to comply with the requirements set out in Clause 20.2. The Authority A Representative and/or the Authority B Representative, as appropriate, may raise comments on any such proposed change only on the grounds set out in paragraph 3 of Schedule Part 8 (*Review Procedure*).
- 20.8 If there is no objection under Schedule Part 8 (*Review Procedure*) to a change to any Quality Plan proposed pursuant to Clause 20.7, the Quality Plan shall be amended to incorporate such change.

#### **Quality Manuals and Procedures**

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

#### **Quality Management**

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

#### **Quality Monitoring**

- 20.11 An Authority's Representative may carry out audits of Sub-hubco's quality management system (including all relevant Quality Plans and any quality manuals and procedures) to establish that Sub-hubco is complying with Clauses 20.1 and 20.3. Each Authority's Representative may individually carry out such audits at approximate intervals of three (3) months and may carry out other periodic

monitoring, spot checks and auditing of Sub-hubco's quality management systems. Sub-hubco shall procure that each Authority's Representative shall have an equivalent right in respect of the Contractor's and the Service Providers' quality management systems. Sub-hubco shall co-operate, and shall procure that any Sub-Contractor co-operates, with each Authority's Representative including providing him with all information and documentation which he reasonably requires in connection with his rights under this Clause.

**PART 5: INFORMATION TECHNOLOGY**

21 **INFORMATION TECHNOLOGY**

NOT USED

## PART 6: SERVICES

### 22 THE SERVICES

#### General obligations

22.1 Throughout the Operational Term Sub-hubco shall provide (or procure that the Service Providers provide) the Services in accordance with:

22.1.1 the Service Level Specification;

22.1.2 the Method Statement; and

22.1.3 the terms of this Agreement.

22.2 To avoid doubt the obligations in Clauses 22.1.1, 22.1.2 and 22.1.3 are independent obligations and:

22.2.1 the fact that Sub-hubco has complied with the Method Statement shall not be a defence to an allegation that Sub-hubco has not satisfied the Service Level Specification; and

22.2.2 the fact that Sub-hubco has complied with the Service Level Specification shall not be a defence to an allegation that Sub-hubco has not satisfied the Method Statement,

provided that where there is any conflict between the Service Level Specification and the Method Statement the Authorities acting together shall be entitled (in their sole discretion) to decide which shall take precedence and inform Sub-hubco of its decision and Sub-hubco shall, at its own cost, be obliged to implement that Authority's decision.

#### Commencement and phase in of Services

22.3 Sub-hubco shall procure that the provision of the Services in respect of a Phase commences on the relevant Phase Actual Completion Date.

#### Sub-hubco Services Changes

22.4 Sub-hubco may at any time submit to both Authority's Representatives in accordance with Schedule Part 8 (*Review Procedure*) proposals for amendments to or substitution for the Method Statement or any part of them, insofar as relating to the relevant Facilities. If there is no comment on such proposed amendment or substitution (on the grounds set out in paragraph 3 of Schedule Part 8 (*Review Procedure*)), then the Method Statement as so amended or substituted shall be the Method Statement for the purposes of this Agreement, insofar as relating to the relevant Facilities, subject to any further amendment or substitution to which there has been no comment in accordance with Schedule Part 8 (*Review Procedure*).

22.5 To avoid doubt, an amendment to or substitution for the relevant Method Statement proposed pursuant to Clause 22.4 shall not be a Qualifying Change entitling Sub-hubco to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.

### **No disruption**

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

23

## **MAINTENANCE**

### **Programmed Maintenance Works**

- 23.1 No later than three (3) months prior to the first Phase Completion Date Sub-hubco shall submit to the Authority's Representatives in accordance with Schedule Part 8 (*Review Procedure*) the Schedule of Programmed Maintenance for the period from the relevant first Phase Completion Date to the expiry of that Contract Year.
- 23.2 Not later than three (3) months prior to the commencement of each subsequent anniversary of the first Phase Completion Date Sub-hubco shall submit to the Authority's Representatives in accordance with Schedule Part 8 (*Review Procedure*) the Schedule of Programmed Maintenance for the next succeeding Contract Year in respect of all Phases completed prior to, and all Phases scheduled to be completed in, that Contract Year.
- 23.3 The Schedule of Programmed Maintenance shall contain the following information (the "**Programmed Maintenance Information**"):
- 23.3.1 details of the proposed start and end dates for each period of Programmed Maintenance, the works to be carried out and the proposed hours of work; and
  - 23.3.2 details of any effect of the Programmed Maintenance on the delivery of any of the Services and/or the activities of the relevant Authority.
- 23.4 Not later than thirty (30) Business Days prior to the commencement of any quarter (being a three month period commencing on 1 April, 1 July, 1 October or 1 January), Sub-hubco may submit to the relevant Authority's Representative for approval in accordance with Schedule Part 8 (*Review Procedure*) a revision to the Schedule of Programmed Maintenance for the Contract Year in which the relevant quarter falls showing the effect of the proposed changes to the relevant Programmed Maintenance Information. If the relevant Authority's Representative does not raise comments on such proposed revision in accordance with Schedule Part 8 (*Review Procedure*), the Schedule of Programmed Maintenance as revised shall become the Schedule of Programmed Maintenance in respect of that quarter.
- 23.5 Where the relevant Authority's Representative raises comments in respect of any Programmed Maintenance periods and/or hours of work shown in the Schedule of Programmed Maintenance in accordance with paragraph 3 of Schedule Part 8 (*Review Procedure*), he shall indicate whether, and if so when, the Programmed Maintenance can be re-scheduled and Sub-hubco shall amend the Schedule of Programmed Maintenance accordingly.

## Programmed and Unprogrammed Maintenance

- 23.6 Sub-hubco shall not carry out any Programmed Maintenance or Unprogrammed Maintenance Works save:
- 23.6.1 in accordance with the Schedule of Programmed Maintenance to which no objection has been made under Schedule Part 8 (*Review Procedure*) or, where comment has been raised in respect of the Programmed Maintenance periods and/or time, the Schedule of Programmed Maintenance has been amended pursuant to the relevant Service Level Specification;
  - 23.6.2 in accordance with the procedures set out in Clause 23.8; or
  - 23.6.3 in an emergency, in accordance with Clause 23.9.
- 23.7 Notwithstanding that there has been no objection to the Schedule of Programmed Maintenance, an Authority's Representative may, at any time, require Sub-hubco to accelerate or defer any Programmed Maintenance in respect of the relevant Facilities by giving written notice to Sub-hubco, (unless otherwise agreed) not less than twenty (20) Business Days prior to the scheduled date for carrying out such Programmed Maintenance, which notice shall set out the time and/or periods at or during which the relevant Authority requires the Programmed Maintenance to be performed. Sub-hubco shall notify the relevant Authority of the amount of any additional reasonable costs which it will incur as a direct consequence of such acceleration or deferment (the "**Estimated Increased Maintenance Costs**") within five (5) Business Days of the receipt of the written notice advising of the requirement for an acceleration or deferment of the Programmed Maintenance. The relevant Authority shall, within a further period of five (5) Business Days following receipt of notification of the amount of the Estimated Increased Maintenance Costs, at the relevant Authority's option, either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance. If the relevant Authority does not respond within this five (5) Business Day period, the request shall be deemed to have been confirmed. The relevant Authority shall reimburse Sub-hubco the direct and reasonable costs actually incurred by Sub-hubco as a consequence of such acceleration or deferment up to, but not exceeding, the amount of the Estimated Increased Maintenance Costs.
- 23.8 If, in circumstances other than an emergency, the need arises for Maintenance Works (excluding any works of a *de minimis* nature in respect of which the parties have agreed this Clause 23.8 shall not apply and excluding works carried out for the purpose of Rectification, which shall take place in accordance with the provisions of Schedule Part 14 (*Payment Mechanism*)), which are not scheduled to be carried out as part of the Programmed Maintenance ("**Unprogrammed Maintenance Work**"), Sub-hubco shall not carry out any Unprogrammed Maintenance Work unless and until the relevant Authority's Representative has approved the proposed commencement date, the proposed hours of work and estimated duration of the requisite Unprogrammed Maintenance Works in accordance with the provisions of paragraph 3.9 of Schedule Part 8 (*Review Procedure*). Nothing in this Clause 23.8 (including any approval of the relevant Authority pursuant to Schedule Part 8 (*Review Procedure*)) shall prevent the relevant Authority from making any deductions in calculating the relevant Monthly Service Payments pursuant to the Payment Mechanism.
- 23.9 If, as a result of an emergency, the need arises for Unprogrammed Maintenance Works, Sub-hubco may carry out such Unprogrammed Maintenance Works

provided that Sub-hubco shall notify the relevant Authority's Representative as soon as possible (and in any event within two (2) Business Days of the occurrence of the emergency) of the extent of the necessary Unprogrammed Maintenance Works and the reasons for them. Sub-hubco shall take all reasonable steps to minimise the duration of such Unprogrammed Maintenance Works. Nothing in this Clause 23.9 shall prevent the relevant Authority from making any deductions in calculating the relevant Monthly Service Payments pursuant to the Payment Mechanism.

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

#### **5 Year Maintenance Plan**

- 23.11 Sub-hubco shall deliver to both Authority's Representatives not less than three (3) months prior to the first Phase Completion Date, and thereafter not less than three (3) months prior to the commencement of each Contract Year the latest version of the 5 Year Maintenance Plan.
- 23.12 An Authority shall have a right to inspect the relevant Facilities and the relevant Maintenance Works to ensure that such Facilities are being maintained in accordance with the relevant Service Level Specification and that those Facilities comply with the Authority's Construction Requirements and the relevant Sub-hubco's Proposals throughout the Project Term. An Authority may appoint an independent third party for the purposes of carrying out any such inspection and shall make known the findings to Sub-hubco and the Funders. Sub-hubco and the relevant Authority shall then meet to discuss any implications of such findings and any steps that are necessary to remedy any failure to comply with such obligations. Sub-hubco shall (subject to Clause 33 (*Change Protocol*)) take into account such discussions in the next Schedule of Programmed Maintenance so that any failure to comply with such obligations shall be remedied.

#### **Authority's Maintenance Obligations**

- 23.13 The Authority's Maintenance Obligations to be performed by an Authority at the relevant Facilities are as follows:
- 23.13.1 not less frequently than once in every five (5) years from the first Phase Actual Completion Date, in a good and workmanlike manner to make good plaster and other interior wall and ceiling finishes and decoration, including skirting, door surrounds and architraves in all such parts of the interior of the Functional Areas as were plastered, finished and/or decorated by Sub-hubco as part of the Works or in implementing an Authority Change;

23.13.2 to renew and replace the following flooring coverings not less frequently than once in the following time periods calculated from the relevant Phase Completion Date:

- (a) carpet tiles every 20 years;
- (b) cushioned flooring every 20 years; and
- (c) vinyl flooring (excluding marmoleum flooring) every 15 years;

together with the appropriate flooring expansion joints and mat wells as necessary in the Functional Areas provided by Sub-hubco as part of the Works or in implementing an Authority Change

23.13.3 not used;

23.13.4 as often as is necessary, to maintain anything provided by the Authority under a Derogated Low Value Change; and

23.13.5 to ensure that all portable electrical appliances that are connected to the electricity supply in the Facilities by the Authority and Authority Parties have been tested in accordance with Law and the "Code of Practice for In-service Inspection and Testing of Electrical Equipment" published from time to time by the Institution of Electrical Engineers.

23.14 Subject to Clause 23.21, the relevant Authority must carry out and perform the Authority's Maintenance Obligations or procure that the Authority's Maintenance Obligations are carried out at the relevant Facilities and performed as often as required by Clause 23.13 and in accordance with Good Industry Practice. Without prejudice to an Authority's rights under Clause 23.7, the Authority's Maintenance Obligations must be scheduled by the relevant Authority so as not to interfere with Sub-hubco carrying out Programmed Maintenance in accordance with the Schedule of Programmed Maintenance in respect of the relevant Facilities and/or interfere with Sub-hubco carrying out any relevant Unprogrammed Maintenance Work in accordance with Clause 23.8.

23.15 If an Authority is in breach of Clause 23.14, Sub-hubco may, while the breach is continuing, give a notice to that Authority requiring it to carry out the relevant Authority Maintenance Obligations. If that Authority:

23.15.1 does not reply to Sub-hubco in writing within ten (10) Business Days of the date of Sub-hubco's notice with a programme for carrying out the relevant Authority Maintenance Obligations within a period of time that is reasonable having regard to the nature of the breach, the reasonably foreseeable consequences of non-performance of the relevant Authority Maintenance Obligations for the relevant Services and Sub-hubco's obligations under this Agreement; or

23.15.2 having provided such a programme, does not comply with it,



Sub-hubco shall be entitled to perform the relevant Authority's Maintenance Obligations so far as necessary to prevent any reasonably foreseeable adverse effect on the relevant Services and/or Sub-hubco's obligations under this Agreement consequent upon the non-performance of the relevant Authority Maintenance Obligations.

- 23.16 Sub-hubco shall not carry out any relevant Sub-hubco's Remedial Services unless and until the relevant Authority's Representative, pursuant to this Clause 23.16, has approved or is deemed to have approved or has specified the proposed commencement date, the proposed hours of work and the estimated duration of relevant Sub-hubco's Remedial Services (together the "SRS Timetable"). Sub-hubco must give the relevant Authority not less than twenty (20) Business Days notice of its proposed SRS Timetable. If the relevant Authority's Representative considers that the proposed SRS Timetable is not consistent with the principles set out in Appendix 2 to Schedule Part 8 (*Review Procedure*), he may specify an alternative SRS Timetable that is consistent with those principles, which shall be as near to the SRS Timetable proposed by Sub-hubco as reasonably practicable. If the relevant Authority's Representative fails either to approve Sub-hubco's proposed SRS Timetable or to specify an alternative SRS Timetable within ten (10) Business Days of receipt of Sub-hubco's proposed SRS Timetable, he shall be deemed to have approved it.
- 23.17 An Authority must allow Sub-hubco and relevant Sub-hubco Parties access to the relevant Site and the relevant Facilities:
- 23.17.1 for the purpose of monitoring the carrying out of relevant Authority's Maintenance Obligations; and
- 23.17.2 in accordance with the relevant approved SRS Timetable for the purpose of carrying out any relevant Sub-hubco's Remedial Services.
- 23.18 If an Authority does not allow access to the relevant Site and/or the relevant Facilities as required pursuant to Clause 23.17.2, or otherwise prevents or interferes with Sub-hubco and any relevant Sub-hubco Party performing any relevant SRS Remedial Works, Sub-hubco may propose a new SRS Timetable in respect of the relevant Sub-hubco's Remedial Services and Clause 23.16 shall apply.
- 23.19 In carrying out and performing Sub-hubco's Remedial Services, Sub-hubco must comply with the standards applicable to the relevant Authority's Maintenance Obligations and Good Industry Practice and must use reasonable endeavours to match colours and other finishes to those that currently exist in the relevant part or parts of the relevant Facilities.
- 23.20 The relevant Authority must reimburse Sub-hubco all reasonable costs that it incurs in carrying out and performing the relevant Sub-hubco's Remedial Services in accordance with this Clause 23.
- 23.21 Notwithstanding the terms of Clauses 23.14 to 23.19 above, Sub-hubco is responsible for:
- 23.21.1 making good any defects in plaster and other interior wall and ceiling finishes and decoration and floor coverings referred to in Clause 23.13.1 provided by Sub-hubco as part of the Works or in implementing an Authority Change, caused by defective design

or workmanship in the carrying out of the Works or in implementing the Authority Change; and

23.21.2 making good any defects in plaster and other interior wall and ceiling finishes and decoration and floor coverings referred to in Clause 23.13.1 provided by Sub-hubco as part of the Works or in implementing an Authority Change (whether or not these have subsequently been replaced or renewed by the Authority and things referred to in Clause 23.13.4) consequential on any Programmed Maintenance or Unprogrammed Maintenance or any act or omission of Sub-hubco.

23.22 The relevant Authority and Sub-hubco shall co-operate with each other to coordinate any activities that the relevant Authority proposes to undertake to implement any of the Authority's Maintenance Obligations and relevant Sub-hubco's Programmed Maintenance and Sub-hubco must include the relevant Authority's intentions with regard to performing the relevant Authority's Maintenance Obligations in the Schedule of Programmed Maintenance for each Contract Year.

#### **Energy for Repairs**

23.23 Subject to Clause 23.24, an Authority is entitled to be reimbursed by Sub-hubco for costs incurred by that Authority for Utilities supplied to its Facilities during the relevant Operational Term that are consumed in the process of Sub-hubco or any Sub-hubco Party carrying out operations to rectify an Availability Failure.

23.24 For the purpose of applying Clause 23.23 the cost of each Utility shall be considered separately and Clause 23.23 shall not apply if the costs concerned, in respect of the particular Availability Failure, do not exceed the daily average cost based on bills paid by the Authority to the supplier of the relevant Utility to the Facilities over the most recent 12-month period for which figures are available.

23.25 Where an Authority claims reimbursement of Utilities costs pursuant to Clause 23.23 it must reasonably estimate those costs using all available evidence and send Sub-hubco a statement showing its calculation of the amount claimed along with its supporting evidence. Unless Sub-hubco disputes the statement within ten (10) Business Days of receipt, the relevant Authority will be entitled, to set-off pursuant to Clause 34.6, the amount claimed.

## 24 **MONITORING OF PERFORMANCE**

### **Monitoring**

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

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

### **Grounds for Warning Notices**

24.3 If at any time during the relevant Operational Term (other than by reason of a Force Majeure Event, a Relief Event or an Emergency):

24.3.1 the total Authority A Deductions for any Contract Month amount to more than 0.326 per cent of the Authority A Annual Service Payment for the current Contract Year; or

24.3.2 the total Authority B Deductions for any Contract Month amount to more than 0.326% per cent of the Authority B Annual Service Payment for the current Contract Year;

24.3.3 the total Authority A Deductions in each of any three Contract Months in any six consecutive Contract Months amount to more than 0.146 per cent of the Authority A Annual Service Payment for the current Contract Year; or

24.3.4 the total Authority B Deductions in each of any three Contract Months in any six consecutive Contract Months amount to more than 0.146 per cent of the Authority B Annual Service Payment for the current Contract Year,

the relevant Authority's Representative may serve a Warning Notice on Sub-hubco, provided always that, to give Sub-hubco time to take appropriate rectification measures, an Authority's Representative shall not be entitled:

(a) to serve more than one Warning Notice in respect of the relevant Facilities in any month;

(b) to serve a Warning Notice in any two consecutive months to the extent that the same event has contributed to the relevant Authority's right to serve the Warning Notice, but provided that Sub-hubco demonstrates to that Authority that it has taken all reasonable steps to remedy the cause of that event.

### **Warning Notices Disputes**

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

### **Authority's remedial rights**

24.5 The provisions of Clauses 24.6 to 24.9 (inclusive) shall apply if an Authority, acting reasonably, considers that it needs to take action in connection with the relevant Services:

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

- 24.5.2 to prevent or address material interruption in the provision of one or more of the relevant Services; or
  - 24.5.3 because of a risk of the ability of that Authority or any Community Services Provider to provide the relevant Community Services at the relevant Facilities being prejudiced to a material degree.
- 24.6 If any of the circumstances set out in Clause 24.5 arise (without prejudice to its rights under Clause 40 (*Sub-hubco Event of Default*) or any other express rights under this Agreement) and an Authority wishes to take action (either by itself or by engaging others), that Authority shall notify Sub-hubco in writing of the following:
  - 24.6.1 the action it wishes to take;
  - 24.6.2 the reason for such action;
  - 24.6.3 the date it wishes to commence such action;
  - 24.6.4 the time period which it believes will be necessary for such action; and
  - 24.6.5 to the extent practicable, the effect on Sub-hubco and its obligation to provide the relevant Services during the period such action is being taken.
- 24.7 Following service of such notice, the relevant Authority shall take such action as has been notified under Clause 24.6 and any consequential additional action as it reasonably believes is necessary (together, the "**Required Action**") and Sub-hubco shall give all reasonable assistance to that Authority while it is taking the Required Action. To the extent that the relevant Authority performs any of the obligations of Sub-hubco hereunder or undertakes tasks that would otherwise be undertaken by Sub-hubco pursuant to this Agreement, that Authority shall perform such obligations or undertake such tasks to the same standard as would be required of Sub-hubco under the terms of this Agreement.
- 24.8 If the Required Action is taken other than as a result of a breach by Sub-hubco of its obligations under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents Sub-hubco from providing any part of the relevant Services:
  - 24.8.1 Sub-hubco shall be relieved from its obligations to provide such part of the relevant Services; and
  - 24.8.2 in respect of this period in which the relevant Authority is taking the Required Action and provided that Sub-hubco provides that Authority with reasonable assistance (such assistance to be at the expense of the relevant Authority to the extent that additional costs are incurred), the relevant Monthly Service Payments due from that Authority to Sub-hubco shall equal the amounts that Sub-hubco would receive if it were satisfying all of its obligations and providing the relevant Services affected by the Required Action in full over that period and the relevant Authority shall indemnify Sub-hubco against all Direct Losses sustained by Sub-

hubco as a result of the relevant Authority taking the Required Action.

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

24.9.1 Sub-hubco shall be relieved of its obligations to provide such part of the Services; and

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

### **Emergencies**

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

24.11 The cost of any additional or alternative services provided by Sub-hubco under Clause 24.10 shall be borne by that Authority and paid in accordance with Clause 34 (*Payment*). The relevant Authority will not be entitled to levy Deductions in respect of any failure to provide the relevant Services to the extent that such failure arises by reason of Sub-hubco's compliance with Clause 24.10.

## **25 TUPE AND EMPLOYMENT MATTERS**

### **No Employee Transfer**

25.1 Each relevant Authority and Sub-hubco agree that there are no individuals presently employed by the Authority (or any Community Services Providers or their respective subcontractors) whose contracts of employment will, by virtue of the transfer to Sub-hubco of responsibility for provision of (or procuring the provision by Service Providers of) any of the Services in accordance with this Agreement and in accordance with the Transfer Regulations, have effect after the date or dates of such transfer as agreed by the relevant parties (each a "Relevant Service Transfer Date") (or at any other time) as if originally made between those persons and the relevant Service Provider.

25.2 If it is subsequently agreed or determined that there are persons presently employed by the Authority (or any Community Services Providers or their respective subcontractors) whose contracts of employment do have effect after the Relevant Service Transfer Date as if originally made between those persons and the relevant Service Provider ("Transferring Staff") then:

- 25.2.1 the relevant Authority shall within ten (10) Business Days of the date on which it was so agreed or determined have the opportunity to offer or procure the offer of a position as an employee of the relevant Authority to some or all of the Transferring Staff;
- 25.2.2 Sub-hubco shall procure that no person to whom the relevant Authority has offered a position in accordance with Clause 25.2.1 shall be dismissed by reason of redundancy until the period for acceptance of such offer has expired and the person in question has not accepted such offer; and
- 25.2.3 subject to Clauses 25.2.1 and 25.2.2, Sub-hubco or any Service Provider shall be entitled to dismiss any or all of the Transferring Staff by reason of redundancy provided that Sub-hubco shall use and shall procure that any Service Provider shall carry out in the required manner any obligation to consult with the Transferring Staff or any of them, or their respective representatives, and shall use all reasonable endeavours to mitigate the amount of any costs payable in respect of the Transferring Staff or their dismissal.

The relevant Authority shall indemnify Sub-hubco against any costs referred to in Clause 25.2.3 reasonably incurred by Sub-hubco (or by a relevant Service Provider and for which Sub-hubco is responsible) and shall reimburse any costs reasonably and properly incurred by Sub-hubco or the Service Provider in employing any Transferring Staff prior to the expiry of the period referred to in Clause 25.2.2.

#### **Compliance with Legislation and Authority Policies**

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

#### **Sub-hubco Indemnities**

- 25.5 Sub-hubco shall indemnify and keep indemnified in full the relevant Authority and, at the relevant Authority's request, each and every service provider who has or shall provide any service equivalent to any of the Services against:
  - 25.5.1 claims in respect of all emoluments and all other contractual or statutory payments unpaid by Sub-hubco or a Service Provider to any person entitled to such payments from Sub-hubco or a Service Provider who is or has been employed or engaged by Sub-hubco or any Service Provider on or after the Relevant Service Transfer Date but prior to the date of expiry or termination of this Agreement, and all income tax and pension and national insurance contributions payable thereon; and

25.5.2 insofar as Clause 25.5.1 does not apply, all Direct Losses incurred by the relevant Authority as a result of any claim against the relevant Authority in respect of any liability to any person who is or has been employed or engaged (whether as a consequence of the Transfer Regulations or of the provisions of this Clause 25) by Sub-hubco or any Service Provider in connection with the provision of any of the Services, where such claim arises as a result of any act or omission of Sub-hubco or the Service Provider occurring after the Relevant Service Transfer Date and before the expiry or termination of this Agreement;

BUT the indemnities in Clauses 25.5.1 and 25.5.2 shall not apply to the extent that the claim arises from a wrongful act or omission of the relevant Authority or is in respect of sums for which the relevant Authority is liable pursuant to Clause 25.2.

25.6 Clause 49.3 (*Conduct of Claims*) of this Agreement shall apply where any claim is made in respect of the indemnities given by Sub-hubco under Clause 25.5 (*Sub-hubco Indemnities*).

#### **Position on expiry or earlier termination of this Agreement**

25.7 On the expiry or earlier termination of this Agreement, the relevant Authority and Sub-hubco agree that it is their intention that the Transfer Regulations shall apply in respect of the provision thereafter of any service equivalent to a Service but the position shall be determined in accordance with the Law at the date of expiry or termination as the case may be and this Clause is without prejudice to such determination.

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

25.8.1 within the period of twelve months immediately preceding the expiry of this Agreement, or

25.8.2 within the period of twelve months before the termination of this Agreement or, if shorter, during the period of notice of termination

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

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

25.10 If an offer of employment is made in accordance with Clause 25.9 the employment shall be on the same terms and conditions as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the relevant Authority or other new service provider may at its absolute discretion not offer such terms and conditions if there has been any change to the terms and conditions of the persons concerned in breach of Clause 25.8

26 **PENSIONS**

NOT USED.

## 27 SITE SECURITY AND PERSONNEL ISSUES

### **Access**

- 27.1 An Authority shall have the right to refuse admittance to, or order the removal from, the relevant Facilities of any person employed by (or acting on behalf of) Sub-hubco, any Sub-hubco Party or any sub-contractor whose presence, in the reasonable opinion of that Authority, is likely to have a material adverse effect on the provision by that Authority and/or any Community Services Provider of the relevant Community Services at such Facilities or who is not a fit and proper person to be in such Facilities.
- 27.2 Action taken under Clause 27.1 shall forthwith be confirmed in writing by the relevant Authority to Sub-hubco and, to avoid doubt, shall not relieve Sub-hubco of any of its obligations under this Agreement.
- 27.3 If and when so directed in writing by an Authority, Sub-hubco shall within twenty (20) Business Days provide a list of the names and addresses of all persons it expects may require admission in connection with this Agreement, to any premises occupied by that Authority, specifying the capacities in which those persons are concerned with this Agreement and giving such other particulars as that Authority may reasonably require.
- 27.4 The decision of an Authority as to whether any person is to be refused admission to the relevant Facilities shall be final and conclusive.

### **Authority Policies**

- 27.5 Sub-hubco shall, and shall procure that all Sub-hubco Parties shall, comply at all times with the relevant Authority Policies.
- 27.6 An Authority shall notify Sub-hubco of any proposed change to the relevant Authority Policies as soon as practicable (and, in any event, prior to such change taking effect) and consult with Sub-hubco. Subject to Clause 27.7, such change shall take effect as a Change in accordance with Schedule Part 16 (*Change Protocol*).
- 27.7 An Authority may, at its sole option, notify Sub-hubco that Sub-hubco shall not be obliged to comply with any change to any relevant Authority Policy and that Sub-hubco should continue to comply with the relevant Authority Policy prior to any change in which case such change shall not take effect as a Change in accordance with Schedule Part 16 (*Change Protocol*).

### **Resources and training**

- 27.8 Sub-hubco shall procure that:
- 27.8.1 there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision



of the Services with the requisite level of skill and experience. To avoid doubt, this obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absence, and anticipated and actual peaks in demand for each of the Services; and

27.8.2 all staff receive such training and supervision as is necessary to ensure the proper performance of this Agreement and compliance with all health and safety rules, procedures and requirements.

27.9 Not used.

#### **Convictions and disciplinary action**

27.10 Sub-hubco (to the extent permitted by Law) shall procure that all potential staff or persons performing any of the Project Operations who may reasonably be expected in the course of their employment or engagement to have access to children, the elderly and/or vulnerable adults:

27.10.1 are questioned concerning their Convictions; and

27.10.2 are required to complete a Protecting Vulnerable Groups Scheme form.

27.11 Sub-hubco shall procure that no person who discloses any Convictions, or who is found to have any Convictions following the completion of an enhanced Disclosure Scotland check, in either case of which Sub-hubco or a Service Provider is aware or ought to be aware is employed or engaged in the provision of the Project Operations without the relevant Authority's prior written consent (such consent not to be unreasonably withheld or delayed).

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

27.13 An Authority's Representative (acting reasonably) may instruct Sub-hubco to procure that appropriate disciplinary action is taken against any employee of Sub-hubco or any Sub-Contractor (in accordance with the terms and conditions of employment of the employee concerned) who misconducts himself or is incompetent or negligent in his duties or whose presence or conduct on a Site or at work is otherwise considered by that Authority's Representative (acting reasonably) to be undesirable. The relevant Authority shall co-operate with any such disciplinary proceedings and shall be advised in writing by Sub-hubco of the outcome.

27.14 Sub-hubco shall procure that there are set up and maintained, by it and by all Service Providers, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). Sub-hubco shall procure that the terms and the implementation of such policies and procedures comply with Law and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are forthwith issued to the Authority.

## **Management**

- 27.15 Sub-hubco shall consult with the relevant Authority in relation to the selection procedure for Sub-hubco's Facility Manager(s) and such person(s) shall not be appointed (or replaced) without the prior written consent of that Authority (such consent not to be unreasonably withheld or delayed).
- 27.16 Sub-hubco shall provide, and shall procure that all Service Providers provide, to the relevant Authority upon request details of their respective management organisations.

## **Lists and Records**

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

27.17.1 details of qualifications; and

27.17.2 details of training undertaken by the employee.

## **Health Requirements**

- 27.18 Sub-hubco shall procure that all potential employees or persons who may otherwise perform any of the Services undergo pre-employment health screening (including a medical examination if necessary) by a qualified occupational health professional to establish in each case that the relevant person is medically fit for his proposed tasks in the provision of the Services and that he does not pose at that time any danger to the health of other persons (provided that Sub-hubco is not required to procure compliance with an obligation which contravenes the Equality Act 2010) and Sub-hubco shall also procure (to the extent permitted by Law) that all persons employed or engaged in the provision of the Services shall undergo such medical screening examination or treatment and provide such information during the currency of this Agreement when reasonably requested to do so by the relevant Authority as required to ensure that the relevant Authority is able to comply with the relevant legal obligations in respect of the health of that Authority's staff, patients or visitors to that Authority's premises.
- 27.19 To the extent permitted by Law, records of all screenings, examinations or treatments referred to in this Clause 27 (*Site Security and Personnel Issues*) shall be held by Sub-hubco on behalf of and as agent for the Authority and produced (subject to requirements under the Law) for inspection upon request by the relevant Authority's Representative provided that no such inspection shall take place unless each staff member has given his or her written consent to such inspection.
- 27.20 Sub-hubco shall (to the extent permitted by Law) procure that the relevant Authority shall be informed upon reasonable request by that Authority of the outcome of each and every medical screening examination or treatment referred to in Clause 27.18 with reference to the purpose of the screening, examination or treatment concerned and shall receive all such other information referred to in Clause 27.18 subject to requirements under the Law.

- 27.21 An Authority's Representative may (acting reasonably) refuse admittance to or order the removal from the relevant Authority's premises of any person employed or engaged in the provision of the Services whose presence poses or is reasonably believed to pose a risk to the health of relevant Authority's staff, patients or visitors and such action which shall forthwith be confirmed in writing by the relevant Authority shall not relieve Sub-hubco of any of its obligations under this Agreement.

## 28 STOCKS CONSUMABLES, MATERIALS AND EQUIPMENT

### Standards

- 28.1 All goods, equipment, consumables and materials which are to be used in the provision of the Services shall be of satisfactory quality.
- 28.2 Sub-hubco shall ensure that the goods, equipment, consumables and materials used by it or any Sub-Contractor in connection with the provision of any of the Services (each as a distinct and separate obligation) are:
- 28.2.1 maintained in a safe, serviceable and clean condition in accordance with Good Industry Practice;
  - 28.2.2 of the type specified in the relevant Service Level Specification and/or the relevant Method Statement (where appropriate); and
  - 28.2.3 in compliance with any relevant rules, regulations, codes of practice and/or British or European Standards,
- and shall, as soon as practicable after receiving a request from an Authority's Representative, supply to that Authority's Representative evidence to demonstrate its compliance with this Clause 28.2.
- 28.3 Sub-hubco shall procure that sufficient stocks of goods, consumables, equipment and materials are held in order to comply with its obligations under this Agreement.

### Hazardous substances and materials

- 28.4 Sub-hubco shall not install, keep or use in or on the Facilities any materials, equipment or apparatus the installation, keeping or use of which is likely to cause (or in fact causes):
- 28.4.1 material damage to the Facilities;
  - 28.4.2 dust, noise or vibration constituting a nuisance to the owners and/or occupiers of any property adjoining or near to the Facilities; or
  - 28.4.3 the generation, accumulation or migration of any hazardous substance in an unlawful manner whether within or outside the Facilities,

and shall use all reasonable endeavours to ensure (by directions to staff and otherwise) that all materials, equipment or apparatus in or on the Facilities is

operated so as to minimise noise and vibration likely to cause annoyance or disturbance and the unlawful generation or migration of any hazardous substance.

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

28.6 Without prejudice to the generality of its obligations, Sub-hubco shall:

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

28.6.2 use all practicable and reasonable means to:

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

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

28.7 The Authority shall:

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

28.7.2 use all practicable and reasonable means to:

- (a) prevent or counteract the unlawful emission of any such hazardous substance;

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

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

28.8 The relevant Authority shall:

28.8.1 maintain a COSHH register for each of the relevant Facilities, which shall be up-to-date at all times;

28.8.2 ensure that a copy of the relevant COSHH register is kept at each of the Facilities; and

28.8.3 ensure that a further copy of each COSHH register is given to Sub-hubco as often as is changed.

28.9 Sub-hubco shall notify the relevant Authority of all relevant substances that will be stored or used at the relevant Facilities by Sub-hubco or any Sub-hubco Party that would normally be included on a COSHH register prior to them being brought to the relevant Facilities.

## PART 7: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

29

### DELAY EVENTS

- 29.1 If, at any time, Sub-hubco becomes aware that there will be (or is likely to be) a delay in completion of one or more Phases, Sub-hubco shall forthwith give notice to the relevant Authority's Representative to that effect specifying the relevant delay or impediment. In relation to any such delay or impediment if the relevant Authority's Representative is satisfied, or it is determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*), that such delay or impediment has arisen as a result of the occurrence of a Delay Event, then, subject to Clause 29.2, the relevant Authority's Representative shall allow Sub-hubco an extension of time equal to the delay or impediment caused by such Delay Event (taking into account reasonably foreseeable consequences of the Delay Event) and shall revise the relevant Phase Completion Date(s) accordingly but to avoid doubt, there shall be no extension to the Project Term as a result of any such delay or impediment.
- 29.2 If Sub-hubco is (or claims to be) affected by a Delay Event:
- 29.2.1 it shall (and shall procure that Sub-hubco Parties shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of such an event upon the performance of its obligations under this Agreement and, where relevant, resume performance of its obligations affected by the Delay Event as soon as practicable; and
  - 29.2.2 it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 29 (*Delay Events*) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 29.2.1 above.
- 29.3 For the purposes of this Agreement, a Delay Event means any of the following to the extent in each case that there will be (or is likely to be) a delay in completion of a Phase or Phases:
- 29.3.1 the occurrence of a Qualifying Change in relation to which it has been agreed or determined that the implementation of the relevant Authority Change would delay the completion of a Phase or Phases;
  - 29.3.2 any breach by the Authority and/or any Authority Party of any of the Authority's express obligations under this Agreement to the extent in each case that any such breach is not caused, or contributed to, by Sub-hubco or any Sub-hubco Party;
  - 29.3.3 the execution of works on the relevant Site not forming part of this Agreement by the Authority or any contractors employed by the Authority;
  - 29.3.4 opening up of the relevant Works pursuant to Clauses 13.3 to 13.7 (inclusive) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) that the

opening up of the relevant Works was reasonable in the light of other defects previously discovered by the Authority);

29.3.5 Force Majeure;

29.3.6 a Relief Event;

29.3.7 a Relevant Change in Law referred to in Clause 32.3.1 (*Discriminatory Change in Law*) and Clause 32.3.2 (*Specific Change in Law*);

29.3.8 prior to the Phase Actual Completion Date for Phase 1, Sub-hubco are delayed or impeded in their carrying out of the Works as a result of the exercise of the Reserved Rights specified in paragraph 1.1, 1.2 or 1.3 of Section 1B (*Tain Reserved Rights*) of Schedule Part 5 (*Land Matters*) where and to the extent the conditions set out in paragraph 2 of the said Section 1B (*Tain Reserved Rights*) have not been observed in connection with the exercise of such rights; or

29.3.9 delay or impediment to the Works as a result of damage to the Tain Service Road caused during the exercise of the Reserved Rights specified in paragraph 1.4 of Section 1B (*Tain Reserved Rights*) of Schedule Part 5 (*Land Matters*) where such damage is not made good in accordance with the terms of paragraph 3.1 of Section 1B of Schedule Part 5 (*Land Matters*).

29.4 Without prejudice to the generality of Clause 29 (*Delay Events*), Sub-hubco shall give notice in writing to the relevant Authority's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event occurring or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event. Sub-hubco shall within ten (10) Business Days after such notification, give further written details to the Authority's Representative which shall include:

29.4.1 a statement of which Delay Event the claim is based upon;

29.4.2 details of the circumstances from which the Delay Event arises;

29.4.3 details of the contemporary records which Sub-hubco will maintain to substantiate its claim for extra time;

29.4.4 details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event may have upon completion of the relevant Phase(s); and

29.4.5 details of any measures which Sub-hubco proposes to adopt to mitigate the consequences of such Delay Event.

29.5 As soon as possible but in any event within five (5) Business Days of Sub-hubco (or the Contractor) receiving, or becoming aware of, any supplemental information which may further substantiate or support Sub-hubco's claim then, provided that the relevant Phase Completion Date has not otherwise already been revised pursuant to Clause 29.7, Sub-hubco shall submit further particulars based on such information to the relevant Authority's Representative.

29.6 The relevant Authority's Representative shall, after receipt of written details under Clause 29.3.7, or of further particulars under Clause 29.5, be entitled by notice in writing to require Sub-hubco to provide such further supporting particulars as he may reasonably consider necessary. Sub-hubco shall afford the relevant Authority's Representative reasonable facilities for investigating the validity of Sub-hubco's claim including, without limitation, on-site inspection.

29.7 Subject to the provisions of this Clause, the relevant Authority's Representative shall revise the relevant Phase Completion Date(s) in accordance with Clause 29.1 (*Delay Events*) as soon as reasonably practicable and in any event within fifteen (15) Business Days of the later of:

29.7.1 the date of receipt by the relevant Authority's Representative of Sub-hubco's notice given in accordance with Clause 29.4 and the date of receipt of any further particulars (if such are required under Clause 29.5), whichever is the later; and

29.7.2 the date of receipt by the relevant Authority's Representative of any supplemental information supplied by Sub-hubco in accordance with Clause 29.5 and the date of receipt of any further particulars (if such are required under Clause 29.6), whichever is the later.

If Sub-hubco has failed to comply with the requirements as to the giving of notice under Clause 29.4, or has failed to maintain records or afford facilities for inspection to the relevant Authority's Representative, then Sub-hubco shall not be entitled to any extension of time (and the relevant Phase Completion Date(s) shall not be revised) in respect of any period of delay by Sub-hubco in giving notice or providing information under Clause 29.4 and/or to the extent that its failure to maintain records or afford facilities for inspection to the relevant Authority's Representative has prevented the relevant Authority's Representative from assessing the consequences of the Delay Event.

29.8 If:

29.8.1 the relevant Authority's Representative declines to fix a revised Phase Completion Date(s); or

29.8.2 Sub-hubco considers that a different Phase Completion Date(s) should be fixed; or

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

then Sub-hubco shall be entitled to refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

### **Compensation**

29.9 If the Delay Event is a Compensation Event Sub-hubco's sole right to compensation shall be as provided for in Clauses 29.11 to 29.13 inclusive. To avoid doubt, no other Delay Event shall entitle Sub-hubco to receive any compensation save as otherwise expressly provided in:



- 29.9.1 Schedule Part 16 (*Change Protocol*) in the case of a Delay Event referred to in Clause 29.3.1 (subject always to the provisions of Clause 32 (*Changes in Law*)); or
- 29.9.2 Clause 32 (*Changes in Law*) in the case of a Delay Event referred to in Clause 29.3.7.
- 29.10 For the purposes of Clause 29.9, a Compensation Event means:
- 29.10.1 any Delay Event referred to in Clause 29.3.2, Clause 29.3.3, Clause 29.3.4, Clause 29.3.8 or Clause 29.3.9 for which, in each case, it has been agreed or determined pursuant to this Clause 29 (*Delay Events*) that Sub-hubco is entitled to an extension of time; or
- 29.10.2 in the period prior to the relevant Phase Actual Completion Date, in circumstances where there is no delay in completion of the relevant Phase any breach by the Authority and/or any Authority Party of any of the Authority's express obligations under this Agreement to the extent that such breach is not caused, or contributed to, by Sub-hubco or any Sub-hubco Party.
- 29.11 Subject to Clause 29.12, if it is agreed, or determined, that there has been a Compensation Event, and Sub-hubco has incurred loss (including loss of revenue) and/or expense as a direct result of such Compensation Event, Sub-hubco shall be entitled to such compensation from the relevant Authority as would place Sub-hubco in no better or worse position than it would have been in had the relevant Compensation Event not occurred. Sub-hubco shall promptly provide the relevant Authority's Representative with any additional information he may require in order to determine the amount of such compensation.
- 29.12 Sub-hubco shall take all reasonable steps so as to minimise the loss and/or expense referred to in Clause 29.11 in relation to any Compensation Event and any compensation payable shall:
- 29.12.1 exclude any amounts incurred or to be incurred as a result of any failure of Sub-hubco (or any Sub-hubco Party) to comply with this Clause 29.12; and
- 29.12.2 be reduced by any amount which Sub-hubco has recovered or will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement) which amount, to avoid doubt, shall not include any excess or deductibles or any amount over the maximum amount insured applicable to any such insurance policy.
- 29.13 The amount of any compensation due to Sub-hubco under Clause 29.11 shall be agreed between the parties or, failing agreement, determined pursuant to Schedule Part 20 (*Dispute Resolution Procedure*) and such compensation shall be payable:
- 29.13.1 in respect of compensation for a Compensation Event to the extent resulting in Capital Expenditure being incurred the relevant Authority shall compensate Sub-hubco for the actual Capital Expenditure incurred by Sub-hubco within twenty (20)

Business Days of its receipt of a written demand accompanied by a valid VAT invoice for the same by Sub-hubco supported by all relevant information; and

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

## 30 RELIEF EVENTS

30.1 For the purposes of this Agreement, subject to Clause 30.4, Relief Events mean any of the following events:

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

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

30.1.3 accidental loss or damage to a Phase or Phases and/or relevant Facilities or any roads servicing the same;

30.1.4 without prejudice to any obligation of Sub-hubco to provide stand by power facilities in accordance with the Authority's Construction Requirements, the relevant Service Level Specification, failure or shortage of power, fuel or transport;

30.1.5 blockade or embargo falling short of Force Majeure;

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

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

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

30.2 Subject to Clauses 30.3 and 30.4, no right of termination shall arise under this Agreement by reason of any failure by a party to perform any of its obligations under this Agreement to the extent that such failure to perform occurs because of the occurrence of a Relief Event (and, to avoid doubt, and without prejudice to Clause 30.9, unless expressly stated to the contrary in this Agreement, it is acknowledged that all other rights and obligations of the parties under this Agreement remain unaffected by the occurrence of a Relief Event).

30.3 Without prejudice to Sub-hubco's rights under Clause 29 (*Delay Events*), Sub-hubco shall only be relieved of its obligations under Clauses 12 (*The Design*,

*Construction and Commissioning Process*), 13 (*Right of Access of Authority's Representative*), 14 (*Programme and Dates for Completion*), 17 (*Pre-Completion Commissioning and Completion*) and 29 (*Delay Events*) by Delay Events in accordance with Clause 29 (*Delay Events*).

## **Mitigation**

- 30.4 Where a party is (or claims to be) affected by a Relief Event:
- 30.4.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Relief Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
  - 30.4.2 it shall not be entitled to rely upon the relief afforded to it pursuant to Clause 30.2 of this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 30.4.1 above.
- 30.5 The party claiming relief shall serve written notice on the other relevant party within five (5) Business Days of it becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- 30.6 A subsequent written notice shall be served by the party claiming relief on the other relevant party within a further five (5) Business Days of the notice referred to in Clause 30.5 which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Relief Event on the ability of the party to perform, the action being taken in accordance with Clause 30.4, the date of the occurrence of the Relief Event and an estimate of the period of time required to overcome it (and/or its effects).
- 30.7 The party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- 30.8 If, following the issue of any notice referred to in Clause 30.6, the party claiming relief receives or becomes aware of any further information relating to the Relief Event (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 30.9 To avoid doubt, the occurrence of a Relief Event shall not entitle Sub-hubco to any compensation.

## **31 FORCE MAJEURE**

- 31.1 For the purposes of this Agreement, Force Majeure means any of the following events or circumstances:
- 31.1.1 war, civil war, armed conflict or terrorism; or

- 31.1.2 nuclear contamination unless in any case Sub-hubco and/or any Sub-hubco Party is the source or the cause of the contamination; or
- 31.1.3 chemical or biological contamination of any part of the Works and/or any of the Facilities and/or a Site from any of the events referred to in Clause 31.1.1 above; or
- 31.1.4 pressure waves caused by devices travelling at supersonic speeds,

which directly causes any party to be unable to comply with all or a material part of its obligations (and in the case of Sub-hubco this shall include any material part of its obligations to an Authority) under this Agreement.

- 31.2 Subject to Clauses 31.3 and 31.4 the party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Force Majeure it is not able to perform its obligations under this Agreement. For the avoidance of doubt (but without prejudice to Clause 41 (*Termination Resulting from Force Majeure*)) the Authority shall not be entitled to terminate this Agreement for a Sub-hubco Event of Default if such Sub-hubco Event of Default arises from a Force Majeure Event.
- 31.3 Where a party is (or claims to be) affected by an event of Force Majeure:
  - 31.3.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
  - 31.3.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 31.3.1.
- 31.4 Without prejudice to Sub-hubco's rights under Clause 29 (*Delay Events*), Sub-hubco shall only be relieved from its obligations under Clauses 12 (*The Design, Construction and Commissioning Process*), 13 (*Right of Access of Authority's Representative*), 14 (*Programme and Dates for Completion*) and 29 (*Delay Events*) by Delay Events in accordance with Clause 29 (*Delay Events*).
- 31.5 The party claiming relief shall serve written notice on the other relevant party within five (5) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 31.6 A subsequent written notice shall be served by the party claiming relief on the other relevant party within a further five (5) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the party to perform, the action being taken in accordance with Clause 31.3, the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).

- 31.7 The party claiming relief shall notify the other relevant party as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- 31.8 If, following the issue of any notice referred to in Clause 31.6, the party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other relevant party as soon as reasonably possible.
- 31.9 Nothing in this Clause 31 shall affect the relevant Authority's entitlement to make Deductions in the period during which any event of Force Majeure is subsisting.
- 31.10 The relevant Authority and Sub-hubco shall endeavour to agree any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule Part 20 (*Dispute Resolution Procedure*) shall not apply to a failure of the relevant Authority and Sub-hubco to reach agreement pursuant to this Clause 31.10.

## PART 8: CHANGES IN LAW & CHANGES

### 32 CHANGES IN LAW

#### General

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

#### Relevant Changes in Law

- 32.2 Subject to Clause 32.4.3(e) and Clause 32.4.3(f) and on the occurrence of any Relevant Change in Law, the relevant parties shall be entitled to seek adjustments to the relevant Annual Service Payments to compensate for any increase or decrease (as the case may be) in the net cost to Sub-hubco of performing the relevant Project Operations. Such adjustments (if any) will be calculated in accordance with and subject to Clause 32.4.

- 32.3 Relevant Change in Law means any of the following:

- 32.3.1 the occurrence of any Discriminatory Change in Law having an impact on the cost of performance of the relevant Project Operations;
- 32.3.2 the occurrence of any Specific Change in Law having an impact on the cost of performance of the relevant Project Operations; or
- 32.3.3 the occurrence, after the relevant date, of any Change in Law which requires any work of alteration, addition, demolition or extension or variation in the quality or function of the relevant Facilities which is not Maintenance Work or work which Sub-hubco would otherwise be required to undertake to comply with its obligations under this Agreement. For the purposes of this Clause 32.3.3, the relevant date shall in respect of a Phase be the later to occur of the relevant Phase Completion Date and the relevant Phase Actual Completion Date, save where the relevant Phase Actual Completion Date is delayed by a Compensation Event, a Delay Event referred to in Clause 29.3.1 or by a Delay Event referred to in Clause 29.3.7, in which case the relevant date shall be the later to occur of the relevant Phase Completion Date and the date on which the Works relating to the relevant Phase would have been completed in accordance with this Agreement had the relevant Compensation Event or Delay Event not occurred,

provided that:

- (a) such Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Project Operations, on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers,

bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:

- (i) prior to the date of this Agreement; and
  - (ii) in substantially the same form or having substantially the same effect as the Relevant Change in Law; and
- (b) a Change in Law relating to the application for, coming into effect, terms, implementation, repeal, revocation or otherwise of any Planning Permission shall not constitute a Relevant Change in Law.

**32.4 On the occurrence of a Relevant Change in Law:**

32.4.1 any party may give notice to the other relevant party of the occurrence of the Relevant Change in Law;

32.4.2 the relevant parties shall meet within ten (10) Business Days of the notice referred to in Clause 32.4.1 to consult and seek to agree the effect of the Relevant Change in Law. If the relevant parties, within fifteen (15) Business Days of this meeting, have not agreed the occurrence or the effect of the Relevant Change in Law, either of the relevant parties may refer the question of whether a Relevant Change in Law has occurred or the effect of any Relevant Change in Law for resolution in accordance with Schedule Part 20 (*Dispute Resolution Procedure*); and

32.4.3 within ten (10) Business Days of the agreement or determination referred to in Clause 32.4.2 above, the relevant Authority's Representative shall issue an Authority Change Notice and the relevant provisions of Schedule Part 16 (*Change Protocol*) shall apply except that:

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

the implementation of the Low Value Change, confirmation of an estimate for the Medium Value Change or approval of a High Value Change Stage 2 Submission (as appropriate), issued in accordance with this Clause 32.4;

- (e) Sub-hubco shall, without prejudice to its general obligation to comply with the terms of this Agreement:
  - (i) use all reasonable endeavours to mitigate the adverse effects of any Relevant Change in Law and take all reasonable steps to minimise any increase in costs arising from such Relevant Change in Law; and
  - (ii) use all reasonable endeavours to take advantage of any positive or beneficial effects of any Relevant Change in Law and take all reasonable steps to maximise any reduction in costs arising from such Relevant Change in Law; and
- (f) any compensation payable, or reduction to the relevant Annual Service Payments, shall be calculated in accordance with the relevant provisions of Schedule Part 16 (*Change Protocol*) provided that:
  - (i) the amount of any compensation payable; or
  - (ii) the amount by which the relevant Annual Service Payment is to be reduced,

shall not take into account any amounts incurred or to be incurred as a result of Sub-hubco's failure to comply with Clause 32.4.3(e) above.

### **General Change in Law**

32.5 A party may give notice to the other relevant party of the need for a Change which is necessary in order to enable Sub-hubco to comply with any Change in Law which is not a Relevant Change in Law, in which event:

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

32.5.2 within ten (10) Business Days of the agreement or determination referred to in Clause 32.5.1 above the relevant Authority's



Representative shall, if it is agreed or determined that a Change is required in order to comply with the Change in Law, issue an Authority Change Notice and the relevant provisions of Schedule Part 16 (*Change Protocol*) shall apply except that:

- (a) Sub-hubco may give notice to the relevant Authority's Representative that it objects to such an Authority Change Notice only on the grounds that the implementation of the Change would not give effect to or comply with the Change in Law;
- (b) the relevant Authority shall (i) agree the implementation of the Low Value Change; or (ii) confirm the estimate for the Medium Value Change; or (iii) approve the High Value Change Stage 2 Submission, (as appropriate) in respect of the Change in accordance with the relevant provisions of Schedule Part 16 (*Change Protocol*);
- (c) the provisions of Clause 11 (*Consents and Planning Approval*) shall apply;
- (d) the relevant Authority shall not be entitled to withdraw any Authority Change Notice or its (i) agreement as to the implementation of the Low Value Change; or (ii) confirmation of an estimate for the Medium Value Change; or (iii) approval of a High Value Change Stage 2 Submission (as appropriate), issued in accordance with this Clause 32.5 (*General Changes in Law*); and
- (e) Sub-hubco shall not be entitled to any payment or other compensation or relief from any performance of its obligations under this Agreement in respect of such Change in Law or associated Change (or the consequences of either).

### 33 CHANGE PROTOCOL

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

## PART 9: FINANCIAL

### 34 PAYMENT

#### Service Payments

- 34.1 Sub-hubco shall not be entitled to receive any Monthly Service Payments until the relevant Payment Commencement Date. Subject to the provisions of this Agreement, an Authority shall pay Sub-hubco the relevant Monthly Service Payments in respect of each Contract Month following the relevant Payment Commencement Date in accordance with the provisions of Schedule Part 14 (*Payment Mechanism*).

#### Invoicing and payment arrangements

- 34.2 The provisions of this Clause 34.2 apply to the issue of invoices by Sub-hubco to each of Authority A and Authority B individually under this Agreement:

- 34.2.1 On or before the last day of each Contract Month Sub-hubco shall submit to the relevant Authority an invoice ("**Monthly Invoice**") aggregating the following:

- (a) the relevant Monthly Service Payment for that Contract Month, calculated in accordance with Section 2 (*Calculation of Service Payments*) of Schedule Part 14 (*Payment Mechanism*);
- (b) adjustments to reflect previous over-payments and/or under-payments (each adjusted stated separately);
- (c) any other amounts due by one party to the other (and where owed by Sub-hubco showing as a negative figure);
- (d) any VAT payable in respect of the above amounts;
- (e) not used;
- (f) as a negative figure, in respect of the relevant Monthly Invoice issued during the final Contract Month only, an amount equivalent to twice the monthly average of the relevant Deductions incurred in the previous six Contract Months ("**Estimated Deductions**"),

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

- 34.2.2 Subject to Clauses 34.2.3 and 34.3 and the submission of the supporting information referred to in Clause 34.2.1, where a Monthly Invoice shows a net amount owed by the relevant Authority to Sub-hubco, the relevant Authority shall pay the

amount of the relevant Monthly Invoice within twenty (20) Business Days of its submission and delivery of a valid VAT invoice in respect thereof. Where a Monthly Invoice shows a net amount owed by Sub-hubco to the relevant Authority, Sub-hubco shall pay that amount to the relevant Authority within twenty (20) Business Days of the Monthly Invoice or, at the option of the relevant Authority, carry forward that amount to the next relevant Monthly Invoice to reduce amounts which would otherwise be owed by the relevant Authority to Sub-hubco.

34.2.3 Within 10 Business Days of the Expiry Date, Sub-hubco shall provide to each Authority a Performance Monitoring Report in respect of the final two Contract Months. If the relevant Deductions incurred in the final two Contract Months exceed the relevant Estimated Deductions, Sub-hubco shall pay to the relevant Authority an amount equal to the excess within twenty (20) Business Days of receipt of an invoice therefor. If the relevant Estimated Deductions exceed the relevant Deductions incurred in the final two Contract Months the relevant Authority shall pay to Sub-hubco an amount equal to the excess within twenty (20) Business Days of receipt of an invoice therefor.

34.2.4 On or before the tenth day of each Contract Month Sub-hubco shall submit to the relevant Authority a relevant Monthly Service Report in respect of the immediately preceding Contract Month. Such Monthly Service Report shall set out, in respect of the immediately preceding Contract Month:

- (a) details of each and the aggregate amount of all relevant Deductions incurred in relation to relevant Performance Failures;
- (b) details of each and the aggregate amount of all relevant Deductions incurred in relation to relevant Availability Failures;
- (c) other relevant information detailed in Schedule Part 12 (*Service Requirements*).

34.2.5 The relevant Authority and Sub-hubco shall endeavour to agree the contents of a relevant Monthly Service Report within ten (10) Business Days of its submission in accordance with Clause 34.2.4, failing which either party may refer the matter to the Dispute Resolution Procedure.

#### **Manner of payment**

34.3 All payments under this Agreement shall be made in pounds sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice, quoting the invoice number against which payment is made.

#### **Disputes**

34.4 If the relevant Authority (acting in good faith) disputes all or any part of the relevant Monthly Service Payments calculated in accordance with Clause 34.2 (*Invoicing*

*and Payment Arrangements*), the undisputed amount of such Monthly Service Payment shall be paid by that Authority in accordance with Clause 34.2 (*Invoicing and Payment Arrangements*) and the provisions of this Clause 34.4 shall apply. Sub-hubco and the relevant Authority shall use all reasonable endeavours to resolve the dispute in question within ten (10) Business Days of the dispute arising. If they fail so to resolve it, either party may refer the matter to the Dispute Resolution Procedure. Following resolution of the dispute, any amount agreed or determined to have been payable shall be paid forthwith by the relevant Authority to Sub-hubco, together with interest on such amount calculated in accordance with Clause 34.5 (*Late Payments*).

#### **Late Payments**

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

#### **Set-Off**

- 34.6 Subject to Clause 46.12, whenever any sum of money shall be agreed, or determined, as due and payable by Sub-hubco to an Authority, such sum may at the relevant Authority's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, to Sub-hubco from the relevant Authority under this Agreement provided that the relevant Authority has given Sub-hubco not less than five (5) Business Days' notice of its intention to deduct or apply such sum.
- 34.7 Whenever any sum of money shall be agreed, or determined, as due and payable by the relevant Authority to Sub-hubco, such sum may at Sub-hubco's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, from Sub-hubco to the relevant Authority under this Agreement provided that Sub-hubco has given the relevant Authority not less than five (5) Business Days' notice of its intention to deduct or apply such sum.

### **35 VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION SCHEME**

#### **VAT**

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

"Commissioners") as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request the Commissioners for such a ruling.

35.4 The following further provisions shall apply in respect of the application for a ruling in accordance with Clause 35.3:

35.4.1 prior to submitting its request for such a ruling and any further communication to the Commissioners in connection with the obtaining of the ruling, the Second Party shall first obtain the agreement of the First Party to the contents of such request and any such further communication, such agreement not to be unreasonably withheld or delayed;

35.4.2 the Second Party shall provide to the First Party copies of all communications received from the Commissioners in connection with the application for a ruling as soon as practicable after receipt; and

35.4.3 the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as the Commissioners may require) to obtain such a ruling as soon as reasonably practicable following the initial request.

35.5 If a ruling is required by the First Party under Clause 35.3, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until a ruling is received from the Commissioners which states that a sum of VAT (the "VAT Sum") is properly so chargeable or the Commissioners state that they are not prepared to give any ruling on the matter. In this case, then subject to Clauses 35.6 and 35.7 and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III VAT Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum (and any interest or penalties attributable to the VAT Sum) to the Second Party.

35.6 If the First Party disagrees with any ruling obtained pursuant to Clause 35.3 by the Second Party from the Commissioners, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses including interest and penalties which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such ruling or otherwise to resist or avoid the imposition of VAT on the relevant supply.

35.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 35.6:

35.7.1 the action which the First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of the Commissioners before any VAT tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;

35.7.2 if the Second Party shall be required to pay to or deposit with the Commissioners a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to the Commissioners on behalf of

the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with the Commissioners the First Party shall pay such sum to the Second Party;

35.7.3 save as specifically provided in Clause 35.5, the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and

35.7.4 the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal, for any sum paid to or deposited with the Commissioners in accordance with Clause 35.7.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

#### **Changes in recoverability of VAT**

35.8 Subject to Clause 35.9, if, following a Change in Law, Sub-hubco becomes unable to recover VAT attributable to supplies to be made to an Authority by Sub-hubco pursuant to this Agreement, that Authority shall ensure that Sub-hubco is left in no better and no worse position than it would have been had such Change in Law not occurred (including but not limited to making such amendments to this Agreement as Sub-hubco and that Authority shall agree acting reasonably), provided that Sub-hubco shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.

35.9 The provisions of Clause 35.8 shall apply only if (and to the extent that) the Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Works on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:

35.9.1 prior to the date of this Agreement; and

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

#### **Construction Industry Tax Deduction Scheme**

35.10 This Clause 35.10 (*Construction Industry Tax Deduction Scheme*) relates to the Construction Industry Tax Deduction Scheme:

35.10.1 In this Clause 35.10 (*Construction Industry Tax Deduction Scheme*) (but not otherwise):

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

35.10.2 The parties shall comply with the Legislation.

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

35.10.4 If any payment due from an Authority to Sub-hubco under this Agreement is a contract payment under section 60(1) of the Act, then:

- (a) if Sub-hubco is registered for gross payment under section 63(2) of the Act, that Authority shall make a payment to Sub-hubco without any deduction;
- (b) if Sub-hubco is not registered for gross payments under section 63(2) of the Act, that Authority shall make a payment to Sub-hubco, subject to the deduction of the relevant percentage in accordance with section 61(1) of the Act, and thereupon Clause 35.10.6 below shall apply.

35.10.5 If any dispute arises between an Authority and Sub-hubco as to whether any payment due by that Authority to Sub-hubco under this Agreement is or is not a contract payment by virtue of the exemption in Regulation 23 of the Regulations, the relevant Authority and Sub-hubco will jointly apply to HM Revenue and Customs for a written ruling and until such ruling is received it shall be assumed that such payment is a contract payment and the provisions of Clause 35.10 (*Construction Industry Tax Deduction Scheme*) shall apply accordingly.

35.10.6 An Authority shall be entitled to make a deduction at the rate specified in section 61(1) of the Act or at such other rate as may be in force from time to time from the whole of any payment to Sub-hubco (and not just that part of such payment which does not represent the direct cost to Sub-hubco or any other person of materials used or to be used in carrying out the construction operations to which the relevant payment relates) unless prior to making such payment that Authority shall have received written confirmation from HM Revenue and Customs (obtained by and at the expense of Sub-hubco) in a form which is reasonably satisfactory to that Authority directing the relevant Authority to make the deduction against only a specified amount or proportion of any such payment to Sub-hubco.

35.10.7 Where any error or omission has occurred in calculating or making any payment under this Clause 35.10 (*Construction Industry Tax Deduction Scheme*) then:

- (a) in the case of an over deduction, the relevant Authority shall correct that error by repayment of the sum over deducted to Sub-hubco; and
- (b) in the case of an under deduction, Sub-hubco shall correct that error or omission by repayment of the sum under deducted to the relevant Authority.

35.10.8 An Authority shall send promptly to H M Revenue & Customs any returns required by the Legislation, and shall provide to Sub-hubco a payment statement (where appropriate) and/or such other information as may be required by the Legislation in relation to any contract payment.

35.10.9 If compliance with this Clause 35.10 involves an Authority or Sub-hubco in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail.

## 36 IRR SHARING AND CAP

36.1 Not later than one month before each Distribution Date, Sub-hubco shall send to the Authority a calculation showing:

36.1.1 the Proposed Distribution;

36.1.2 the Investor Return on the assumption that the whole of the Proposed Distribution will be paid to the Investors on the Relevant Distribution Date;

36.1.3 where the Proposed Distribution would be a Qualifying Distribution, the First Threshold Excess and, if applicable, the Second Threshold Excess; and

36.1.4 the Authority's Distribution Share of the Proposed Distribution.

36.2 For the purposes of this Clause 36 (*IRR Sharing and Cap*), in calculating the amount of the Investor Return, the amount of any Distribution or Proposed



Distribution or Projected Distribution that is attributable to Sub-hubco's share of all (if any) Refinancing Gains shall be excluded.

36.3 Nothing contained in this Agreement shall affect the right or ability of Sub-hubco to make Distributions that are not Qualifying Distributions.

36.4 If, taking into account:

36.4.1 all Distributions actually made prior to the Relevant Distribution Date;

36.4.2 the Proposed Distribution; and

36.4.3 all Projected Distributions,

the Proposed Distribution would, were it to be paid in full to the Investors on the Relevant Distribution Date, result in the Investor Return exceeding the First Whole Life Threshold Return (a "Qualifying Distribution"), the provisions of Clauses 36.6 and 36.7 shall apply.

36.5 In the event that Sub-hubco has available to it funds to make a Distribution that would:

36.5.1 be permitted by Law and the Funding Agreements;

36.5.2 be a Qualifying Distribution; and

36.5.3 if paid to the Investors in full on a particular date, result in the Investor Return exceeding the Second Whole Life Threshold Return,

Authority A and Authority B (acting together) may request that Sub-hubco makes a Qualifying Distribution and propose the date for so doing and Sub-hubco shall act reasonably in considering such request, having regard to the interests of the Authority and Sub-hubco respectively.

36.6 In relation to any Qualifying Distribution, Sub-hubco must pay or allow the Authority's Distribution Share to Authority A and Authority B in accordance with Clause 36.8.

36.7 This Clause 36 (*IRR Sharing and Cap*) shall continue to apply, notwithstanding termination or expiry of this Agreement, until the dissolution or striking-off of Sub-hubco.

36.8 An Authority shall have the right to receive its relevant Proportion of the Authority's Distribution Share of a Proposed Distribution to which it becomes entitled from time to time as:

36.8.1 a rebate of the relevant Monthly Service Payments for the Contract Year most recently ended prior to the Relevant Distribution Date, paid as a single payment on the Relevant Distribution Date; or

36.8.2 a reduction in the relevant Annual Service Payments from the Relevant Distribution Date over the remaining term of this Agreement; or

36.8.3 a combination of the above,

as the relevant Authority elects by notice to Sub-hubco prior to the Relevant Distribution Date provided that the manner in which that Authority elects to receive its relevant Proportion of the Authority's Distribution Share is permitted by the Funding Agreements.

## 37 FINANCIAL MODEL

37.1 Unless otherwise agreed between the parties, any amendments to the Financial Model shall reflect, be consistent with and be made only in accordance with the provisions of this Agreement, and shall in all cases be subject to the prior written approval of the Authority A and Authority B (acting together) (such approval not to be unreasonably withheld or delayed), subject always to paragraph 10 of Section 6 (*Changing the Financial Model*) of Schedule Part 16 (*Change Protocol*). In the event that the parties fail to agree any proposed amendments to the Financial Model, the matter shall be referred for resolution in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

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

## 38 RECORDS AND OPEN BOOK ACCOUNTING

### Records and Reports

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

## PART 10: TERMINATION

### 39 AUTHORITY EVENTS OF DEFAULT

- 39.1 For the purposes of this Agreement, Authority Events of Default means any of the following events or circumstances:
- 39.1.1 an Authority is in material breach of its obligations under Clause 9 (*Nature of Land Interests*) (other than as a consequence of a breach by Sub-hubco of its obligations under this Agreement) and such breach materially adversely affects the ability of Sub-hubco to perform its material obligations under this Agreement for a continuous period of not less than thirty (30) Business Days; or
  - 39.1.2 an Authority fails to pay any sum or sums due to Sub-hubco under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) the amount of the relevant Monthly Service Payment from time to time and such failure continues for thirty (30) Business Days from receipt by the relevant Authority of a notice of non payment from Sub-hubco; or
  - 39.1.3 an Authority is in breach of its obligations under Clause 57.4.

#### Sub-hubco's options

- 39.2 On the occurrence of an Authority Event of Default, or within a reasonable time after Sub-hubco becomes aware of the same, and while the same is still subsisting, Sub-hubco may, at its option:
- 39.2.1 in respect of execution of the relevant Works, suspend performance by it of its obligations under this Agreement until such time as the relevant Authority shall have demonstrated to the reasonable satisfaction of Sub-hubco that it is capable of performing, and will perform, its obligations under this Agreement; or
  - 39.2.2 serve notice on each Authority (or such other parties as may be notified in advance in writing by an Authority to Sub-hubco) of the occurrence (and specifying details) of such Authority Event of Default. If the relevant matter or circumstance has not been rectified or remedied by an Authority (or otherwise) in respect of Clause 39.1.1 or Clause 39.1.3 within sixty (60) Business Days of such notice, and in respect of Clause 39.1.2 within thirty (30) Business Days of such notice, Sub-hubco may serve a further notice on each Authority (or their substitutes notified in accordance with this Clause 39.2.2) terminating this Agreement with immediate effect.
  - 39.2.3 Sub-hubco shall not exercise or purport to exercise any right to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly set out in this Agreement.

**SUB-HUBCO EVENT OF DEFAULT**

References in this Clause 40 (*Sub-hubco Event of Default*) to "the Authority" shall, unless expressly stated otherwise, refer to Authority A and Authority B acting together.

**Sub-hubco Event of Default**

40.1 For the purposes of this Agreement, Sub-hubco Event of Default means any of the following events or circumstances:

**Insolvency**

40.1.1 the occurrence of any of the following events in respect of Sub-hubco, namely:

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

**Long stop**

40.1.2 Sub-hubco failing to achieve the final Phase Actual Completion Date within a period of 12 months after relevant Phase Completion Date. **Default**

40.1.3

- (a) Sub-hubco committing a material breach of its obligations under this Agreement which has a material and adverse effect on the delivery of the Community Services at any of the Facilities (other than as a consequence of a breach by an Authority of its obligations under this Agreement);

- (b) Sub-hubco wilfully breaches Schedule Part 23 (*Refinancing*);

40.1.4 Sub-hubco abandoning this Agreement;

#### **Health and safety**

40.1.5 at any time after the relevant Phase Actual Completion Date Sub-hubco committing a material breach of its obligations under this Agreement (other than as a consequence of a breach by an Authority of its obligations under this Agreement) which results in the criminal investigation, prosecution and conviction of Sub-hubco or any Sub-hubco Party or an Authority under the Health and Safety Regime (an "**H&S Conviction**") provided that an H&S Conviction of a Sub-hubco Party or an Authority shall not constitute a Sub-hubco Event of Default if, within ninety (90) Business Days from the date of the H&S Conviction (whether or not the H&S Conviction is subject to an appeal or any further judicial process), the involvement in the relevant Project Operations of each relevant Sub-hubco Party (which in the case of an individual director, officer or employee shall be deemed to include the Sub-hubco Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by Sub-hubco in accordance with Clause 57.5 (*Sub contracting*);

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

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

#### **Change in Control**

40.1.6 the occurrence of any Change in Control which is prohibited by Clause 58 (*Ownership Information and Changes in Control*);

#### **Assignment**

40.1.7 Sub-hubco failing to comply with the provisions of Clauses 57.2 or 57.5;

#### **Deductions**

40.1.8 in each of any three Contract Months in any six consecutive Contract Months Sub-hubco has suffered:

40.1.8.1 Authority A Deductions equal to or greater than 0.326 per cent of the Authority A Annual Service Payment for the current Contract Year; or

40.1.8.2 Authority B Deductions equal to or greater than 0.326 per cent of the Authority B Annual Service Payment for the current Contract Year;

#### **Warning Notices**

40.1.9 Sub-hubco is awarded by Authority A or Authority B (individually and not collectively) a total of four or more Warning Notices in any period of 12 consecutive months;

#### **Payment**

40.1.10 Sub-hubco failing to pay any sum or sums due to an Authority under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) £50,000 (index linked) and such failure continues for sixty (60) Business Days from receipt by Sub-hubco of a notice of non payment from the relevant Authority; or

#### **Insurance**

40.1.11 a breach by Sub-hubco of its obligation to take out and maintain the insurances required by Clauses 53.1 and 53.2.

#### **Notification**

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

#### **Authority's options**

40.3 On the occurrence of a Sub-hubco Event of Default, or within a reasonable time after the Authority becomes aware of the same, and while the same is subsisting, the Authority may:

40.3.1 in the case of the Sub-hubco Events of Default referred to in Clauses 40.1.1 (*Insolvency*), 40.1.2 (*Long Stop*), 40.1.3(b), 40.1.5 (*Health and Safety*), 40.1.6 (*Change in Control*), 40.1.7 (*Assignment*), 40.1.8 (*Deductions*) 40.1.9 (*Warning Notices*), or 40.1.10 (*Payment*), terminate this Agreement in its entirety by notice in writing having immediate effect;

40.3.2 in the case of any Sub-hubco Event of Default referred to in Clause 40.1.3(a) and 40.1.4, serve notice of default on Sub-hubco requiring Sub-hubco at Sub-hubco's option either:

(a) to remedy the Sub-hubco Event of Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or

(b) to put forward within twenty (20) Business Days of such notice of default a reasonable programme (set

out, if appropriate, in stages) for remedying the Sub-hubco Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Sub-hubco Event of Default is proposed to be remedied (Sub-hubco shall only have the option of putting forward a programme in accordance with this Clause 40.3.2(b) if it first notifies the Authority within ten (10) Business Days of such notice of default that it proposes to do so); and

40.3.3 in the case of any Sub-hubco Event of Default referred to in Clause 40.1.11 (*Insurance*) serve notice of default on Sub-hubco requiring Sub-hubco to remedy the Sub-hubco Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default.

#### Remedy provisions

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

40.5 If:

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

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

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

40.6 then the Authority may terminate this Agreement in its entirety by written notice to Sub-hubco with immediate effect. Provided that for the purposes of Clause 40.5.2 if Sub-hubco's performance of the programme is adversely affected by the occurrence of Force Majeure, a Relief Event or an Excusing Cause then, subject to Sub-hubco complying with the mitigation and other requirements in this Agreement concerning Force Majeure, a Relief Event or an Excusing Cause (as

the case may be), the time for performance of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by Force Majeure, the Relief Event or the Excusing Cause (as the case may be) which is agreed by the parties or determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

#### **Authority's costs**

40.7 Sub-hubco shall reimburse an Authority for all reasonable costs incurred by that Authority in exercising any of its rights pursuant to this Clause 40 (*Sub-hubco Event of Default*) (including, without limitation, any relevant increased administrative expenses). Such Authority shall take reasonable steps to mitigate such costs.

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

#### **41 TERMINATION RESULTING FROM FORCE MAJEURE**

References in this Clause 41 (*Termination Resulting from Force Majeure*) to "the Authority" shall refer to Authority A and Authority B acting together.

If, in the circumstances referred to in Clause 31 (*Force Majeure*), the relevant parties have failed to reach agreement on any modification to this Agreement pursuant to Clause 31 (*Force Majeure*) within six (6) calendar months of the date on which the party affected serves notice on the other party in accordance with Clause 31 (*Force Majeure*) either the Authority or Sub-hubco may at any time afterwards terminate this Agreement by written notice to the other party having immediate effect provided always that the effects of the relevant event of Force Majeure continues to prevent a party from performing any material obligation under this Agreement.

#### **42 AUTHORITY VOLUNTARY TERMINATION**

References in this Clause 42 (*Authority Voluntary Termination*) to "the Authority" shall refer to Authority A and Authority B acting together.

42.1 The Authority shall be entitled to terminate this Agreement at any time on three (3) months' written notice to Sub-hubco. In the event of notice being given by the Authority in accordance with this Clause, the Authority shall, at any time before the expiration of such notice, be entitled to direct Sub-hubco, where the Works (or any part or parts of the Works) or any Service (or any elements of any Service) have not been commenced, to refrain from commencing any such Works or Services (or to procure the same).

#### **43 EXPIRY**

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



**CORRUPT GIFTS AND PAYMENTS**

References in this Clause 44 (*Corrupt Gifts and Payments*) to "the Authority" shall refer to Authority A and Authority B acting together.

**Prohibition on corruption**

44.1 The term "Prohibited Act" means:

44.1.1 offering, giving or agreeing to give to an Authority or any other public body or to any person employed by or on behalf of an Authority or any other public body any gift or consideration of any kind as an inducement or reward:

(a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with an Authority or any other public body; or

(b) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with an Authority or any other public body;

44.1.2 entering into this Agreement or any other agreement with an Authority or any other public body in connection with which commission has been paid or has been agreed to be paid by Sub-hubco or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Authority;

44.1.3 committing any offence:

(a) under the Bribery Act 2010;

(b) under any Law creating offences in respect of fraudulent acts; or

(c) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with an Authority or any other public body; or

44.1.4 defrauding or attempting to defraud or conspiring to defraud an Authority or any other public body.

**Warranty**

44.2 Sub-hubco warrants that in entering into this Agreement it has not committed any Prohibited Act.

**Remedies**

44.3 If Sub-hubco or any Sub-hubco Party (or anyone employed by or acting on behalf of them) commits any Prohibited Act, then the Authority shall be entitled to act in accordance with Clauses 44.3.1 to 44.3.6 below:

44.3.1 if a Prohibited Act is committed by Sub-hubco or by an employee not acting independently of Sub-hubco, then the Authority may terminate this Agreement with immediate effect by giving written notice to Sub-hubco;

44.3.2 if the Prohibited Act is committed by an employee of Sub-hubco acting independently of Sub-hubco, then the Authority may give written notice to Sub-hubco of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Sub-hubco terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person;

44.3.3 if the Prohibited Act is committed by a Contracting Associate or by an employee of that Contracting Associate not acting independently of that Contracting Associate then the Authority may give written notice to Sub-hubco of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Sub-hubco terminates the relevant Sub-Contract and procures the performance of the relevant part of the Works and/or Services by another person, where relevant, in accordance with Clause 57 (*Assignment and Sub-Contracting*);

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

44.3.5 if the Prohibited Act is committed by any other person not specified in Clauses 44.3.1 to 44.3.4 above, then the Authority may give notice to Sub-hubco of termination and this Agreement will terminate unless within twenty (20) Business Days Sub-hubco procures the termination of such person's employment and of the appointment of their employer (where the employer is not the Authority and where such person is not employed by Sub-hubco or the Contracting Associate) and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person; and

44.3.6 any notice of termination under this Clause shall specify:

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

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

44.4 Without prejudice to its other rights or remedies under this Clause, the Authority shall be entitled to recover from Sub-hubco:

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

44.4.2 any other loss sustained by an Authority in consequence of any breach of this Clause.

#### **Permitted payments**

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

#### **Notification**

44.6 Sub-hubco shall notify the Authority of the occurrence (and details) of any Prohibited Act promptly on Sub-hubco becoming aware of its occurrence.

#### **Interim Management**

44.7 Where Sub-hubco is required to replace any Sub Contractor pursuant to this Clause, the provisions of Clause 57.9 shall apply and be construed accordingly.

### **45 BREACH OF THE IRR SHARING AND CAP PROVISIONS**

References in this Clause 45 (*Breach of the IRR Sharing and Cap Provisions*) to "the Authority" shall refer to Authority A and Authority B acting together.

#### **Breach by Sub-hubco**

45.1 If Sub-hubco breaches Clause 36.6 then the Authority may, within a reasonable time of becoming aware of such breach, terminate this Agreement in accordance with Clause 45.2 below. Where the Authority becomes aware of such breach, it shall inform Sub-hubco of the occurrence of such breach as soon as reasonably practicable thereafter, provided that the failure by the Authority to so inform Sub-hubco shall not constitute a breach of this Agreement by the Authority.

#### **Notice of Termination**

45.2 If the Authority wishes to terminate this Agreement under this Clause 45 (*Breach of the IRR Sharing and Cap Provisions*), it must first give Sub-hubco notice stating that the Authority is terminating this Agreement under this Clause 45 (*Breach of the IRR Sharing and Cap Provisions*) and that this Agreement will terminate on the date falling 30 Business Days after the date of receipt of the notice.

#### **Date of Termination**

45.3 If the Authority gives notice to Sub-hubco pursuant to Clause 45.2, this Agreement will terminate on the date falling 30 Business Days after receipt of the notice

unless Sub-hubco demonstrates to the satisfaction of the Authority (acting reasonably) that such breach was caused by an administrative error of Sub-hubco and Sub-hubco rectifies such breach within 10 Business Days of receipt of such notice.

#### 46 COMPENSATION ON TERMINATION

References in this Clause 46 (*Compensation on Termination*) to "the Authority" shall refer to Authority A and Authority B acting together.

- 46.1 If this Agreement is terminated pursuant to Clause 41 (*Termination Resulting from Force Majeure*), then the Authority shall pay compensation to Sub-hubco in accordance with Section 3 (*Consequence of Termination for Force Majeure*) of Schedule Part 17 (*Compensation on Termination*).
- 46.2 If this Agreement is terminated pursuant to Clause 40 (*Sub-hubco Event of Default*) other than pursuant to Clause 40.1.3(b), then the Authority shall pay compensation to Sub-hubco in accordance with Section 2 (*Compensation on Sub-hubco Default*) of Schedule Part 17 (*Compensation on Termination*).
- 46.3 If this Agreement is terminated pursuant to Clause 39 (*Authority Events of Default*), then the Authority shall pay compensation to Sub-hubco in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule Part 17 (*Compensation on Termination*).
- 46.4 If this Agreement is terminated pursuant to Clause 42 (*Voluntary Termination*), then the Authority shall pay compensation to Sub-hubco in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule Part 17 (*Compensation on Termination*).
- 46.5 If this Agreement is terminated pursuant to Clause 40.1.3(b), Clause 44.3 or Clause 45 (*Breach of the IRR Sharing and Cap Provisions*) then the Authority shall pay compensation to Sub-hubco in accordance with Section 4 (*Corrupt Gifts and Fraud, Breach of Refinancing and Breach of IRR Sharing and Cap Provisions*) of Schedule Part 17 (*Compensation on Termination*).

#### Tax equalisation

- 46.6 Where a payment is to be made to Sub-hubco pursuant to Clause 0, Clause 46.3, Clause 46.4 or Clause 46.5 (a "**Compensation Payment**") and Sub-hubco has a Relevant Tax Liability in respect of such payment, then the amount of the Compensation Payment to be made by the Authority to Sub-hubco shall be increased so as to ensure that Sub-hubco is in the same position (after account is taken of the Relevant Tax Liability) as it would have been in had it not been for such Relevant Tax Liability.
- 46.7 For the purposes of this Clause 46 (*Compensation on Termination*):
- 46.7.1 "**Relief**" shall mean any relief, allowance or deduction in computing profits or tax or a credit against, or right to repayment of, tax granted by or pursuant to any legislation for tax purposes;
- 46.7.2 a "**Relief derived from the Project**" is a Relief which arises in connection with the Project and includes any Relief arising as a consequence of the distribution of any amount obtained in

respect of the Project (other than a Compensation Payment) by Sub-hubco (whether by way of interest, dividend or other distribution, repayment, reduction or redemption of capital or indebtedness or return of assets or otherwise); and

46.7.3 Sub-hubco shall be regarded as having a "**Relevant Tax Liability**" in respect of a Compensation Payment to the extent that:

- (a) it has a liability for tax in consequence of or in respect of a Compensation Payment ("**Actual Liability**"); or
- (b) it would have had a liability for tax within paragraph (a) above but for the utilisation of a Relief other than a Relief derived from the Project ("**Deemed Liability**").

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

46.9 Sub-hubco shall keep the Authority fully informed of all negotiations with the HM Revenue and Customs in relation to any Relevant Tax Liability in respect of a Compensation Payment. Sub-hubco shall not agree, accept or compromise any claim, issue or dispute relating to such Relevant Tax Liability without the prior written consent of the Authority, which shall not be unreasonably withheld or delayed. The Authority may, if it considers in good faith that such action is justified having regard to the likely costs and benefits, direct Sub-hubco to resist, appeal, defend or otherwise dispute the Relevant Tax Liability in respect of the Compensation Payment, provided that the cost of any such dispute (including any interest or penalties incurred) shall be at the Authority's expense. However, if Sub-hubco obtains professional advice from an independent person with relevant expertise that any resistance, appeal, defence or other mode of dispute is not likely to result in any more beneficial position in relation to the Relevant Tax Liability, Sub-hubco shall be entitled not to continue with such resistance, appeal, defence or other mode of dispute. Where any resistance, appeal, defence or other mode of dispute results in a more beneficial position in relation to the Relevant Tax Liability, an adjustment will be made to the amount payable under Clause 46.6 to reflect such outcome.

46.10 Any increase in the amount of a Compensation Payment which is payable under Clause 46.6 shall be paid on the later of five (5) Business Days after a demand therefore (together with evidence in sufficient detail for the Authority to satisfy itself of the Relevant Tax Liability and its calculation) is made by Sub-hubco and:

46.10.1 in the case of an Actual Liability, five (5) Business Days before the date on which the relevant tax must be paid to the tax authority in order to avoid incurring interest and penalties; and

46.10.2 in the case of a Deemed Liability, five (5) Business Days before the date on which tax which would not have been payable but for the utilisation of the relevant Relief must be paid in order to avoid incurring interest or penalties (whether by Sub-hubco or otherwise) and, for the purposes of determining when the Relief

would otherwise have been utilised, Reliefs shall be regarded as utilised in the order in which they arise.

- 46.11 The Authority shall have the right to pay the amount payable under Clause 46.6 direct to HM Revenue and Customs in satisfaction of the relevant tax due by Sub-hubco.

#### **Rights of Set-Off**

- 46.12 To avoid doubt, the Authority's obligations to make any payment of compensation to Sub-hubco pursuant to this Clause are subject to the Authority's rights under Clause 34.6, save that the Authority agrees not to set-off any amount agreed or determined as due and payable by Sub-hubco to the Authority against any payment of termination compensation (whether payable as a lump sum or in instalments) under Clauses 46.1, 46.3, 46.4, or 46.5 except to the extent that such termination payment exceeds the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) at that time.

#### **Full and final settlement**

- 46.13 Subject to the provisions of paragraph 2.1 of Section 5 (*General*) of Schedule Part 17 (*Compensation on Termination*):

46.13.1 any compensation paid pursuant to this Clause shall be in full and final settlement of any claim, demand and/or proceedings of Sub-hubco in relation to any termination of this Agreement and/or any Project Document (and the circumstances leading to such termination) and Sub-hubco shall be excluded from all other rights and remedies in respect of any such termination; and

46.13.2 the compensation payable (if any) pursuant to this Clause 46 (*Compensation on Termination*) above shall be the sole remedy of Sub-hubco and Sub-hubco shall not have any other right or remedy in respect of such termination.

## **47 CONSEQUENCES OF TERMINATION**

### **Continued performance**

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

### **Transfer to Authority of Assets, Contracts etc.**

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

47.2.1 if prior to the relevant Phase Actual Completion Date, in so far as any transfer shall be necessary fully and effectively to transfer property to the relevant Authority, Sub-hubco shall transfer to, and there shall vest in, the relevant Authority, such part of the

relevant Works and/or the relevant Facilities as shall have been constructed and such items of the Plant and Equipment as shall have been procured by Sub-hubco if the relevant Authority so elects:

- 47.2.2 all goods and all materials on or near to a Site not yet incorporated in the relevant Works shall remain available to the relevant Authority for the purposes of completing the relevant Works and if the cost of such goods and materials has not been reflected in the payment of any compensation pursuant to Schedule Part 17 (*Compensation on Termination*), subject to the payment by the relevant Authority (determined as between a willing vendor and willing purchaser with any disputes determined pursuant to Clause 56 (*Dispute Resolution Procedure*));
- 47.2.3 the construction plant shall remain available to the relevant Authority for the purposes of completing the relevant Works, subject to payment of the Contractor's reasonable charges;
- 47.2.4 Sub-hubco shall hand over to, and there shall vest in, the relevant Authority, free from any Encumbrances (other than any created on or by or against the relevant Authority), the relevant Facilities (which in the case of the termination of this Agreement in accordance with Clause 43 (*Expiry*) shall be in the state required in accordance with Schedule Part 18 (*Handback Procedure*));
- 47.2.5 if the relevant Authority so elects, Sub-hubco shall procure that any of the relevant Construction Contract, the Service Contracts and/or the Independent Tester Contract shall be novated or assigned to the relevant Authority, provided that where termination occurs under Clause 39 (*Authority Events of Default*) the consent of the Contractor, the Service Provider or the Independent Tester (as the case may be) shall be required;
- 47.2.6 Sub-hubco shall, or shall procure that any Contracting Associate shall (as the case may be), offer to sell to the relevant Authority at a fair value (determined as between a willing vendor and willing purchaser, with any disputes as to such fair value being determined pursuant to Schedule Part 20 (*Dispute Resolution Procedure*), free from any Encumbrance all or any part of the stocks of material and other assets, road vehicles, spare parts and other moveable property owned by Sub-hubco or any of its Contracting Associates and reasonably required by the relevant Authority in connection with the operation of the relevant Facilities or the provision of the relevant Services;
- 47.2.7 Sub-hubco shall deliver to the relevant Authority (as far as not already delivered to that Authority) one complete set of:
  - (a) "as built drawings" showing all alterations made to the relevant Facilities since the commencement of operation of the relevant Facilities; and

- (b) maintenance, operation and training manuals for the relevant Facilities;

47.2.8 Sub-hubco shall use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical plant and equipment used or made available by Sub-hubco under this Agreement and included in the relevant Facilities are assigned, or otherwise transferred, to the Authority with full title guarantee; and

47.2.9 Sub-hubco shall deliver to the relevant Authority the records referred to in Clause 38 (*Records and Open Book Accounting*) except where such documents are required by Law to be retained by Sub-hubco or its Contracting Associates (in which case complete copies shall be delivered to the relevant Authority).

47.3 Sub-hubco shall ensure that provision is made in all contracts of any description whatsoever to ensure that the relevant Authority will be in a position to exercise its rights, and Sub-hubco will be in a position to comply with its obligations, under Clause 47.2.

#### **Transitional arrangements**

47.4 On the termination of this Agreement for any reason, for a reasonable period both before and after any such termination, Sub-hubco shall have the following duties:

47.4.1 Sub-hubco shall co-operate fully with the Authority and any successor providing to the relevant Authority services in the nature of any of the relevant Services or any part of the relevant Services in order to achieve a smooth transfer of the manner in which the relevant Authority obtains services in the nature of the relevant Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of the relevant Authority and members of the public;

47.4.2 Sub-hubco shall as soon as practicable remove from the relevant Site all property not acquired by the relevant Authority pursuant to Clause 47.2 (or not belonging to the relevant Authority or any relevant Authority Party) and if it has not done so within forty (40) Business Days after any notice from the relevant Authority requiring it to do so the relevant Authority may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of Sub-hubco;

47.4.3 Sub-hubco shall forthwith deliver to the relevant Authority's Representative:

- (a) any security passwords, access codes and other keys to the relevant Facilities and the equipment; and

- (b) without prejudice to Clause 55 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the



operation of the relevant Facilities (but excluding computer programmes, which have been developed or acquired by a Service Provider for its own use and not solely for the purposes of provision of any of the relevant Services at the relevant Facilities or the assignation or transfer of which is otherwise restricted); and

47.4.4 Sub-hubco shall as soon as practicable vacate the relevant Site and (without prejudice to Schedule Part 18 (*Handback Procedure*)) shall leave the relevant Site and the relevant Facilities in a safe, clean and orderly condition.

47.5 If an Authority wishes to conduct a competition prior to the Expiry Date with a view to entering into an agreement for the provision of services (which may or may not be the same as, or similar to, the relevant Services or any of them) following the expiry of this Agreement, Sub-hubco shall co-operate with the relevant Authority fully in such competition process including (without limitation) by:

47.5.1 providing any information which the relevant Authority may reasonably require to conduct such competition but, to avoid doubt, information which is commercially sensitive to Sub-hubco shall not be provided (and, for the purpose of this Clause 47.5.1 commercially sensitive shall mean information which would if disclosed to a competitor of Sub-hubco give that competitor a competitive advantage over Sub-hubco and thereby prejudice the business of Sub-hubco but shall, to avoid doubt, exclude any information to be disclosed in terms of Clause 25 (*TUPE and Employment matters*)); and

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

### **Continuing Obligations**

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

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

47.6.2 termination of this Agreement shall not affect the continuing rights and obligations of Sub-hubco and the Authority under Clauses 10 (*The Sites*), 25 (*TUPE and Employment Matters*), 31 (*Force Majeure*), 34 (*Payment*), 35 (*Taxation*), 36 (*IRR Sharing and Cap*), 37 (*Custody of Financial Model*), 38 (*Records and Reports*), 41 (*Termination Resulting from Force Majeure*), 42 (*Authority Voluntary Termination*), 44 (*Corrupt Gifts and Payments*), 46 (*Compensation on Termination*), 47.2, 47.4 and 47.5 (*Transitional Arrangements*), 49 (*Indemnities and Liability*), 53 (*Insurance*), 54 (*Exclusions and Limits on Liability*), 55 (*Intellectual Property*), 56 (*Dispute Resolution Procedure*), 59 (*Mitigation*), 61 (*Confidentiality*), 64 (*Notices*) and Clause 73

(*Governing Law and Jurisdiction*) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

48 **HANDBACK PROCEDURE**

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

## **PART 11: INDEMNITIES, WARRANTIES & INSURANCE**

### **49 INDEMNITIES**

#### **Sub-hubco indemnities to Authority**

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

#### **Authority indemnities to Sub-hubco**

- 49.2 An Authority shall indemnify and keep Sub-hubco indemnified at all times from and against all Direct Losses sustained by Sub-hubco in consequence of:
- 49.2.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, that Authority or any relevant Authority Party notwithstanding any act or omission of Sub-hubco or any Sub-hubco Party;
  - 49.2.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 49.1.1) arising by reason of any act or omission of that Authority or any relevant Authority Party in the course of provision of the Community Services, any Unreasonable Act by that Authority or

any relevant Authority Party, breach of any express provision of this Agreement by that Authority or any relevant Authority Party or any deliberate act or omission of that Authority or any relevant Authority Party, save to the extent caused (or contributed to) by any act or omission of Sub-hubco or any Sub-hubco Party;

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

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

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

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

#### **Conduct of claims**

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

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

49.3.2 subject to Clauses 49.3.3, 49.3.4 and 49.3.5 below, on the giving of a notice by the Beneficiary pursuant to Clause 49.3.1 above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part

only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with an indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable co operation, access and assistance for the purposes of considering and resisting such claim;

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

- (a) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
- (b) the Indemnifier shall not bring the name of the Beneficiary into disrepute; and
- (c) the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;

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

- (a) the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 49.3.2 above; or
- (b) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under Clause 49.3.1 above or notifies the Beneficiary that it does not intend to take conduct of the claim; or
- (c) the Indemnifier fails to comply in any material respect with the provisions of Clause 49.3.3 above;

49.3.5 the Beneficiary shall be free at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which Clause 49.3.2 above applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable co operation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Clause 49.3.5, then the Indemnifier shall be released from any liability under its indemnity under Clause 49.1 (*Sub-hubco Indemnities to Authority*) or Clause 49.2 (*Authority Indemnities to Sub-hubco*) (as the case may be) and, without prejudice to any accrued

liabilities, any liability under its indemnity given pursuant to Clause 49.3.2 in respect of such claim;

49.3.6 If the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the indemnifier whichever is the lesser of:

- (a) an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out of pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
- (b) the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,

49.3.7 provided that there shall be no obligation on the Beneficiary to pursue such recovery and that the Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose indirect or consequential losses or claims for loss of profits which are excluded by this Agreement from being recovered from the Indemnifier); and

49.3.8 any person taking any of the steps contemplated by Clauses 49.3.1 to 49.3.5 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

#### **Mitigation – indemnity claims**

49.4 To avoid doubt the provisions of Clause 59 (*Mitigation*) apply to any indemnity given under this Agreement and any such indemnity shall not apply to the extent that such part or parts of Direct Losses could have been reduced or avoided by the Beneficiary complying with the provisions of such Clause 59 (*Mitigation*).

#### **49A MALICIOUS DAMAGE**

##### **49A.1 Remit of Clause**

This Clause 49A specifies the respective obligations of the parties in relation to malicious damage to any of the Facilities during the relevant Operational Term.

##### **49A.2 Notification**

49A.2.1 As soon as possible after a Service Event has been notified to the relevant Helpdesk or after Sub-hubco has itself or by a Service Provider become aware of a Service Event, if it considers that the Service Event was caused by malicious damage by a person other than a Sub-hubco Party, Sub-hubco must verbally inform the relevant Helpdesk and the relevant Authority's Representative (a "**Malicious Damage Report**").

Where it is reasonably practicable for it to do so without prejudicing its ability to achieve Rectification of the Service Event within the Rectification Period and subject to any immediate steps that it requires to take to make the relevant Facilities safe, it must allow the relevant Authority's Representative an opportunity to inspect the evidence it relies on to support its claim that malicious damage caused the Service Event concerned before carrying out Rectification and, where this is not reasonably practicable, Sub-hubco must take reasonable steps to preserve or record in a suitable manner any such evidence and forthwith make that record available to the relevant Authority.

49A.2.2 Provided Sub-hubco has complied with the requirements of Clause 49A.2.1, unless within two (2) hours of receipt of a Malicious Damage Report or within two (2) hours of the start of the next Core Times where the Malicious Damage Report is made outside Core Times, or, if applicable, within one (1) Business Day of receipt of the evidence or record of the alleged malicious damage concerned the relevant Authority's Representative notifies Sub-hubco that he agrees that the Service Event referred to in the relevant Malicious Damage Report was caused by malicious damage by a person other than a Sub-hubco Party, the relevant Authority's Representative will be deemed to have disagreed that the Service Event concerned was caused by malicious damage by a person other than a Sub-hubco Party.

#### **49A.3 Rectification of Malicious Damage**

49A.3.1 In relation to any Service Event referred to in a Malicious Damage Report, Sub-hubco shall always take such steps as are necessary in accordance with its obligations under this Agreement to make the relevant Facilities safe.

49A.3.2 If the relevant Authority's Representative agrees in accordance with Clause 49A.2 that a Service Event was caused by malicious damage by a person other than a Sub-hubco Party, except when Clause 49A.3.3 applies, Sub-hubco shall not Rectify the Service Event beyond what is required by Clause 49A.3.1 unless instructed by the relevant Authority to do so as an Authority Change under Schedule Part 16 (*Change Protocol*).

49A.3.3 If, in the reasonable opinion of Sub-hubco, the Service Event referred to in a Malicious Damage Report, if not Rectified, will or is likely to result in the costs of performing the relevant Services and in particular the costs of Maintenance Works and Lifecycle Replacement being materially increased, it may notify the relevant Authority's Representative to that effect and shall be entitled to proceed with Rectification in accordance with its obligations under this Agreement.

49A.3.4 If the relevant Authority's Representative does not agree in accordance with Clause 49A.2 that the Service Event referred to in a Malicious Damage Report was caused by malicious damage by a person other than a Sub-hubco Party, Sub-hubco shall be entitled to proceed with Rectification in accordance with its obligations under this Agreement.

#### **49A.4 Costs of rectifying malicious damage**

Sub-hubco will be entitled to include all reasonable costs incurred with any Service Provider or third party:

49A.4.1 to make the relevant Facilities safe pursuant to Clause 49A.3.1 if it is agreed by the relevant Authority or subsequently determined under the Dispute Resolution Procedure that the Service Event was caused by malicious damage by a person other than a Sub-hubco Party; or

49A.4.2 to carry out Rectification pursuant to Clause 49A.3.3; or

49A.4.3 to carry out Rectification pursuant to Clause 49A.3.4 if it is subsequently determined under the Dispute Resolution Procedure that the Service Event was caused by malicious damage by a person other than a Sub-hubco Party,

in a relevant Monthly Invoice relating to the Services provided at the Facilities in question in accordance with Clause 34.2.1(c). In deciding what a reasonable cost is, regard may be had to prices and rates in the Catalogue (as defined in Schedule Part 16 (*Change Protocol*)).

#### **49A.5 Sub-hubco to Provide Information**

Sub-hubco must provide the relevant Authority with such information as that Authority reasonably requests for the purpose of making claims for losses due to malicious damage, under the Operational Insurances.

#### **49A.6 Disputes**

Any dispute under this Clause 49A shall be determined under the Dispute Resolution Procedure.

### **50 TAX ON INDEMNITY PAYMENTS**

If any payment by one party under an indemnity in this Agreement is subject to income tax or corporation tax (or any tax replacing them) in the hands of the recipient, the recipient may demand in writing to the party making the payment that the payment shall be increased by such amount as would ensure that, after taking into account any such tax payable in respect of such additional amount, the recipient receives and retains a net sum equal to the amount it would have otherwise received had the payment not been subject to such tax. In relation to any such additional amount payable to Sub-hubco, Sub-hubco and an Authority shall have the same rights and obligations as would apply to a Relevant Tax Liability under Clause 46.7.3 and Clauses 46.6 to 46.11 (inclusive) shall apply *mutatis mutandis* to the payment of the additional amount. The party making the payment shall pay such additional amount within ten (10) Business Days of receipt of such demand.

### **51 EXCUSING CAUSES**

51.1 If an Excusing Cause interferes adversely with, or causes or contributes to a failure of, the performance of the any of the Project Operations by Sub-hubco and/or causes or contributes to the occurrence of an Availability Failure and/or a Performance Failure and provided that the effect of such Excusing Cause is claimed within ten (10) Business Days of the date on which Sub-hubco became aware (or ought reasonably to have become so aware) of the occurrence of the



Excusing Cause, then (subject to Clauses 51.3 (*Insured Exposure*) and 51.4) to the extent such failure or interference or occurrence of an Availability Failure and/or a Performance Failure arises as a result of such Excusing Cause:

51.1.1 such failure by Sub-hubco to perform or interference or occurrence, and any poor performance of, any affected Service shall not constitute a breach of the provisions of this Agreement by Sub-hubco;

51.1.2 such failure by Sub-hubco to perform or interference or occurrence shall be taken account of in measuring the performance of any affected Service in accordance with the relevant Service Level Specification, which shall be operated as though the relevant Service had been performed free from such adverse interference; and

51.1.3 any such Availability Failure and/or Performance Failure shall be deemed not to have occurred,

so that Sub-hubco shall be entitled to payment under this Agreement from the relevant Authority as if there had been no such interference with, or failure in the performance of, the relevant Project Operations and no such occurrence of an Availability Failure and/or Performance Failure.

51.2 For the purpose of Clause 51 (*Excusing Causes*), an Excusing Cause means:

51.2.1 any breach of any express provision of this Agreement by the relevant Authority or any relevant Authority Party, including any breach of the relevant Authority's obligations under Clause 23.14, (unless, and to the extent, caused or contributed to by Sub-hubco or any Sub-hubco Party);

51.2.2 any deliberate act or omission of the relevant Authority or of any Authority Party or any failure by the relevant Authority or relevant Authority Party (having regard always to the interactive nature of the activities of the relevant Authority, the Community Services Providers and of Sub-hubco) to take reasonable steps to carry out its activities in a manner which minimises undue interference with Sub-hubco's performance of the relevant Project Operations, save where (and to the extent):

(a) caused or contributed to by Sub-hubco or any Sub-hubco Party;

(b) the relevant Authority or relevant Authority Party is acting in accordance with a recommendation or instruction of Sub-hubco or any Sub-hubco Party;

(c) any such act or omission giving rise to such failure was within the contemplation of the relevant Authority and Sub-hubco or was otherwise provided for in this Agreement; or

(d) the consequences of any such deliberate act or omission or other acts or omissions giving rise to

such failure would have been prevented by the proper performance of Sub-hubco's obligations under this Agreement.

- 51.2.3 the outbreak or the effects of any outbreak of any Medical Contamination unless and to the extent that the effects of such outbreak are caused (or contributed to) by any failure of Sub-hubco or any Sub-hubco Party to comply with procedures (or a relevant Authority's instructions) relating to control of infection or to take all reasonable steps to mitigate the effect of such Medical Contamination;
- 51.2.4 the implementation of any action taken by the relevant Authority or any relevant Authority Party, or any suspension of Sub-hubco's obligation to deliver any or any part of the relevant Services or the compliance by Sub-hubco with instructions given by the relevant Authority, in each case in the circumstances referred to in Clauses 24.6 to 24.9 (inclusive);
- 51.2.5 the carrying out of any Low Value Change in accordance with the terms of this Agreement during the period of time agreed between the relevant Authority and Sub-hubco; or
- 51.2.6 the carrying out of planned preventative maintenance in accordance with the relevant Schedule of Programmed Maintenance; or
- 51.2.7 the occurrence of a Service Event that the relevant Authority's Representative has agreed pursuant to Clause 49A.3.2 has been caused by malicious damage by a person other than a Sub-hubco Party, but only until such time as either (i) the relevant Authority has instructed Sub-hubco to Rectify the Service Event as an Authority Change and the time period for implementation of such Authority Change has expired or (ii) Sub-hubco has Rectified the Service Event pursuant to Clause 49A.3.3 or
- 51.2.8 with effect from the Phase Actual Completion Date for Phase 1, Sub-hubco are delayed or impeded in their performance of the Authority A Services as a result of the exercise of the Reserved Rights specified in paragraph 1.1, 1.2 or 1.3 of Section 1B (*Tain Reserved Rights*) of Schedule Part 5 (*Land Matters*) where and to the extent the conditions set out in paragraph 2 of the said Section 1B have not been observed in connection with the exercise of such rights; or
- 51.2.9 damage to the Tain Service Road caused during the exercise of the Reserved Rights specified in paragraph 1.4 of Section 1B (*Tain Reserved Rights*) of Schedule Part 5 (*Land Matters*) where such damage is not made good in accordance with the terms of paragraph 3.1 of Section 1B (*Tain Reserved Rights*) of Schedule Part 5 (*Land Matters*).

#### **Insured exposure**

- 51.3 Without prejudice to Clause 53 (*Insurance*), Sub-hubco shall not be entitled to any payment which would not have been due under this Agreement but for Clause 51

(*Excusing Causes*) to the extent that Sub-hubco is or should be able to recover under any policy of insurance required to be maintained by Sub-hubco or any Sub-hubco Party in accordance with this Agreement (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of Sub-hubco (or any Sub-hubco Party), including but not limited to non disclosure or under insurance) or any other policy of insurance which Sub-hubco has taken out and maintained.

#### **Mitigation of Excusing Cause**

51.4 Sub-hubco shall take all reasonable steps to mitigate the consequences of an Excusing Cause on Sub-hubco's ability to perform its obligations under this Agreement. To the extent that Sub-hubco does not take such steps, Sub-hubco shall not be entitled to, and shall not receive, the relief specified in Clause 51.1

51.5 To avoid doubt, Clause 51.2.2 shall not impose a general obligation on an Authority to take (or to procure that any relevant Authority Party takes) such steps and shall apply (and be construed) solely for the purpose of establishing whether an Excusing Cause has occurred.

#### **52 WARRANTIES**

NOT USED

#### **53 INSURANCE**

References in this Clause 53 (*Insurance*) to "the Authority" shall refer to Authority A and Authority B acting together.

#### **Sub-hubco Insurances**

53.1 Sub-hubco shall procure that the insurances, details of which are set out in Section 1 (*Policies to be taken out by Sub-hubco and maintained during the Design and Construction Phase*) of Schedule Part 15 (*Insurance Requirements*), are taken out prior to the commencement of the Works and are maintained for the periods specified in Section 1 (*Policies to be taken out by Sub-hubco and maintained during the Design and Construction Phase*) of Schedule Part 15 (*Insurance Requirements*).

53.2 Sub-hubco shall procure that the insurances, details of which are set out in Section 2 (*Policies to be taken out by Sub-hubco and maintained from the Phase Actual Completion Date*) of Schedule Part 15 (*Insurance Requirements*), are taken out from the relevant Phase Actual Completion Date and are maintained for the periods specified in Section 2 (*Policies to be taken out by Sub-hubco and maintained from the Phase Actual Completion Date*) of Schedule Part 15 (*Insurance Requirements*).

53.3 Without prejudice to the other provisions of this Clause 53 (*Insurance*), Sub-hubco shall, at all relevant times, at its own cost, effect and maintain in full force those insurances which it is required to effect by any applicable Law.

53.4 All Insurances referred to in Clauses 53.1 and 53.2 shall:

53.4.1 be maintained in the names of the parties specified in Schedule Part 15 (*Insurance Requirements*) and shall be composite

policies of insurance (and not joint) unless stated otherwise in Schedule Part 15 (*Insurance Requirements*);

- 53.4.2 be placed with insurers who are acceptable to the Authority (such acceptance not to be unreasonably withheld or delayed);
  - 53.4.3 in so far as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value;
  - 53.4.4 comply with the relevant provisions of Section 1 (*Policies to be taken out by Sub-hubco and maintained during the Design and Construction Phase*) and Section 2 (*Policies to be taken out by Sub-hubco and maintained from the Phase Actual Completion Date*) of Schedule Part 15 (*Insurance Requirements*).
  - 53.4.5 provide for 30 days prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with Endorsement 1 in Section 3 (*Endorsements*) of Schedule Part 15 (*Insurance Requirements*);
  - 53.4.6 in respect of the Physical Damage Policies provide for payment of any proceeds received by Sub-hubco to be applied in accordance with Clause 53.22 (*Reinstatement*);
  - 53.4.7 in the case of the Operational Insurances only, be taken out and maintained in accordance with Section 4 of Schedule Part 15 (*Insurance Requirements*).
  - 53.4.8 The limit of indemnity set out in paragraph 3.2 of Section 2 of Schedule Part 15 and the maximum deductibles specified at paragraphs 1.4 and 3.3 of Section 2 of Schedule Part 15 shall be index-linked, provided such limits of indemnity and maximum deductibles shall be increased on each renewal date to the next whole insurable amount or deductible (as the case may be) available in the insurance market if the value obtained by applying the indexation formula set out in paragraph 16 of Section 2 of Schedule Part 1 does not result in an insurable amount or deductible available in the insurance market.
- 53.5 Sub-hubco shall ensure that its brokers give the Authority a letter of undertaking substantially in the form set out in Section 5 (*Broker's Letter of Undertaking*) of Schedule Part 15 (*Insurance Requirements*) at Financial Close and subsequently on the renewal of each of the Insurances.

#### **Subrogation and Vitiating**

- 53.6 Sub-hubco shall in respect of the insurances referred to in Clauses 53.1 and 53.2:
- 53.6.1 procure that all policies of insurance to be effected by it pursuant to this Clause shall contain a provision to the effect that the insurers have agreed to waive all rights of subrogation against the Authority (and all Authority Parties other than contractors and sub-contractors) in accordance with Endorsement 2 in Section 3 (*Endorsements*) of Schedule Part 15 (*Insurance Requirements*); and

53.6.2 provide for non-vitiation protection in respect of any claim made by an Authority as co-insured in accordance with Endorsement 2 in Section 3 (*Endorsements*) of Schedule Part 15 (*Insurance Requirements*);

provided that, to avoid doubt, this Clause 53.6 shall not by itself prevent Sub-hubco from claiming against an Authority (or any Authority Party) under an express provision of this Agreement for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent such loss or damage exceeds the maximum of such insurance required by this Agreement.

53.7 No party shall take any action or fail to take any reasonable action or (in so far as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) as a result of which any of the Insurances may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

#### **Evidence of Sub-hubco Insurance**

53.8 Not less than twenty (20) Business Days prior to the amendment or expiry of any relevant insurance policy (other than the expiry of any of the Operational Insurances in respect of which Sub-hubco must comply with the provisions of Section 4 of Schedule Part 15 (*Insurance Requirements*)), Sub-hubco shall submit to the Authority a request for approval from the Authority of the insurer and the principal terms and conditions of such insurance policy (and any revision to such terms and conditions or change in identity of such insurer), such approval not to be unreasonably withheld or delayed.

53.9 Sub-hubco shall provide to the Authority:

53.9.1 copies on request of all insurance policies referred to in Clauses 53.1 to 53.3 (together with any other information reasonably requested by the Authority relating to such insurance policies) and the Authority shall be entitled to inspect them during ordinary business hours; and

53.9.2 evidence that the premiums payable under all insurance policies have been paid and that the Insurances are in full force and effect in accordance with the requirements of this Clause 53 (*Insurance*) and Schedule Part 15 (*Insurance Requirements*).

53.10 Renewal certificates or other such evidence of renewal in relation to the Insurances shall be obtained as and when necessary and copies (certified in a manner acceptable to the Authority) shall be forwarded to the Authority as soon as possible but in any event within 20 Business Days of the renewal date.

53.11 If Sub-hubco defaults in insuring or continuing to maintain the Insurances, the Authority may insure against any risk in respect of which such default has occurred and recover any premiums from Sub-hubco as a debt provided that if the default occurs during any relevant Operational Term the amount recoverable from Sub-hubco by the relevant Authority shall be the difference between the premiums had Sub-hubco continued to maintain the Insurances and the premiums paid by that Authority to take out and maintain the Insurances.

### Acceptance and compliance

53.12 The supply to the Authority of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 53 (*Insurance*) shall not imply acceptance by the Authority (or each Authority's Representative) that:

53.12.1 the extent of insurance cover is sufficient and its terms are satisfactory; or

53.12.2 in respect of any risks not insured against, that the same were Uninsurable.

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

### Uninsurable Risks

53.14.1 If a risk usually covered by contractors' 'all risks' insurance, property damage insurance, third party liability insurance, delay in start up and business interruption insurance (but not loss of profits) or statutory insurances in each case required under this Agreement becomes Uninsurable then:

- (a) Sub-hubco shall notify the Authority of any risk becoming Uninsurable within five (5) Business Days of becoming aware of the same and in any event at least five (5) Business Days before expiry or cancellation of any existing insurance in respect of that risk; and
- (b) if the parties agree, or it is determined in accordance with the Dispute Resolution Procedure that the risk is Uninsurable and that:
  - (i) the risk being Uninsurable is not caused by the actions of Sub-hubco or any sub-contractor of Sub-hubco (of any tier); and
  - (ii) Sub-hubco has demonstrated to the Authority that Sub-hubco and a prudent board of directors of a company operating the same or substantially similar businesses in the United Kingdom to that operated by Sub-hubco would in similar circumstances (in the absence of the type of relief envisaged by this Clause) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the likelihood of the Uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such Uninsurable risk did occur (or has occurred)

and other mitigants against such consequences which may be available to such company,

the parties shall meet to discuss the means by which the risk should be managed or shared (including considering the issue of self-insurance by either party).

53.14.2 If the requirements of Clause 53.14.1 are satisfied, but the parties cannot agree as to how to manage or share the risk, then:

- (a) where such requirements are satisfied in respect of such third party liability insurance the Authority shall (at the Authority's option) either pay to Sub-hubco an amount equal to the amount calculated in accordance with Section 3 (*Consequences of Termination for Force Majeure*) of Schedule Part 17 (*Compensation on Termination*) and this Agreement will terminate, or elect to allow this Agreement to continue and Clause 53.14.2(b) below shall thereafter apply in respect of such risk; and
- (b) where such requirements are satisfied in respect of contractors' 'all risks' insurance, property damage insurance, third party liability insurance (if the Authority elects to allow this Agreement to continue in accordance with Clause 53.14.2(a)), delay in start up and business interruption insurance (but not loss of profits) or statutory insurances this Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to Sub-hubco an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and this Agreement will continue, or an amount equal to the amount calculated in accordance with Section 3 (*Consequences of Termination for Force Majeure*) of Schedule Part 17 (*Compensation on Termination*) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon this Agreement will terminate; and
- (c) where pursuant to Clauses 53.14.2(a) and/or 53.14.2(b) this Agreement continues then each Annual Service Payment shall be reduced in each year for which the relevant insurance is not maintained by an amount equal to the relevant Proportion of the premium paid (or which would have been paid) by Sub-hubco in respect of the relevant risk in the year prior to it becoming Uninsurable (index linked from the date that the risk becomes Uninsurable) save to the extent that such reduction is

otherwise reflected in a reduction in the payments claimed by Sub-hubco pursuant to paragraph 3.1 of Section 6 (*Pass Through Costs*) of Schedule Part 14 (*Payment Mechanism*). Where the risk is Uninsurable for part of a year only the reduction in each Annual Service Payment shall be pro rated to the number of months for which the risk is Uninsurable.

- (d) where pursuant to Clauses 53.14.2(a) and/or 53.14.2(b) this Agreement continues Sub-hubco shall approach the insurance market at least every four months to establish whether the risk remains Uninsurable. As soon as Sub-hubco is aware (and the parties agree or it is determined pursuant to the Dispute Resolution Procedure) that the risk is no longer Uninsurable, Sub-hubco shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Agreement;
- (e) in respect of any period between the Authority receiving notification in accordance with Clause 53.14.1(a) that a TPL Risk has become Uninsurable and the Authority's notification to Sub-hubco in accordance with Clause 53.14.2(a) in respect of such risk then, provided it is ultimately agreed or determined that the requirements of Clause 53.14.1(b) are satisfied in respect of the Uninsurable TPL Risk and subject to Clause 53.14.2(f) below, Clause 53.14.2(b) shall apply in respect of occurrences of the Uninsurable TPL Risk during such period unless the parties otherwise agree how to manage the risk during this period; and
- (f) Clause 53.14.2(e) shall only apply provided the Sub-hubco does not unreasonably materially delay (a) agreement and/or determination in accordance with the Dispute Resolution Procedure as to whether the requirements of Clause 53.14.1(b) are satisfied in respect of the Uninsurable TPL Risk and/or (b) meeting with the Authority to discuss the means by which the risk should be managed.

Where this Clause 53.14.2 applies and this Agreement continues, Sub-hubco shall, subject to Clause 53.14.2(c), be relieved of its obligations to maintain insurance in respect of the relevant Uninsurable Risk.

53.14.3 If, pursuant to Clause 53.14.1(b), the Authority elects to make payment of compensation to Sub-hubco (such that this Agreement will terminate)(the "**Relevant Payment**"), Sub-hubco shall have the option (exercisable in writing within (20) Business Days of the date of such election by the Authority (the "**Option Period**")) to pay to the Authority on or before the end of the Option Period, an amount equal to the insurance proceeds that



would have been payable had the relevant risk not become Uninsurable, in which case this Agreement will continue (and the Relevant Payment will not be made by the Authority), and Sub-hubco's payment shall be applied for the same purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

53.14.4 During an Operational Term, the Authority shall be entitled to notify Sub-hubco that a risk has become Uninsurable under paragraph (b) of the definition of "Uninsurable". Following such notification, Clauses 53.14.1(b) to 53.14.3 (except Clause 53.14.1(b)(ii)) shall apply as if Sub-hubco had issued a notice under Clause 53.14.1(a).

#### 53.15 Unavailability of terms

53.15.1 If, upon the renewal of any of the Insurances:

- (a) any insurance Term is not available to Sub-hubco in the worldwide insurance market with reputable insurers of good standing; and/or
- (b) the insurance premium payable for Insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom,

other than, in each case by reason of one or more actions of Sub-hubco and/or any sub-contractor of Sub-hubco (of any tier) then Clause 53.15.2, shall apply.

53.15.2 If it is agreed or determined that Clause 53.15.1 applies then the Authority shall waive Sub-hubco's obligations in Clauses 53.1 to 53.3 and/or Schedule Part 15 (*Insurance Requirements*) in respect of that particular Insurance Term and Sub-hubco shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in Clause 53.15.1 continue to apply to such Insurance Term.

53.15.3 To the extent that the parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and /or condition of insurance is available to Sub-hubco in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address Sub-hubco's inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in the UK are (at such time) generally prepared to pay, Sub-hubco shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition.

53.15.4 Sub-hubco shall notify the Authority as soon as reasonably practicable and in any event within five (5) days of becoming aware that Clause 53.15.1(a) and/or Clause 53.15.1(b) are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). During an Operational Term the Authority shall be entitled to notify Sub-hubco that Clause 53.15.1(b) is likely to apply or (on expiry of the relevant insurance then in place) does apply in respect of an Insurance Term (irrespective of the reason for the same). Sub-hubco shall provide the Authority with such information as the Authority reasonably requests regarding the unavailability of the Insurance Term and the parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.

53.15.5 In the event that Clause 53.15.1(a) and/or Clause 53.15.1(b) apply in respect of an Insurance Term, (irrespective of the reasons for the same) Sub-hubco shall approach the insurance market at least every four months to establish whether Clause 53.15.1(a) and/or Clause 53.15.1(b) remain applicable to the Insurance Term. As soon as Sub-hubco is aware, and the parties agree or it is determined pursuant to the Dispute Resolution Procedure, that Clause 53.15.1(a) and/or Clause 53.15.1(b) has ceased to apply to the Insurance Term Sub-hubco shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Agreement.

### **Risk Management**

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

53.16.1 be responsible for dealing with all risk management matters on behalf of its appointing or designating party including (without limitation) ensuring compliance by that party with this Clause 53.16;

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

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

53.17 Without prejudice to the provisions of Clause 53.16, the parties shall notify one another, and in Sub-hubco's case the relevant insurer, of any circumstances which may give rise to a claim of a value equal to or in excess of fifty thousand pounds (£50,000) (index linked) under the Insurances within five (5) Business Days of becoming aware of the same (or earlier, if so requested by the terms of the relevant insurance policy). If any insurer disputes any such claim, Sub-hubco shall provide the Authority with full details of any disputed claim and the parties shall liaise with one another to ensure that the relevant claim is preserved or pursued.

### **Application of Proceeds**

- 53.18 All insurance proceeds received by Sub-hubco under the insurances referred to in Schedule Part 1 (*Definitions and Interpretation*) and Clause 11 of Schedule Part 2 (*Completion Documents*) and paragraph 1 (*Contractor's "All Risk" Insurance*) of Section 1 (*Insurance Requirements*) and paragraph 1 (*Property Damage Insurance*) of Section 2 (*Policies to be taken out by Sub-hubco and Maintained from the Phase Actual Completion Date*) of Schedule Part 15 (*Insurance Requirements*) shall be paid into the Insurance Proceeds Account and shall be applied in accordance with this Agreement and in accordance with the Insurance Proceeds Accounts Agreement.
- 53.19 Subject to the provisions of the Funders' Direct Agreement and Clause 53.22 (*Reinstatement*), Sub-hubco shall apply any proceeds of any policies of Insurance:
- 53.19.1 in the case of third party legal liability or employers' liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable; and
- 53.19.2 in the case of any other insurance other than delay in start up or business interruption insurance, so as to ensure the performance by Sub-hubco of its obligations under this Agreement, including where necessary the reinstatement, restoration or replacement of the Facilities, assets, materials or goods affected by the event giving rise to the insurance claim and consequent payment of proceeds.
- 53.20 Where reinstatement monies are required to be released from the Insurance Proceeds Account Sub-hubco shall obtain the Authority's consent in accordance with the Insurance Proceeds Account Agreement. The Authority shall give its consent (or confirm that it is withholding its consent) to the release of monies from the Insurance Proceeds Account within one (1) Business Day of a request from Sub-hubco (provided that such consent must not be unreasonably withheld).
- 53.21 If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, Sub-hubco will make good any deficiency forthwith.
- 53.22 **Reinstatement**
- 53.22.1 All insurance proceeds received under any Physical Damage Policy shall be applied to repair, reinstate and replace each part or parts of the Facilities in respect of which the proceeds were received.
- 53.22.2 Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the "**Relevant Incident**") in an amount in excess of one hundred and fifty thousand pounds (£150,000) (index-linked):
- (a) Sub-hubco shall deliver as soon as practicable and in any event within 28 days after the making of the claim a plan prepared by Sub-hubco for the carrying out of the works necessary (the "**Reinstatement Works**") to repair, reinstate or replace (the "**Reinstatement Plan**") the assets which are the subject of the relevant claim or claims in accordance with Clause (b)(iv)below. The Reinstatement Plan shall set out:

- (i) if not the Contractor, the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the relevant Authority; and
  - (ii) the proposed terms and timetable or, if not then established, the reasonably anticipated terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the relevant Authority, which approval shall not be unreasonably delayed;
- (b) provided that the relevant Authority is satisfied that the Reinstatement Plan will enable Sub-hubco to comply with Clause 53.22.2(b)(iv) below within a reasonable timescale:
- (i) the Reinstatement Plan will be adopted and carried out by Sub-hubco;
  - (ii) Sub-hubco shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the Reinstatement Plan approved by the Authority;
  - (iii) prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Insurance Proceeds Account (the "**Relevant Proceeds**") (together with any interest accrued) may be withdrawn by Sub-hubco from the Insurance Proceeds Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in Clause 53.22.2(b)(ii) above, and to meet any other reasonable costs and expenses of Sub-hubco for the sole purposes of funding the Reinstatement Works and the parties shall operate the signatory requirements of the Insurance Proceeds Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Authority may withdraw amounts standing to the credit of the Insurance Proceeds Account for the purposes of funding any Reinstatement Works;
  - (iv) the relevant Authority agrees and undertakes that, subject to compliance by

Sub-hubco with its obligations under this Clause, and provided that Sub-hubco procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 53.22.2(b)(ii), it shall not exercise any right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds;

- (v) the relevant Authority shall use reasonable endeavours to assist Sub-hubco in the carrying out of the Reinstatement Plan; and
- (vi) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the relevant Authority and in accordance with Clause 53.22.3 below the Authority shall permit withdrawal by Sub-hubco of any Relevant Proceeds then held in the Insurance Proceeds Account that have not been paid under Clause 53.22.2(b)(ii) above, in respect of the Relevant Incident, together with any interest accrued.
- (vii) subject to the provisions of Clause 49.1 (*Sub-hubco Indemnities to Authority*) Sub-hubco shall be solely responsible for the payment of any deficiency.

53.22.3 Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace any Facility, Sub-hubco shall carry out the work in accordance with the Authority's Construction Requirements so that on completion of the work, the provisions of this Agreement are complied with.

53.22.4 If and to the extent that a breach by Sub-hubco of its obligations under Clause 53.22.2(b) leads to a delay in the completion of the Reinstatement Works, any entitlement that Sub-hubco has to relief under Clause 30 (*Relief Events*) shall be suspended.

## 54 EXCLUSIONS AND LIMITATIONS ON LIABILITY

### Exclusions

- 54.1 The indemnities under this Agreement shall not apply and (without prejudice to an Authority's rights under the Payment Mechanism) there shall be no right to claim damages for breach of this Agreement, in delict or on any other basis whatsoever to the extent that any loss claimed by either party is for loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or is a claim for consequential loss or for indirect loss of any nature ("**Indirect Losses**") suffered or allegedly suffered by either party. The Authority agrees that, notwithstanding the foregoing, any losses of Sub-hubco arising under the Construction Contracts and the Service Contracts as originally executed (or as amended in accordance with

and subject to Clause 4.1 (*Ancillary Documents*)) which are not Indirect Losses shall not be excluded from such a claim solely by reason of this Clause 54.1.

- 54.2 No Authority shall be liable in delict to Sub-hubco or any Sub-hubco Party in respect of any negligent act or omission of an Authority or any Authority Party relating to or in connection with this Agreement and Sub-hubco shall procure that no Sub-hubco Party shall bring such a claim against an Authority. Sub-hubco has accepted this on the basis that it and each Sub-hubco Party will cover the risk of negligent acts or omissions by insurance or in such other manner as it (or they) may think fit.

#### **No Double Recovery**

- 54.3 Subject to:

54.3.1 any other express right of an Authority pursuant to this Agreement; and

54.3.2 an Authority's right to claim, on or after termination of this Agreement, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Agreement by Sub-hubco save to the extent that the same has already been recovered by that Authority pursuant to this Agreement or has been taken into account to reduce any compensation payable by that Authority pursuant to Clause 46 (*Compensation on Termination*),

the sole remedy of an Authority in respect of a failure to provide the relevant Services in accordance with this Agreement shall be the operation of the Payment Mechanism.

- 54.4 Subject to Clause 39 (*Authority Events of Default*) and any other express right of Sub-hubco pursuant to this Agreement, Sub-hubco's sole remedy in respect of any breach of this Agreement which is a Compensation Event shall be pursuant to Clause 29 (*Delay Events*).

- 54.5 Nothing in Clause 54.3 shall prevent or restrict the right of an Authority to seek interdict or a decree of specific implement or other discretionary remedies of the court.

- 54.6 Notwithstanding any other provision of this Agreement, no party shall be entitled to recover compensation or make a claim under this Agreement or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement or otherwise.

- 54.7 No party shall have the right to terminate this Agreement for breach of contract save as expressly set out in this Agreement.

## PART 12: MISCELLANEOUS

### 55 INTELLECTUAL PROPERTY

#### Project Data

- 55.1 Sub-hubco shall make available to the Authority free of charge (and hereby irrevocably licences the Authority to use) all Project Data that might reasonably be required by an Authority and Sub-hubco shall ensure that it can make the Project Data available to the Authority on these terms, for such purposes as an Authority at its sole discretion may require, and in this Clause "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly. Neither Sub-hubco nor any Sub-hubco Party shall be liable to an Authority in respect of use by or on behalf of an Authority of Project Data other than in relation to the Project.

#### Intellectual Property Rights

##### 55.2 Sub-hubco:

55.2.1 hereby grants to each of Authority A and Authority B individually, free of charge, an irrevocable, non exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub licences) to use the Intellectual Property Rights which are or become vested in Sub-hubco; and

55.2.2 shall, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in Clause 55.2.1 above to the Authority,

in both cases, for such purposes as Authority A and/or Authority B may at their sole discretion require.

Sub-hubco shall use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in Sub-hubco and Sub-hubco shall enter into appropriate agreements with any Sub-hubco Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

#### Maintenance of data

- 55.3 To the extent that any of the data, materials and documents referred to in this Clause are generated by or maintained on a computer or similar system, Sub-hubco shall use all reasonable endeavours to procure for the benefit of the Authority, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Authority or its nominees to access and otherwise use (subject to the payment by the Authority of the relevant fee, if any) such data for such purposes as they may at their sole discretion require. As an alternative, Sub-hubco may provide such data, materials or

documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format.

- 55.3A.1 Notwithstanding the provisions of this Clause 55, Sub-hubco shall not be obliged to grant any Authority, either during the Project Term or on termination of this Agreement, any licence to use the Computer Aided Facilities Management Software or any equivalent software which may be used by the Sub-hubco or the FM Contractor from time to time in connection with the Project which has been developed specifically for or by Sub-hubco (together the "CAFM Software"). For the avoidance of doubt, this Clause 55.3A does not release Sub-hubco from its general obligation under Clause 55.3 and therefore where data is held on, or otherwise processed by, the CAFM Software, Sub-hubco shall provide such data to each Authority in a format which may be read by software generally available in the market at the relevant time or in hard copy format, whichever each Authority requests.
- 55.3A.2 Following the Expiry Date or in the event that this Agreement is terminated for whatever reason, Sub-hubco shall, on request by either Authority, provide such data held on, or otherwise processed by, the CAFM Software to that Authority in a format which may be read by software generally available in the market at the relevant time or in hard copy format, whichever each Authority requests
- 55.4 Sub-hubco shall ensure the back up and storage in safe custody of the data, materials and documents referred to in Clause 55.3 in accordance with Good Industry Practice. Without prejudice to this obligation, Sub-hubco shall submit to the Authority's Representative for approval its proposals for the back up and storage in safe custody of such data, materials and documents and an Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. Sub-hubco shall comply, and shall cause all Sub-hubco Parties to comply, with all procedures to which the Authority's Representative has given its approval. Sub-hubco may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Authority's Representative, who shall be entitled to object on the basis set out above.

#### **Claims**

- 55.5 Where a claim or proceeding is made or brought against an Authority which arises out of the infringement of any rights in or to any Intellectual Property (other than any Disclosed Data) or because the use of any materials, Plant, machinery or equipment in connection with the relevant Project Operations infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Intellectual Property by or on behalf of an Authority otherwise than in accordance with the terms of this Agreement, or in respect of a use of the Intellectual Property for a purpose other than that for which it was produced, Sub-hubco shall indemnify that Authority at all times from and against all such claims and proceedings and the provisions of Clause 49.3 (*Conduct of Claims*) shall apply.

#### **56 DISPUTE RESOLUTION PROCEDURE**

Except where expressly provided otherwise in this Agreement, any dispute arising out of or in connection with this Agreement shall be resolved in accordance with the procedure set out in Schedule Part 20 (*Dispute Resolution Procedure*).



**ASSIGNATION AND SUB-CONTRACTING****Assignment**

- 57.1 This Agreement and any other agreement in connection with the Project to which an Authority and Sub-hubco are a party shall be binding on, and shall enure to the benefit of, Sub-hubco and that Authority and their respective statutory successors and permitted transferees and assignees. In the case of an Authority, its successors shall include any person to whom the Scottish Ministers, in exercising their statutory powers to transfer property, rights and liabilities of that Authority upon that Authority ceasing to exist, transfers the property, rights and obligations of that Authority under this Agreement and such other agreements in connection with the Project to which that Authority and Sub-hubco are both a party.
- 57.2 Subject to Clause 57.3, Sub-hubco shall not, without the prior written consent of the Authority, assign, novate, transfer, sub-contract or otherwise dispose of any interest in this Agreement, the Independent Tester Contract, the Construction Contracts, the Service Contracts entered into by Sub-hubco for the purposes of performing its obligations under this Agreement.
- 57.3 The provisions of Clause 57.2 do not apply to the grant of any security, in a form approved by the Authority prior to its grant (such approval not to be unreasonably withheld or delayed), for any loan made to Sub-hubco under the Initial Funding Agreements provided that any assignee shall enter into the Funders' Direct Agreement in relation to the exercise of its rights, if the Authority so requires.
- 57.4 An Authority shall be entitled to assign, transfer or dispose of the whole of this Agreement and/or the Leases or any other agreement entered into in connection with this Agreement to which that Authority and Sub-hubco are both party to:
- 57.4.1 the Scottish Ministers, another Health Board or any other person or body replacing any of the foregoing (or to whom the Scottish Ministers exercising their statutory rights would be entitled to transfer such benefits) covered by the National Health Service (Residual Liabilities) Act 1996; or
  - 57.4.2 any other Participant which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Agreement and any other agreements to which such assignment, transfer or disposal relates,

without the consent of Sub-hubco, provided that an Authority's right, title and interest in and to the Leases is assigned, transferred or disposed of at the same time and to the same entity as any assignment, transfer or disposal of this Agreement. The prior written consent of Sub-hubco (not to be unreasonably withheld or delayed) shall be required for any other assignment, transfer or disposal by an Authority of the whole or any part of this Agreement or of any agreement entered into in connection with this Agreement to which that Authority and Sub-hubco are both party, provided that nothing in this Clause shall restrict the rights of the Scottish Ministers to effect a statutory transfer.

### **Sub-contractors**

57.5 Sub-hubco shall, without prejudice to Clause 57.1, procure that none of the persons listed below shall sub-contract all (or substantially all) of their obligations under or in the agreement set out next to its name:

<b>Person</b>	<b>Contract</b>
Contractor	Authority A Construction Contract Authority B Construction Contract
Service Provider	Service Contract

without, in each case, the prior written consent of the relevant Authority (such consent not to be unreasonably withheld or delayed). To avoid doubt, (i) any failure to comply with Clause 57.7 shall be a reasonable ground for withholding consent and (ii) consent shall, without prejudice to the other provisions of Clause 57.5, not be required in respect of the appointment of any party currently approved by the relevant Authority as a suitable replacement.

57.6 If the contract set out next to the name of any person referred to in Clause 57.5 shall at any time lapse, terminate or otherwise cease to be in full force and effect (whether by reason of expiry or otherwise), with the effect that such person shall cease to act in relation to the Project, Sub-hubco shall forthwith appoint a replacement (subject to compliance with Clause 57.5).

57.7 Sub-hubco shall procure that any replacement for any person referred to in Clause 57.5, any member of the Professional Team or any Key Sub-Contractor shall enter into a contract upon the same or substantially similar terms as the person so replaced and shall also enter into a collateral agreement on the same or substantially the same terms as the relevant Collateral Agreement or Key Sub-Contractor Collateral Agreement as applicable entered into by the person so replaced.

57.7A Sub-hubco undertakes to obtain and deliver to the relevant Authority within 10 Business Days of the date of appointment of each Key Sub-Contractor, collateral warranty agreements in the form of the Key Sub-Contractor Collateral Agreement (subject to any reasonable amendments required by the Key Sub-Contractor and/or the relevant Authority approved by the Key Sub-Contractor and/or the relevant Authority as appropriate), validly executed in self proving form by the relevant Key Sub-Contractor, the Contractor and Sub-hubco together with a certified true copy of the sub-contract entered into between the Contractor and the relevant Key Sub-Contractor.

57.8 Where Sub-hubco enters into a contract with a sub-contractor for the purposes of carrying out the Project Operations or any part of the Project Operations under this Agreement, Sub-hubco shall cause a term to be included in such contract:

57.8.1 which requires payment to be made to the sub-contractor within a specified period not exceeding thirty (30) days from receipt of a

valid invoice as defined by the contract requirements and in the case of the provision of Services provides that, for the purpose of payment alone, where the relevant Authority has made payment to Sub-hubco and the sub-contractor's invoice includes Project Operations in relation to which payment has been made by the relevant Authority then, to the extent that it relates to such Project Operations, the invoice shall be treated as valid and payment shall be made to the sub-contractor without deduction (but without prejudice to any right to deduct or set off validly arising under the terms of the contract with the sub-contractor); and

57.8.2 which notifies the sub-contractor that the contract forms part of a larger contract for the benefit of the relevant Authority and that should the sub-contractor have any difficulty in securing the timely payment of an invoice that matter may be referred by the sub-contractor to the relevant Authority's Representative; and

57.8.3 in the same terms as this Clause 57.8 (including for the avoidance of doubt this Clause 57.8.3) subject only to modification to refer to the correct designation of the equivalent party as the supplier and recipient of the relevant Project Operations as the case may be.

#### **Replacement of a non-performing Sub-Contractor**

57.9 On the substitution or replacement of a Service Provider due to a breach or default under the Service Contract, Sub-hubco may elect, subject to Clause 57.11 and provided that at the time of making such election no notice of termination has been served under this Agreement, that for the purposes of Clauses 40.1.8 (*Deductions*) and 40.1.9 (*Warning Notices*) only, all Deductions incurred and Warning Notices served prior to the date of such substitution or replacement in relation to such Service Contract (and not for the avoidance of doubt in relation to performance under any other Service Contract) shall be disregarded by virtue of Clause 57.10 below.

57.10 If Sub-hubco makes an election pursuant to Clause 57.9 above then, with effect from the date of substitution or replacement of the Service Provider, all Deductions incurred and Warning Notices served prior to that date shall be disregarded for the purposes of Clause 40.1.8 (*Deductions*) and Clause 40.1.9 (*Warning Notices*). For the avoidance of doubt, an Authority shall retain the right to make Deductions in accordance with Schedule Part 14 (*Payment Mechanism*) in respect of the Availability Failures and/or Performance Failures to which the Deductions and/or Warning Notices are attributable.

57.11 Sub-hubco shall be entitled to make an election pursuant to Clause 57.9 on a maximum of two occasions during the Project Term.

#### **58 OWNERSHIP INFORMATION AND CHANGES IN CONTROL**

58.1 Sub-hubco represents and warrants to the Authority that at the date of this Agreement the legal and beneficial ownership of Sub-hubco is as set out in Schedule Part 21 (*Sub-hubco Information*) and that, other than any Shareholder pre-emption rights, no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in Sub-hubco.

- 58.2 Sub-hubco shall inform the Authority as soon as reasonably practicable (and in any event, within thirty (30) days) of any Change in Control occurring in respect of Sub-hubco.
- 58.3 An Authority may, not more than twice in any Contract Year, or at any time when a Sub-hubco Event of Default is outstanding, require Sub-hubco to inform it, as soon as reasonably practicable and in any event within thirty (30) days of receipt of an Authority's request for details, of any Change in Control in respect of Sub-hubco.
- 58.4 Sub-hubco's obligations under Clauses 58.1 and 58.2 above shall, except where a legal transfer of shares has occurred be limited to the extent of Sub-hubco's awareness having made all reasonable enquiry.
- 58.5 Subject to Clause 58.6, prior to the expiry of a period of twelve (12) months commencing on the final Phase Actual Completion Date, no Change in Control in any or all of the shares in Sub-hubco shall be permitted without the prior written approval of the Authority A and Authority B (acting together). Any Change in Control arising as a consequence of either:
- 58.5.1 the grant or enforcement of security in favour of the Senior Funders over or in relation to any of the shares of the Sub-hubco, provided that any document conferring security over any shares has been approved by Authority A and Authority B (acting together) (such approval not to be unreasonably withheld or delayed); or
- 58.5.2 any transfer by a Shareholder to an Associate of such transferor,
- shall be disregarded for the purpose of this Clause 58.5 above. Where Clause 58.5.2 applies and subsequent to any such transfer (the "Original Transfer") the transferee ceases to be an Associate of the original transferor, it shall be a breach of this Clause 58.5 if the shares or interests which were the subject of the Original Transfer are not within 20 Business Days of the transferee ceasing to be an Associate of the original transferor, transferred to the original transferor or any Associate of such transferor.
- 58.6 No Change in Control (at any time) in any or all of the shares in Sub-hubco (or any company (other than a public quoted company whose equity securities are listed on a recognised investment exchange, as defined in section 285 of the Financial Services and Markets Act 2000) holding shares in hubco, Sub-hubco or in any company (or its shareholders) holding shares in such a company (or its shareholders)) shall be permitted without the prior written approval of Authority A and Authority B (acting together) where the person acquiring control is a Restricted Person.

## 59 MITIGATION

Each Authority and Sub-hubco shall at all times take all reasonable steps to minimise and mitigate any loss for which the relevant party is entitled to bring a claim against the other party pursuant to this Agreement.

## 60 DATA PROTECTION

### Data Protection

- 60.1 For the purpose of the following Clauses, the term "personal data" shall have the meaning given to it in the Data Protection Act 1998.
- 60.2 Sub-hubco undertakes to the Authority that it shall comply with the obligations of a "data controller" under the provisions of the Seventh Data Protection Principle as set out in Schedule 1 of the Data Protection Act 1998. In addition, Sub-hubco:
- 60.2.1 warrants that it has, or will have at all material times, (and it shall use best endeavours to procure that all Sub Contractors (and their agents and sub contractors of any tier have or will have at all material times) the appropriate technical and organisational measures in place against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data held or processed by it and that it has taken, or will take at all material times, all reasonable steps to ensure the reliability of any of its staff which will have access to personal data processed as part of the Project Operations;
  - 60.2.2 undertakes that it will act only on the instructions of the relevant Authority in relation to the processing of any personal data made available by or on behalf of the relevant Authority as part of the Project Operations;
  - 60.2.3 undertakes that it will only obtain, hold, process, use, store and disclose personal data as is necessary to perform its obligations under this Agreement and (without prejudice to Clause 5.2 (*General standards*)) that such data will be held, processed, used, stored and disclosed only in accordance with the Data Protection Act 1998 and any other applicable Law; and
  - 60.2.4 undertakes to allow an Authority access to any relevant premises on reasonable notice to inspect its procedures described at Clause 60.2.1 above.

## 61 CONFIDENTIALITY

- 61.1 The Authority shall, subject to Clause 61.2 and Schedule Part 26 be entitled to make the documents and information listed in this Clause 61.1 freely available to the public (which may include, without limitation, publication on the Authority's website):
- 61.1.1 this Agreement;
  - 61.1.2 the Independent Tester Contract;
  - 61.1.3 the Collateral Agreements;
  - 61.1.4 the Key Sub-Contractor Collateral Agreements;
  - 61.1.5 the payment and performance report; and
  - 61.1.6 the Financial Model (as updated from time to time in accordance with this Agreement),

and Sub-hubco acknowledges and agrees that, subject to the exclusion of information referred to in Clause 61.2.2, the provision or publication of the documents and information listed in this Clause 61.1 shall not give rise to any liability under the terms of this Agreement or otherwise. An Authority shall notify Sub-hubco in writing not less than ten (10) Business Days prior to any intended provision or publication of information pursuant to this Clause 61.1.

## 61.2

61.2.1 The parties agree that the provisions of this Agreement, the Financial Model and each Ancillary Document shall, subject to Clause 61.2.2 below, not be treated as Confidential Information and may be disclosed without restriction and Sub-hubco acknowledges that the Authority shall, subject to Clause 61.2.2 below, be entitled to make this Agreement, the Financial Model and each Ancillary Document available in the public domain.

61.2.2 Clause 61.2.1 above shall not apply to provisions of this Agreement, the Financial Model or an Ancillary Document designated as Commercially Sensitive Information and listed in Schedule Part 26 (*Commercially Sensitive Information*) to this Agreement which shall, subject to Clause 61.3 be kept confidential for the periods specified in that Schedule Part 26 (*Commercially Sensitive Information*).

61.2.3 The parties shall keep confidential all Confidential Information received by one party from another party relating to this Agreement and Ancillary Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

## Permitted Disclosure

61.3 Clauses 61.2.2 and 61.2.3 shall not apply to:

61.3.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the performance of those obligations;

61.3.2 any matter which a party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause;

61.3.3 any disclosure to enable a determination to be made under Schedule Part 20 (*Dispute Resolution Procedure*) or in connection with a dispute between Sub-hubco and any of its subcontractors;

61.3.4 any disclosure which is required pursuant to any Law or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;

- 61.3.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 61.3.6 any provision of information to the parties' own professional advisers or insurance advisers or to the Senior Funders or the Senior Funders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to Sub-hubco to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in Sub-hubco and/or hubco in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 61.3.7 any disclosure by an Authority of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new contractor, its advisers and lenders, should that Authority decide to retender this Agreement; or
- 61.3.8 any registration or recording of the Consents and property registration required;
- 61.3.9 any disclosure of information by an Authority to any other department, office or agency of the Government or their respective advisers or to the Scottish Futures Trust or to any person engaged in providing services to the Authority for any purpose related to or ancillary to this Agreement;
- 61.3.10 any disclosure for the purpose of:
- (a) the examination and certification of an Authority's or Sub-hubco's accounts;
  - (b) any examination pursuant to section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which an Authority has used its resources;
  - (c) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or
  - (d) (without prejudice to the generality of Clause 61.3.4) compliance with the FOI(S)A and/or the Environmental Information (Scotland) Regulations;
- 61.3.11 disclosure pursuant to Clause 61.1; or
- 61.3.12 disclosure to the extent required pursuant to Clause 63.2,

provided that, to avoid doubt, neither Clause 61.3.10(d) nor Clause 61.3.4 above shall permit disclosure of Confidential Information otherwise prohibited by Clause 61.2.3 where that information is exempt from disclosure under section 36 of the FOI(S)A.

- 61.4 Where disclosure is permitted under Clause 61.3, other than under Clauses 61.3.2, 61.3.4, 61.3.5, 61.3.8 and 61.3.10, the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.
- 61.5 Sub-hubco shall not make use of this Agreement or any information issued or provided by or on behalf of an Authority in connection with this Agreement otherwise than for the purpose of this Agreement, except with the written consent of the Authority (in the case of the use of this Agreement) and the relevant Authority in the case of such other information referenced in this Clause 61.5.
- 61.6 Where Sub-hubco, in carrying out its obligations under this Agreement, is provided with information relating to any Authority Party, Sub-hubco shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless Sub-hubco has obtained the prior written consent of that person and has obtained the prior written consent of the relevant Authority.
- 61.7 On or before the Expiry Date, Sub-hubco shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any patient or Authority Party including any documents in the possession, custody or control of a Sub-Contractor, are delivered up to the relevant Authority.
- 61.8 The parties acknowledge that Audit Scotland has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.
- 61.9 The provisions of this Clause 61 (*Confidentiality*) are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

#### **Announcements**

- 61.10 Unless otherwise required by any Law or any regulatory or governmental authority (but only to that extent), neither party shall make or permit or procure to be made any public announcement or disclosure (whether for publication in the press, the radio, television screen or any other medium) of any Confidential Information or in the case of Sub-hubco of its (or any Sub-hubco Party's) interest in the Project or, in any such case, any matters relating thereto, without the prior written consent of the other party (which shall not be unreasonably withheld or delayed).

## **62 FREEDOM OF INFORMATION**

- 62.1 Sub-hubco acknowledges that the Authority is subject to the requirements of the FOI(S)A and the Environmental Information (Scotland) Regulations and shall assist and cooperate with an Authority to facilitate an Authority's compliance with its information disclosure requirements pursuant to the same in the manner provided for in Clauses 62.2 to 62.8.
- 62.2 Where an Authority receives a Request for Information in relation to Information that Sub-hubco is holding on its behalf and which that Authority does not hold itself



the relevant Authority shall refer to Sub-hubco such Request for Information as soon as practicable and in any event within five (5) Business Days of receiving such Request for Information and Sub-hubco shall:

- 62.2.1 provide the relevant Authority with a copy of all such Information in the form that the relevant Authority requires as soon as practicable and in any event within five (5) Business Days (or such other period as the Authority acting reasonably may specify) of the relevant Authority's request; and
  - 62.2.2 provide all necessary assistance as reasonably requested by the relevant Authority in connection with any such Information, to enable the relevant Authority to respond to the Request for Information within the time for compliance set out in section 10 of the FOI(S)A or Regulation 5 of the Environmental Information (Scotland) Regulations.
- 62.3 Following notification under Clause 62.2, and up until such time as Sub-hubco has provided the relevant Authority with all the Information specified in Clause 62.2.1, Sub-hubco may make representations to the relevant Authority as to whether or not or on what basis information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the relevant Authority shall be responsible for determining at its absolute discretion:
  - 62.3.1 whether Information is exempt from disclosure under the FOI(S)A and the Environmental Information (Scotland) Regulations;
  - 62.3.2 whether Information is to be disclosed in response to a Request for Information, and
- in no event shall Sub-hubco respond directly, or allow its Sub-Contractors to respond directly, to a Request for Information unless expressly authorised to do so by the relevant Authority.
- 62.4 Sub-hubco shall ensure that all Information held on behalf of the Authority is retained for disclosure for at least the number of years (from the date it is acquired) specified in the relevant Authority Policy relating to records retention and shall permit the relevant Authority to inspect such Information as requested from time to time.
- 62.5 Sub-hubco shall transfer to the relevant Authority any Request for Information received by Sub-hubco as soon as practicable and in any event within two (2) Business Days of receiving it.
- 62.6 Sub-hubco acknowledges that any lists provided by it listing or outlining Confidential Information are of indicative value only and that an Authority may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of FOI(S)A and the Environmental (Scotland) Regulations.
- 62.7 In the event of a request from an Authority pursuant to Clause 62.2 Sub-hubco shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the relevant Authority of Sub-hubco's estimated costs of complying with the request to the extent these would be recoverable, if incurred by the relevant Authority, under section 13(1) of the FOI(S)A and the

Fees Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in section 12(1) of the FOI(S)A and as set out in the Fees Regulations (the "Appropriate Limit") the relevant Authority shall inform Sub-hubco in writing whether or not it still requires Sub-hubco to comply with the request and where it does require Sub-hubco to comply with the request the ten (10) Business Days period for compliance shall be extended by such number of additional days for compliance as the relevant Authority is entitled to under section 10 of the FOI(S)A. In such case, the relevant Authority shall notify Sub-hubco of such additional days as soon as practicable after becoming aware of them and shall reimburse Sub-hubco for such costs as Sub-hubco incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOI(S)A policy from time to time.

62.8 Sub-hubco acknowledges that (notwithstanding the provisions of Clause 61 (*Confidentiality*)) the relevant Authority may, acting in accordance with the Scottish Ministers Code of Practice on the Discharge of Functions of Public Authorities under Part 6 of the Freedom of Information (Scotland) Act 2002 (the "**Code**"), and/or having full regard to any guidance or briefings issued by the Scottish Information Commissioner or the Scottish Ministers, be obliged under the FOI(S)A, or the Environmental Information (Scotland) Regulations to disclose Information concerning Sub-hubco or the Project:

62.8.1 in certain circumstances without consulting with Sub-hubco; or

62.8.2 following consultation with Sub-hubco and having taken their views into account,

provided always that where Clause 62.8.1 above applies the relevant Authority shall, in accordance with the recommendations of the Code, draw this to the attention of Sub-hubco prior to any disclosure.

62.9 In the event that Sub-hubco is or becomes subject to Environmental Information (Scotland) Regulations or FOI(S)A it shall comply with its obligations under Environmental Information (Scotland) Regulations and FOI(S)A. In doing so, it will use reasonable endeavours to consult the relevant Authority before disclosing Information about them or any agreement entered into between the relevant Authority and Sub-hubco.

## 63 INFORMATION AND AUDIT ACCESS

63.1 Sub-hubco shall provide to the relevant Authority's Representative all information, documents, records and the like in the possession of, or available to, Sub-hubco (and to this end Sub-hubco shall use all reasonable endeavours to procure that all such items in the possession of the Contractor or any Service Providers shall be available to it and Sub-hubco has included, or shall include, relevant terms in all contracts with the Contractor or any Service Providers to this effect) as may be reasonably requested by an Authority's Representative for any purpose in connection with this Agreement.

63.2 For the purpose of:

63.2.1 the examination and certification of an Authority's accounts; or

63.2.2 any examination pursuant to section 23 of the Public Finance and Accountability (Scotland) Act 2000 of the economy,

efficiency and effectiveness with which the Authority has used its resources,

the Auditor General for Scotland may examine such documents as he may reasonably require which are owned, held or otherwise within the control of Sub-hubco (and Sub-hubco shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require Sub-hubco to produce such oral or written explanations as he considers necessary.

- 63.3 Sub-hubco shall provide and shall procure that its Sub-Contractors shall provide such information as an Authority may reasonably require from time to time to enable it to meet its obligations to provide reports and returns pursuant to regulations, directions or guidance applicable to that Authority including, without limitation, reports and returns regarding the physical condition of buildings occupied by that Authority, health and safety, under the firecode, relating to environmental health and to comply with requirements for the provision of information relating to achievement of customer service targets.

64 **NOTICES**

- 64.1 All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class post, email, facsimile or by hand, leaving the same at:

If to Sub-hubco      Address:      Miller House, 2 Lochside View, Edinburgh Park, Edinburgh EH1 9DH

Fax No:      0870 336 5361

Email:      [REDACTED]

If to Authority A      Address:      Caithness General Hospital, Wick KW1 5NS

Fax No:      01955 604 606

Email:      [REDACTED]

If to Authority B      Address:      Summerfield House, 2 Eday Road, Aberdeen AB15 6RE

Fax No:      01224 558 721

Email:      [REDACTED]

- 64.2 Where any information or documentation is to be provided or submitted to the Authority's Representative or the Sub-hubco Representative it shall be provided or submitted by sending the same by first class post, email, facsimile or by hand, leaving the same at:

If to Sub-hubco's Representative      Address: Miller House, 2 Lochside View, Edinburgh Park, Edinburgh EH1 9DH

Fax No: 0870 336 5361

Email: [REDACTED]

If to the Authority A Representative Address: Caithness General Hospital, Wick  
KW1 5NS

Fax No: 01955 604 606

Email: [REDACTED]

(copied to Authority B)

If to the Authority B Representative Address: Summerfield House, 2 Eday Road,  
Aberdeen AB15 6RE

Fax No: 01224 558 686

Email: [REDACTED]

(copied to Authority A)

64.3 Either party to this Agreement (and their Representative) may change its nominated address or facsimile number by prior notice to the other party.

64.4 Notices given by post shall be effective upon the earlier of (i) actual receipt, and (ii) five (5) Business Days after mailing. Notices delivered by hand shall be effective upon delivery. Notices given by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form;

64.4.1 within two (2) hours after sending, if sent on a Business Day between the hours of 9am and 4pm; or

64.4.2 by 11am on the next following Business Day, if sent after 4pm, on a Business Day but before 9am on that next following Business Day.

64.4A Notices given by e-mail shall be deemed to have been received:

(d) at the time the e-mail enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the e-mail address specified in Clauses 64.1 and 64.2 or notified from time to time under Clause 64.3) if on a Business Day between the hours of 9am and 4pm

(e) by 11am on the next following Business Day, if the time the email enters the intended recipient's relevant Information System after 4pm, on a Business Day but before 9am on that next following Business Day,

and provided that no error message indicating failure to deliver has been received by the sender and provided further that within 24 hours of transmission a hard copy of the e-mail signed by or on behalf of the person giving it is sent by post or delivered by hand to the intended recipient in accordance with the provisions of Clauses 64.1 and 64.2.

65 **NO WAIVER**

65.1 Any relaxation, forbearance, indulgence or delay (together "**indulgence**") of any party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right (whether against that party or any other person).

**Continued effect – no waiver**

65.2 Notwithstanding any breach of this Agreement by either party, and without prejudice to any other rights which the other party may have in relation to it, the other party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement. The failure of either party to exercise any right under this Agreement, including any right to terminate this Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

66 **NO AGENCY**

66.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between an Authority and Sub-hubco.

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

66.3 Without limitation to its actual knowledge, Sub-hubco shall for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project as is held (or ought reasonably to be held) by any Sub-hubco Party.

67 **ENTIRE AGREEMENT**

67.1 Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

67.2 Each of the parties acknowledges that:

67.2.1 it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement; and

67.2.2 this Clause shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies

available shall be all those available under the law governing this Agreement.

**68 THIRD PARTY RIGHTS**

Save to the extent expressly provided in this Agreement and, to avoid doubt, without prejudice to the terms of the Funders' Direct Agreement or the rights of any permitted successor to the rights of Sub-hubco or of any permitted assignee, it is expressly declared that no rights shall be conferred under and arising out of this Agreement upon any person other than Authority A, Authority B and Sub-hubco and without prejudice to the generality of the foregoing, there shall not be created by this Agreement a *jus quaesitum tertio* in favour of any person whatsoever.

**69 SEVERABILITY**

If any provision of this Agreement shall be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.

**70 CONFLICTS OF AGREEMENTS**

In the event of any conflict between this Agreement and the Project Documents, the provisions of this Agreement shall prevail.

**71 COSTS AND EXPENSES**

Each party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

**72 FURTHER ASSURANCE**

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

73 **GOVERNING LAW AND JURISDICTION**


- 73.1 This Agreement shall be considered as a contract made in Scotland and shall be subject to the laws of Scotland.
- 73.2 Subject to the provisions of the Dispute Resolution Procedure, both parties agree that the courts of Scotland shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

**IN WITNESS WHEREOF** these presents typewritten on this and the preceding 133 pages together with the Schedule in 27 Parts are executed by the parties hereto as follows:

SUBSCRIBED for and on behalf of **GRAMPIAN HEALTH BOARD**

At 141 Bothwell Street, Glasgow  
on the 28 day of March 2013

by  ..... Authorised Signatory  
..... Print name

 ..... Authorised Signatory  
..... Print name

SUBSCRIBED for and on behalf of **HIGHLAND HEALTH BOARD**

At 141 Bothwell Street, Glasgow  
on the 28 day of March 2013

by  ..... Authorised Signatory  
..... Print name

 ..... Authorised Signatory  
..... Print name

SUBSCRIBED for and on behalf of **HUB NORTH SCOTLAND (FWT) LIMITED**

At **EDINBURGH**

on the **17<sup>th</sup>** day of **APRIL** 20**123**

by



..... Director

in the presence of this witness



..... Witness

..... Full name

..... Address



## SCHEDULES

### SCHEDULE PART 1

#### DEFINITIONS AND INTERPRETATION

##### SECTION 1

In this Agreement unless the context otherwise requires:

- "5 Year Maintenance Plan"** means the plan, to be prepared by or on behalf of Sub-hubco, for any works for the maintenance or repair of the Facilities, including the renewal or replacement of plant or equipment as necessary, during each rolling five year period for the duration of the Project Term;
- "Aberdeen City Council"** means Aberdeen City Council or its successor in ownership of the Woodside Retained Property;
- "Actual Commissioning End Date"** means the date specified in the relevant Commissioning Completion Certificate issued by the Independent Tester pursuant to Clause 18.4;
- "Actual Liability"** has the meaning given in Clause 46.7.3;
- "Additional Permitted Borrowing"** means on any date, the amount equal to any amount of principal outstanding under the Senior Funding Agreements (as the same may from time to time be amended, whether or not with the approval of the Authority) in excess of the amount of principal scheduled under the Senior Funding Agreements at Financial Close to be outstanding at that date;
- but only to the extent that:
- (a) his amount is less than or equal to the Additional Permitted Borrowings Limit; and
  - (b) n respect of any Additional Permitted Borrowing the Agent is not in material breach of its obligations under clause 9.4.3 of the Funders' Direct Agreement as it applies to such Additional Permitted Borrowing,
- and provided further that any such excess amount of principal which is:
- (i) invested as part of any Qualifying

Change; or

- (ii) outstanding from time to time as a result of any drawing under the Senior Funding Agreements as entered into at the date of this Agreement, disregarding any subsequent amendment; or
- (iii) outstanding from time to time as a result of any amendment to the Senior Funding Agreements in respect of which the Authority has agreed that its liabilities on a termination may be increased pursuant to Clause 4.3
- (iv) shall not be counted as Additional Permitted Borrowing;

**"Additional Permitted Borrowings Limit"**

means an amount equal to:

- (a) 10% of the Original Senior Commitment, for any Additional Permitted Borrowing subsisting in the period from the date of Financial Close to the date on which the amount outstanding under the Senior Funding Agreements is reduced to 50% or less of the Original Senior Commitment; and thereafter
- (b) the higher of:
  - (i) 5% of the Original Senior Commitment; and
  - (ii) the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in paragraph 73.2(a);

**"Additional Rights"**

means in relation to each Site, the relevant rights as set out in Sections 1D, 2D and 3D of Schedule Part 5 (*Land Matters*);

**"Adjudicator"**

has the meaning given in paragraph 4.1 of Schedule Part 20 (*Dispute Resolution Procedure*);

**"Adverse Planning Decision"**

means a decision by a Relevant Authority pursuant to which the Woodside Planning Approval is amended, revoked, quashed or otherwise rendered ineffective;

**"Affiliate"**

means, in relation to any person, any holding company or subsidiary of that person or any

	<p>subsidiary of such holding company, and "<b>holding company</b>" and "<b>subsidiary</b>" shall have the meaning given to them in section 1159 of the Companies Act 2006;</p>
"Agent"	<p>has the meaning given in the Funders' Direct Agreement;</p>
"Ancillary Documents"	<p>means the Construction Contracts, the Service Contracts, the appointments of the Professional Team, the appointment of the Key Sub-Contractors and the Performance Guarantees, all as the same may be amended or replaced from time to time;</p>
"Ancillary Rights"	<p>means such rights as are set out in Section 1C, Section 2C and Section 3C of Schedule Part 5 (<i>Land Matters</i>);</p>
"Annual Service Payment"	<p>has the meaning given in Schedule Part 14 (<i>Payment Mechanism</i>);</p>
"Approved RDD Item"	<p>means an item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed either "Level A – no comment" or "Level B – proceed subject to amendment as noted" by the relevant Authority's Representative pursuant to the provisions of Clause 12 (<i>Design, Construction and Commissioning Process</i>) and Schedule Part 8 (<i>Review Procedure</i>) (provided that in the case of any item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed "Level B – proceed subject to amendment as noted" Sub-hubco has taken account of the relevant Authority's Representative's comments), as such item of Reviewable Design Data may be varied or amended from time to time in accordance with Schedule Part 16 (<i>Change Protocol</i>);</p>
"Associated Companies"	<p>means, in respect of a relevant company, a company which is a Subsidiary, a Holding Company or a company that is a Subsidiary of the ultimate Holding Company of that relevant company, and in the case of Sub-hubco shall include hubco and each of the Shareholders, and the term "<b>Associate</b>" shall be interpreted accordingly;</p>
"Authority A Commissioning"	<p>means the pre-completion commissioning activities to be carried out by Authority A in relation to Phase 1 in accordance with Clause 17 (<i>Pre-Completion Commissioning and Completion</i>);</p>
"Authority A Construction Contract"	<p>means the design and build contract relating to</p>

				the Authority A Works dated the same date as this Agreement between Sub-hubco and the Contractor (which, as at the date of this Agreement, is in the Agreed Form) as amended or replaced from time to time in accordance with this Agreement;
<b>"Authority A Deductions"</b>				means any Deductions applied by Authority A to an Authority A Monthly Service Payment;
<b>"Authority A Final Commissioning Programme"</b>	<b>A</b>	<b>Final</b>	<b>Commissioning</b>	means the programme relating to Phase 1 jointly developed and agreed by Authority A and Sub-hubco in accordance with the provisions of Clause 17.1;
<b>"Authority A Facilities"</b>				means the buildings and other facilities, together with all supporting infrastructure (including the Plant and the Group 1 Equipment), external hard-standings, specialist surfaces and other amenities located on the Tain Site (including as a minimum all aspects detailed within Appendix B to Section 1 ( <i>Service Level Specification</i> ) of Schedule Part 12 ( <i>Service Requirements</i> ), as required to enable Sub-hubco to comply with its obligations under this Agreement, all as the same may be varied, amended or supplemented from time to time in accordance with this Agreement);
<b>"Authority A Matters"</b>				means the Authority A Works, the Authority A Commissioning, the Authority A Post Completion Commissioning, the Authority A Services, the Authority A Facilities, the Authority A Project Operations, any Authority Policy applicable to Authority A, any Defects in the Authority A Works, and/or the Authority A Site;
<b>"Authority A Post Commissioning"</b>	<b>A</b>	<b>Post</b>	<b>Commissioning</b>	means the relevant post-completion commissioning activities to be carried out by Authority A in accordance with Clause 18.1 ( <i>Post Completion Commissioning</i> );
<b>"Authority A Project Operations"</b>				means the carrying out of the Authority A Works, the carrying out of Sub-hubco's Pre-Completion Commissioning and Sub-hubco's Post-Completion Commissioning at the Authority A Facilities, the management and provision of the Authority A Services and the performance of all other obligations of Sub-hubco owed to Authority A under this Agreement from time to time;
<b>"Authority A Proportion"</b>				means 29.2% as amended from time to time pursuant to Clause 1A.6;
<b>"Authority A Representative"</b>				means the person so appointed by Authority A pursuant to Clause 8 ( <i>Representatives</i> );

<b>"Authority A Services"</b>	means the services to be provided, managed and/or procured by Sub-hubco in accordance with Schedule Part 12 ( <i>Service Requirements</i> ) as subsequently amended or adjusted in accordance with this Agreement insofar as such Services relate to the Authority A Facilities or Authority A;
<b>"Authority A Site"</b>	means the land to be made available to Sub-hubco for the completion of Authority A Works at the Tain Site;
<b>"Authority A Works"</b>	means the design (including the preparation of all Design Data), construction, testing, commissioning and completion of the Authority A Facilities (including any temporary works) and the installation of Equipment to be performed by Sub-hubco at the Tain Site in accordance with this Agreement (as varied, amended or supplemented from time to time in accordance with this Agreement);
<b>"Authority Assets"</b>	means any assets and equipment or other property used by, or on behalf of, an Authority or any Authority Party, other than the Facilities;
<b>"Authority B Commissioning"</b>	means the relevant pre-completion commissioning activities to be carried out by Authority B in relation to Phase 2 or Phase 3, as the case may be, in accordance with Clause 17 ( <i>Pre-Completion Commissioning and Completion</i> );
<b>"Authority B Construction Contract"</b>	means the design and build contract relating to the Authority B Works dated the same date as this Agreement between Sub-hubco and the Contractor (which, as at the date of this Agreement, is in the Agreed Form) as amended or replaced from time to time in accordance with this Agreement;
<b>"Authority B Deductions"</b>	means any Deductions applied by Authority B to an Authority B Monthly Service Payment;
<b>"Authority B Facilities"</b>	means the buildings and other facilities, together with all supporting infrastructure (including the Plant and the Group 1 Equipment), external hard-standings, specialist surfaces and other amenities located on the Woodside Site or the Forres Site, as the case may be (including as a minimum all aspects detailed within Appendix B to Section 1 ( <i>Service Level Specification</i> ) of Schedule Part 12 ( <i>Service Requirements</i> ), as required to enable Sub-hubco to comply with its obligations under this Agreement, all as the same

may be varied, amended or supplemented from time to time in accordance with this Agreement;

- "Authority B Final Commissioning Programme"** means the programmes relating to, respectively Phase 2 and Phase 3, jointly developed and agreed by Authority B and Sub-hubco in accordance with the provisions of Clause 17.1;
- "Authority B Matters"** means the Authority B Works, the Authority B Commissioning, the Authority B Post Completion Commissioning, the Authority B Services, the Authority B Facilities, the Authority B Project Operations, any Authority Policy applicable to Authority B, any Defects in the Authority B Works, and/or the Authority B Site;
- "Authority B Post Completion Commissioning"** means the post-completion commissioning activities to be carried out by Authority B at Phase 2 or Phase 3, as applicable, in accordance with Clause 18.1 (*Post Completion Commissioning*);
- "Authority B Project Operations"** means the carrying out of the Authority B Works, the carrying out of Sub-hubco's Pre-Completion Commissioning and Sub-hubco's Post-Completion Commissioning at the Authority B Facilities, the management and provision of the Authority B Services and the performance of all other obligations of Sub-hubco owed to Authority B under this Agreement from time to time;
- "Authority B Proportion"** means 70.8% as amended from time to time pursuant to Clause 1A.6;
- "Authority B Representative"** means the person so appointed by Authority B pursuant to Clause 8 (*Representatives*);
- "Authority B Services"** means the services to be provided, managed and/or procured by Sub-hubco in accordance with Schedule Part 12 (*Service Requirements*) as subsequently amended or adjusted in accordance with this Agreement insofar as such Services relate to the Authority B Facilities or Authority B;
- "Authority B Site"** means the land to be made available to Sub-hubco for the completion of Authority B Works at the Woodside Site and Forres Site;
- "Authority B Works"** means the design (including the preparation of all Design Data), construction, testing, commissioning and completion of the Authority B Facilities (including any temporary works) and the installation of Equipment to be performed by Sub-hubco at the Woodside Site and the Forres Site in accordance with this Agreement (as varied,

	amended or supplemented from time to time in accordance with this Agreement);
<b>"Authority Change"</b>	has the meaning given in Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Authority Change Notice"</b>	has the meaning given in Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Authority Events of Default"</b>	has the meaning given in Clause 39.1;
<b>"Authority Party"</b>	means in respect of each Authority, that Authority's agents, contractors and sub-contractors of any tier and/or its or their directors, officers and employees and/or Community Services Providers (or any director, officer or employee of a Community Services Provider or any contractor or sub-contractor of any tier of any Community Services Provider) at the relevant Facilities with the authority of the relevant Authority but excluding Sub-hubco, any Sub-hubco Party and statutory undertakers and utilities and <b>"Authority Parties"</b> shall be construed accordingly;
<b>"Authority Planning Conditions"</b>	means those planning conditions which the relevant Authority is discharging as set out in Schedule Part 27;
<b>"Authority Policies"</b>	means, subject to Clause 27.7, the policies of Authority A and Authority B set out in the document annexed to this Agreement as Attachment A as amended from time to time;
<b>"Authority's Commissioning"</b>	means, in respect of the Authority A Facilities, the Authority A Commissioning and, in respect of each of the Authority B Facilities, the relevant Authority B Commissioning;
<b>"Authority's Construction Requirements"</b>	means the requirement as set out or identified in Section 3 ( <i>Authority's Construction Requirements</i> ) of Schedule Part 6 ( <i>Construction Matters</i> ) which apply equally to all Phases, with the exception of: <ul style="list-style-type: none"> <li>(a) chapter 9 and relevant parts of sections D and E of the Authority's Construction Requirements (which apply only to Phase 1);</li> <li>(b) chapter 10 and relevant parts of sections D and E of the Authority's Construction Requirements (which only apply only to Phase 2); and</li> <li>(c) chapter 11 and relevant parts of sections D and E of the Authority's Construction</li> </ul>

	Requirements (which apply only to Phase 3), as amended from time to time in accordance with the terms of this Agreement;
<b>"Authority's Distribution Share"</b>	means the greater of:  (a) half of the First Threshold Excess; and  (b) the Second Threshold Excess;
<b>"Authority's Maintenance Obligations"</b>	has the meaning given in Clause 23.13;
<b>"Authority's Post Completion Commissioning"</b>	means the Authority A Post Completion Commissioning and the Authority B Post Completion Commissioning;
<b>"Authority's Representative"</b>	has the meaning given in Clause 1A.5;
<b>"Availability Failure"</b>	has the meaning given in Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Base Date"</b>	has the meaning given in paragraph 16 of Section 2 ( <i>Interpretation</i> ) of Schedule Part 1 ( <i>Definitions and Interpretation</i> );
<b>"Base Senior Debt Termination Amount"</b>	has the meaning given in Section 6 ( <i>Definitions</i> ) of Schedule Part 17 ( <i>Compensation on Termination</i> );
<b>"Beneficiary"</b>	has the meaning given in Clause 49.3 ( <i>Conduct of Claims</i> );
<b>"Business Day"</b>	means a day other than a Saturday, Sunday or a bank holiday in Edinburgh;
<b>"CAFM Software"</b>	has the meaning given to it in Clause 55.3A.1;
<b>"Capital Expenditure"</b>	means capital expenditure (as such term is interpreted in accordance with generally accepted accounting principles in the United Kingdom from time to time);
<b>"CDM Regulations"</b>	has the meaning given in Section 2 ( <i>Safety During Construction</i> ) of Schedule Part 6 ( <i>Construction Matters</i> );
<b>"Certificate of Practical Completion"</b>	means a certificate in the relevant form set out in Schedule Part 22 ( <i>Certificates</i> );
<b>"Change"</b>	has the meaning given in Schedule Part 16 ( <i>Change Protocol</i> );



<b>"Change in Control"</b>	<p>means:</p> <p>(c) any sale or other disposal of any legal, beneficial or equitable interest in any or all of the equity share capital of a corporation (including the control over the exercise of voting rights conferred on that equity share capital, control over the right to appoint or remove directors or the rights to dividends); and/or</p> <p>(d) any other arrangements that have or may have or which result in the same effect as paragraph (a) above;</p>
<b>"Change in Law"</b>	<p>means the coming into effect or repeal (without re-enactment or consolidation) in Scotland of any Law, or any amendment or variation to any Law, or any judgement of a relevant court of law which changes binding precedent in Scotland in each case after the date of this Agreement;</p>
<b>"Clinical Services"</b>	<p>means management, responsibility, administration and carrying out of the clinical and medical services provided at the Facilities by the Authority from time to time and which are not services to be provided by Sub-hubco to the Authority under this Agreement;</p>
<b>"Clinical Use"</b>	<p>means the use of a room or space to the extent that it is used by Authority A or Authority B or its employees, tenants, agents and/or contractors (but not, to avoid doubt, Sub-hubco Parties) for carrying out the Clinical Services;</p>
<b>"Collateral Agreements"</b>	<p>means the Contractor's Collateral Agreements, the Service Providers' Collateral Agreements and the Professional Team Collateral Agreements;</p>
<b>"Commencement Date"</b>	<p>means the date of this Agreement;</p>
<b>"Commercially Sensitive Information"</b>	<p>means the sub set of Confidential Information listed in column 1 of Part 1 (<i>Commercially Sensitive Contractual Provisions</i>) and column 1 of Part 2 (<i>Commercially Sensitive Material</i>) of Schedule Part 26 (<i>Commercially Sensitive Information</i>) in each case for the period specified in column 2 of Parts 1 and 2 of Schedule Part 26 (<i>Commercially Sensitive Information</i>);</p>
<b>"Commissioners"</b>	<p>has the meaning given in Clause 35.3;</p>
<b>"Commissioning Completion Certificate"</b>	<p>means a certificate in the relevant form set out in Schedule Part 22 (<i>Certificates</i>);</p>

<b>"Commissioning End Date"</b>	means the date by which the parties' commissioning activities are programmed to be completed in accordance with the Final Commissioning Programme;
<b>"Committed Standby Facility"</b>	means the Debt Service Reserve Facility, as that term is defined in the Loan Agreement;
<b>"Community Services"</b>	means all services provided from the Facilities as envisaged by the Authority's Construction Requirements and/or the Service Level Specification and such other services as may be notified to Sub-hubco by the Authority from time to time;
<b>"Community Services Provider"</b>	means any organisation (excluding for the avoidance of doubt the Authority) providing any of the Community Services at the relevant Facilities from time to time;
<b>"Compensation Event"</b>	has the meaning given in Clause 29.10;
<b>"Compensation Payment"</b>	has the meaning given in Clause 46.6;
<b>"Completion Criteria"</b>	means the Completion Tests as defined in Appendix A of Schedule Part 10 ( <i>Outline Commissioning Programme</i> ) and as may be applicable to each Phase;
<b>"Confidential Information"</b>	means: <ul style="list-style-type: none"> <li>(e) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1988 and</li> <li>(f) Commercially Sensitive Information;</li> </ul>
<b>"Consents"</b>	means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations required by Law, and all necessary consents and agreements from any third parties (including, without limitation, any Planning Permission), needed to carry out the Project Operations in accordance with this Agreement;

<b>"Construction Contracts"</b>	means each of the Authority A Construction Contract and the Authority B Construction Contract;
<b>"Construction Phase"</b>	means each of the Phase 1 Construction Phase, the Phase 2 Construction Phase and the Phase 3 Construction Phase;
<b>"Construction Quality Plan"</b>	means the Phase 1 Construction Quality Plan, the Phase 2 Construction Quality Plan and the Phase 3 Construction Quality Plan;
<b>"Contamination"</b>	means all or any pollutants or contaminants, including any chemical or industrial, radioactive, dangerous, toxic or hazardous substance, waste or residue (whether in solid, semi-solid or liquid form or a gas or vapour) and including without limitation genetically modified organisms;
<b>"Contract Month"</b>	means a calendar month provided that: <ul style="list-style-type: none"> <li>(a) the first Contract Month shall be the period from and including the relevant Payment Commencement Date to and including the last day of the calendar month in which the relevant Payment Commencement Date falls; and</li> <li>(b) the last Contract Month shall be the period from and including the first day of the calendar month in which the Expiry Date or Termination Date (as the case may be) falls to and including the Expiry Date or the Termination Date (as the case may be);</li> </ul>
<b>"Contract Year"</b>	means the period of twelve (12) calendar months commencing on and including the date of this Agreement and each subsequent period of twelve (12) calendar months commencing on each anniversary of the date of this Agreement, provided that the final Contract Year shall be such period as commences on and includes the anniversary of the date of this Agreement that falls in the year in which this Agreement expires or is terminated (for whatever reason) and ends on and includes the date of expiry or earlier termination of this Agreement (as the case may be);
<b>"Contracting Associate"</b>	means the Contractor, any Service Provider and any other entity which performs on behalf of Subhubco any material function in connection with this Agreement or the Project Operations;

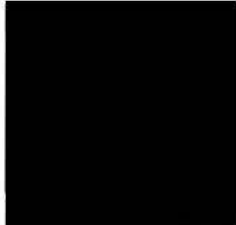
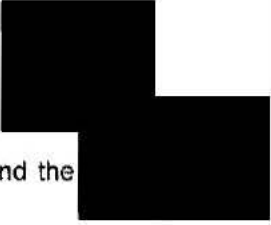
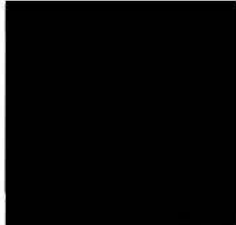
<b>"Contractor"</b>	means Miller Construction (UK) Limited engaged by Sub-hubco to carry out the Works and any substitute design and/or building contractor engaged by Sub-hubco as may be permitted by this Agreement;
<b>"Contractor's Collateral Agreements"</b>	means the collateral agreements among Authority A or Authority B, Sub-hubco and the Contractor in the form set out in Section 1 of Schedule Part 9 ( <i>Collateral Agreements</i> );
<b>"Contractor's Site Manager"</b>	means the manager to be appointed by the Contractor for purposes of supervision of all day-to-day activities on the relevant Site;
<b>"Contractor's Site Rules"</b>	means the Contractor's rules, applicable on the relevant Site to the relevant Authority, Sub-hubco, the Contractor and their respective sub-contractors and suppliers of every tier during the construction of the relevant Facilities;
<b>"Convictions"</b>	means other than in relation to minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding-over orders (including any spent convictions as contemplated by section 1(1) of The Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 Scottish SI 2003/231) or any replacement or amendment to those Orders);
<b>"Deduction"</b>	means a deduction to be made in calculating a Monthly Service Payment, calculated in accordance with Section 3 ( <i>Deductions from Monthly Service Payments</i> ) of Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Deemed Liability"</b>	has the meaning given in Clause 46.7.3;
<b>"Default Interest"</b>	means any increased margin that is payable to the Senior Funders or which accrues as a result of any payment due to the Senior Funders not being made on the date on which it is due;
<b>"Default Interest Rate"</b>	means 2% over LIBOR;
<b>"Defects"</b>	means any defect or fault in the Works and/or the Facilities (not being a Snagging Matter) which occurs due to a failure by Sub-hubco to meet the Authority's Construction Requirements and/or relevant Sub-hubco's Proposals or otherwise to comply with its obligations under this Agreement;

<b>"Delay Event"</b>	has the meaning given in Clause 29.3;
<b>"Derogated Low Value Change"</b>	has the meaning given in Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Design Data"</b>	means all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing and/or operation of the relevant Facilities;
<b>"Design Quality Plan"</b>	means the Phase 1 Design Quality Plan, the Phase 2 Design Quality Plan and the Phase 3 Design Quality Plan;
<b>"Direct Losses"</b>	means, subject to the provisions of Clause 54.1, all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an agent/client, client paying basis), proceedings, demands and charges whether arising under statute, contract or at common law but, to avoid doubt, excluding Indirect Losses;
<b>"Disclosed Data"</b>	means any Design Data and any other written information, data and documents made available or issued to Sub-hubco or any Sub-hubco Party in connection with the Project by or on behalf of an Authority (or any Authority Party) whether on, before or after the execution of this Agreement;
<b>"Discriminatory Change in Law"</b>	<p>means any Change in Law the effect of which is to discriminate directly against:</p> <ul style="list-style-type: none"> <li>(a) facilities whose design, construction, financing and operation are procured under the hub programme in relation to other similar projects; or</li> <li>(b) companies undertaking projects procured by contracts under the hub programme in relation to other companies undertaking similar projects; or</li> <li>(c) the Facilities (or any of them) in relation to other similar facilities; or</li> <li>(d) Sub-hubco in relation to other companies,</li> </ul> <p>save:</p> <ul style="list-style-type: none"> <li>i. where such Change in Law is in response to any act or omission on the part of Sub-hubco which is illegal (other than an act or omission</li> </ul>

rendered illegal by virtue of the Change in Law itself);

- ii. that such action shall not be deemed to be discriminatory solely on the basis that its effect on Sub-hubco is greater than its effect on other companies; and
- iii. that a change in taxes or the introduction of a tax affecting companies generally or a change in VAT shall be deemed not to be discriminatory in any circumstances (to avoid doubt, such changes being given effect in accordance with Clause 35 (*VAT and Construction Industry Tax Deduction Scheme*))

<b>"Distribution"</b>	has the meaning given in Schedule Part 23 ( <i>Refinancing</i> ) (excluding limb (b) of that definition);
<b>"Distribution Date"</b>	means a date during the Project Term or after its expiry on which Sub-hubco intends to make a Distribution;
<b>"Dividend"</b>	means any dividend or distribution made or paid by Sub-hubco on its share capital;
<b>"Dispute"</b>	has the meaning given in paragraph 1 of Schedule Part 20 ( <i>Dispute Resolution Procedure</i> );
<b>"Dispute Resolution Procedure"</b>	means the procedure set out in Schedule Part 20 ( <i>Dispute Resolution Procedure</i> );
<b>"Emergency"</b>	means an event causing or, in the reasonable opinion of a party, threatening to cause death or injury to any individual, or serious disruption to the lives of a number of people or extensive damage to property, or contamination of the environment, in each case on a scale beyond the capacity of the emergency services or preventing the relevant Services operating under normal circumstances and requiring the mobilisation and organisation of the emergency services;
<b>"Encumbrance"</b>	means any option, right of pre-emption, pledge, security, interest, lien, charge, mortgage, lease, licence, claim, condition, retention or other encumbrance or restriction whether imposed by agreement, by law or otherwise;
<b>"Environmental Regulations"</b>	<b>Information (Scotland)</b> means the Environmental Information (Scotland) Regulations 2004 together with any guidance

		and/or codes of practice issued by the Scottish Information Commissioner or relevant Government Department in relation to such regulations;
<b>"Equity"</b>		means the aggregate subscription price paid by the Shareholders for the ordinary share capital of Sub-hubco;
<b>"Equipment"</b>		has the meaning given to it in Schedule Part 11 ( <i>Equipment</i> );
<b>"Estimated Deductions"</b>		has the meaning given in Clause 34.2.1;
<b>"Estimated Increased Maintenance Costs"</b>		has the meaning given in Clause 23.7;
<b>"Excusing Cause"</b>		has the meaning given in Clause 51.2;
<b>"Expiry Date"</b>		means midnight on 30 APRIL 2039 
<b>"Facilities"</b>		means each of the Authority A Facilities and the Authority B Facilities;
<b>"Facility Manager"</b>		means Sub-hubco's duty manager who shall be present at the relevant Facilities in accordance with the relevant Service Level Specification;
<b>"Fees Regulations"</b>		means the Freedom of Information (Fees for Required Disclosure (Scotland)) Regulations 2004;
<b>"Final Commissioning Programme"</b>		means the Authority A Final Commissioning Programme in respect of Phase 1 and the Authority B Final Commissioning Programme in respect of Phase 2 and Phase 3, respectively;
<b>"Financial Close"</b>		means the date of this Agreement;
<b>"Financial Model"</b>		means the computer spreadsheet model for the Project incorporating statements of Sub-hubco's cashflows including all expenditure, revenues, financing and taxation of the Project Operations together with the profit and loss accounts and balance sheets for Sub-hubco throughout the Project Term accompanied by details of all assumptions, calculations and methodology used in their compilation and any other documentation necessary or desirable to operate the model, a copy of which is attached to this Agreement on disk as Attachment B, as amended from time to time in accordance with the terms of Clause 37 ( <i>Financial Model</i> );
<b>"Finishes Proposal Date"</b>		means, in relation to a Finish, the relevant date identified in the table set out in paragraph 1.2.3 of Schedule Part 8 ( <i>Review Procedure</i> );

<b>"Finishes Selection Date"</b>	means, in relation to a Finish, the relevant date identified in the table set out in paragraph 1.2.3 of Schedule Part 8 ( <i>Review Procedure</i> );
<b>"Finishes"</b>	means those finishes listed in the table set out in paragraph 1.2.3 of Schedule Part 8 ( <i>Review Procedure</i> );
<b>"First Party"</b>	has the meaning given in Clause 35.3;
<b>"First Whole Life Threshold Return"</b>	means [REDACTED]
<b>"First Threshold Excess"</b>	means the portion, if any of a Proposed Distribution that would, if paid to the Investors on the Relevant Distribution Date, result in the Investor Return being in excess of the First Whole Life Threshold Return, but not more than the Second Whole Life Threshold Return;
<b>"FOI(S)A"</b>	means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation (as defined in section 73 of the Freedom of Information (Scotland) Act 2002) made under the Freedom of Information (Scotland) Act 2002 from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Government department in relation to such Act;
<b>"Force Majeure"</b>	has the meaning given in Clause 31 ( <i>Force Majeure</i> );
<b>"Forres Area 1"</b>	means the area shown shaded brown on drawing number 3268;
<b>"Forres Area 2"</b>	means the area shown shaded green on drawing number 3268;
<b>"Forres Area 3"</b>	means the area shown shaded yellow on drawing number 3268;
<b>"Forres Football Pitch Specification"</b>	means the specification in relation to the Forres Football Pitch Works annexed as Attachment I;
<b>"Forres Football Pitch Works"</b>	means the works described in the Forres Football Pitch Specification;
<b>"Forres Land Certificate"</b>	means the land certificate in respect of title number MOR5145 for subjects at the North of Grantown Road, Thornhill, Forres IV36 2SE, in the Agreed Form;
<b>"Forres Licence for Works"</b>	means the form of licence for works between the Moray Council and the Scottish Ministers



	annexed as Attachment D;
<b>"Forres Planning Approval"</b>	means detailed planning consent for the Facilities at Forres dated 30 March 2012 and annexed as Attachment E;
<b>"Forres Scottish Water Plan"</b>	means the plan dated 2 November 2009 with Scottish Water reference SWPS/09/60383 forming part of the Site Plans;
<b>"Forres Section 75 Agreement"</b>	means the Section 75 Agreement related to the Forres Site and annexed as Attachment F;
<b>"Forres Site"</b>	means the land made available in Forres to Sub-hubco for the Project and outlined in red on drawing number L(90)105 Rev B forming part of the Site Plans;
<b>"Forres SSE Plan"</b>	means the Scottish and Southern Energy plc plan with O.S Ref: nj0258se, nj0358sw forming part of the Site Plans;
<b>"Functional Area"</b>	means an area of the relevant Facilities identified as such in Appendix 2 to Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Funders"</b>	means all or any of the persons who provide financing or funding in respect of the Project Operations under the Funding Agreements including Aviva Public Private Finance Limited and, where the context so permits, prospective financiers or funders;
<b>"Funders' Direct Agreement"</b>	means the agreement to be entered into between Authority A, Authority B, the Senior Funders and Sub-hubco in the form set out in Schedule Part 4 ( <i>Funders' Direct Agreement</i> );
<b>"Funding Agreements"</b>	means all or any of the agreements or instruments to be entered into by Sub-hubco or any of its Associates relating to the financing of the Project Operations (including the Initial Funding Agreements and any agreements or instruments to be entered into by Sub-hubco or any of its Associates relating to the rescheduling of their indebtedness or the refinancing of the Project Operations);
<b>"Funding Default"</b>	means any event of default under the Loan Agreement which has been notified by the Senior Funders to Sub-hubco or by Sub-hubco to the Senior Funders;
<b>"Good Industry Practice"</b>	means using standards, practices, methods and procedures conforming to the Law and exercising that degree of skill and care, diligence, prudence

and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances;

<b>"Government"</b>	means the government of the United Kingdom or the Scottish Ministers;
<b>"Ground Physical and Geophysical Investigation"</b>	means the investigation of all the conditions of and surrounding the Sites and of any extraneous materials in, on or under the Sites (including its surface and subsoil) to enable the Facilities to be designed and constructed and the Works to be carried out with due regard for those conditions and the seismic activity (if any) in the region of the Sites;
<b>"H&amp;S Conviction"</b>	has the meaning given in Clause 40.1.5;
<b>"Handback Amount"</b>	has the meaning given in Schedule Part 18 ( <i>Handback Procedure</i> );
<b>"Handback Bond"</b>	has the meaning given in Schedule Part 18 ( <i>Handback Procedure</i> );
<b>"Handback Certificate"</b>	means the certificate of confirmation that the Facilities comply with the Handback Requirements in the relevant form set out in Schedule Part 18 ( <i>Handback Procedure</i> );
<b>"Handback Programme"</b>	has the meaning given in Schedule Part 18 ( <i>Handback Procedure</i> );
<b>"Handback Requirements"</b>	has the meaning given in Schedule Part 18 ( <i>Handback Procedure</i> );
<b>"Handback Works"</b>	has the meaning given in Schedule Part 18 ( <i>Handback Procedure</i> );
<b>"Head Leases"</b>	means the head leases for each of the Sites to be entered into between the Scottish Ministers and Sub-hubco on the Commencement Date in the Agreed Form, as more particularly described therein, with such variations and/or additions as may be agreed by the relevant Authority, Sub-hubco and the Scottish Ministers from time to time in writing;
<b>"Health and Safety Regime"</b>	means the Food Safety Act 1990 (and associated regulations), the Health & Safety at Work etc Act 1974 (and associated regulations), the Fire Precautions Act 1971, the Environmental Protection Act 1990 and the Water Industry (Scotland) Act 2002 and any similar or analogous health, safety or environmental legislation in force

	from time to time;
<b>"Health Board"</b>	means a health board established under section 2 of the National Health Service (Scotland) Act 1978 (or any successor body to any such body established with substantially the same powers or duties);
<b>"High Value Change Stage 2 Submission"</b>	has the meaning given in Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Holding Company"</b>	has the meaning given to it in section 1159 of the Companies Act 2006;
<b>"Hours for Programmed Maintenance"</b>	has the meaning given in Appendix 2 of Schedule Part 8 ( <i>Review Procedure</i> );
<b>"Hours of Operation"</b>	has the meaning given in Appendix 2 of Schedule Part 8 ( <i>Review Procedure</i> );
<b>"hubco"</b>	means hub North Scotland Limited;
<b>"Indemnifier"</b>	has the meaning given in Clause 49.3 ( <i>Conduct of Claims</i> );
<b>"Independent Tester"</b>	means Faithful & Gould Limited or such substitute independent tester as may be permitted pursuant to this Agreement;
<b>"Independent Tester Contract"</b>	means the contract dated the same date as this Agreement in substantially the form set out in Schedule Part 13 ( <i>Independent Tester Contract</i> ) or any replacement thereof among Sub-hubco, Authority A, Authority B and the Independent Tester;
<b>"Indirect Losses"</b>	has the meaning given in Clause 54.1 ( <i>Exclusions and Limits on Liability</i> );
<b>"Information"</b>	has the meaning given under section 73 of the Freedom of Information (Scotland) Act 2002;
<b>"Information System"</b>	means a system for generating, sending, receiving, storing or otherwise processing electronic communications;
<b>"Initial Funding Agreements"</b>	means the Funding Agreements put in place upon the execution of this Agreement, details of which are set out at Attachment C;
<b>"Insurance Proceeds Account"</b>	means the account numbered [REDACTED] to be confirmed in the joint names of Sub-hubco Authority A and Authority B with the Account Bank (as defined in the Funding Agreement);

<b>"Insurance Proceeds Account Agreement"</b>	means the agreement substantially in the form set out in Schedule Part 25 ( <i>Insurance Proceeds Account Agreement</i> );
<b>"Insurance Term"</b>	means any term and/or condition required to be included in a policy of insurance by Clause 53 ( <i>Insurance</i> ) and/or Schedule Part 15 ( <i>Insurance Requirements</i> ) but excluding any risk;
<b>"Insurances"</b>	means, as the context requires, all or any of the insurances required to be maintained by Sub-hubco pursuant to this Agreement;
<b>"Intellectual Property"</b>	means all registered or unregistered trademarks, service marks, patents, registered designs, utility models, applications for any of the foregoing, copyrights, unregistered designs, the sui generis rights of extraction relating to databases, trade secrets and other confidential information or know-how;
<b>"Intellectual Property Rights"</b>	means the Intellectual Property which (or the subject matter of which) is created, brought into existence, acquired, used or intended to be used by Sub-hubco, any Sub-hubco Party or by other third parties (for the use by or on behalf of or for the benefit of Sub-hubco) for the purposes of the design or construction of the relevant Facilities, the operation, maintenance, improvement and/or testing of the relevant Facilities or the conduct of any other Project Operation or otherwise for the purposes of this Agreement;
<b>"Interest"</b>	means any interest in Relevant Debt paid by Sub-hubco;
<b>"Interim Project Report"</b>	means either: (i) the report to be produced by Sub-hubco on request by the Authorities pursuant to Clause 4.8 ( <i>Funding Default</i> ), which report shall contain all information pertaining to the occurrence of the relevant Funding Default (including without limitation details of any action taken by the Funders under the Loan Agreement, any discussions that have taken place with the Funders and if the funders intend to issue a waiver in respect of the Funding Default) as the Authorities (acting reasonably) deems necessary together with a programme of action which will, if performed, remedy or otherwise resolve the matters which gave rise to the Funding Default; or (ii) where the Senior Funders have requested that Sub-hubco provide them with a report in relation to the relevant Funding Default, a copy of such report, together with any updates or follow on reports requested by the Senior Funders;

<b>"Investor Return"</b>	<p>means the projected final blended internal rate of return of the Investors post tax (in relation to any tax payable or to be paid by Sub-hubco on the aggregate of the Subordinated Debt and Equity expressed in nominal terms having regard to:</p> <ul style="list-style-type: none"> <li>(a) all actual Distributions that have been made or paid to the Investors;</li> <li>(b) the Proposed Distribution at the relevant Distribution Date; and</li> <li>(c) all Projected Distributions</li> </ul> <p>and calculated from the actual point of investment of moneys by the Investors rather than the point of commitment to invest on the assumption, whether or not a fact, that the Investors are a single person;</p>
<b>"Investors"</b>	<p>means the Shareholders and the holders of the Subordinated Debt in each case for the time being;</p>
<b>"IT"</b>	<p>means information technology systems, hardware and software;</p>
<b>"Key Sub-Contractor"</b>	<p>means the sub-contractors appointed to complete the following works: stair balustrades, glazing and curtain walling, structural steel connections and structural steel decking, roof cladding and associated fixings, structural framing systems, lifts, precast stairs and landings, specialised mechanical and engineering elements, timber roof trusses and associated fixings and wall cladding;</p>
<b>"Key Sub-Contractor Collateral Agreements"</b>	<p>means the collateral agreements among Authority A or Authority B, Sub-hubco, the Contractor and each of the Key Sub-Contractors in the form set out in Section 3 of Schedule Part 9 (<i>Collateral Agreements</i>);</p>
<b>"Law"</b>	<p>means:</p> <ul style="list-style-type: none"> <li>(a) any applicable statute or proclamation or any delegated or subordinate legislation;</li> <li>(b) any enforceable community right within the meaning of section 2(1) of the European Communities Act 1972;</li> <li>(c) any applicable guidance, direction or determination with which the Authority and/or Sub-hubco is bound to comply to</li> </ul>

the extent that the same are published and publicly available or the existence or contents of them have been notified to Sub-hubco by the Authority; and

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

in each case in force in Scotland;

**"Leases"**

means the Head Lease(s) and/or the Sub-Lease(s), as the context may require;

**"LIBOR"**

means the rate per annum determined by Clydesdale Bank plc to be the offered rate for six month sterling deposits in the London interbank market which appears on Telerate Page 3750 (or such other page as may replace that page on the Dow Jones Telerate service);

**"Low Value Change"**

has the meaning given in Schedule Part 16 (*Change Protocol*);

**"Maintenance Works"**

means any works for maintenance or repair of the relevant Facilities that are necessary to ensure that the relevant Facilities are maintained in accordance with relevant Service Level Specification and relevant Method Statement and that the relevant Facilities comply with the Authority's Construction Requirements and relevant Sub-hubco's Proposals (including, without limitation, the renewal or replacement of any Plant or equipment) throughout the Project Term;

**"Malicious Damage Report"**

has the meaning given in Clause 49A.2.1;

**"Medical Contamination"**

means a disease carrying agent which cleaning and prevention of infection or contamination techniques in use in accordance with Good Industry Practice and this Agreement cannot substantially prevent or cannot substantially remove with the result that:

- (a) it is unsafe to admit patients or staff to the relevant area or to use the area for the purpose for which it is intended; and
- (b) the area cannot be made safe for the admission of patients or staff;

<b>"Medium Value Change"</b>	has the meaning given in Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Method Statement"</b>	means the method of providing the Services to an Authority as set out or identified in Section 2 ( <i>Method Statement</i> ) of Schedule Part 12 ( <i>Service Requirements</i> ) as amended from time to time in accordance with Clause 33 ( <i>Change Protocol</i> ) and Clause 22 ( <i>The Services</i> );
<b>"Monthly Service Payment"</b>	has the meaning given in Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Monthly Service Report"</b>	means a monthly report to be prepared by Sub-hubco and provided to the relevant Authority in accordance with the relevant provisions in Section 1 ( <i>Service Level Specification</i> ) of Schedule Part 12 ( <i>Service Requirements</i> );
<b>"Moray Council"</b>	means the Moray Council or successor authority;
<b>"NHS"</b>	means the National Health Service;
<b>"NHS Requirement"</b>	means: <ul style="list-style-type: none"> <li>(a) in relation to the relevant Works, Health Building Notes and Health Technical Memoranda and such other requirements as are designated as NHS Requirements in the Authority's Construction Requirements; and</li> <li>(b) in relation to the relevant Project Operations (other than the Works), Health Building Notes, Health Technical Memoranda, all Executive Letters, Health Service Guidelines, Health Circulars of the NHS and any similar official requests, requirements and guidance having similar status for the time being in force, but only to the extent the same are published and publicly available or the existence and contents of them have been notified to Sub-hubco by the relevant Authority;</li> </ul>
<b>"Operational Functionality"</b>	means <ul style="list-style-type: none"> <li>(a) the following matters as shown on the 1:200 scale plans contained within Subhubco's Proposals: <ul style="list-style-type: none"> <li>(i) the points of access to and within the Facilities;</li> </ul> </li> </ul>

- (ii) the adjacencies between different departments within the Facilities;
  - (iii) the adjacencies between different departments; and
  - (iv) the adjacencies between rooms within the departments;
- (b) the quantity, description and areas (in square metres) of those rooms and spaces shown on the Schedule of Accommodation;
- (c) the location and relationship of equipment, furniture, fittings and user terminals as shown on the 1:50 loaded room plans contained within Subhubco's Proposals in respect of:
- (i) internal room elevations;
  - (ii) actual ceiling layouts; and
- (d) the location of and the inter-relationships between rooms within a department as shown on 1:200 scale plans scale drawings,

but only insofar as each of the matters listed in (a) to (d) above relate to or affect Clinical Use;

**"Operational Insurances"**

means the insurances required by Clause 53.2 and **"Operational Insurance"** means any one of such insurances;

**"Operational Term"**

means each of the Phase 1 Operational Term, the Phase 2 Operational Term and the Phase 3 Operational Term;

**"Option Period"**

has the meaning given in Clause 53.14.3 (*Uninsurable Risks*);

**"Original Senior Commitment"**

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

**"Outline Commissioning Programme"**

means the Phase 1 Outline Commissioning Programme, the Phase 2 Outline Commissioning Programme and/or the Phase 3 Outline Commissioning Programme, as appropriate;

**"Participant"**

has the meaning given in the Territory Partnering Agreement;



<b>"Payment Commencement Date"</b>	means each of the Phase 1 Payment Commencement Date, the Phase 2 Payment Commencement Date and the Phase 3 Payment Commencement Date;
<b>"Payment Mechanism"</b>	means Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Performance Failure"</b>	has the meaning given in Section 1 of Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Performance Guarantees"</b>	means the guarantees to Sub-hubco in respect of the Construction Contracts and the Service Contract which, as at the date of this Agreement are in the Agreed Form;
<b>"Permitted Borrowing"</b>	<p>means without double-counting, any:</p> <ul style="list-style-type: none"> <li>(a) advance to Sub-hubco under the Senior Funding Agreements, provided that such advance is not made under any Committed Standby Facility;</li> <li>(b) Additional Permitted Borrowing;</li> <li>(c) advance to Sub-hubco under any Committed Standby Facility which is made solely for the purpose of funding any cost overruns, increased expenses or loss of revenue which Sub-hubco incurs, provided that such funds are not used in substitution for other sources of committed funding designated for those purposes; and</li> <li>(d) interest and, in respect of the original Senior Funding Agreements only (as entered into at the date of this Agreement, prior to any subsequent amendment), other amounts accrued or payable under the terms of such original Senior Funding Agreements,</li> </ul> <p>except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing;</p>
<b>"Phase"</b>	means, as the context may require, Phase 1, Phase 2 and/or Phase 3 and " <b>Phases</b> " shall be construed accordingly;
<b>"Phase 1"</b>	means the Authority A Works;
<b>"Phase 1 Actual Completion Date"</b>	means the later of;

		(a) the date of the Certificate of Practical Completion issued by the Independent Tester in respect of Phase 1 pursuant to Clause 17.12; and
		(b) subject to Clause 14.5, the Phase 1 Completion Date;
<b>"Phase 1 Completion Date"</b>		means <b>25 April 2014</b> or such revised date as may be specified by the Authority's Representative pursuant to Clause 29 or such other date as may be agreed by the parties;
<b>"Phase 1 Construction Phase"</b>		means the period from and including the date of execution of this Agreement to and including the Phase 1 Actual Completion Date;
<b>"Phase 1 Construction Quality Plan"</b>		means the construction quality plan forming part of the Phase 1 Quality Plan (Design and Construction) in the Agreed Form;
<b>"Phase 1 Design Quality Plan"</b>		means the design quality plan forming part of the Phase 1 Quality Plan (Design and Construction) in the Agreed Form;
<b>"Phase 1 Operational Term"</b>		means the period from the Phase 1 Actual Completion Date until the end of the Project Term;
<b>"Phase 1 Outline Commissioning Programme"</b>		means the programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the commissioning activities of Authority A and Sub-hubco at the Authority A Facilities set out in outline in Schedule Part 10 ( <i>Outline Commissioning Programme</i> );
<b>"Phase 1 Payment Commencement Date"</b>		means the Phase 1 Actual Completion Date;
<b>"Phase 1 Programme"</b>		means the programme for Phase 1 set out in Section 1 ( <i>Phase 1 Programme</i> ) of Schedule Part 7 ( <i>The Programmes</i> ) as revised and issued by Sub-hubco (or on its behalf) from time to time pursuant to Clause 14 ( <i>Programme and Dates for Completion</i> );
<b>"Phase 1 Room Data Sheets"</b>		has the meaning given in Section 6A ( <i>Room Data Sheets</i> ) of Schedule Part 6 ( <i>Construction Matters</i> );
<b>"Phase 1 Sub-hubco's Proposals"</b>		means the document at Section 4A ( <i>Sub-hubco's Proposals</i> ) of Schedule Part 6 ( <i>Construction Matters</i> ) as amended from time to time in accordance with Clause 33 ( <i>Change Protocol</i> );

<b>"Phase 2"</b>	means the Authority B Works in relation to the Facilities at the Woodside Site;
<b>"Phase 2 Actual Completion Date"</b>	means the later of: <ul style="list-style-type: none"> <li>(a) the date of the Certificate of Practical Completion issued by the Independent Tester in respect of Phase 2 pursuant to Clause 17.12; and</li> <li>(b) subject to Clause 14.5, the Phase 2 Completion Date;</li> </ul>
<b>"Phase 2 Completion Date"</b>	means <b>25 APRIL 2014</b> or such revised date as may be specified by the Authority's Representative pursuant to Clause 29 or such other date as may be agreed by the parties;
<b>"Phase 2 Construction Quality Plan"</b>	means the construction quality plan forming part of the Phase 2 Quality Plan (Design and Construction) in the Agreed Form;
<b>"Phase 2 Design Quality Plan"</b>	means the design quality plan forming part of the Phase 2 Quality Plan (Design and Construction) in the Agreed Form;
<b>"Phase 2 Construction Phase"</b>	means the period from and including the date of execution of this Agreement to and including the Phase 2 Actual Completion Date;
<b>"Phase 2 Operational Term"</b>	means the period from the Phase 2 Actual Completion Date until the end of the Project Term;
<b>"Phase 2 Outline Commissioning Programme"</b>	Means the programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the commissioning activities of Authority B and Sub-hubco at the Authority B Facilities at the Woodside Site set out in outline in Schedule Part 10 ( <i>Outline Commissioning Programme</i> );
<b>"Phase 2 Payment Commencement Date"</b>	means the Phase 2 Actual Completion Date;
<b>"Phase 2 Programme"</b>	means the programme for Phase 2 set out in Section 2 ( <i>Phase 2 Programme</i> ) of Schedule Part 7 ( <i>The Programmes</i> ) as revised and issued by Sub-hubco (or on its behalf) from time to time pursuant to Clause 14 ( <i>Programme and Dates for Completion</i> );
<b>"Phase 2 Room Data Sheets"</b>	has the meaning given in Section 6B ( <i>Room Data Sheets</i> ) of Schedule Part 6 ( <i>Construction Matters</i> );
<b>"Phase 2 Sub-hubco's Proposals"</b>	means the document at Section 4B ( <i>Sub-hubco's</i>

	<i>Proposals</i> ) of Schedule Part 6 ( <i>Construction Matters</i> ) as amended from time to time in accordance with Clause 33 ( <i>Change Protocol</i> );
<b>"Phase 3"</b>	means the Authority B Works in relation to the Facilities at the Forres Site;
<b>"Phase 3 Actual Completion Date"</b>	means the later of: <ul style="list-style-type: none"> <li>(c) the date of the Certificate of Practical Completion issued by the Independent Tester in respect of Phase 3 pursuant to Clause 17.12; and</li> <li>(d) subject to Clause 14.5, the Phase 3 Completion Date;</li> </ul>
<b>"Phase 3 Completion Date"</b>	means <b>25 APRIL 2014</b> or such revised date as may be specified by the Authority's Representative pursuant to Clause 29 or such other date as may be agreed by the parties;
<b>"Phase 3 Construction Phase"</b>	means the period from and including the date of execution of this Agreement to and including the Phase 3 Actual Completion Date;
<b>"Phase 3 Construction Quality Plan"</b>	means the construction quality plan forming part of the Phase 3 Quality Plan (Design and Construction) in the Agreed Form;
<b>"Phase 3 Design Quality Plan"</b>	means the design quality plan forming part of the Phase 3 Quality Plan (Design and Construction) in the Agreed Form;
<b>"Phase 3 Operational Term"</b>	means the period from the Phase 3 Actual Completion Date until the end of the Project Term;
<b>"Phase 3 Outline Commissioning Programme"</b>	means the programme for Phase 3 setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the commissioning activities of Authority B and Sub-hubco at the Authority B Facilities at the Forres Site set out in outline in Schedule Part 10 ( <i>Outline Commissioning Programme</i> );
<b>"Phase 3 Payment Commencement Date"</b>	means the Phase 3 Actual Completion Date;
<b>"Phase 3 Programme"</b>	means the programme set out in Section 3 ( <i>Phase 3 Programme</i> ) of Schedule Part 7 ( <i>The Programmes</i> ) as revised and issued by Sub-hubco (or on its behalf) from time to time pursuant to Clause 14 ( <i>Programme and Dates for Completion</i> );
<b>"Phase 3 Room Data Sheets"</b>	has the meaning given in Section 6C ( <i>Room Data</i>

	Sheets) of Schedule Part 6 ( <i>Construction Matters</i> );
<b>"Phase 3 Sub-hubco's Proposals"</b>	means the document at Section 4C ( <i>Sub-hubco's Proposals</i> ) of Schedule Part 6 ( <i>Construction Matters</i> ) as amended from time to time in accordance with Clause 33 ( <i>Change Protocol</i> );
<b>"Phase Actual Completion Date"</b>	means, as the context may require, the Phase 1 Actual Completion Date, the Phase 2 Actual Completion Date and/or the Phase 3 Actual Completion Date;
<b>"Phase Completion Date"</b>	means, as the context may require, the Phase 1 Completion Date, Phase 2 Completion Date and/or the Phase 3 Completion Date;
<b>"Physical Damage Policies"</b>	means the policies of insurance referred to in paragraph 1 ( <i>Contractors' 'All Risk' Insurance</i> ) of Section 1 ( <i>Policies to be Taken Out by Sub-hubco and Maintained During the Design and Construction Phase</i> ) and paragraph 1 ( <i>Property Damage</i> ) of Section 2 ( <i>Policies to be Taken Out By Sub-hubco and Maintained from the Phase Actual Completion Date</i> ) of Schedule Part 15 ( <i>Insurance Requirements</i> );
<b>"Planning Challenge"</b>	means, in respect of the Woodside Planning Approval, the occurrence of either of the following within three months of the date of the grant of the Woodside Planning Approval: <ul style="list-style-type: none"> <li>(a) an application for judicial review under Chapter 58 of the Rules of the Court of Session (or any statutory challenge or appeal which proceeds on principles similar to judicial review); or</li> <li>(b) a statutory challenge under section 239 of the Town and Country Planning (Scotland) Act 1997</li> </ul> in either case (i) other than by Sub-hubco or any Sub-hubco Party and (ii) on grounds other than Sub-hubco's or a Sub-hubco Party's failure to comply with statutory procedure and other than the commission of an unlawful act or acts by Sub-hubco or a Sub-hubco Party;
<b>"Planning Challenge Dismissal"</b>	means, in relation to a Planning Challenge: <ul style="list-style-type: none"> <li>(a) a decision by a Relevant Authority pursuant to which the Planning Challenge is dismissed or otherwise rejected and in respect of which any rights of appeal have expired, been rejected or otherwise lost; or</li> </ul>

	(b) the withdrawal of that Planning Challenge;
<b>"Planning Permission"</b>	means any planning permission, approval of reserved matters, listed building consent, conservation areas consent and/or other consent or approval reasonably required from time to time for construction and/or operation of the relevant Facilities (including without limitation for any Authority Change and the Woodside Planning Approval);
<b>"Plant"</b>	means the infrastructure systems, building systems, fixed, and immovable equipment systems, installed as part of the relevant Works or pursuant to an Authority Change as replaced from time to time;
<b>"Post Completion Commissioning"</b>	means, as appropriate, the relevant Sub-hubco's Post Completion Commissioning and/or the relevant Authority's Post Completion Commissioning;
<b>"Professional Team"</b>	means the architects, structural engineers and mechanical and electrical engineers employed by the Contractor in connection with the Works;
<b>"Professional Team Collateral Agreements"</b>	means the form of collateral warranty forming part of the appointment of the relevant member of the Professional Team being substantially in the Key Sub-Contractor Collateral Agreement;
<b>"Programmes"</b>	means each of the Phase 1 Programme, the Phase 2 Programme and the Phase 3 Programme;
<b>"Programmed Maintenance"</b>	means the maintenance work which Sub-hubco is to carry out in accordance with Schedule of Programmed Maintenance;
<b>"Programmed Maintenance Information"</b>	has the meaning given in Clause 23.3;
<b>"Prohibited Act"</b>	has the meaning given in Clause 44 ( <i>Corrupt Gifts and Payments</i> );
<b>"Project"</b>	has the meaning given to it in Recital C;
<b>"Project Data"</b>	means: <ul style="list-style-type: none"> <li>(a) all Design Data;</li> <li>(b) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the provision of the Services; and</li> <li>(c) any other materials, documents and or</li> </ul>

	data acquired, brought into existence or used in relation to the Project Operations or this Agreement;
<b>"Project Documents"</b>	means the Ancillary Documents and the Funding Agreements;
<b>"Project Operations"</b>	means each of the Authority A Project Operations and the Authority B Operations;
<b>"Project Term"</b>	means the period commencing at midnight on the date of this Agreement and ending on the earlier of the Expiry Date and the Termination Date;
<b>"Projected Distribution"</b>	means sums that are shown in the Financial Model as being paid to the Investors as Distributions at dates after the Relevant Distribution Date;
<b>"Proportion"</b>	means the Authority A Proportion and/or the Authority B Proportion;
<b>"Proposed Distribution"</b>	means the aggregate amount of all Distributions that Sub-hubco proposes to make at the Relevant Distribution Date;
<b>"Qualifying Change"</b>	<p>means (unless expressly stated otherwise):</p> <ul style="list-style-type: none"> <li>(a) a Low Value Change in respect of which the parties have agreed the method of implementation; or</li> <li>(b) a Medium Value Change in respect of which the relevant Authority has issued a confirmation notice pursuant to paragraph 7.1.1 of Section 3 (<i>Medium Value Changes</i>) of Schedule Part 16 (<i>Change Protocol</i>); or</li> <li>(c) a High Value Change which has received Stage 2 Approval pursuant to paragraph 8.2.1 of Section 4 (<i>High Value Changes</i>) of Schedule Part 16 (<i>Change Protocol</i>),</li> </ul> <p>in each case provided that any necessary changes required to be made to any Project Document and/or Ancillary Document pursuant to Schedule Part 16 (<i>Change Protocol</i>) have been given effect to and become unconditional;</p>
<b>"Qualifying Distribution"</b>	has the meaning given in Clause 36.4;
<b>"Quality Plans"</b>	means the relevant Design Quality Plan and

	relevant Construction Quality Plan, prepared in accordance with Section 8 ( <i>Quality Plans (Design and Construction)</i> ) of Schedule Part 6 ( <i>Construction Matters</i> ), and the Services Quality Plan, prepared in accordance with Section 3 ( <i>Service Quality Plan</i> ) of Schedule Part 12 ( <i>Service Requirements</i> ), as required to be implemented by Sub-hubco in accordance with Clause 20 ( <i>Quality Assurance</i> );
<b>"Range of Finishes"</b>	has the meaning given in paragraph 1.2.3(a) of Schedule Part 8 ( <i>Review Procedure</i> );
<b>"Rectification Period"</b>	has the meaning given in Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Refinancing"</b>	has the meaning given in Schedule Part 23 ( <i>Refinancing</i> );
<b>"Reinstatement Plan"</b>	has the meaning given in Clause 53.22 ( <i>Reinstatement</i> );
<b>"Reinstatement Works"</b>	has the meaning given in Clause 53.22.2 ( <i>Reinstatement</i> );
<b>"Relevant Authority"</b>	means any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom, or of the European Union, (or of the Scottish Government or the Scottish Parliament);
<b>"Relevant Change in Law"</b>	has the meaning given in Clause 32.3 ( <i>Changes in Law</i> );
<b>"Relevant Debt"</b>	means all sums advanced to Sub-hubco from time to time under a Funding Agreement other than Senior Debt;
<b>"Relevant Distribution Date"</b>	means the Distribution Date at which the Qualifying Distribution in question is proposed to be paid;
<b>"Relevant Event"</b>	has the meaning given in Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Relevant Incident"</b>	has the meaning given in Clause 53.22.2 ( <i>Reinstatement</i> );
<b>"Relevant Payment"</b>	has the meaning given in Clause 53.14.3;
<b>"Relevant Proceeds"</b>	has the meaning given in Clause 53.22.2 ( <i>Reinstatement</i> );
<b>"Relevant Service Transfer Date"</b>	has the meaning given in Clause 25.1;



<b>"Relevant Tax Liability"</b>	has the meaning given in Clause 46.7.3;
<b>"Relief"</b>	has the meaning given in Clause 46.7.1;
<b>"Relief Events"</b>	has the meaning given in Clause 30 ( <i>Relief Events</i> );
<b>"Request for Information"</b>	has the meaning set out in the FOI(S)A or the Environmental Information (Scotland) Regulations as relevant (where the meaning set out for the term "request" shall apply);
<b>"Required Action"</b>	has the meaning given in Clause 24.7;
<b>"Reserved Rights"</b>	means the matters referred to in Section 1B, Section 2B and Section 3B of Schedule Part 5 ( <i>Land Matters</i> );
<b>"Restricted Person"</b>	means either: <ul style="list-style-type: none"> <li>(a) a person (other than a Participant) providing or proposing to provide healthcare services of a similar nature to those provided or contemplated by an Authority at the time in question; or</li> <li>(b) any person who has a material interest in the production of tobacco products and/or alcoholic beverages;</li> </ul>
<b>"Retail Prices Index" or "RPI"</b>	means the Retail Prices Index (All Items) as published by the Office for National Statistics from time to time (the "Index"), or, failing such publication or in the event of a fundamental change to the Index, such other index as the parties may agree, or such adjustments to the Index as the parties may agree (in each case with the intention of putting the parties in no better nor worse position than they would have been in had the Index not ceased to be published or the relevant fundamental change not been made) or, in the event that no such agreement is reached, as may be determined in accordance with the Dispute Resolution Procedure;
<b>"Revenue"</b>	means the projected Unavoidable Fixed Costs and Senior Debt Service Costs of Sub-hubco;
<b>"Reviewable Design Data"</b>	means the Design Data listed at Section 5 ( <i>Reviewable Design Data</i> ) of Schedule Part 6 ( <i>Construction Matters</i> );
<b>"Revised Senior Debt Termination Amount"</b>	has the meaning given in Section 6 ( <i>Definitions</i> ) of Schedule Part 17 ( <i>Compensation on</i>

	<i>Termination</i> );
<b>"Room Data Sheets"</b>	means each of the Phase 1 Room Data Sheets, Phase 2 Room Data Sheets and Phase 3 Room Data Sheets;
<b>"Scottish Futures Trust"</b>	means Scottish Futures Trust Limited (Company Number SC348382), having its registered office at 1st Floor, 11-15 Thistle Street, Edinburgh EH2 1DT;
<b>"Schedule of Programmed Maintenance"</b>	means programme referred to in Clause 23.1 to be submitted to the Authority's Representatives by Sub-hubco in accordance with Schedule Part 8 ( <i>Review Procedure</i> );
<b>"Second Party"</b>	has the meaning given in Clause 35.3;
<b>"Second Threshold Excess"</b>	means the portion, if any, of a Proposed Distribution that would, if paid to the Investors on the Relevant Distribution Date, result in the Investor Return being in excess of the Second Whole Life Threshold Return;
<b>"Second Whole Life Threshold Return"</b>	means [REDACTED]
<b>"Security Trustee"</b>	has the meaning given to it in the Funders Direct Agreement;
<b>"Senior Debt"</b>	has the meaning given in Section 6 ( <i>Definitions</i> ) of Schedule Part 17 ( <i>Compensation on Termination</i> );
<b>"Senior Debt Service Costs"</b>	means interest and debt service costs incurred in respect of the Senior Funding Agreements less: <ul style="list-style-type: none"> <li>(a) sums which are in arrears;</li> <li>(b) all sums reserved by Sub-hubco and which Sub-hubco is entitled to use to make such payments, without breaching the Senior Funding Agreements;</li> </ul>
<b>"Senior Funders"</b>	means Aviva Public Private Finance Limited (registered number 02334210) and whose registered office is at 2 Rougier Street, York, YO90 1UU;
<b>"Senior Funding Agreements"</b>	means the Building Contractor Direct Agreement, the FM Contractor Direct Agreement, the Borrower Security Documents, the HoldCo Share Pledge, the Account Bank Agreement, the Intercreditor Deed (all as defined in the Loan Agreement), the Loan Agreement, and the Funders' Direct Agreement, as at the date of this

	Agreement and as amended as permitted under Clause 4 ( <i>Project Documents</i> );
<b>"Service Contract"</b>	means the contract dated the same date as this Agreement between Sub-hubco and each Service Provider (which as at the date of this Agreement are in the Agreed Form), by which Sub-hubco will procure the performance of the relevant Services (as amended or replaced from time to time in accordance with this Agreement);
<b>"Service Event"</b>	has the meaning given in Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Service Level Specification"</b>	means the requirements of the Authorities set out in Section 1 ( <i>Service Level Specification</i> ) of Schedule Part 12 ( <i>Service Requirements</i> ) as amended from time to time in accordance with Clause 33 ( <i>Change Protocol</i> );
<b>"Service Provider"</b>	means Miller Construction (UK) Limited (trading as Asset 24) or any other person engaged by Sub-hubco from time to time as may be permitted by this Agreement to procure the provision of the Services (or any part of them);
<b>"Service Providers Collateral Agreements"</b>	means the collateral agreements among Authority A or Authority B, Sub-hubco and each Service Provider in the form set out in Section 2 of Schedule Part 9 ( <i>Collateral Agreements</i> );
<b>"Services"</b>	means each of the Authority A Services and the Authority B Services;
<b>"Services Quality Plan"</b>	means the document set out in Section 3 ( <i>Services Quality Plan</i> ) of Schedule Part 12 ( <i>Service Requirements</i> ), as amended from time to time in accordance with this Agreement;
<b>"Shareholder(s)"</b>	means any person(s) who from time to time, as permitted by this Agreement, holds share capital in Sub-hubco or hubco which persons are, as at the date of this Agreement, listed as such in Schedule Part 21 ( <i>Sub-hubco Information</i> );
<b>"Shareholders Agreements"</b>	means the agreement or agreements between the Shareholders relating to Sub-hubco, including any agreement relating to the subscription of equity (or other shareholder funding) by the Shareholders in Sub-hubco;
<b>"Sites"</b>	means each of the Authority A Site and each Authority B Site;
<b>"Site Conditions"</b>	means the condition of a Site including (but not limited to) climatic, hydrological, hydrogeological,

	ecological, environmental, geotechnical and archaeological conditions;
<b>"Site Plans"</b>	means the plans so entitled in the Agreed Form;
<b>"Snagging Matters"</b>	means minor items of outstanding work (including in relation to landscaping) which would not materially impair the relevant Authority's use and enjoyment of the relevant Facilities or the carrying out by that Authority or a relevant Community Services Provider of the Community Services or the performance of the relevant Services by Sub-hubco;
<b>"Snagging Notice"</b>	means the notice to be issued by the Independent Tester in accordance with Clause 17.14;
<b>"Specific Change in Law"</b>	means any Change in Law which specifically refers to: <ul style="list-style-type: none"> <li>(a) the provision of works or services the same as or similar to the relevant Works or the relevant Services in premises similar to the relevant Facilities; or</li> <li>(b) the holding of shares in companies whose main business is providing works or services the same as or similar to the relevant Works or the relevant Services in premises similar to the relevant Facilities;</li> </ul>
<b>"SRS Timetable"</b>	has the meaning given in Clause 23.16;
<b>"Sub-Contractor"</b>	means any third party (including the Contractor and a Services Provider) who enters into any Sub-Contract;
<b>"Sub-Contracts"</b>	means the contracts entered into by or between Sub-hubco, the Contractor and/or a Service Provider and other third parties in relation to any aspect of the Project Operations;
<b>"Sub-hubco Event of Default"</b>	has the meaning given in Clause 40 ( <i>Sub-hubco Events of Default</i> );
<b>"Sub-hubco-Party"</b>	means Sub-hubco's agents and contractors (including without limitation the Contractor and the Service Providers) and its or their sub-contractors of any tier and its or their directors, officers, employees and workmen in relation to the Project. <b>"Sub-hubco Parties"</b> shall be construed accordingly;

<b>"Sub-hubco's Commissioning"</b>	<b>Post-Completion</b>	means Sub-hubco's commissioning activities for each Phase carried out in accordance with Clause 18.1;
<b>"Sub-hubco's Commissioning"</b>	<b>Pre-Completion</b>	means Sub-hubco's commissioning activities for each Phase carried out in accordance with Clause 17 ( <i>Pre-Completion Commissioning and Completion</i> );
<b>"Sub-hubco's Proposals"</b>		means the Phase 1 Sub-hubco's Proposals, the Phase 2 Sub-hubco's Proposals and the Phase 3 Sub-hubco's Proposals as amended from time to time in accordance with Clause 33 ( <i>Change Protocol</i> );
<b>"Sub-hubco's Remedial Services"</b>		means any activities to be performed by or on behalf of Sub-hubco pursuant to its rights under Clause 23.15;
<b>"Sub-hubco's Representative"</b>		means the person appointed by Sub-hubco pursuant to Clause 8 ( <i>Representatives</i> );
<b>"Sub-Leases"</b>		means, in respect of each Site, the Sub-Lease to be entered into between Sub-hubco and the Scottish Ministers in the Agreed Form, as more particularly described therein, with such variations and/or additions as may be agreed by the relevant Authority, Sub-hubco and the Scottish Ministers from time to time;
<b>"Subordinated Debt"</b>		has the meaning given in Section 6 ( <i>Definitions</i> ) of Schedule Part 17 ( <i>Compensation on Termination</i> );
<b>"Subordinated Funder"</b>		means, in the context of the provisions of Clause 36 ( <i>IRR Sharing and Cap</i> ), any party providing Relevant Debt, and otherwise has the meaning given in Schedule Part 23 ( <i>Refinancing</i> );
<b>"Subsidiary"</b>		has the meaning given to it in section 1159 of the Companies Act 2006;
<b>"Suitable Substitute Contractor"</b>		has the meaning given in Section 6 ( <i>Definitions</i> ) of Schedule Part 17 ( <i>Compensation on Termination</i> );
<b>"Termination Date"</b>		means the date on which termination of this Agreement takes effect in accordance with its terms;
<b>"Tain Access Roadway"</b>		means that part of the Tain Retained Land comprising the access roadway in the area hatched green on Tain Plan 1 constructed to the east of the Tain Site;

<b>"Tain Drainage Pipe"</b>	means the drainage pipe shown by a yellow line on Tain Drawing 1 with its associated ducts, manholes and traps, inspection chambers and other apparatus and fittings and fixtures;
<b>"Tain Drawing 1"</b>	means the drawing marked "Tain Drawing 1" with drawing number 2533:505 forming part of the Site Plans;
<b>"Tain Drawing 2"</b>	means the drawing marked "Tain Drawing 2" with drawing number 2533:510 forming part of the Site Plans;
<b>"Tain Drawing 3"</b>	means the drawing marked "Tain Drawing 3" with drawing number 2533:511 forming part of the Site Plans;
<b>"Tain Drawing 4"</b>	means the drawing marked "Tain Drawing 4" with drawing number 2533:515 forming part of the Site Plans;
<b>"Tain Electricity Cable"</b>	means the low voltage electricity cable shown by a green line on Drawing 3 and all necessary service media associated with such cabling, including ducts, wires, poles and stays and other apparatus and fittings and fixtures;
<b>"Tain Plan 1"</b>	means the plan marked "Tain Plan 1" with drawing number 2533:500 forming part of the Site Plans;
<b>"Tain Plan 2"</b>	means the plan marked "Tain Plan 2" Ordnance Survey Mapping forming part of the Site Plans;
<b>"Tain Planning Approval"</b>	means detailed planning consent for the Facilities at Tain dated 25 June 2012 and annexed as Attachment G;
<b>"Tain Retained Land"</b>	means the area shown outlined in red on Tain Plan 2;
<b>"Tain Retained Land Surface Water Drainage Pipe"</b>	means the surface water drainage pipe shown by a blue line on Tain Drawing 1 between points B and C with its associated ducts, manholes and traps, inspection chambers and other apparatus and fittings and fixtures;
<b>"Tain Retained Land Telecommunications Cable"</b>	means the telecommunications cable shown by a red line on Tain Drawing 3 between points B and C with its associated ducts, manholes and traps, inspection chambers and other apparatus and fittings and fixtures;
<b>"Tain Retained Land Water Supply Pipe"</b>	means the water supply pipe shown by a blue line on Drawing 2 between the points B and C with its associated ducts, manholes and traps,

	inspection chambers and other apparatus and fittings and fixtures;
<b>"Tain Service Road"</b>	means the area hatched blue on Tain Plan 1;
<b>"Tain Services"</b>	has the meaning given to it in Schedule Part 5 Section 3D, paragraph 1(d);
<b>"Tain Site"</b>	means the land made available in Tain to Subhubco for the Project and outlined in red on Tain Plan 1;
<b>"Tain Stone Dyke 1"</b>	means the feature stone dyke where the Tain Access Roadway joins Craighill Terrace, Tain as shown highlighted pink on drawing number 2533:222/02 forming part of the Site Plans;
<b>"Tain Stone Dyke 2"</b>	means the wall as shown highlighted in green on drawing number 2533:222/02 forming part of the Site Plans;
<b>"Tain Street Lighting"</b>	means street lighting on the Tain Site to serve the Tain Service Road to include street light posts and lamps and associated electrical circuitry;
<b>"Tain Surface Water Drainage Pipe 1"</b>	means the surface water drainage pipe shown by a blue line on Tain Drawing 1 between points A and B with its associated ducts, manholes and traps, inspection chambers and other apparatus and fittings;
<b>"Tain Surface Water Drainage Pipe 2"</b>	means the surface water drainage pipe shown by a broken blue line through the Tain Retained Land on Tain Drawing 4 including on a temporary basis between points B and C and then any re routed permanent line in the future with its associated ducts, manholes and traps, inspection chambers and other apparatus and fittings;
<b>"Tain Surface Water Drainage Pipe 3"</b>	means the surface water drainage pipe shown by a broken blue line on Tain Drawing 1 so far as it extends from the boundary of the Tain Site to point A in the Tain Access Roadway with its associated ducts, manholes and traps, inspection chambers and other apparatus and fittings and fixtures;
<b>"Tain Telecommunications Cable"</b>	means the telecommunications cable shown by a red line on Tain Drawing 3 running northwards from Craighill Terrace, Tain to point A including ducts and wires and other apparatus and fittings and fixtures;
<b>"Tain Water Supply Pipe"</b>	means the water supply pipe shown by a blue line on Tain Drawing 2 so far as between points A and B with its associated ducts, manholes and

	traps, inspection chambers and other apparatus and fittings and fixtures;
<b>"Territory Partnering Agreement"</b>	means the Territory Partnering Agreement in relation to the hub North Territory between hub North Scotland Limited and the Participants dated 17 March 2011;
<b>"The NHS and You"</b>	means the document so-entitled and issued by the Scottish Government Health Directorate in January 2009;
<b>"Title Conditions"</b>	means title conditions set out in Section 1A, Section 2A and Section 3A of Schedule Part 5 ( <i>Land Matters</i> );
<b>"TPL Risk"</b>	means a risk which is required to be insured under the third party liability insurance policy;
<b>"Transfer Regulations"</b>	means the Transfer of Undertaking (Protection of Employment) Regulations 2006 (SI No. 246);
<b>"Unavoidable Fixed Costs"</b>	means the fixed costs incurred by Sub-hubco which first fall due for payment by Sub-hubco during the period of indemnity but excluding: <ul style="list-style-type: none"> <li>(a) costs which could have reasonably been mitigated or avoided by Sub-hubco;</li> <li>(b) payments to Sub-hubco's Associated Companies;</li> <li>(c) payments which are not entirely at arm's length;</li> <li>(d) payments to holders of equity in Sub-hubco, providers of Subordinated Debt and any other financing costs other than Senior Debt Service Costs</li> <li>(e) indirect losses suffered or allegedly suffered by any person;</li> <li>(f) fines, penalties or damages for unlawful acts, breaches of contract or other legal obligations;</li> <li>(g) payments Sub-hubco can recover under contract or in respect of which Sub-hubco has a remedy against another person in respect of the same liability;</li> <li>(h) payments to the extent that Sub-hubco</li> </ul>



	has available to it including:
	(i) reserves which Sub-hubco can draw upon without breaching the Senior Funding Agreements;
	(ii) standby or contingent facilities or funds of Senior Debt or equity which Sub-hubco is entitled to have available;
	(i) payments representing any profits of the Project (to the extent not already excluded in (e) above);
<b>"Uninsurable"</b>	means, in relation to a risk, either that:
	(a) insurance is not available to Sub-hubco in respect of the Project in the worldwide insurance market with reputable insurers of good standing in respect of that risk; or
	(b) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom;
<b>"Unprogrammed Maintenance Work"</b>	has the meaning given in Clause 23.8;
<b>"Unreasonable Act"</b>	means any act or omission which is contrary to any reasonable instruction, guidance or rules for the operation or management of the relevant Facilities;
<b>"Utilities"</b>	has the meaning given in the relevant Service Level Specification;
<b>"VAT"</b>	means value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994;
<b>"VAT Sum"</b>	has the meaning given in Clause 35 ( <i>VAT and Construction Industry Tax Deduction Scheme</i> );
<b>"Vitiating Act"</b>	has the meaning given in Endorsement 2, Section 3 ( <i>Endorsement</i> ) of Schedule Part 15 ( <i>Insurance Requirements</i> );
<b>"Warning Notice"</b>	means a notice validly served by the Authority's

	Representative on Sub-hubco under Clause 24.3 ( <i>Warning Notices</i> ), specifying that it is a Warning Notice and setting out the circumstances that have given rise to the issue thereof;
<b>"Woodside Additional Rights"</b>	means the rights set out in Section 2D ( <i>Woodside Additional Rights</i> ) of Schedule Part 5 ( <i>Land Matters</i> );
<b>"Woodside Disposition"</b>	means the disposition so entitled in the Agreed Form;
<b>"Woodside Drawing 1"</b>	means the drawing so entitled forming part of the Site Plans;
<b>"Woodside Existing Paths"</b>	means those paths that exist on the Woodside Site as at the Commencement Date;
<b>"Woodside North Boundary Wall"</b>	has the meaning given in Section 2B of Schedule Part 5 ( <i>Land Matters</i> );
<b>"Woodside Planning Approval"</b>	means detailed planning consent for the Facilities at Woodside dated 24 January 2013 and annexed as Attachment H;
<b>"Woodside Retained Property"</b>	has the same meaning as the defined term "Retained Property" in the Woodside Disposition;
<b>"Woodside Road-widening Land"</b>	means the area of land shaded light blue and lined purple on drawing number L(90)07 rev B forming part of the Site Plans;
<b>"Woodside Road-widening Works"</b>	means the road-widening works to be carried out on the Woodside Road-widening Land to widen Great Northern Road, Aberdeen including the diverting, varying or replacing (temporarily or permanently) all or any of or any part of the footpaths to be formed on the Woodside Road-widening Land and the provision of landscaping and the formation of the footpaths;
<b>"Woodside Service Media"</b>	means all pipes, cables, ducts, sewers, drains, conduits, connections and other ancillary infrastructure relative to the services of foul and surface water drainage, gas, electricity, water and telecommunications and broadband as are required to provide services for the development of the relevant Site;
<b>"Woodside Site"</b>	means the land made available in Woodside to Sub-hubco for the Project and outlined in red on drawing number L(90)07 rev B forming part of the Site Plans;
<b>"Woodside Turning Head"</b>	means the area in pink on drawing number

L(90)07 rev B forming part of the Site Plans;

**"Works"**

means the Authority A Works and the Authority B Works.

## SECTION 2

### INTERPRETATION

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

- 1 The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
- 2 Except where the context expressly requires otherwise, references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedule are references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedule to this Agreement and references to Sections, Appendices and Attachments (if any) are references to Sections, Appendices and Attachments to or contained in this Agreement.
- 3 The Schedule and Attachments (if any) to this Agreement are integral parts of this Agreement and a reference to this Agreement includes a reference to the Schedule and the Attachments (if any).
- 4 Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.
- 5 Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.
- 6 The language of this Agreement is English. All correspondence, notices, drawings, Design Data, test reports, certificates, specifications and information shall be in English. All operating and maintenance instructions, name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Agreement shall be in English.
- 7 Save where stated to the contrary, references to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments to agreements or documents) a reference to that agreement or document as amended, supplemented, substituted, novated or assigned.
- 8 References to any Law are to be construed as references to that Law as from time to time amended or to any Law from time to time replacing, extending, consolidating or amending the same provided that the provisions of this paragraph shall be without prejudice to the operation of Clause 32 (*Changes in Law*) and Schedule Part 16 (*Change Protocol*) which shall operate in relation to a Change in Law on the basis set out in this Agreement.
- 9 Without prejudice to Clause 57.1, references to a public organisation (other than an Authority) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the relevant functions and relevant responsibilities of such public organisation.
- 10 Without prejudice to Clause 57.1, references to other persons (other than an Authority and Sub-hubco) shall include their successors and assignees.

- 11 References to a deliberate act or omission of an Authority or any Authority Party shall be construed having regard to the interactive nature of the activities of an Authority and of Sub-hubco and the expression shall exclude acts or omissions which were within the contemplation of the parties or which were otherwise provided for in this Agreement.
- 12 The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
- 13 Reference to "parties" means the parties to this Agreement and references to "a party" mean one of the parties to this Agreement.
- 14 In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- 15 All of Sub-hubco's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Authority and to be performed at Sub-hubco's own cost and expense.
- 16 Unless expressly stated otherwise, references to amounts or sums expressed to be "index linked" are references to amounts or sums in 1 December 2012 ("**Base Date**") prices which require to be adjusted whenever the provision containing the amount or sum is given effect in accordance with this Agreement to reflect the effects of inflation after that date. The adjustment shall be measured by changes in the relevant index published for that Contract Year as calculated in accordance with the following formula:
- $$\text{Amount or sum in 1 December 2012 prices} \times \frac{RPI_d}{RPI_0}$$
- Where  $RPI_d$  is the value of the Retail Prices Index published or determined with respect to the month of December most recently preceding the date when the provision in question is to be given effect and  $RPI_0$  is the value of the Retail Prices Index in respect of December 2012.
- 17 Reference to a document being in the Agreed Form is a reference to the form of the relevant document (or, where appropriate, the form of relevant document on disc) agreed between the parties and for the purpose of identification initialled by each of them or on their behalf.
- 18 The operation of the Housing Grants, Construction and Regeneration Act 1996 upon any Project Document shall not affect the rights or obligations of the parties under this Agreement.
- 19 Words in parenthesis and italics appearing after a Clause reference or a reference to a Schedule Part are inserted for ease of reference only. If there is any discrepancy between the Clause reference and the words appearing in parenthesis and italics after the Clause reference, the Clause reference shall prevail.
- 20 Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days after a stipulated date or event, or "no later than" or "by" a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event, the latest time for performance shall be 5pm on the last Business Day for performance of the obligations concerned.

- 21 Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days before a stipulated date or event, or "no later than" or "by" a stipulated date or event which is a prescribed number of Business Days before a stipulated date or event, the latest time for performance shall be 5pm on the last Business Day for performance of the obligations concerned.
- 22 Where in this Agreement a term defined in Schedule Part 1 (Definitions) (a "**Defined Term**") is prefaced by the term "relevant", such terms taken together shall refer to the Defined Term insofar as it relates to the relevant Authority or Phase as applicable. By way of example references in this Agreement to:
- 22.1.1 the "relevant Site" shall mean:
- 22.1.1.1 in the case of Authority A, the Authority A Site; and
- 22.1.1.2 in the case of Authority B, an Authority B Site;
- 22.1.2 the "relevant Facilities" shall mean:
- 22.1.2.1 in the case of Authority A, the Authority A Facilities; and
- 22.1.2.2 in the case of Authority B, the Authority B Facilities; and
- 22.1.3 the "relevant Proportion" shall mean:
- 22.1.3.1 in the case of Authority A, the Authority A Proportion; and
- 22.1.3.2 in the case of Authority B, the Authority B Proportion.

## SCHEDULE PART 2

### COMPLETION DOCUMENTS

#### SECTION 1

##### DOCUMENTS TO BE DELIVERED BY SUB-HUBCO

Unless an original document is specifically requested, a copy (certified by an officer of Sub-hubco as being a true copy) of each of the following documents is to be delivered by Sub-hubco to the Authority in accordance with Clause 2.1 (*Execution and Delivery of Documents*) of this Agreement:

- 1 Not used.
- 2 The Initial Funding Agreements and certification from Sub-hubco that (1) the Initial Funding Agreements have become unconditional (other than any condition relating to the conditionality of this Agreement) and (2) that all conditions to the availability of funds to Sub-hubco under the Initial Funding Agreements have been satisfied or waived, accompanied by evidence of the same.
- 3 The Construction Contracts, the Services Contract and the Performance Guarantees, executed by the parties to such agreements.
- 4 An original of the Funders' Direct Agreement, the Independent Tester Contract, the Insurance Proceeds Account Agreement, the Collateral Agreements and the brokers letters of undertaking relating to the insurances referred to in paragraph 10 below in the Agreed Form, executed by the parties to such agreements (other than the Authority).
- 5 Extracts from the minutes of the meeting of the board of directors (certified as true and accurate) of each of Sub-hubco, hubco, the Contractor, the Service Provider, and the guarantors under the Performance Guarantees, at which resolutions were passed approving the execution, delivery and performance of each relevant document to which such person is expressed to be a party and in each case authorising a named person or persons to execute and deliver each such document and any other documents to be delivered by it pursuant to it. For the avoidance of doubt, this requirement shall not extend to the Senior Funders or the Account Bank.
- 6 The director's certificate addressed to the Senior Funders pursuant to the Loan Agreement.
- 7 An extract of the register of members of Sub-hubco.
- 8 Sub-hubco's Certificate of Incorporation and of any Certificate of Incorporation on Change of Name.
- 9 The Articles of Association of Sub-hubco.
- 10 The insurance broker's letter of undertaking, evidence of the insurances required in accordance with Clause 53 (*Insurances*) having been taken out by Sub-hubco and that the policies comply with the requirements of this Agreement, and an estimate by the insurance broker of the premiums for the Operational Insurances for the first year of the Operational Term.
- 11 Two computer disk copies of the Financial Models audited by PKF (UK) LLP.

- 12 Evidence that an election has been made for Sub-hubco to act as "client" for the Project for the purposes of the CDM Regulations.
- 13 Evidence that the Insurance Proceeds Account has been opened.
- 14 An original duly executed copy of this Agreement.



## **SECTION 2**

### **DOCUMENTS TO BE DELIVERED BY THE AUTHORITY**

The Authority shall deliver to Sub-hubco the following documents:

- 1 An original copy of the Funders' Direct Agreement, the Collateral Agreements, the Independent Tester Contract, the Insurance Proceeds Account Agreement and this Agreement, duly executed by the Authority.
- 2 A certified copy of the resolution of the Authority approving the execution, delivery and performance of the documents referred to in paragraph 1 above and in each case authorising a named person or persons to execute and deliver each such document and any documents to be delivered by it pursuant thereto.
- 3 A certificate of the relevant officer of the Authority setting out the names and specimen signatures of the person or persons named in the resolution of the Authority referred to in paragraph 2 above.
- 4 A certificate of the Scottish Government issued pursuant to the National Health Service (Private Finance) Act 1997.
- 5 A letter from the Scottish Government confirming approval of the Full Business Case in respect of the Project.
- 6 A certified copy of the board resolution of each Authority confirming approval of the Authority's Full Business Case in respect of the Project.
- 7 A certified copy of each Authority's Standing Orders.
- 8 A certified copy of each Authority's Scheme of Delegation – Schedule of Reserved Decisions.
- 9 A certified copy of each Authority's Standing Financial Instructions.

**SCHEDULE PART 3**

**KEY WORKS PERSONNEL**

**Phase 1**

**[REDACTED]**

**SCHEDULE PART 4**  
**FUNDERS' DIRECT AGREEMENT**

**[REDACTED]**

## **SCHEDULE PART 5**

### **LAND MATTERS**

#### **PHASE 1**

##### **SECTION 1A (TAIN TITLE CONDITIONS)**

1. All conditions contained in any wayleaves, deeds of servitude or other similar agreements entered into pursuant to Clause 9.25 of this Agreement.
2. The obligation to maintain the part of the Tain Stone Dyke 1 and Tain Stone Dyke 2 adjacent to or forming part of the Tain Site.

##### **SECTION 1B (TAIN RESERVED RIGHTS)**

1. The following servitudes are imposed on the Tain Site in favour of the Tain Retained Land, subject to the conditions noted at 2 and 3 below:-
  - 1.1 a heritable and irredeemable servitude right of wayleave and tolerance over the Tain Site for the Tain Drainage Pipe, the Tain Retained Land Surface Water Drainage Pipe, the Tain Retained Land Telecommunications Cable and the Tain Retained Land Water Supply Pipe TOGETHER WITH all necessary rights of pedestrian and vehicular access and egress to and from the Tain Drainage Pipe, Tain Retained Land Surface Water Drainage Pipe, the Tain Retained Land Telecommunications Cable and the Tain Retained Land Water Supply Pipe over and across the Tain Site for all necessary purposes, declaring that such rights of access and egress shall, without prejudice to the foregoing provisions, include rights for the purposes of using, inspecting, cleansing, treating, maintaining, repairing, removing, renewing or replacing, upgrading (but not increasing the capacity of) the Tain Drainage Pipe, Tain Retained Land Surface Water Drainage Pipe, the Tain Retained Land Telecommunications Cable and the Tain Retained Land Water Supply Pipe from time to time;
  - 1.2 heritable and irredeemable servitude rights of wayleave and tolerance to (i) connect into, use and discharge foul water through the Tain Drainage Pipe, (ii) connect into, use and discharge surface water through the Tain Retained Land Surface Water Drainage Pipe, (iii) use and connect into the Tain Retained Land Water Supply Pipe and (iv) use and connect into the Tain Retained Land Telecommunications Cable;
  - 1.3 all necessary rights of pedestrian and vehicular access and egress to and from, over and across the Tain Site on all necessary occasions for all necessary purposes in connection with the erection, maintenance and where necessary renewal by the proprietors of the Tain Retained Land of boundary enclosures on the boundaries of the Tain Retained Land; and
  - 1.4 a non-exclusive heritable and irredeemable servitude right of access to and egress from the Tain Retained Land over the Tain Service Road for pedestrian and vehicular traffic of all kinds including construction traffic.
2. The proprietors of the Tain Retained Land may exercise the servitude rights in 1.1 to 1.3 above subject always to:-
  - 2.1 the proprietors of the Tain Retained Land shall make good and restore on demand all damage caused to the Tain Site as a result of the exercise of such rights at the sole

expense of the proprietors of the Tain Retained Land and that to the reasonable satisfaction of the proprietors of the Tain Site;

- 2.2 the proprietors of the Tain Retained Land shall be responsible at their sole cost for obtaining and shall thereafter be obliged to comply with all necessary consents and permissions and all statutory, local authority or other regulatory requirements applicable to the Tain Drainage Pipe, the Tain Retained Land Surface Water Drainage Pipe, the Tain Retained Land Telecommunications Cable and the Tain Retained Land Water Supply Pipe;
- 2.3 such rights being exercised only after intimation in writing to Authority A and Sub-hubco of the intention to exercise such rights being not less than 14 days notice and thereafter intimation of completion of such works;
- 2.4 the Tain Drainage Pipe, the Tain Retained Land Surface Water Drainage Pipe, the Tain Retained Land Telecommunications Cable and the Tain Retained Land Water Supply Pipe shall be laid and thereafter maintained, repaired or where necessary renewed in accordance with the specifications and standards of the relevant local authority or public utility or service undertaker concerned;
- 2.5 the points of connection to the Tain Drainage Pipe, the Tain Retained Land Surface Water Drainage Pipe, the Tain Retained Land Telecommunications Cable and the Tain Retained Land Water Supply Pipe being at locations approved by the Authority A in consultant with Sub-hubco. in writing where such connections are proposed within the Tain Site;
- 2.6 such rights being exercised at all times so as to cause as little disruption as is reasonably practicable and causing the minimum practicable inconvenience to the proprietors of the Tain Site and the occupiers thereof and in the case of rights of access and egress not to impede the flow of traffic;
- 2.7 such rights of access and egress shall not include nor imply any rights of car parking;
- 2.8 the rights being exercised at the sole cost of those exercising the rights and without recourse to the proprietors of the Tain Site;
- 2.9 the access and egress rights being exercisable only over and across routes within the Tain Site designated by the proprietors of the Tain Site;
- 2.10 in the case of access for construction traffic, be exercised only to the extent necessary and in the least burdensome manner reasonably practicable and subject to the obligation incumbent upon the party exercising such right to repair and make good any damage caused thereby;
- 2.11 the rights being exercised in such a way to respect and take into account any road and/or services installation and/or maintenance or upgrading or other works and operations which may be being undertaken by the proprietors of the Tain Site or the occupiers thereof from time to time; and
- 2.12 the proprietors of the Tain Retained Land shall indemnify and keep indemnified the proprietors of the Tain Site against all or any liability which may arise in respect of any loss, injury to, or death of any person, or damage to any property arising or which may arise directly or indirectly from the exercise of such rights or from any failure of the proprietors of the Tain Retained Land in the implementation or observance of the terms and conditions on the proprietors of the Tain Retained Land under this paragraph 2 and from all costs incurred by the proprietors of the Tain Site in respect of any such liability.

3. The proprietors of the Tain Retained Land may exercise the servitude rights in 1.4 above subject always to:-
  - 3.1 The proprietors of the Tain Retained Land shall make good and restore on demand all damage caused to the Tain Service Road as a result of the exercise of such rights at the sole expense of the proprietors of the Tain Retained Land and that to the reasonable satisfaction of the proprietors of the Tain Service Road;
  - 3.2 the rights being exercised at all times so as to cause the minimum disturbance, nuisance and annoyance and cause the minimum inconvenience to the proprietors of the Tain Service Road and their tenants or occupiers of the Tain Service Road and all other adjoining or neighbouring proprietors, tenants or occupiers and the exercise of such rights shall not impede the flow of traffic on the Tain Service Road;
  - 3.3 in the case of access for construction traffic, be exercised only to the extent necessary and in the least burdensome manner reasonably practicable and subject to the obligation incumbent upon the party exercising such right to repair and make good any damage caused thereby;
  - 3.4 the rights being exercised in such a way to respect and take into account any road and/or services installation and/or maintenance or upgrading or other works and operations which may be being undertaken by the proprietors of the Tain Service Road or their tenants or occupiers of the Tain Service Road from time to time; and
  - 3.5 the proprietors of the Tain Retained Land shall indemnify and keep indemnified the proprietors of the Tain Service Road against all or any liability which may arise in respect of any loss, injury to, or death of any person, or damage to any property arising or which may arise directly or indirectly in consequence of the exercise of such rights and/or from any failure of the proprietors of the Tain Retained Land in the implementation or observance of the terms and conditions on the proprietors of the Tain Retained Land under this paragraph 3 and from all costs incurred by the proprietors of the Tain Service Road in respect of any such liability.
4. Rights for all third parties (or their successors and assignees) having equipment, apparatus, structures, cables or service media (including public water, sewerage, drainage, Surface Water Drainage Pipe 3, electricity, gas, telephone or telecommunications) within the Tain Site as at the Commencement Date (excluding the pipes and cables referred to in paragraph 1.1 of this Section 1B (*Tain Reserved Rights*)), or which is to be installed and used in connection with the carrying out of the Project Operations to: (i) access the Tain Site for purposes of inspecting, removing, maintaining, operating, replacing, enlarging, connecting or renewing such equipment, apparatus, structures, cables or service media and (ii) use, inspect, remove, maintain, operate, replace, repair, enlarge, connect or renew such equipment, structures, cables or service media.

#### **SECTION 1C (TAIN ANCILLARY RIGHTS)**

##### **NO ANCILLARY RIGHTS**

#### **SECTION 1D (TAIN ADDITIONAL RIGHTS)**

1. Subject always to paragraph 2 below:
  - (a) an unrestricted heritable and irredeemable servitude right, so far as is necessary, of access over the Tain Retained Land to install, inspect,

clean, treat, maintain, repair and if necessary renew or replace any part of the Tain Street Lighting and the Tain Service Road;

- (b) all necessary rights of pedestrian and vehicular access and egress to and from, over and across the Tain Retained Land on all necessary occasions for all necessary purposes in connection with the erection, maintenance and where necessary renewal by Sub-hubco of boundary enclosures on the boundaries of the Tain Site;
- (c) an unrestricted, non-exclusive heritable and irredeemable servitude right of access to and egress from the Tain Site over the Tain Access Roadway for pedestrian and vehicular traffic of all kinds including construction traffic at all times;
- (d) unrestricted heritable and irredeemable servitude rights of wayleave and tolerance over the Tain Retained Land for each of:-
  - (i) the Tain Surface Water Drainage Pipe 1 through and under the Tain Retained Land;
  - (ii) the Tain Surface Water Drainage Pipe 2 through and under the Tain Retained Land;
  - (iii) the Tain Water Supply Pipe through and under the Tain Retained Land;
  - (iv) the Tain Electricity Cable through and under the Tain Retained Land; and
  - (v) the Tain Telecommunications Cable through and under the Tain Retained Land,

as the Tain Surface Water Drainage Pipe 1, the Tain Surface Water Drainage Pipe 2, the Tain Water Supply Pipe, the Tain Electricity Cable and the Tain Telecommunications Cable hereinbefore mentioned and the Tain Surface Water Drainage Pipe 3 are hereinafter referred to collectively as "the Tain Services";

TOGETHER WITH all necessary rights of pedestrian and vehicular access and egress to and from the Tain Services over and across the Tain Retained Land declaring that such rights of access and egress shall, without prejudice to the foregoing provisions, include as the case may be rights for the purposes of installing, connecting into, using, inspecting, cleansing, treating, maintaining, repairing, removing, renewing or replacing, upgrading and increasing the capacity of the Tain Services from time to time.

- (e) unrestricted heritable and irredeemable servitude rights of wayleave and tolerance to (i) connect into, use and discharge foul water through the Tain Drainage Pipe; (ii) connect into, use and discharge surface water through each of the Tain Surface Water Drainage Pipe 1, the Tain Surface Water Drainage Pipe 2 and the Tain Surface Water Drainage Pipe 3; (iii) use and connect into the Tain Water Supply Pipe; (iv) use the Tain Telecommunications Cable and (v) use the Tain Electricity Cable.

- (f) A servitude right to form a section of footpavement off Craighill Terrace, Tain on that part of the Tain Retained Land shown hatched in black and shaded green on Tain Plan 1.

2. The exercise of the servitude rights in paragraph 1 above, is subject always to:-
- 2.1 the requirement to make good and restore as soon as reasonably practicable any damage caused to the Tain Retained Land as a result of the exercise of such rights at the sole expense of Sub-hubco and that to the reasonable satisfaction of the proprietors of the affected part of the Tain Retained Land;
  - 2.2 Sub-hubco shall be responsible at their sole cost for obtaining and shall thereafter be obliged to comply with all necessary consents and permissions and all statutory, local authority or other regulatory requirements applicable to any such connections to the Tain Services;
  - 2.3 such rights being exercised only after intimation in writing to the proprietors of the affected part of the Tain Retained Land of the intention to exercise such rights being not less than 14 days notice and thereafter intimation in writing of completion of such works;
  - 2.4 any of the service pipes or cables serving the Tain Site and laid within the Tain Retained Land, shall be laid and thereafter maintained, repaired or where necessary renewed in accordance with the specifications and standards of the relevant local authority or public utility or service undertaker concerned;
  - 2.5 such rights being exercised at all times so as to cause as little disruption as is reasonably practicable and causing the minimum practicable inconvenience to the proprietors of the affected part of the Tain Retained Land and the occupiers thereof and in the case of rights of access and egress not impede the flow of traffic;
  - 2.6 such rights of access and egress shall not include nor imply any rights of car parking;
  - 2.7 the rights being exercised at the sole cost of those exercising the rights and without recourse to the proprietors of the affected part of the Tain Retained Land;
  - 2.8 the access and egress rights being exercisable only over and across routes within the affected part of the Tain Retained Land designated by the proprietors of the affected part of the Tain Retained Land;
  - 2.9 in the case of access for construction traffic, be exercised only to the extent necessary and in the least burdensome manner reasonably practicable and subject to the obligation incumbent upon the party exercising such right to repair and make good any damage caused thereby;
  - 2.10 the rights being exercised in such a way to respect and take into account any road and/or services installation and/or maintenance or upgrading or other works and operations which may be being undertaken by the proprietors of the affected part of the Tain Retained Land or occupiers thereof from time to time; and
  - 2.11 Sub-hubco shall indemnify and keep indemnified the proprietors of the affected part of the Tain Retained Land against all or any liability which may arise in respect of any loss, injury to, or death of any person, or damage to any property arising or which may arise directly or indirectly from the exercise of such rights or from any failure of Sub-hubco in the implementation or observance of the terms and conditions on Sub-hubco under this



paragraph 2 and from all costs incurred by the proprietors of the affected part of the Tain Retained Land in respect of any such liability.

## **PHASE 2**

### **SECTION 2A (WOODSIDE TITLE CONDITIONS)**

1. The obligation to maintain the footpaths constructed by or on behalf of Sub-hubco within the Woodside Road-widening Land until the earlier of adoption by the local authority or the exercise of the Reserved Right under paragraph 2 of Section 2B of this Schedule Part 5.
2. The obligation to exercise the Woodside Additional Rights:
  - 2.1 at reasonable times and in a reasonable manner; and
  - 2.2 so as to keep any disturbance and interference to a minimum insofar as reasonably practicable.

The obligation to make good all physical damage caused to the Woodside Retained Property, the Woodside North Boundary Wall and/or the Woodside Road-widening Land in carrying out the Works and/or, in exercising the Woodside Additional Rights as soon as reasonably practicable.
3. All conditions contained in any wayleaves, deeds of servitude or other similar agreements entered into pursuant to Clause 9.25 of this Agreement.

### **SECTION 2B (WOODSIDE RESERVED RIGHTS)**

1. There is reserved to Aberdeen City Council rights of access as may be reasonably necessary for the purposes of inspecting, repairing, upgrading, replacing and renewing the wall to the north of the Woodside Site (the "Woodside North Boundary Wall") to the extent that the same cannot be reasonably carried out from within the Woodside Retained Property, provided that such rights are to be exercised: (i) at reasonable times and in a reasonable manner; (ii) so as to keep any disturbance and interference to a minimum insofar as reasonably practicable; and (iii) with an obligation to make good all physical damage caused to the Woodside Site as soon as reasonably practicable.
2. The right of Aberdeen City Council to use the Woodside Road-widening Land for the purposes of the Road-widening Works, thereby diverting, varying or replacing (temporarily or permanently) all or any of or any part of the footpaths to be formed on the Woodside Road-widening Land, provided that:
  - 2.1 alternative servitude rights of access are provided over the Woodside Road-widening Land;
  - 2.2 the amenity benefiting the Woodside Site shall not be lessened or adversely affected in any way;
  - 2.3 Aberdeen City Council shall make good make good new ends of the footpaths within the Woodside Site where the same join any newly formed footpath within the Woodside Road-widening Land, all to the Authority's reasonable satisfaction;
  - 2.4 the works will cause as little inconvenience and disturbance to Sub-hubco as is reasonably practicable;

- 2.5 Sub-hubco's consent will be required to any proposed diversion, re-routing or relocation of any Service Media within the Woodside Road-widening Land (including the substation) which services the Woodside Site and Aberdeen City Council will be responsible for ensuring continuity of service to the Woodside Site and for all costs relating thereto; and
- 2.6 all damage thereby caused is to be made good by Aberdeen City Council.
3. Rights for all third parties (or their successors and assignees) having equipment, apparatus, structures, cables or service media (including public water, sewerage, drainage, electricity, gas, telephone or telecommunications) within the Woodside Site as at the Commencement Date; or which is to be installed and used in connection with the carrying out of the Project Operations to: (i) access the Woodside Site for purposes of inspecting, removing, maintaining, operating, replacing, enlarging, connecting or renewing such equipment, apparatus, structures, cables or service media and (ii) use, inspect, remove, maintain, operate, replace, repair, enlarge, connect or renew such equipment, structures, cables or service media.

### **SECTION 2C (WOODSIDE ANCILLARY RIGHTS)**

#### **NO ANCILLARY RIGHTS**

### **SECTION 2D (WOODSIDE ADDITIONAL RIGHTS)**

1. The right:
- 1.1 to carry out that part of the Works which requires to be carried out on the Woodside Road-widening Land, including the provision of landscaping and the formation of footpaths;
- 1.2 (subject always to Clause 12 and Clause 33), to vary the routes of the footpaths and the landscaping requirements, referred to in paragraph 1.1 of this Section 2D, subject to intimating any changes to Aberdeen City Council and the Authority; and
- 1.3 once the footpaths referred to in paragraph 1.1 and 1.2 of this Section 2D have been formed, the right of access for pedestrian and cycle traffic over the same until the exercise of the rights by Aberdeen City Council provided at Section 2B paragraph 2 above.
2. The right:
- 2.1 to connect any roads, footpaths and service areas to be formed by or on behalf of Sub-hubco within the Woodside Site or the Woodside Road-widening Land with Marquis Road, Aberdeen and Great Northern Road, Aberdeen including the right to carry out all necessary works to the adjoining pavements, kerbs and the turning head in relation thereto in order to form any new entrances to the Woodside Site and Woodside Road-widening Land;
- 2.2 to carry out all necessary works to the Woodside North Boundary Wall in order to form a new pedestrian entrance at the area shown in a dotted black line on plan L(90)07 rev B forming part of the Site Plans and thereafter a right of pedestrian access to the area shown green on Woodside Drawing 1;
- 2.3 access to the Retained Property as necessary to carry out the Works and to maintain the Woodside Road-widening Land;
- 2.4 of wayleave and tolerance for laying down, constructing, inspecting, maintaining, repairing, using, renewing, enlarging Service Media over, under or through the Woodside Retained Property along such routes to be agreed with the Authority and Aberdeen City Council

including the right to 2.5 lead services to the sub-station shown in a dark grey box in the Woodside Road-widening Land on plan L(90)07 rev B forming part of the Site Plans together with all necessary rights of access for the purposes of the foregoing, subject to paragraph 3 of this Section 2D below;

- 2.5 to divert, vary or connect into such Service Media as exist or are installed in the Woodside Retained Property;
- 2.6 to access over such parts of the Woodside Retained Property as may be reasonably necessary for the purpose of inspecting, cleaning, repairing, upgrading, replacing and renewing the Woodside Site to the extent that the same cannot be reasonably carried out from within the Woodside Site.
3. In the event of any variation to the routes of the footpaths or once the routes of the Service Media, on the Woodside Road-widening Land and/or the Retained Property, are known, the right to require (acting reasonably) the Authority to request Aberdeen City Council or persons deriving title from them to enter into a deed of variation of the servitude rights contained in paragraph 1 and 2 of this Section 2D above in order to record the actual routes of the footpaths and the Service Media.

### **PHASE 3**

#### **SECTION 3A (FORRES TITLE CONDITIONS)**

- 1 Sub-hubco shall perform, be liable for and observe the following conditions contained within Section D (Burden Section) of the Forres Land Certificate but only so far as applicable to the Forres Site:
  - 1.1 the burdens set out in Entry 3, Part II, conditions 1 (other than obligations to intimate to the Council), 2, 4 (but only insofar as Sub-hubco shall have the obligation to not and to procure that Sub-hubco Parties do not park on the Access Strip (as defined in the Forres Land Certificate) and 5;
  - 1.2 the burdens set out in Entry 3, Part IV (except condition 5),

provided that nothing in this paragraph 1 shall require Sub-hubco to construct any road outside the Forres Site which is not required pursuant to the Authority's Construction Requirements.
- 2 All conditions contained in any wayleaves, deeds of servitude or other similar agreements entered into pursuant to Clause 9.25 of this Agreement.
- 3 All rights of wayleave and tolerance for the electricity cables shown on the SSE Plan and any associated service media within the Forres Site held by SSE or such other electricity supplier through statutory powers or otherwise and also (i) for access over the Forres Site for purposes of inspecting, removing, maintaining, operating, replacing, enlarging, connection or renewing such cables and any associated service media and (ii) to use, inspect, remove, maintain, operate, replace, repair, enlarge, connect or renew the same.
- 4 All rights of wayleave and tolerance for the sewer pipe shown on the Scottish Water Plan and any associated service media within the Forres Site held by Scottish Water or such other authority through statutory powers or otherwise and also (i) for access over the Forres Site for purposes of inspecting, removing, maintaining, operating, replacing, enlarging, connection or renewing such pipe and any associated service media and (ii) to use, inspect, remove, maintain, operate, replace, repair, enlarge, connect or renew the same.

### **SECTION 3B (FORRES RESERVED RIGHTS)**

- 1 The servitudes contained within Section D (Burdens Section) of the Forres Land Certificate, Entry 3, Part III, but only so far as applicable to the Forres Site and subject to Part VI conditions 2, 5 and 7 and Part VIII (excluding condition 1).
- 2 The right of the Scottish Ministers to grant consent and servitude rights of access and egress as described in condition 5 of Part IV of Entry 3 in Section D (Burdens Section) of the Forres Land Certificate, subject to compliance by Authority B with condition 7 of Part VIII of Entry 3 in Section D (Burdens Section) of the Forres Land Certificate.
- 3 The rights of access of the Moray Council in terms of the Forres Licence for Works subject to the conditions therein contained.
- 4 Rights for all third parties (or their successors and assignees) having equipment, apparatus, structures, cables or service media (including public water, sewerage, drainage, electricity, gas, telephone or telecommunications) within the Forres Site as at the Commencement Date; or which is to be installed and used in connection with the carrying out of the Project Operations to: (i) access the Forres Site for purposes of inspecting, removing, maintaining, operating, replacing, enlarging, connecting or renewing such equipment, apparatus, structures, cables or service media and (ii) use, inspect, remove, maintain, operate, replace, repair, enlarge, connect or renew such equipment, structures, cables or service media.

### **SECTION 3C (FORRES ANCILLARY RIGHTS)**

NO ANCILLARY RIGHTS

### **SECTION 3D (FORRES ADDITIONAL RIGHTS)**

- 1 A right of access to Forres Area 3 and Forres Area 2 and adjacent land to carry out the Forres Football Pitch Works, subject to the conditions set out in the Forres Licence for Works and the Reserved Right under paragraph 3 of Section 3B of this Schedule Part 5.
- 2 The burdens set out in Entry 3, Part VI (excluding conditions 2, 5, 7 and 12).
- 3 The servitudes set out in Entry 3, Part VII.
- 4 The burdens set out in Entry 3, Part VIII (excluding condition 7).

## SECTION 4

### AUTHORITY A PROPERTY ACTIONS

1. Save to the extent agreed to the contrary or instructed pursuant to Schedule Part 16 (*Change Protocol*), Authority A shall procure that a sub-station with not less than 1000kva gross capacity and 170kva capacity available for the Authority A Facility is installed at the location shown for a proposed sub-station on Tain Drawing 3 and available for Sub-hubco to apply to connect into, by 5th August 2013 provided always that Sub-hubco has made payment of the sum of £9,749.03 (plus VAT) as its contribution to the costs payable in respect of the installation of such substation, when called upon to do so.
2. To carry out its obligations under paragraph 9.4.1 of Sub-section C of the Authority's Construction Requirements so as to procure completion of the relevant roadworks which are the Authority's responsibility no later than 30 June 2013.

Authority A shall procure that Sub-hubco, the Contractor and the Service Provider shall have the opportunity to inspect the relevant roadworks before their completion is certified and to make representations on the condition of such roadworks to the Authority's supervising engineer prior to such certification being made (and Authority A shall put forward any reasonable representations made by Sub-hubco or the Contractor on Sub-hubco's behalf as regards the condition of such roadworks, to the supervising engineer as if they were the Authority's representations).

Authority A shall be responsible for procuring remediation of defects in the roadworks procured pursuant to this paragraph 2 caused by its failure to comply with the requirements set out in para 9.4.1 of Sub-section C of the Authority's Construction Requirements, to the extent such defects are notified to Authority A by Sub-hubco within 50 weeks of certification of their completion. In the event that Authority A fails to procure the remediation of any such defects so notified by Sub-hubco within a reasonable period of time after notification, Sub-hubco shall, following service of a notice advising of its intention so to do, be entitled to procure the remediation of the same to the standards required by this Agreement and Authority A shall reimburse Sub-hubco for all costs properly and reasonably incurred by Sub-hubco in connection with such remediation.

**SCHEDULE PART 6**  
**CONSTRUCTION MATTERS**  
**SECTION 1**  
**PLANNING/CONSENTS**  
**NOT USED**

## SECTION 2

### SAFETY DURING CONSTRUCTION

- 1 In this Section 2 (*Safety During Construction*) of Schedule Part 6 (*Construction Matters*) and wherever used elsewhere in this Agreement:
  - 1.1 "CDM Regulations" means the Construction (Design and Management) Regulations 2007 (and "CDM Regulation" shall be construed accordingly); and
  - 1.2 "the client", "the CDM Co-ordinator" and "the Executive" shall have the same meanings as are ascribed to them in the CDM Regulations.
- 2 In so far as not already done, within 10 (ten) Business Days of the date of execution of this Agreement, Sub-hubco shall make and serve on the relevant Authority a declaration pursuant to and in the form (if any) required by CDM Regulation 8 that Sub-hubco will act as the client in relation to the relevant Works for all the purposes of the CDM Regulations. Notwithstanding the election made by Sub-hubco in relation to CDM Regulation 8, the relevant Authority will comply with its remaining obligations as set out in CDM Regulation 8. During the Project Term, Sub-hubco shall not, and shall not seek to, withdraw, terminate or in any manner derogate from its declaration that it will act as, and its acceptance of its responsibilities as, the client in relation to the relevant Works for all the purposes of the CDM Regulations. The relevant Authority will endorse its consent, in writing, to such election on the said election and return it to Sub-hubco within ten (10) Business Days of receipt.
- 3 Sub-hubco warrants that it has the competence, resources and capacity to, and shall, observe, perform and discharge or shall procure the observance, performance and discharge of:
  - 3.1 all the obligations, requirements and duties of the client arising under the CDM Regulations in connection with the relevant Works and, where necessary, the provision of the relevant Services; and
  - 3.2 all obligations incumbent on the client under any Code of Practice for the time being approved by the Health and Safety Commission pursuant to the Health and Safety at Work etc Act 1974 issued in connection with the CDM Regulations.
- 4 Sub-hubco shall provide to the relevant Authority's Representative:
  - 4.1 in a substantially complete form on the relevant Phase Actual Completion Date; and
  - 4.2 in final form within 5 (five) Business Days of the relevant Phase Actual Completion Date,

one electronic copy (on computer disk, tape or other format) of each and every health and safety file and construction phase plan prepared by the CDM Co-ordinator pursuant to the CDM Regulations in relation to the relevant Works and the relevant Services and electronic or paper copies of every amendment or update made to such file during the Project Term.

**SECTION 3**

**AUTHORITY'S CONSTRUCTION REQUIREMENTS**

The Authority's Construction Requirements are the Authority's Construction Requirements in the Agreed Form



**SECTION 4A**

**PHASE 1 SUB-HUBCO'S PROPOSALS**

The Phase 1 Sub-hubco's Proposals are the Phase 1 Sub-hubco's Proposals in the Agreed Form

**SECTION 4B**

**PHASE 2 SUB-HUBCO'S PROPOSALS**

The Phase 2 Sub-hubco's Proposals are the Phase 2 Sub-hubco's Proposals in the Agreed Form

**SECTION 4C**

**PHASE 3 SUB-HUBCO'S PROPOSALS**

The Phase 3 Sub-hubco's Proposals are the Phase 3 Sub-hubco's Proposals in the Agreed Form

**SECTION 5**

**REVIEWABLE DESIGN DATA**

The Reviewable Design Data are the Reviewable Design Data in the Agreed Form

**SECTION 6A**

**PHASE 1 ROOM DATA SHEETS**

The Phase 1 Room Data Sheets are the Phase 1 Room Data Sheets in the Agreed Form

**SECTION 6B**

**PHASE 2 ROOM DATA SHEETS**

The Phase 2 Room Data Sheets are the Phase 2 Room Data Sheets in the Agreed Form

**SECTION 6C**

**PHASE 3 ROOM DATA SHEETS**

The Phase 3 Room Data Sheets are the Phase 3 Room Data Sheets in the Agreed Form

## **SECTION 7**

### **THERMAL AND ENERGY EFFICIENCY TESTING PROCEDURE**

The Thermal and Energy Efficiency Testing Procedure is the Thermal and Energy Efficiency Testing Procedure in the Agreed Form



**SECTION 8**  
**NOT USED**

## **SECTION 9**

### **COMMENTS/QUALIFICATIONS IN RELATION TO OPERATIONAL FUNCTIONALITY**

The Comments/Qualifications in relation to Operational Functionality are the Comments/Qualifications in relation to Operational Functionality in the Agreed Form

**SCHEDULE PART 7**  
**THE PROGRAMMES**

**SECTION 1**

**PHASE 1 PROGRAMME**

The Phase 1 Programme is the Phase 1 Programme in the Agreed Form

**SECTION 2**

**PHASE 2 PROGRAMME**

The Phase 2 Programme is the Phase 2 Programme in the Agreed Form

### **SECTION 3**

#### **PHASE 3 PROGRAMME**

The Phase 3 Programme is the Phase 3 Programme in the Agreed Form

**SCHEDULE PART 8**  
**REVIEW PROCEDURE**

**1 REVIEW**

1.1 The provisions of this Schedule Part 8 (*Review Procedure*) shall apply whenever any item, document or course of action is required to be reviewed, approved or otherwise processed in accordance with Schedule Part 8 (*Review Procedure*).

1.2 Subject to any express provision of this Agreement, the manner, form and timing of any submission to be made by Sub-hubco to an Authority's Representative for review under this Schedule Part 8 (*Review Procedure*) shall be a matter for Sub-hubco to determine. Each submission under this Schedule Part 8 (*Review Procedure*) shall be accompanied by a copy of the proposed document to be reviewed (including, where applicable, any Reviewable Design Data) or a statement of the proposed course of action (the entire contents of a submission being referred to in this Schedule Part 8 (*Review Procedure*) as a "**Submitted Item**"). In relation to each Submitted Item, the following procedure shall apply:

1.2.1 as soon as possible and, if the Submitted Item comprises:

- (a) an item of Reviewable Design Data;
- (b) a revised Programme submitted pursuant to Clause 14 (*Programme and Dates for Completion*); or
- (c) a document or proposed course of action submitted in the case of (an emergency),

within 15 (fifteen) Business Days of the date of receipt of a submission (or re-submission, as the case may be) of the Submitted Item to the Authority's Representative (or such other period as the parties may agree), the Authority's Representative shall return one copy of the relevant Submitted Item to Sub-hubco endorsed "no comment" or (subject to and in accordance with paragraph 3 (*Grounds for Objection*)) "comments" as appropriate; and

1.2.2 subject to paragraph 1.4, if the Authority's Representative fails to return a copy of any Submitted Item (including any re submitted Submitted Item) duly endorsed in accordance with paragraph 1.2.1, within 15 (fifteen) Business Days (or within such other period as the parties may agree in writing) of the date of its submission to the Authority's Representative, then the Authority's Representative shall be deemed to have returned the Submitted Item to Sub-hubco endorsed "no comment" (and, in the case of Reviewable Design Data, endorsed "Level A - no comment"); and

1.2.3 in relation to the aspects of each Finish identified in the table below:

- (a) Sub-hubco shall submit to the Authority a range or selection of finishes ("**Range of Finishes**") no later than the relevant Finishes Proposal Date;
- (b) the Authority's Representative shall by the relevant Finishes Selection Date notify Sub-hubco of its selection for the relevant Finish; and
- (c) if no selection of a Finish has been made by the Authority's Representative and notified to Sub-hubco in accordance with paragraph 1.2.3(b) by the relevant Finish Selection Date, Sub-hubco shall be entitled to make a selection from the Range of Finishes submitted in accordance with paragraph 1.2.3(a). After the relevant Finish Selection Date, should an Authority wish to vary any selection previously made by Sub-hubco or by that Authority, such variation shall be effected as a Change in accordance with Schedule Part 16 (*Change Protocol*).

**Table of Finishes**

<b>Finishes</b>	<b>Aspects</b>	<b>Finishes Proposal Date</b>	<b>Finishes Selection Date</b>
Internal wall finishes	Colour	17 June 13	08 July 13
wall protection and corner protection.	Colour and material	20 May 13	10 June 13
IPS panels	Colour	20 May 13	10 June 13
wet walls and splash back	Colour	17 June 13	08 July 13
floor finishes and skirting	Colour	17 June 13	08 July 13
ironmongery	Colour	06 May 13	27 May 13
main public light fittings (walkways, corridors, reception areas, waiting areas, arrival atrium, thoroughfares)	Specification, style and colour	29 April 13	20 May 13
light switches and sockets	style and colour	29 April 13	20 May 13
stair nosing	colour, material	17 June 13	08 July 13
balustrade	colour, material	01 July 13	22 July 13
blinds	Style, colour	03 June 13	24 June 13
pull cords	colour and material	29 April 13	20 May 13



<b>Finishes</b>	<b>Aspects</b>	<b>Finishes Proposal Date</b>	<b>Finishes Selection Date</b>
handrails and grabrails	style, colour	29 April 13	20 May 13
doors (including revolving door, automated roller shutter door, receipt and dispatch door and two main entrance doors)	colour	20 May 13	10 June 13
Lift Finishes	Colour and material	29 April 13	20 May 13

1.3 If an Authority's Representative raises comments on any Submitted Item in accordance with paragraph 3 (*Grounds for Objection*) he shall state the ground upon which such comments are based and the evidence or other information necessary to substantiate that ground. To the extent that an Authority's Representative comments on a Submitted Item other than on the basis set out in this Schedule Part 8 (*Review Procedure*), or fails to comply with the provisions of this paragraph, Sub-hubco may, in its discretion, either:

1.3.1 request written clarification of the basis for such comments and, if clarification is not received within 10 (ten) Business Days of such request by Sub-hubco, refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*); or

1.3.2 in the case of a Submitted Item comprising Reviewable Design Data only, at its own risk, and without prejudice to Clause 12 (*The Design, Construction and Commissioning Process*), proceed with further design or construction disregarding such comments pending the outcome of any reference to the Dispute Resolution Procedure that may be made by either party.

1.4 In the case of any Submitted Item of the type referred to in paragraph 3.10, a failure by an Authority's Representative to endorse and return such Submitted Item within the period specified in paragraph 1.2.2 shall be deemed to constitute an objection by that Authority's Representative to such Submitted Item. If the parties fail to agree the form and content of such Submitted Item, within 10 (ten) Business Days following the expiry of the period specified in paragraph 1.2.2, the matter shall be determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

## 2 FURTHER INFORMATION

Sub-hubco shall submit any further or other information, data and documents that an Authority's Representative reasonably requires in order to determine whether he has a basis for raising comments or making objections to any Submitted Item in accordance with this Schedule Part 8 (*Review Procedure*). If Sub-hubco does not submit any such information, data and documents, that Authority's Representative shall be entitled to:

2.1 comment on the Submitted Item on the basis of the information, data and documents which have been provided; or

- 2.2 object to the Submitted Item on the grounds that insufficient information, data and documents have been provided to enable that Authority's Representative to determine whether he has a legitimate basis for commenting or objecting in accordance with this Schedule Part 8 (*Review Procedure*).

### 3 GROUNDINGS OF OBJECTION

The expression "raise comments" in this paragraph shall be construed to mean "raise comments or make objections" unless the contrary appears from the context. An Authority's Representative may raise comments in relation to any Submitted Item on the grounds set out in paragraph 2 (*Further Information*) above or on the ground that the Submitted Item would (on the balance of probabilities) breach any Law but otherwise may raise comments in relation to a Submitted Item only as follows:

- 3.1 in relation to any Submitted Item if:
- 3.1.1 Sub-hubco's ability to perform its obligations under this Agreement would (on the balance of probabilities) be adversely affected by the implementation of the Submitted Item; or
  - 3.1.2 the implementation of the Submitted Item would (on the balance of probabilities) adversely affect any right of the relevant Authority under this Agreement or its ability to enforce any such right;
- 3.2 in relation to any Submitted Item submitted pursuant to Clause 4.1 (*Ancillary Documents*) if:
- 3.2.1 the relevant Authority's ability to perform its obligations under this Agreement would be adversely affected by the proposed course of action;
  - 3.2.2 the relevant Authority's or a relevant Community Services Provider's ability to provide the relevant Community Services or to carry out any of its statutory functions would (on the balance of probabilities) be adversely affected by the proposed course of action;
  - 3.2.3 the proposed course of action would be likely to result in an increase to the relevant Authority's liabilities or potential or contingent liabilities under this Agreement;
  - 3.2.4 the proposed course of action would adversely affect any right of the relevant Authority under this Agreement or its ability to enforce any such right; or
  - 3.2.5 Sub-hubco's ability to perform its obligations under this Agreement would be materially adversely affected by the proposed course of action;
- 3.3 in relation to Reviewable Design Data submitted pursuant to Clause 12.6:
- 3.3.1 which does not comprise 1:50 scale Room Layout Drawings an Authority's Representative may raise comments, subject to and

in accordance with paragraph 4 (*Effect of Review*) on the ground that the Submitted Item is not in accordance with:

- (a) the Authority's Construction Requirements; and/or
- (b) the relevant Sub-hubco's Proposals;

3.3.2 which comprises a 1:50 scale Room Layout Drawing in respect of which there is a corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by an Authority's Representative in accordance with this Schedule Part 8 (*Review Procedure*)), the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*), on the ground that the Submitted Item does not conform to the generic 1:50 scale Room Layout Drawing; and

3.3.3 which comprises a 1:50 scale Room Layout Drawing in respect of which there is no corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by an Authority's Representative in accordance with this Schedule Part 8 (*Review Procedure*)), the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*), on the grounds that the Submitted Item:

- (a) is not in accordance with the Authority's Construction Requirements and/or relevant Sub-hubco's Proposals; or
- (b) is inconsistent with the guidance contained in any current NHS Requirement which is applicable to a room of that function provided that such guidance has not been superseded by and is not inconsistent with any other provisions of the Authority's Construction Requirements (including any existing Approved RDD Item);

3.4 in relation to a proposal to amend Sub-hubco's Proposals and rectify (part of) the relevant Works submitted pursuant to Clause 12.8, on the grounds that, following the amendment and rectification proposed:

3.4.1 relevant Sub-hubco's Proposals would not satisfy the Authority's Construction Requirements; and/or

3.4.2 the structural, mechanical and/or electrical performance of the relevant Facilities would not be of an equivalent standard of performance to that set out in the relevant Sub-hubco's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made);

3.5 in relation to Finishes:

3.5.1 which have the effect of making a selection from the relevant Range of Finishes (or any alternative range or selection of

Finishes submitted by Sub-hubco to the relevant Authority's Representative) pursuant to Clause 12.6.1; or

- 3.5.2 where the Submitted Item does not comply with the relevant provisions of the Authority's Construction Requirements and/or relevant Sub-hubco's Proposals;
- 3.6 in relation to the submission of any revised Programme pursuant to Clause 14 (*Programme and Dates for Completion*) on the ground that such revised Programme would not (on the balance of probabilities) enable the relevant Works to be completed by the Completion Date;
- 3.7 in relation to the submission of any Quality Plan or part of a Quality Plan or any changes to any Quality Plan pursuant to Clause 20.4 or Clause 20.7 or any quality manual or procedure in accordance with Clause 20.9 (*Quality Manuals and Procedures*), on the grounds that such Quality Plans, or parts of or changes to such Quality Plans, quality manuals or procedures, or the quality management systems which they reflect, would not comply with:
  - 3.7.1 in the case of the relevant Design Quality Plan and the relevant Construction Quality Plan referred to in Clause 20.8, the requirements referred to in Section 8 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*); and
  - 3.7.2 in the case of the Services Quality Plan referred to in Clause 20 (*Quality Assurance*), the requirements referred to in Section 3 (*Services Quality Plan*) of Schedule Part 12 (*Service Requirements*);
- 3.8 in relation to the submission of any proposed revision or substitution for the relevant Method Statement or any part of any relevant Method Statement (as the case may be) pursuant to Clause 22.4, on the grounds that:
  - 3.8.1 the proposed revision or substitution is not in accordance with Good Industry Practice;
  - 3.8.2 the performance of the relevant Services in accordance with the proposed revision or substitution would (on the balance of probabilities):
    - (a) be materially different from the performance of the relevant Services in accordance with the relevant Method Statement prior to such proposed revision or substitution; or
    - (b) be less likely to achieve compliance with the relevant Service Level Specification; or
    - (c) have an adverse effect on the provision by the relevant Authority or any relevant Community Services Provider of the relevant Community Services at, or on the safety of any users of, the relevant Facilities; or
  - 3.8.3 the proposed revision or substitution would (on the balance of probabilities) result in an inferior standard of performance of the relevant Services to the standard of performance in accordance

with the relevant Method Statement prior to such proposed revision or substitution; and

- 3.9 in relation to the submission of the Schedule of Programmed Maintenance pursuant to Clause 23.1, any revision to any such Schedule of Programmed Maintenance pursuant to Clause 23.4 or any relevant submission of Unprogrammed Maintenance Works pursuant to Clause 23.8, on the grounds that:
- 3.9.1 carrying out the relevant Programmed Maintenance or the relevant Unprogrammed Maintenance Works in the period or at the times suggested would (on the balance of probabilities) interfere with the operations of that Authority and/or any relevant Community Services Provider and such interference could be avoided or mitigated by Sub-hubco rescheduling the relevant Programmed Maintenance or the relevant Unprogrammed Maintenance Works; or
  - 3.9.2 in relation to the Schedule of Programmed Maintenance the proposed hours for carrying out the relevant Programmed Maintenance are not consistent with the principles set out in Appendix 2, Table B to this Schedule Part 8 (*Review Procedure*); or
  - 3.9.3 the proposed method of performance of the relevant Programmed Maintenance or the relevant Unprogrammed Maintenance Works would not be in accordance with the relevant Service Level Specification; or
  - 3.9.4 the safety of users of the relevant Facilities would (on the balance of probabilities) be adversely affected; or
  - 3.9.5 the period for carrying out the relevant Programmed Maintenance or the relevant Unprogrammed Maintenance Works would (on the balance of probabilities) exceed the period reasonably required for the relevant works.
- 3.10 In relation to the submission of Sub-hubco's proposals for the relevant Handback Works, the relevant Handback Programme and the relevant Handback Amount pursuant to Schedule Part 18 (*Handback Procedure*), on the grounds that:
- 3.10.1 in the case of the relevant Handback Works, Sub-hubco's proposals will not (on the balance of probabilities) ensure that the relevant Handback Requirements are achieved by the Expiry Date;
  - 3.10.2 in the case of the relevant Handback Programme, performance of the relevant Handback Works in accordance with the programme is not (on the balance of probabilities) capable of achieving satisfaction of the relevant Handback Requirements by the Expiry Date; and
  - 3.10.3 in the case of the relevant Handback Amount, it does not represent the cost of carrying out the relevant Handback Works according to the relevant Handback Programme and the provisions of Schedule Part 18 (*Handback Procedure*).

## 4

### EFFECT OF REVIEW

- 4.1 Any Submitted Item which is returned or deemed to have been returned by an Authority's Representative endorsed "no comment" (and in the case of Reviewable Design Data, endorsed "Level A - no comment") shall be complied with or implemented (as the case may be) by Sub-hubco.
- 4.2 In the case of any Submitted Item other than Reviewable Design Data, if an Authority's Representative returns the Submitted Item to Sub-hubco endorsed "comments", Sub-hubco shall comply with such Submitted Item after amendment in accordance with the comments unless Sub-hubco disputes that any such comment is on grounds permitted by this Agreement, in which case Sub-hubco or the relevant Authority's Representative may refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) and Sub-hubco shall not act on the Submitted Item until such matter is so determined or otherwise agreed.
- 4.3 In the case of a Submitted Item comprising Reviewable Design Data, if an Authority's Representative returns the Submitted Item endorsed other than "Level A - no comment", Sub-hubco shall:
- 4.3.1 where the relevant Authority's Representative has endorsed the Submitted Item "Level B - proceed subject to amendment as noted", either proceed to construct or proceed to the next level of design of the part of the relevant Works to which the Submitted Item relates but take into account any amendments required by that Authority's Representative in his comments;
  - 4.3.2 where the relevant Authority's Representative has endorsed the Submitted Item "Level C - subject to amendment as noted" not act upon the Submitted Item, amend the Submitted Item in accordance with the relevant Authority's Representative's comments and re-submit the same to that Authority's Representative in accordance with paragraph 4.4; and
  - 4.3.3 where the relevant Authority's Representative has endorsed the Submitted Item "Level D - rejected" not act upon the Submitted Item, amend the Submitted Item and re-submit the Submitted Item to the relevant Authority's Representative in accordance with paragraph 4.4,
- unless Sub-hubco disputes that any such comment or proposed amendment is on grounds permitted by this Agreement, in which case Sub-hubco or the relevant Authority's Representative may refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) and Sub-hubco shall not act on the Submitted Item until such matter is so determined or otherwise agreed except at its own risk in accordance with paragraph 1.3.2.
- 4.4 Within 10 (ten) Business Days of receiving the comments of an Authority's Representative on any Submitted Item comprising Reviewable Design Data, Sub-hubco shall (except in the case contemplated in paragraph 4.3.1) send a copy of the Submitted Item as amended to the relevant Authority's Representative pursuant to paragraph 4.3 and the provisions of paragraphs 1.2.1, 4.1 and 4.3 shall apply (changed according to context) to such re-submission.

- 4.5 The return or deemed return of any Submitted Item endorsed "no comment" (or in the case of Reviewable Design Data endorsed "Level A - no comment" or otherwise endorsed in accordance with paragraph 4.3.1 or 4.3.2) shall mean that the relevant Submitted Item may be used or implemented for the purposes for which it is intended but, save to the extent expressly stated in this Agreement including, without limitation, as specified in Appendix 1 Table A to this Schedule Part 8 (*Review Procedure*), such return or deemed return of any Submitted Item shall not otherwise relieve Sub-hubco of its obligations under this Agreement nor is it an acknowledgement by the relevant Authority that Sub-hubco has complied with such obligations.

## 5 DOCUMENTATION MANAGEMENT

- 5.1 Sub-hubco shall issue three (3) copies of all Submitted Items to an Authority and compile and maintain a register of the date and contents of the submission of all Submitted Items.
- 5.2 Sub-hubco shall compile and maintain a register of the date of receipt and content of all Submitted Items that are returned or deemed to be returned by an Authority's Representative.
- 5.3 Save to the extent set out in Appendix 1, Table A to this Schedule Part 8 (*Review Procedure*) or elsewhere in this Schedule Part 8 (*Review Procedure*), no review, comment or approval by an Authority shall operate to exclude or limit Sub-hubco's obligations or liabilities under this Agreement (or an Authority's rights under this Agreement).

## 6 CHANGES

- 6.1 No approval or comment or any failure to give or make an approval or comment under this Schedule Part 8 shall constitute a Change save to the extent provided in this Schedule Part 8 (*Review Procedure*).
- 6.2 If, having received comments from an Authority's Representative, Sub-hubco considers that compliance with those comments would amount to a Change, Sub-hubco shall, before complying with the comments, notify the relevant Authority of the same and, if it is agreed by the parties or determined pursuant to Schedule Part 20 (*Dispute Resolution Procedure*) that a Change would arise if the comments were complied with, the relevant Authority may, if it wishes, implement the Change and it shall be dealt with in accordance with Schedule Part 16 (*Change Protocol*). Any failure by Sub-hubco to notify the relevant Authority that it considers compliance with any comments of the relevant Authority's Representative would amount to a Change shall constitute an irrevocable acceptance by Sub-hubco that any compliance with that Authority's comments shall be without cost to that Authority and without any extension of time.
- 6.3 No alteration or modification to the design, quality and quantity of the relevant Works arising from the development of detailed design or from the co-ordination of the design shall be construed or regarded as a Change.

**APPENDIX 1**

**TABLE A**

Approved (by category)	RDD Item	Scale	Meaning of "Level A - no comment" and "Level B - proceed subject to amendment as noted" endorsement of Reviewable Design Data under Schedule Part 8 (Review Procedure) (including both the actual and deemed endorsement).
Room Data Sheets	n/a		A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any room data sheet means that Sub-hubco may proceed to construct in accordance with the Submitted Item and that the relevant Authority is satisfied that the design and other information in the relevant room data sheet satisfies Operational Functionality.
Drawings –  Development Control  Plan		1:1250	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:1250 scale development control plan means that Sub-hubco may proceed to construct in accordance with the Submitted Item and that the relevant Authority is satisfied that the design and other information contained in the relevant drawing satisfies Operational Functionality.
Drawings –  Site Plan		1:500	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:500 scale site plan means that Sub-hubco may proceed to construct in accordance with the Submitted Item and that the relevant Authority is satisfied that the design and other information contained in the relevant drawing satisfies Operational Functionality.
Drawings –  Floor Plans		1:200	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:200 scale floor plan means that Sub-hubco may proceed to construct in accordance with the Submitted Item and that the relevant Authority is satisfied that the design and other information contained in the relevant drawing satisfies the Operational Functionality.
Drawings –  Room Layouts (including room elevations) &		1:50	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:50 scale room layout and/or reflected ceiling drawing means that Sub-hubco may proceed to construct in accordance with the Submitted Item and that the relevant Authority is satisfied (to the extent of the design and other information contained in the relevant drawing) that



Reflected ceiling plans		the design and other information in the relevant drawing satisfies Operational Functionality.
Drawings –  Departmental plans	1:50	A "Level A - no comment" endorsement or a "Level B – proceed subject to amendment as noted" endorsement of any 1:50 scale departmental plan means that Sub-hubco may proceed to construct in accordance with the Submitted item and that the relevant Authority is satisfied (to the extent of the design and other information contained in the relevant drawing) that the design and other information in the relevant drawing satisfies Operational Functionality.

## APPENDIX 2

### HOURS FOR PROGRAMMED MAINTENANCE

- 1 Subject to paragraphs 3 to 5 below, Sub-hubco shall carry out Programmed Maintenance at the relevant Facilities during the hours of 8am to 8pm on Monday to Friday ("**Hours for Programmed Maintenance**")
- 2 Sub-hubco may, with the consent of the relevant Authority (which consent shall not be unreasonably withheld) carry out Maintenance Works outside the relevant Hours for Programmed Maintenance provided always that it shall take into account:
  - 2.1 the likely disturbance to the relevant Authority and/or any relevant Community Services Provider and/or their staff and users within the immediate area where the relevant Maintenance Works are to be undertaken;
  - 2.2 the likely disturbance to adjacent areas, the relevant Authority and/or any relevant Community Services Provider and/or their staff and users in those adjacent areas that may be affected by the relevant Maintenance Works to be undertaken in the area(s) identified in (i) above; and
  - 2.3 compliance with the Law.
- 3 Subject to paragraph 4, Sub-hubco shall have access to the relevant Facilities during the hours of operation to the areas set out in and in accordance with Table B below ("**Hours of Operation**") to carry out any relevant Programmed Maintenance.

TABLE B

Facility	Hours of Operation
Phase 1	6.30am -8pm Mon-Fri
	7.30am – 1pm Sat
Phase 2	6.30am -8pm Mon-Fri
	7.30am – 1pm Sat
Phase 3	6.30am -8pm Mon-Fri
	7.30am – 1pm Sat

- 4 Where Sub-hubco requires access to an area of the relevant Facilities during the Hours of Operation, Sub-hubco will consult with and obtain the consent of the member of personnel in charge of a department ("**Head of Department**") concerning dates, times and periods during which Programmed Maintenance is to be undertaken in those departments so as to minimise disruption to those departments.
- 5 An Authority may request Sub-hubco to carry out Programmed Maintenance outside the Hours for Programmed Maintenance in the event that the carrying out of such Programmed Maintenance during the Hours for Programmed Maintenance would adversely affect the use of the department or area.

**SCHEDULE PART 9**  
**COLLATERAL AGREEMENTS**

**SECTION 1**

**CONTRACTOR'S COLLATERAL AGREEMENT**

**[REDACTED]**

**SECTION 2**

**SERVICE PROVIDER COLLATERAL AGREEMENT**

**[REDACTED]**

**SECTION 3**

**KEY SUB-CONTRACTOR COLLATERAL AGREEMENT**

**[REDACTED]**

**SCHEDULE PART 10**

**OUTLINE COMMISSIONING PROGRAMME**

The Outline Commissioning Programme is the Outline Commissioning Programme in the Agreed Form

**APPENDIX A**

**COMPLETION CRITERIA**

The Completion Criteria are the Completion Criteria in the Agreed Form



**SCHEDULE PART 11**

**EQUIPMENT**

Schedule Part 11 is the Equipment Schedule in the Agreed Form

**SCHEDULE PART 12**  
**SERVICE REQUIREMENTS**

**SECTION 1**

**SERVICE LEVEL SPECIFICATIONS**

The Service Level Specifications are the Service Level Specifications in the Agreed Form

## **SECTION 2**

### **METHOD STATEMENTS**

The Method Statements are the Method Statements in the Agreed Form

**SECTION 3**  
**SERVICES QUALITY PLAN**

The Services Quality Plan is the Services Quality Plan in the Agreed Form

**SCHEDULE PART 13**  
**INDEPENDENT TESTER CONTRACT**

**[REDACTED]**

**APPENDIX 2**

**SECTION 1**

**SCHEDULE OF DRAWDOWN OF FEES**

**SECTION 2**  
**SCHEDULE OF DAILY RATES**

## SCHEDULE PART 14

### PAYMENT MECHANISM

#### SECTION 1

#### INTERPRETATION

In this Schedule Part 14 (*Payment Mechanism*) and elsewhere in this Agreement (save where Schedule Part 1 (*Definitions and Interpretation*) provides to the contrary) the following words shall have the following meanings:

- "Annual Service Payment"** means each of the Authority A Annual Service Payment and the Authority B Annual Service Payment;
- "Authority A Annual Service Payment"** means the sum payable by Authority A in pounds sterling calculated in accordance with paragraph 2 (*Annual Service Payment*) of Section 2 (*Calculation of Service Payments*) of this Schedule Part 14 (*Payment Mechanism*);
- "Authority A Monthly Service Payment"** means the sum payable by Authority A in pounds sterling calculated in accordance with paragraph 1 of Section 2 (*Calculation of Service Payments*) of this Schedule Part 14 (*Payment Mechanism*);
- "Authority B Annual Service Payment"** means the sum payable by Authority B in pounds sterling calculated in accordance with paragraph 2 (*Annual Service Payment*) of Section 2 (*Calculation of Service Payments*) of this Schedule Part 14 (*Payment Mechanism*);
- "Authority B Monthly Service Payment"** means the sum payable by Authority B in pounds sterling calculated in accordance with paragraph 1 of Section 2 (*Calculation of Service Payments*) of this Schedule Part 14 (*Payment Mechanism*);
- "Availability Failure"** subject to Section 4 (*Temporary Repairs*) of this Schedule Part 14 (*Payment Mechanism*), means a Service Event which has not been Rectified within the relevant Rectification Period and which causes a Functional Area to be Unavailable;
- "Availability Standards"** means the service requirements identified as such, set out in the relevant Service Level Specification;
- "Core Times"** has the meaning given in the relevant Service Level Specification and "Core Time" means a time within Core Times;
- "Daily SUF"** means, on a Day, the aggregate GSUs for all of the relevant Functional Areas that have Core Time on that Day;
- "Day"** means a period of 24 hours, beginning at 00:00 hours, during which there are Core Times;
- "Deduction Period" or "DP"** (a) where the relevant Performance Failure or Availability Failure arises following a Service Event in respect of which a Rectification Period is specified in the Availability



Standards or the Performance Standards, as applicable,

- (i) if the Service Failure Time occurs before or during Core Time for the relevant Functional Area on a Day, means the number of Days that elapse from and including that Day to, and including, the Day on which the Logged Rectification Time occurs, but excludes the Day on which the Logged Rectification Time occurs if the Logged Rectification Time is before the commencement of Core Time for the relevant Functional Area on that Day; and
  - (ii) if the Service Failure Time occurs after the expiry of Core Times for the relevant Functional Area on a Day, means the number of Days that elapse from and including the next Day to, and including, the Day on which the Logged Rectification Time occurs, but excludes the Day on which the Logged Rectification Time occurs if this occurs before commencement of Core Time for the relevant Functional Area on that Day; and
- (b) where the relevant Performance Failure arises following a Service Event in respect of which no Rectification Period is specified in the relevant Performance Standards, as applicable, means 1;

**“External Utility Failure”**

means a failure in:

- (a) the supply of gas, electricity, water, telephone or telecommunications services to a Site where such failure originates on the side of the relevant Utility Point that is owned or controlled by the relevant utility provider and provided that such failure has not arise as a result of an act or omission of Sub-hubco or a Sub-hubco Party; or
- (b) the service and facility of discharging water and sewerage from a Site, where such failure originates on the side of the relevant Utility Point that is owned or controlled by the relevant utility provider and provided that such failure has not arise as a result of an act or omission of Sub-hubco or a Sub-hubco Party, or
- (c) the supply or availability of fuel biomass in the Scottish market for a Facility provided that such failure has not arisen as a result of an act or omission of Sub-hubco or a Sub-hubco Party;

**“Gross Monthly Availability Deduction”**

means, for Contract Month “n”, the amount in pounds sterling calculated by the formula:

$$\text{SUR} \times \text{SUF} \times \text{Days}_n$$

where  $\text{Days}_n$  is the number of Days in Contract Month<sub>n</sub>

<b>"Gross Service Units" or "GSUs"</b>	means the number of service units attributed to each Functional Area as set out in Appendix 2 to this Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Helpdesk"</b>	means the helpdesk facilities established by Sub-hubco pursuant to the relevant Service Level Specification;
<b>"Logged Rectification Time"</b>	means the time which is shown in the Helpdesk records maintained by Sub-hubco in accordance with the relevant Service Level Specification as being the time when a Service Event was Rectified or Remedied, as the case may be, or, in the event that a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by Sub-hubco;
<b>"Logged Report Time"</b>	means the date and time which is shown in the Helpdesk records maintained by Sub-hubco in accordance with the relevant Service Level Specification as being the date and time at which a Service Report was received by the Helpdesk or, if a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by Sub-hubco;
<b>"Major Performance Failure"</b>	means a Performance Failure which has been designated as such in the relevant Service Level Specification or in this Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Medium Performance Failure"</b>	means a Performance Failure which has been designated as such in the relevant Service Level Specification or in this Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Minimum Agreed Availability Standards"</b>	means the minimum standards with which a Functional Area must comply, as agreed between the relevant Authority and Sub-hubco, for the period until a Permanent Repair can be undertaken;
<b>"Minimum Availability Deduction"</b>	means, in any Contract Year "n", an amount in pounds sterling calculated using the following formula:

$$MAD_n = MAD_o \times (1 - IF) + \left( (MAD_o \times IF) \times \left( 1 + \frac{(RPI_n - RPI_o)}{RPI_o} \right) \right)$$

where

$MAD_n$  is the Minimum Availability Deduction applicable for the relevant Contract Year;

$MAD_o$  is £33, or, where the relevant Functional Area is Unavailable but Used, is £17.50;

IF is the indexation factor being 0.25;

$RPI_n$  is the value of the Retail Price Index published or determined with respect to the month of February which most recently precedes the relevant Contract Year; and

$RPI_o$  is the value of the Retail Price Index published or determined with respect to the Base Date;

RPI<sub>0</sub> is the value of the Retail Price Index published or determined with respect to the Base Date;

- “Minor Performance Failure”** means a Performance Failure which has been designated as such in the relevant Service Level Specification or in this Schedule Part 14 (*Payment Mechanism*);
- “Monthly Service Payment”** means each of the Authority A Monthly Service Payment and the Authority B Monthly Service Payment;
- “Pass Through Costs”** means costs payable to Sub-hubco by the relevant Authority pursuant to Section 6 (*Pass Through Costs*) of this Schedule Part 14 (*Payment Mechanism*);
- “Performance Failure”** subject to Section 4 (*Temporary Repairs*) of this Schedule Part 14 (*Payment Mechanism*), means a Service Event relating to a Performance Standard which has not been Rectified within the relevant Rectification Period (if any);
- “Performance Standards”** means the service requirements identified as such, set out in the relevant Service Level Specification;
- “Permanent Repair”** means Rectification following the agreement of a Temporary Repair;
- “Permanent Repair Deadline”** has the meaning given in paragraph 1.2 of Section 4 (*Temporary Repairs*) of this Schedule Part 14 (*Payment Mechanism*);
- “Rectification”** means, following the occurrence of a Service Event, making good the Service Event so that the subject matter of the Service Event complies with the levels of service required pursuant to this Agreement which shall, without prejudice to the generality of the foregoing, include (a) restoring all functional capability and (b) ensuring that any Functional Area which has been affected by the relevant Service Event complies with the relevant Availability Standards and the relevant Performance Standards, as applicable, and “Rectify” and “Rectifying” shall be construed accordingly;
- “Rectification Period”** means, where applicable, the period of time specified in the relevant Availability Standards or the relevant Performance Standards, as the case may be, allowed for the Rectification of the relevant Service Event, which period:
- (a) shall commence at the Logged Report Time (if the Logged Report Time occurs during Core Time for the relevant Functional Area); or
  - (b) if the Logged Report Time occurs outwith Core Time for the relevant Functional Area, shall commence at the commencement of the immediately following Core Time for the relevant Functional Area;

provided that:

- i. subject to Sub-hubco having promptly notified the relevant Authority's Representative of the fact and having recorded the same on the Helpdesk system, the Rectification Period shall be extended by any period during which Sub-hubco was prevented or interrupted by the relevant Authority and any relevant Authority Party from Rectifying any failure to meet the relevant Availability Standards or relevant Performance Standards; and
- ii. if the Rectification Period would otherwise expire outside Core Time for the relevant Functional Area, it shall be extended so as to expire immediately prior to the start of the next Core Time for the relevant Functional Area;

**“Remedial Period”** means, where applicable, the period of time specified in the relevant Performance Standards within which Sub-hubco must Remedy a Service Event;

**“Remedy”** means the actions or tasks, detailed in the column headed Remedial Period/Remedy in the relevant Performance Standards, required to remedy a Performance Failure and “Remedied” shall be construed accordingly;

**“Service Event”** means an incident or state of affairs which does not meet or comply with the relevant Performance Standards and/or does not satisfy the relevant Availability Standards;

**“Service Failure Time”** means the date and time when a Service Event becomes a Performance Failure or an Availability Failure, as the case may be;

**“Service Report”** has the meaning given in Section 1 (*Service Level Specifications*) of Schedule Part 12 (*Service Requirements*);

**“Service Unit Rate” or “SUR”** means, for Contract Year “n”, the amount in pounds sterling calculated by the formula:

$$SUR = \left( \frac{ASP_n}{SUF \times TSD} \right)$$

where:

ASP<sub>n</sub> is the relevant Annual Service Payment for Contract Year “n” calculated in accordance with paragraph 2 of Section 2 (*Calculation of Service Payments*) of this Schedule Part 14 (*Payment Mechanism*); and

TSD is the number of Days in Contract Year “n”;

**“Service Units Affected” or “SUA”** means the total Gross Service Units of the Functional Areas affected by an Availability Failure;

**“Service Units of the Facilities”** means the total number of Gross Service Units attributable to the relevant Facilities as set out in Appendix 2 of this Schedule Part

or "SUF"

14 (*Payment Mechanism*);

**"Temporary Repair"**

means, in respect of the occurrence of a Service Event, works of a temporary nature that do not constitute Rectification but satisfy the relevant Minimum Agreed Availability Standards and substantially make good the relevant Service Event for the period until a Permanent Repair can be undertaken;

**"Unavailable"**

means in relation to a Functional Area that such Functional Area is in a state or condition which does not comply with any one or more of the relevant Availability Standards;

**"Unavailable but Used"**

means in relation to any Functional Area that it is Unavailable but is used by the relevant Authority for its normal purpose at any time (apart from the purposes of evacuating the relevant Functional Areas and the time taken for such evacuation) during the Core Times including for the avoidance of doubt, for the provision of Community Services during which it would otherwise be Unavailable;

**"Utility Point"**

means for each of the Utilities excluding fuel biomass, the point of connection to the Utility Providers Network or the Utility Providers Meter as appropriate and for fuel biomass means the point of entry of the biomass plant where the supplier deposits the fuel biomass.

## SECTION 2

### CALCULATION OF SERVICE PAYMENTS

#### 1 MONTHLY SERVICE PAYMENT

- 1.1 For each of Authority A and Authority B, calculate the relevant Monthly Service Payment payable in respect of a Contract Month "n" using the following formula:

$$MSP_n = \left( \frac{ASP_n \times PP}{12} \right) - \sum D_{n-2} + PTC$$

where:

**MSP** is the relevant Monthly Service Payment for the Contract Month n;

**ASP<sub>n</sub>** is the relevant Annual Service Payment for the Contract Year in which Contract Month n occurs, calculated in accordance with paragraph 1.2 below;

**ΣD** is the sum of Deductions in respect of performance of the relevant Services in the relevant Facilities during the Contract Month that was 2 months prior to Contract Month n as shown in the relevant Monthly Service Report for that Contract Month and calculated in accordance with the provisions set out in Section 3 (*Deductions from Monthly Service Payments*) of this Schedule Part 14 (*Payment Mechanism*);

**PTC** means any relevant Pass Through Costs due for which supporting uncontested invoices from Sub-hubco's suppliers are available;

- 1.2 In the Contract Month in which the relevant Payment Commencement Date falls, unless the Payment Commencement Date is the first day of that Contract Month, and in the last Contract Month of the Project Term, unless the last day of the Project Term is the last day of that Contract Month, adjust **ASP<sub>n</sub>** for the purposes of paragraph 1.1 above pro rata to reflect the actual number of days in the relevant Contract Month from and including the Payment Commencement Date (for the first month) and (for the last month) up to and including the last day of the Project Term (for the last month).

#### 2 ANNUAL SERVICE PAYMENT

For each of Authority A and B, calculate the relevant Annual Service Payment for any Contract Year "n" using the following formula:

$$ASP_n = ASP_0 \times (1 - IF) + \left[ (ASP_0 \times IF) \times \left[ 1 + \frac{(RPI_n - RPI_0)}{RPI_0} \right] \right]$$

where:

**ASP<sub>n</sub>** is the relevant Annual Service Payment for the relevant Contract Year;

**ASP<sub>0</sub>** is the relevant value for ASP<sub>0</sub> stated in Appendix 1 to this Schedule Part 14 (*Payment Mechanism*) (being the relevant Annual Service Payment at the Base Date), subject to any adjustments made from time to time in accordance with any express provision of this Agreement;

**IF** is the indexation factor being 0.25;

**RPI<sub>n</sub>** is the value of the Retail Prices Index published or determined with respect to the month of February which most recently precedes the relevant Contract Year; and

**RPI<sub>0</sub>** is the value of the Retail Prices Index published or determined with respect to the Base Date.

## SECTION 3

### DEDUCTIONS FROM MONTHLY SERVICE PAYMENTS

#### 1 ENTITLEMENT TO MAKE DEDUCTIONS

- 1.1 If at any time after the Payment Commencement Date an Availability Failure or a Performance Failure occurs the relevant Authority will be entitled, subject to paragraphs 1.2 and 1.4 of this Section 3 (*Deductions from Monthly Service Payments*) and paragraph 1 of Section 4 (*Temporary Repairs and Alternative Accommodation*), to make Deductions in calculating the relevant Monthly Service Payment in respect of that Availability Failure or Performance Failure, calculated in accordance with this Section 3 (*Deductions from Monthly Service Payments*) of Schedule Part 14 (*Payment Mechanism*).
- 1.2 In calculating the relevant Monthly Service Payment for Contract Month "n", the maximum aggregate of all Deductions that the relevant Authority may make in respect of Contract Month "n-2" is the relevant Gross Monthly Availability Deduction for Contract Month "n-2".
- 1.3 In any Contract Month where the value of  $\sum D_{n-2}$  exceeds the value of  $ASP_{n/12}$  in respect of the relevant Authority, the relevant Monthly Service Payment due by the relevant Authority shall be an amount equal to PTC for that Contract Month but the relevant Authority shall, in calculating the relevant Monthly Service Payment in respect of the following and (to the extent necessary) any subsequent Contract Months, be entitled to carry forward and set off the amount of such excess against the amount by which the value of  $ASP_{n/12}$  exceeds the value of  $\sum D_{n-2}$  (as such values are calculated in the following Contract Month and (to the extent necessary) any subsequent Contract Months) until the amount of such excess has been set-off in full. To the extent that any such excess has not been set off as at the earlier to occur of the Expiry Date and the Termination Date, then an amount equal to such excess shall be immediately due and payable by Sub-hubco to the relevant Authority.
- 1.4 To the extent that an Availability Failure or a Performance Failure:
- 1.4.1 is the result of an Excusing Cause; or
  - 1.4.2 is the result of an External Utility Failure,
- the relevant Authority shall not be entitled to make Deductions.
- 1.5 To the extent that an Availability Failure or a Performance Failure is the result of:
- 1.5.1 a Relief Event; or
  - 1.5.2 an event of Force Majeure,
- the relevant Authority shall be entitled to make Deductions but any such Deductions shall be disregarded for the purposes of Clause 24.3 and Clause 40.1.8.

#### 2 DEDUCTIONS FOR PERFORMANCE FAILURES

- 2.1 Subject to paragraphs 1 (*Entitlement to make Deductions*) and 5 (*Repeated Failures*) of this Section 3 (*Deductions from Monthly Service Payments*), the amount of the Deduction in respect of a Performance Failure is calculated using the following formula:



$$D = PFD \times DP$$

where:

**D** means the amount (in pounds sterling) of the Deduction in respect of the Performance Failure; and

**PFD** means:

- (a) in the case of a Minor Performance Failure, the sum of £25, index linked;
- (b) in the case of a Medium Performance Failure, the sum of £40, index linked; and
- (c) in the case of a Major Performance Failure, the sum of £125, index linked.

2.2 In the case of a Service Event for which no Rectification Period is specified in the relevant Performance Standard, a Performance Failure occurs immediately upon the occurrence of the Service Event and, if it is not Remedied within the relevant Remedial Period, it will reoccur at the expiry of the relevant Remedial Period and the relevant Remedial Period shall recommence and so on until such time as the Performance Failure has been Remedied.

2.3 No Deduction may be made by the Authority A from the relevant Monthly Service Payment for the relevant Contract Month in respect of any Minor Performance Failure if the total number of Minor Performance Failures which have occurred at the relevant Facilities in the relevant Contract Month is not more than 2.

2.4 No Deduction may be made by the Authority B from the relevant Monthly Service Payment for the relevant Contract Month in respect of any Minor Performance Failure if the total number of Minor Performance Failures which have occurred at the relevant Facilities in the relevant Contract Month is not more than 4.

Where two or more Performance Failures occur in a Functional Area during a Day, only the Performance Failure that results in the highest Deduction will apply.

### 3 DEEMED PERFORMANCE FAILURES

If Sub-hubco fails to monitor or accurately report a Service Event, a Performance Failure or an Availability Failure then, without prejudice to the Deduction to be made in respect of the relevant Performance Failure or Availability Failure (if any), the failure to monitor or report the Service Event, Performance Failure or Availability Failure will be deemed to be a new Medium Performance Failure in respect of the relevant Facilities unless the circumstances set out in paragraph 6 of Section 5 (*Failure by Sub-hubco to Monitor or Report*) apply, in which case there shall be deemed to be a new Major Performance Failure in respect of the relevant Facilities.

### 4 DEDUCTIONS FOR AVAILABILITY FAILURES

4.1 Subject to paragraphs 1 (*Entitlement to make Deductions*) and 5 (*Repeated Failures*) of this Section 3 (*Deductions from Monthly Service Payments*), and subject also to paragraph 4.2 and paragraph 4.3 below where applicable, the amount of the Deduction in respect of an Availability Failure is the higher of:

4.1.1 the Minimum Availability Deduction; and

4.1.2 an amount calculated in accordance with the following formula:

$$D = SUA \times SUR \times DP$$

where:

**D** means the amount (in pounds sterling) of the Deduction in respect of the Availability Failure

4.2 Where the relevant Functional Area is Unavailable but Used the Deduction for the Availability Failure shall be reduced by 50%.

## 5 REPEATED FAILURES

Subject to paragraph 1 (*Entitlement to make Deductions*) of this Section 3 (*Deductions from Monthly Service Payments*) if:

5.1 a Performance Failure in respect of the same relevant Performance Standard; or

5.2 an Availability Failure in respect of the same relevant Availability Standard,

a) occurs 9 or more times at the Authority A Facilities in a rolling period of 3 consecutive Contract Months, then the Deduction calculated pursuant to paragraph 2 (*Deductions for Performance Failures*) or paragraph 4 (*Deductions for Availability Failures*) of this Section 3 (*Deductions from Monthly Service Payments*) for the 10<sup>th</sup> and each subsequent such Performance Failure at the Authority A Facilities and/or the 10<sup>th</sup> and each subsequent such Availability Failure at the Authority A Facilities during the relevant period of 3 consecutive Contract Months shall be multiplied by 1.5.

b) occurs 15 or more times at the Authority B Facilities in a rolling period of 3 consecutive Contract Months, then the Deduction calculated pursuant to paragraph 2 (*Deductions for Performance Failures*) or paragraph 4 (*Deductions for Availability Failures*) of this Section 3 (*Deductions from Monthly Service Payments*) for the 16<sup>th</sup> and each subsequent such Performance Failure at the Authority B Facilities and/or the 16<sup>th</sup> and each subsequent such Availability Failure at the Authority B Facilities during the relevant period of 3 consecutive Contract Months shall be multiplied by 1.5.

## 6 REPEATED RECTIFICATION

If four or more Service Events occur in any rolling seven day period and:

6.1 each such Service Event is in connection with the same relevant Performance Standard or relevant Availability Standard;

6.2 each such Service Event affects the same relevant Functional Area; and

6.3 there is good reason to believe that the root cause of each such Service Event is the same,

then, notwithstanding paragraph 2.3 and notwithstanding that Sub-hubco achieves Rectification of the Service Events within the relevant Rectification Period, there will be deemed to be a Major Performance Failure in respect of the relevant Facilities.

**EFFECT OF UNAVAILABILITY ON OTHER DEDUCTIONS**

- 7.1 Subject to paragraphs 7.2 and 7.3, if a Performance Failure occurs affecting a Functional Area and the Service Event giving rise to the Performance Failure also gives rise to an Availability Failure affecting that Functional Area, only the Deductions for the Availability Failure apply.
- 7.2 If an Availability Failure affects a Functional Area and the relevant Authority does not continue to use that Functional Area, the relevant Authority shall not, until Rectification of that Availability Failure, be entitled to make further Deductions in respect of that Functional Area other than in respect of the Availability Failure.
- 7.3 If a Functional Area is Unavailable but Used, the relevant Authority will be entitled to make Deductions in respect of any Performance Failures affecting that Functional Area.

## SECTION 4

### TEMPORARY REPAIRS

- 1 If Sub-hubco informs an Authority that it is unable to Rectify a Service Event within the specified Rectification Period due to the need for specialised materials or personnel that are not, and cannot reasonably be expected to be, immediately available at the relevant Facilities but that a Temporary Repair can be effected:
  - 1.1 Sub-hubco may carry out the Temporary Repair proposed by Sub-hubco unless the relevant Authority, acting reasonably, considers that, if the Temporary Repair proposed by Sub-hubco is carried out, the relevant Functional Area will not be fit for use for the Community Services for which it is normally used; and
  - 1.2 where a Temporary Repair is permitted pursuant to paragraph 1.1, the relevant Authority and Sub-hubco must act reasonably to agree a date and time (the “**Permanent Repair Deadline**”) by which a Permanent Repair must be made, giving Sub-hubco a reasonable period within which to carry out the Permanent Repair.
- 2 During any period beginning at the time when a Temporary Repair has been approved by an Authority and ending at the earlier of:
  - 2.1 the time at which a Permanent Repair is successfully completed; and
  - 2.2 the Permanent Repair Deadline,the relevant Availability Standards will be replaced by the relevant Minimum Agreed Availability Standards.
- 3 If an agreed Temporary Repair is completed by Sub-hubco before the Permanent Repair Deadline and results in the relevant Functional Area affected by the relevant Service Event satisfying the relevant Minimum Agreed Availability Standards, the date and time shown in the Helpdesk records maintained by Sub-hubco in accordance with the relevant Service Level Specification as being the date and time when the Temporary Repair was completed (or, in the event that a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by Sub-hubco as being the date and time when the Temporary Repair was completed) shall be deemed to be the Logged Rectification Time for that Service Event for the purpose of determining the value of DP in the formula in paragraph 4 (*Deductions for Availability Failures*) in Section 3 (*Deductions from Monthly Service Payments*) of this Schedule Part 14 (*Payment Mechanism*).
- 4 If the Permanent Repair is not carried out by the Permanent Repair Deadline, a Performance Failure or, as the case may be, an Availability Failure, will occur at that date and time and the provisions of paragraph 2 (*Deductions for Performance Failures*), paragraph 4 (*Deductions for Availability Failures*) and, if applicable, paragraph 5 (*Repeated Failures*) of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule Part 14 (*Payment Mechanism*) shall apply.

## SECTION 5

### FAILURE BY SUB-HUBCO TO MONITOR OR REPORT

- 1 Subject to paragraphs 2 to 4 inclusive of this Section 5 (*Failure by Sub-hubco to Monitor or Report*), the relevant Performance Monitoring Report produced by Sub-hubco for any Contract Month shall be the source of the factual information regarding the performance of the relevant Services for the relevant Contract Month for the purposes of calculating the relevant Deductions pursuant to Section 3 (*Deductions from Monthly Service Payments*) of this Schedule Part 14 (*Payment Mechanism*).
- 2 Either of the relevant Authority and Sub-hubco may give written notice to the other if it believes there is an error or omission in a relevant Monthly Service Report provided that, save in the circumstances referred to in paragraph 6 below, such notice must be given before the end of the Contract Month that falls two Contract Months after the Contract Month in which the relevant Monthly Service Report was submitted by Sub-hubco. The relevant Authority and Sub-hubco shall endeavour to agree the amendments required to rectify the error or omission (if any) within 10 Business Days of notice being given in accordance with this paragraph 2, failing which either party may, on giving written notice to the other, refer the matter to the Dispute Resolution Procedure.
- 3 Where Sub-hubco fails to monitor or accurately to report a Performance Failure or an Availability Failure in the circumstances referred to in paragraph 6 of this Section 5 (*Failure by Sub-hubco to Monitor or Report*), for the purposes of paragraph 1 of Section 1 (*General Requirements*) of Schedule Part 19 (*Record Provisions*) the relevant Authority shall be deemed to have reasonable cause to require that Sub-hubco shall make available to that Authority for inspection such of the records referred to in paragraphs 10 and 11 of Section 2 (*Records to be Kept*) of Schedule Part 19 (*Record Provisions*) as that Authority may specify.
- 4 Sub-hubco shall upon submission of a valid invoice pay to the relevant Authority a sum equal to the costs reasonably incurred by that Authority in carrying out any inspection and investigation of records made available pursuant to paragraph 3 above.
- 5 If an Authority's inspection or investigation of records made available pursuant to paragraph 3 above reveals any further matters of the types referred to in paragraphs 2 and 3 above, those matters shall be dealt with in accordance with paragraph 2 or 3 as appropriate and that Authority shall, in addition, be entitled to make Deductions in respect of any Performance Failures or Availability Failures in the manner prescribed Section 3 (*Deductions from Monthly Service Payments*) of this Schedule Part 14 (*Payment Mechanism*). The relevant Monthly Service Payment for the Contract Month in which any such Deduction would (but for the error or omission in the relevant Performance Monitoring Report) have been made shall be re-calculated to take account of such Deduction and the amount of such Deduction shall be immediately due and payable by Sub-hubco to the relevant Authority together with interest at the Default Interest Rate from the date on which the relevant Authority paid the relevant Monthly Invoice for the relevant Contract Month until the date on which payment is made by Sub-hubco.
- 6 For the purposes of paragraphs 2 and 3 of this Section 5 (*Failure by Sub-hubco to Monitor or Report*) the relevant circumstances are:
  - 6.1 fraudulent action or inaction; or
  - 6.2 deliberate misrepresentation; or
  - 6.3 gross misconduct or gross incompetence,in each case on the part of Sub-hubco or a Sub-hubco Party.

The provisions of this Section 5 (*Failure by Sub-hubco to Monitor or Report*) shall be without prejudice to any rights of an Authority in this Agreement pursuant to Clause 24 (*Monitoring of Performance*), Clause 40 (*Sub-hubco Events of Default*) and Clause 44 (*Corrupt Gifts and Payments*).

## SECTION 6

### PASS THROUGH COSTS

#### 1 UTILITY CHARGES

- 1.1 Sub-hubco may include charges for Utilities for each Facility in the relevant Monthly Service Payment in accordance with paragraph 1.1 of Section 2 (*Calculation of Service Payments*) of this Schedule Part 14 (*Payment Mechanism*) on the basis of costs reasonably incurred by Sub-hubco at the relevant Facilities and supported by an appropriate invoice from Sub-hubco's suppliers.
- 1.2 The relevant Authority is responsible for all connection, line rental and usage telephone charges at the relevant Facilities.

#### 2 RATES

Sub-hubco may include local authority rates in the relevant Monthly Service Payment in accordance with paragraph 1.1 of Section 2 (*Calculation of Service Payments*) of this Schedule Part 14 (*Payment Mechanism*) on the basis of the cost incurred by Sub-hubco at the relevant Facilities and supported by an appropriate invoice from the relevant local authority.

#### 3 OPERATIONAL INSURANCE PREMIUMS

- 3.1 Subject to paragraph 3.2, Sub-hubco may include the relevant Proportion of the premiums paid by Sub-hubco to take out and maintain the Operational Insurances in accordance with Clause 53 in the relevant Monthly Service Payment in accordance with paragraph 1 (*Monthly Service Payment*) of Section 2 (*Calculation of Service Payments*) of this Schedule Part 14 (*Payment Mechanism*) on the basis of the cost incurred by Sub-hubco and supported by an appropriate premium notices from the relevant insurer.
- 3.2 There shall be excluded from the premiums referred to in paragraph 3.1, a sum equal to any portion of the premiums attributable to any issue or factor other than circumstances generally prevailing in the relevant insurance market and circumstances attributable to malicious damage to the relevant Facilities or the claims history or re-rating of the relevant Authority or any relevant Authority Party.

APPENDIX 1

ANNUAL SERVICE PAYMENTS AT BASE DATE

ASPo Phase 1 = £451,594

ASPo Phase 2 & Phase 3 = £1,094,960 in aggregate, comprising £453,140

in respect of Phase 2 (and only payable after the Phase 2 Payment Commencement Date) and £641,820

in respect of Phase 3 (and only payable after the Phase 3 Payment Commencement Date)



## **APPENDIX 2**

### **FUNCTIONAL AREAS AND GSUs**

The Functional Area and GSUs are the Functional Area and GSUs in the Agreed Form

**SCHEDULE PART 15  
INSURANCE REQUIREMENTS**

**[REDACTED]**

## SCHEDULE PART 16

### CHANGE PROTOCOL

#### SECTION 1

#### DEFINITIONS

In this Schedule Part 16 (*Change Protocol*) and elsewhere in this Agreement (save where Schedule Part 1 provides to the contrary) the following words shall have the following meanings:

- “Adjustment Date”** means the date on which the adjustment to the relevant Annual Service Payments takes effect in accordance with the provisions of this Agreement, or such other date as is agreed between the parties;
- “Affordable”** means within the revenue resource parameters determined by the relevant Authority and notified in writing by it to Sub-hubco as available for a proposed High Value Change;
- “Approval Criteria”** has the meaning given in paragraph 7 (*Approval Criteria*) of Section 4 (*High Value Changes*) of this Schedule Part 16 (*Change Protocol*);
- “Approved Project”** has the meaning given in paragraph 8.2.1 of Section 4 (*High Value Changes*) of this Schedule Part 16 (*Change Protocol*);
- “Assumption Adjustment”** means an adjustment to any of the assumptions contained in the Financial Model;
- “Authority Change”** means, as the case may be, a Low Value Change, a Medium Value Change or a High Value Change;
- “Authority Change Notice”** means a notice issued in accordance with this Schedule Part 16 (*Change Protocol*) requiring an Authority Change;
- “Calculation Date”** means the relevant date for the purposes of calculating the Incurred Change Management Fee in accordance with Section 4 (*High Value Changes*) of this Schedule Part 16 (*Change Protocol*);
- “Capital Cost”** means in relation to any High Value Change the cost of carrying out the design, construction and commissioning of any construction works required to implement that High Value Change;
- “Catalogue of Small Works and Services” and “Catalogue”** means the list of prices and time periods for types of Low Value Changes set out in Appendix 1 Part 1 (*Catalogue*) to this Schedule Part 16 (*Change Protocol*), as amended from time to time in accordance with paragraph 3 (*Sub-hubco Response and Authority Confirmation*) of Section 2 (*Low Value Changes*) of this Schedule Part 16 (*Change Protocol*);
- “Catalogue Price”** means the total cost (excluding VAT) of carrying out a Low Value Change as set out in the Catalogue;
- “Catalogue Review Date”** means each third anniversary of the Commencement Date;
- “Change”** means a change in the relevant Works, the relevant Facilities and/or relevant Services or additional works and/or services or a change in the relevant Authority's Policies that may be made under Clause 33

(*Change Protocol*) or this Schedule Part 16 (*Change Protocol*);

**“Change in Costs”**

means in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated costs, losses or liabilities of Sub-hubco and/or the Contractor and/or any Service Provider (without double counting), including, as relevant, the following:

- (a) the reasonable costs of complying with the requirements of Clauses 24.9, 29 (*Delay Events*), 32 (*Changes in Law*) and/or Sections 2 (*Low Value Changes*) to 4 (*High Value Changes*) of this Schedule Part 16 (*Change Protocol*), including the reasonable costs of preparation of design and estimates;
- (b) the costs of continued employment of, or making redundant, staff who are no longer required;
- (c) the costs of employing additional staff;
- (d) reasonable professional fees;
- (e) the costs to Sub-hubco of financing any Relevant Event (and the consequences thereof) including commitment fees and capital costs interest and hedging costs, lost interest on any of Sub-hubco's own capital employed and any finance required pending receipt of a lump sum payment or adjustments to the relevant Annual Service Payment;
- (f) the effects of costs on implementation of any insurance reinstatement in accordance with this Agreement, including any adverse effect on the insurance proceeds payable to Sub-hubco (whether arising from physical damage insurance or business interruption insurance (or their equivalent)) in respect of that insurance reinstatement and any extension of the period of implementation of the insurance reinstatement;
- (g) operating costs, or lifecycle maintenance or replacement costs;
- (h) Capital Expenditure (or, in the case of a Relevant Event which is a Relevant Change in Law, Capital Expenditure for which the Authority is responsible);
- (i) the costs required to ensure continued compliance with the Funding Agreements;
- (j) any deductible or increase in the level of deductible, or any increase in premium under or in respect of any insurance policy; and
- (k) Direct Losses or Indirect Losses, including reasonable legal expenses on an indemnity basis;

**“Change in Revenue”**

means, in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated income of Sub-hubco and/or

any Service Provider from income committed from third parties (if any);

**“Change Management Fee”** means the fee calculated in accordance with paragraph 10 (*Information and notifications by the Authority to Sub-hubco and cooperation of the Authority*) of Section 4 (*High Value Changes*);

**“Cost”** where used in the definitions of High Value Change and Low Value Change means the immediate cost that will be incurred by Sub-hubco to implement the relevant Change, disregarding any Whole Life Costs;

**“Derogated Low Value Change”** means:

(a) changes to shelving, pin boarding, replacing blinds, screens, fitting wall protectors, fitting fixings such as hooks, brackets, replacing equipment that involves alterations to fixings/new fixings, brackets etc, fixing/replacing signs (internally), additional keys, pigeon hole units, additional worktops that are not adjoining to Group 1 Equipment, additional base and wall unit(s) if not adjoining to Group 1 Equipment, letter boxes (in wall) and any other Low Value Change that:

iii. consists of minor works at the relevant Facilities;

iv. only affects the interior of the relevant Facilities;

v. does not affect any of the mechanical and electrical equipment of the relevant Facilities;

vi. does not involve any interference with the service media in the relevant Facilities;

vii. will not conflict with any Programmed Maintenance; and

viii. will not prejudice any of the Operational Insurances;

**“Derogated Low Value Change Notice”** means a notice given by the relevant Authority in accordance with paragraph 1.2 of Section 2 (*Low Value Changes*) of this Schedule Part 16 (*Change Protocol*);

**“Estimate”** has the meaning given in paragraph 3 of Section 3 (*Medium Value Changes*) of this Schedule Part 16 (*Change Protocol*);

**“Estimated Change in Project Costs”** means, in respect of any Relevant Event, the aggregate of any Change in Costs and/or (without double counting) Change in Revenue (as relevant);

**“High Value Change”** means:

(a) a Change requested by the relevant Authority that, in the reasonable opinion of that Authority, is likely either to Cost in excess of one hundred thousand pounds (£100,000) (index linked) or to require an adjustment to the relevant Annual Service Payment that on a full year basis is 2% or more of the relevant Annual Service Payment in the relevant Contract Year provided

that the parties may agree that such a Change should instead be processed as a Medium Value Change; or

- (b) any other Change that the relevant Authority and Sub-hubco agree is to be treated as a High Value Change;

**“High Value Change Proposal”** means a proposal satisfying the requirements of paragraph 3.4 of Section 4 (*High Value Changes*) of this Schedule Part 16 (*Change Protocol*);

**“High Value Change Requirements”** has the meaning given in paragraph 2.1.3 of Section 4 (*High Value Changes*) of this Schedule Part 16 (*Change Protocol*);

**“High Value Change Stage 2 Submission”** has the meaning given in paragraph 4.1.1 of Section 4 (*High Value Changes*) of this Schedule Part 16 (*Change Protocol*);

**“Incurred Change Management Fee”** means the amounts actually incurred or payable by or on behalf of Sub-hubco up to the Calculation Date in respect of matters identified by Sub-hubco pursuant to paragraphs 3.4.3 and/or 4.3.7 of Section 4 (*High Value Changes*) of this Schedule as falling within the Change Management Fee (and not already reimbursed by the relevant Authority);

**“Input Adjustment”** means any adjustment to the Financial Model other than Assumption Adjustment and Logic Adjustments;

**“Key Ratios”** means the following ratios:

- (a) the Loan Life Cover Ratio (as defined under the Senior Funding Agreements);
- (b) the Projected Debt Service Cover Ratio (as defined under the Senior Funding Agreements);
- (c) the Threshold Equity IRR (as defined under Schedule Part 23 (*Refinancing*));
- (d) the Interest Rate (as defined under the Borrower Loan Notes)

**“Logic Adjustment”** means an adjustment to the logic or formulae contained in the Financial Model;

**“Low Value Change”** means a Change which is either:

- (a) of a type listed in the Catalogue of Small Works and Services; or
- (b) is not so listed, but has an individual Cost not exceeding five thousand pounds (£5,000) (index linked), or as otherwise agreed from time to time, except for any request that would (if implemented) increase the likelihood of Sub-hubco failing to meet the Authority's Construction Requirements and/or the relevant Service Level Specification or materially and adversely affect Sub-hubco's ability to perform its obligations under this Agreement;

**“Medium Value Change”** means a Change requested by the relevant Authority which is not a Low Value Change or a High Value Change;

**“Post-Adjustment”** means the Financial Model in effect immediately following the making of

<b>Financial Model"</b>	the relevant Adjustments;
<b>"Pre-Adjustment Financial Model"</b>	means the Financial Model in effect immediately prior to the making of the relevant Adjustments;
<b>"Relevant Event"</b>	means an event or circumstance in which this Agreement expressly provides for an adjustment to the relevant Annual Service Payments to be made;
<b>"Review Procedure"</b>	means the procedure set out in Schedule Part 8 ( <i>Review Procedure</i> ),
<b>"Small Works and Services Rates"</b>	and means the rates to be applied in respect of any request from the relevant Authority for a Low Value Change set out in Appendix 1 Part 2 ( <i>Small Works and Services Rates</i> ) to this Schedule Part 16 ( <i>Change Protocol</i> ), as amended from time to time in accordance with paragraph 8 of Section 2 ( <i>Low Value Changes</i> ) of this Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Stage 1 Approval"</b>	has the meaning given in paragraph 3.7 of Section 4 ( <i>High Value Changes</i> ) of this Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Stage 1 Approved Project"</b>	has the meaning given in paragraph 3.7 of Section 4 ( <i>High Value Changes</i> ) of this Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Stage 2 Approval"</b>	has the meaning given in paragraph 8.2.1 of Section 4 ( <i>High Value Changes</i> ) of this Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Sub-hubco Change"</b>	means a Change that is initiated by Sub-hubco by submitting a Sub-hubco Notice of Change to the relevant Authority pursuant to Section 5 ( <i>Sub-hubco Changes</i> ) of this Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Sub-hubco Notice of Change"</b>	has the meaning given in paragraph 1 of Section 5 ( <i>Sub-hubco Changes</i> ) of this Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Target Cost"</b>	has the meaning given in paragraph 2.1.2 of Section 4 ( <i>High Value Changes</i> ) of this Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Third Party Costs"</b>	means the costs incurred by Sub-hubco with third parties in responding to an Authority Change Notice for a Medium Value Change or a High Value Change, including, but not limited to, the Sub-Contractors, consultants and advisers; and
<b>"Whole Life Cost"</b>	means the estimated and (to the extent that such information is available) the actual cost of operating and maintaining that High Value Change over its intended design life (consistent with relevant Sub-hubco's Proposals).

**SECTION 2**  
**LOW VALUE CHANGES**

**1 Low Value Change Notice**

- 1.1 Subject to paragraph 1.2 of this Section 2 (Low Value Changes), where a Low Value Change is required by an Authority, it must submit an Authority Change Notice to Sub-hubco.
- 1.2 Each Authority may carry out Derogated Low Value Changes during the Operational Term. If an Authority wishes to carry out a Derogated Low Value Change it shall send Sub-hubco a notice at least five (5) Business Days prior to the date on which it proposes to start to implement the Change setting out the nature of the proposed Change in sufficient detail to enable Sub-hubco to satisfy itself that the proposed Change constitutes a Derogated Low Value Change. Sub-hubco may notify the relevant Authority within three (3) Business Days of receipt of a Derogated Low Value Change Notice that it does not agree that the proposed Change constitutes a Derogated Low Value Change and, unless the relevant Authority and Sub-hubco otherwise agree, the relevant Authority must not take any steps to carry out the proposed Change unless it has referred the dispute to the Dispute Resolution Procedure and it has been determined that the proposed Change is a Derogated Low Value Change.
- 1.3 If it carries out a Derogated Low Value Change, the relevant Authority must use Good Industry Practice to the standards that would have applied to Sub-hubco if it had carried it out as a Low Value Change.

**2 Authority Change Notice**

An Authority Change Notice for a Low Value Change must:

- 2.1 state that it relates to a Low Value Change;
- 2.2 contain a description of the works and/or the change to the relevant Works and/or the relevant Services that the relevant Authority requires including, if relevant, the applicable type of Low Value Change listed in the Catalogue; and
- 2.3 if there is no applicable type of change listed in the Catalogue, specify the time period within which the Authority requires the Change to be implemented.

**3 Sub-hubco Response and Authority Confirmation**

Within five (5) Business Days of receipt of an Authority Change Notice for a Low Value Change, Sub-hubco must notify the relevant Authority of:

- 3.1 the cost of implementing the required Low Value Change; and
- 3.2 the time period for implementing the Low Value Change,

in each case in accordance with paragraph 4 of this Section 2 (*Low Value Changes*).

**4 Cost and Timing**

- 4.1 If the Low Value Change is of a type listed in the Catalogue, the cost of carrying out that Low Value Change shall not exceed the relevant Catalogue Price and the time period for implementing the Low Value Change shall not exceed the relevant time specified in the Catalogue.



4.2 If the Low Value Change is not of a type that is listed in the Catalogue, the cost of carrying out that Low Value Change shall be calculated on the basis that:

4.2.1 wherever practicable during the relevant Operational Term(s) the Low Value Change will be carried out by an existing on-site and suitably qualified employee of Sub-hubco or a Sub-hubco Party and in that case Sub-hubco may not charge for labour. In respect of Low Value Changes to be implemented during:

- (i) the relevant Construction Phase and
- (ii) thereafter, where there is no such suitably qualified on-site employee reasonably available to carry out the Low Value Change,

the cost of the labour element will be calculated in accordance with the Small Works and Services Rates or, where such rates are not applicable, in accordance with rates which are fair and reasonable; and

4.2.2 the materials element will be charged at the cost of materials to Sub-hubco or to the Sub-hubco Party carrying out the work (net of all discounts) and there shall be no management fee, margin, overhead, contingency or other cost applied in relation thereto; and

4.2.3 in respect of Low Value Changes being implemented during the relevant Construction Phase, in addition to labour and materials, Sub-hubco shall be entitled to:

- (a) make a fair and reasonable charge for the additional cost (if any) of related plant to the Sub-hubco Party carrying out the work (net of all discount);
- (b) include a charge (not to exceed [REDACTED] to the Sub-hubco Party carrying out the work in aggregate) to represent any reasonable charge for prelims property applied in relation to the carrying out of the Low Value Change by such Sub-hubco Party; and
- (c) include a charge of [REDACTED] to the Sub-hubco Party carrying out the work in aggregate in respect of all management fees, margin, overhead, contingency or other costs applied in relation to the carrying out of the Low Value Change by such Sub-hubco Party.

4.3 Other than the costs referred to in paragraphs 4.1 and 4.2 of this Section 2 (*Low Value Changes*) Sub-hubco may not charge the relevant Authority for processing, implementing or managing a Low Value Change.

## 5 Authority objection

The relevant Authority may object in writing within five (5) Business Days of receipt of Sub-hubco's notice pursuant to paragraph 3 of this Section 2 (*Low Value Changes*), to any part of that notice and in that event the parties shall act reasonably to endeavour to agree as soon as practicable how the Low Value Change is to be implemented, which may include the relevant Authority withdrawing the Authority Notice of Change.

## 6 Implementation

- 6.1 Sub-hubco must implement a required Low Value Change so as to minimise any inconvenience to the relevant Authority and, subject to paragraph 10.2 of this Section 2 (*Low Value Changes*), within the timescale specified in the notice given by Sub-hubco pursuant to paragraph 3 of this Section 2 (*Low Value Changes*) (or agreed by the parties pursuant to paragraph 5 of this Section 2 (*Low Value Changes*)).
- 6.2 Sub-hubco shall notify the relevant Authority when it considers that the Low Value Change has been completed.
- 6.3 If Sub-hubco:
- 6.3.1 fails to give a notice to the relevant Authority in accordance with paragraph 3 of this Section 2 (*Low Value Changes*) within fifteen (15) Business Days of the date of the Authority Change Notice; or
  - 6.3.2 gives a notice pursuant to paragraph 3 of this Section 2 (*Low Value Changes*) to which the relevant Authority has objected pursuant to paragraph 5 of this Section 2 (*Low Value Changes*) on any ground other than the cost of the Low Value Change, the relevant Authority and Sub-hubco have not reached agreement as to how the Low Value Change is to be implemented and the objection has not been referred to the Dispute Resolution Procedure; or
  - 6.3.3 gives a notice pursuant to paragraph 3 of this Section 2 (*Low Value Changes*) to which the relevant Authority does not object pursuant to paragraph 5 but then fails to fully implement the Low Value Change within ten (10) Business Days after the timescale specified in that notice or agreed in accordance with paragraph 5 of this Section 2 (*Low Value Changes*),

then, subject to paragraph 10.3 of this Section 2 (*Low Value Changes*), the relevant Authority may notify Sub-hubco that the Low Value Change Notice is withdrawn and, following such notification, may procure the implementation of the Low Value Change without further recourse to Sub-hubco, but the relevant Authority must ensure that the Low Value Change is carried out in accordance with Good Industry Practice and to the standards that would have applied to Sub-hubco if it had implemented the Low Value Change.

## 7 Payment

Unless the relevant Authority notifies Sub-hubco within five (5) Business Days of receipt of a notice from Sub-hubco pursuant to paragraph 6.2 above that the Low Value Change has not been implemented to its reasonable satisfaction:

- 7.1 Sub-hubco shall, where the Low Value Change is implemented prior to the Operational Term, issue an invoice in respect of the costs of the Low Value Change, which the relevant Authority must pay within 20 Business Days of receipt; or
- 7.2 Sub-hubco shall, where the Low Value Change is implemented during the Operational Term, include the costs of the Low Value Change in the next relevant Monthly Invoice submitted pursuant to Clause 34.2 of this Agreement following completion or implementation of the relevant Low Value Change and the amounts payable for the Low Value Changes shall be invoiced and paid in accordance with the procedure described in Clause 34 of this Agreement.

## 8 Update of Catalogue and Small Works and Services Rates

- 8.1 From the Commencement Date the Catalogue shall be that set out in Part 1 of Appendix 1 to this Schedule Part 16 (*Change Protocol*) and the Small Works and Services Rates shall be those set out in Part 2 of Appendix 1 to this Schedule Part 16 (*Change Protocol*).
- 8.2 Subject to paragraph 8.3 of this Section 2 (*Low Value Changes*), the unit prices and the Small Works and Services Rates set out in the Catalogue and the Small Works and Services Rates shall be indexed on each anniversary of the Commencement Date for the change in RPI since the Commencement Date or, after the first Catalogue Review Date, since the most recent Catalogue Review Date.
- 8.3 On the date which is twenty (20) Business Days before each Catalogue Review Date, Sub-hubco must provide the Authority with:
- 8.3.1 a revised and updated Catalogue which:
    - (a) includes in the Catalogue unit prices for any types of Low Value Changes which have occurred and which the parties consider are reasonably likely to reoccur during the life of the Project and any other types of Low Value Changes as the parties may agree; and
    - (b) includes time periods for the carrying out of each listed type of Low Value Change; and
  - 8.3.2 updated Small Works and Services Rates.

The unit prices and Small Works and Services Rates will be for the ensuing three-year period following the Catalogue Review Date. The unit prices must represent good value for money having regard to:

- (a) prices prevailing for similar items in the market at the time; and
- (b) paragraph 4.2 of this Section 2 (*Low Value Changes*).

The Small Works and Services Rates must provide value for money with reference to rates prevailing for similar services in the market at the time.

- 8.4 Within ten (10) Business Days of the submission by Sub-hubco of the revised and updated Catalogue and Small Works and Services Rates pursuant to paragraph 8.3 of this Section 2 (*Low Value Changes*), Authority A and Authority B (acting together) shall confirm in writing whether or not they agree that the revised and the updated Catalogue shall constitute the Catalogue and the updated Small Works and Services Rates shall constitute the Small Works and Services Rates for the purposes of this Agreement from the relevant Catalogue Review Date;
- 8.5 If Authority A and Authority B (acting together) do not confirm to Sub-hubco that they agree with the revised and updated Catalogue and/or Small Works and Services Rates provided by Sub-hubco pursuant to paragraph 8.3 of this Section 2 (*Low Value Changes*), the parties shall meet and endeavour, in good faith, to agree any amendments to the Catalogue and/or Small Works and Services Rates. Any dispute in relation to this paragraph 8 may be referred by any party to the Dispute Resolution Procedure. The revised and updated Catalogue and revised and updated Small Works and Services Rates with such amendments as are agreed by the parties or determined under the Dispute Resolution Procedure shall constitute the Catalogue and the Small Works and Services Rates for the purposes of this Agreement from the relevant Catalogue Review Date.

## 9 Documentation and Monitoring

- 9.1 No due diligence (whether funder, legal, technical, insurance or financial) shall be required in relation to Low Value Changes unless otherwise agreed between the relevant Authority and Sub-hubco.
- 9.2 No changes shall be made to this Agreement or any Project Document as a result of a Low Value Change, unless otherwise agreed between the parties.
- 9.3 Where it is agreed that an adjustment of the relevant Annual Service Payment is required in respect of a Low Value Change, the Financial Model shall be adjusted to give effect to such Low Value Changes once each Contract Year on a date to be agreed between the parties and all relevant Low Value Changes that have occurred since the preceding such adjustment shall be aggregated together into a single cumulative adjustment in accordance with Section 4 (*Changing the Financial Model*) of this Schedule Part 16 (*Change Protocol*).
- 9.4 Sub-hubco shall keep a record of all Low Value Changes processed, completed and outstanding and shall provide an Authority with a copy of that record whenever reasonably required by that Authority.

## 10 Disputes

- 10.1 Any dispute concerning any matter referred to in this Section 2 (*Low Value Changes*) may be referred by any relevant party to the Dispute Resolution Procedure.
- 10.2 Sub-hubco shall not be obliged to implement the Low Value Change until any dispute has been determined except that where such dispute concerns only the cost of a Low Value Change, unless the relevant Authority otherwise directs, Sub-hubco must continue to carry out or implement the Low Value Change within the prescribed timescale notwithstanding the dispute.
- 10.3 An Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a Low Value Change in respect of which there is a dispute that has been referred to the Dispute Resolution Procedure, unless that dispute has been determined in its favour and Sub-hubco has not confirmed to the relevant Authority in writing within five (5) Business Days of the date of the determination that it will implement and carry out the Low Value Change in accordance with the determination.

## SECTION 3

### MEDIUM VALUE CHANGES

#### 1 Medium Value Changes

- 1.1 If an Authority requires a Medium Value Change, it must serve an Authority Change Notice on Sub-hubco in accordance with paragraph 2 (*Medium Value Change Notice*) of this Section 3 (*Medium Value Changes*).
- 1.2 Sub-hubco shall be entitled to refuse a Medium Value Change that:
  - 1.2.1 requires the relevant Works and/or relevant Services to be performed in a way that infringes any law or is inconsistent with Good Industry Practice;
  - 1.2.2 would cause any Necessary Consent to be revoked (or would require a new consent to be obtained or any existing Necessary Consent to be amended which, after using reasonable efforts, Sub-hubco has been unable to obtain);
  - 1.2.3 would materially and adversely affect Sub-hubco's ability to deliver the relevant Works and/or relevant Services (except those relevant Works and/or relevant Services which have been specified as requiring to be amended in the Authority Change Notice) in a manner not compensated for pursuant to this Section 3 (*Medium Value Changes*);
  - 1.2.4 would materially and adversely affect the health and safety of any person;
  - 1.2.5 would, if implemented, materially and adversely change the nature of the Project (including its risk profile); or
  - 1.2.6 the relevant Authority does not have the legal power or capacity to require implementation of.

#### 2 Medium Value Change Notice

- 2.1 An Authority Change Notice for a Medium Value Change must:
  - 2.1.1 state that it refers to a Medium Value Change;
  - 2.1.2 set out the change in the relevant Works or relevant Services or the additional works or services required in sufficient detail to enable Sub-hubco to calculate and provide the Estimated Change in Project Costs in accordance with paragraph 3 (*Contractor's Estimate*) of this Section 3 (*Medium Value Changes*);
  - 2.1.3 set out whether, in respect of any additional facilities, Sub-hubco is expected to provide facilities management services and lifecycle maintenance services in respect of such additional facilities; and
  - 2.1.4 set out the timing of the additional works or services required by the relevant Authority.

- 2.2 Within fifteen (15) Business Days of receipt of the Medium Value Change Notice, Sub-hubco must notify the relevant Authority in writing:
- 2.2.1 whether it considers that it is entitled to refuse the Medium Value Change on any of the grounds set out in paragraphs 1.2.1 to 1.2.6 of this Section 3;
  - 2.2.2 when it will provide the Estimate to the relevant Authority bearing in mind the requirement in paragraph 7.2.2 of this Section 3; and
  - 2.2.3 its estimate of the Third Party Costs that it will incur to prepare the Estimate.
- 2.3 If Sub-hubco notifies the relevant Authority that it considers that it is entitled to refuse the Medium Value Change on one or more of the grounds set out in paragraphs 1.2.1 to 1.2.6 of this Section 3, then unless the parties otherwise agree, the relevant Authority shall be deemed to have withdrawn the Authority Notice of Change if it has not referred the matter to the Dispute Resolution Procedure within twenty (20) Business Days of receipt of Sub-hubco's notice.
- 2.4 If the relevant Authority considers that Sub-hubco's proposed time for providing the Estimate is not reasonable, the parties shall endeavour to agree the time, failing which the matter may be referred to the Dispute Resolution Procedure.
- 2.5 If the relevant Authority considers that the Sub-hubco's estimate of Third Party Costs to prepare the Estimate is not reasonable, the parties shall endeavour to agree the same, failing which the matter may be referred to the Dispute Resolution Procedure.
- 2.6 If any matter is referred to the Dispute Resolution Procedure pursuant to paragraph 2 (*Medium Value Change Notice*) of this Section 3 (*Medium Value Changes*), the time for Sub-hubco to provide the Estimate shall be counted from the date of determination of that dispute if the dispute is determined in Sub-hubco's favour.

### 3 Contractor's Estimate

As soon as reasonably practicable and in any event within the time period agreed or determined pursuant to paragraph 2.4 of this Section 3, Sub-hubco shall deliver to the relevant Authority the Estimate.

The Estimate must contain:

- 3.1 a detailed timetable for implementation of the Medium Value Change;
- 3.2 any requirement for relief from compliance with obligations, including the obligations of Sub-hubco to achieve the relevant Actual Phase Completion Date by the relevant Phase Completion Date and to meet the requirements set out in the Authority's Construction Requirements and/or the relevant Service Level Specification during the implementation of the Medium Value Change;
- 3.3 an outline of the proposed design solution and design, including an appropriate analysis/risk appraisal and, to the extent relevant, the impact on whole life costings;
- 3.4 any impact on the provision of the relevant Works and/or the relevant Services;
- 3.5 a value for money justification for any proposed change to the quality of the works or the services comprised in the Medium Value Change as compared to the relevant Works and the relevant Services;

- 3.6 any amendment required to this Agreement and/or any Project Document as a result of the Medium Value Change;
- 3.7 any Estimated Change in Project Costs that results from the Medium Value Change;
- 3.8 any Capital Expenditure that is required or no longer required as a result of the Medium Value Change;
- 3.9 amendments to existing Necessary Consents that are required;
- 3.10 a payment schedule for any Capital Expenditure required to implement the Change, based on milestones where relevant;
- 3.11 costs and details of (i) any other approvals required and/or due diligence permitted pursuant to paragraph 12 of this Section 3 (*Medium Value Changes*); and (ii) any Third Party Costs;
- 3.12 the method of implementation and the proposed method of certification of any construction aspects of the Medium Value Change, if not covered by the procedures specified in Clause 14 (*Programme and Dates for Completion*); and
- 3.13 any other information requested by the relevant Authority in the Authority Change Notice.

together the "**Estimate**"

#### 4 **Costing of the Estimate**

In calculating the Estimated Change in Project Costs and/or the Capital Expenditure for the purposes of the Estimate, Sub-hubco shall apply the following principles wherever applicable:

- 4.1 unless the relevant Authority's requirements for the Medium Value Change specify a different quality as compared to the relevant Works:
  - 4.1.1 the unit cost of any construction or installation works or associated preliminaries (excluding any temporary or demolition works, professional fees, contingencies, overheads and profit margins) required to implement the Medium Value Change is the equivalent unit rate set out in Part 1 (*Unit Cost for Construction or Installation Costs*) of Appendix 2 of this Schedule Part 16 (*Change Protocol*), uplifted using the DTI Pubsec index for construction cost inflation in the period between the Commencement Date and the date the Medium Value Change is to be commenced;
  - 4.1.2 any lifecycle replacement and maintenance associated with additional works (or changes to the relevant Works) are consistent with the lifecycle and maintenance profile of the relevant Facilities envisaged in Section 4 (*Sub-hubco's Proposals*) of Schedule Part 6 (*Construction Matters*) including (without limitation) in terms of the replacement cycles for equipment, provided that Sub-hubco must reflect improvements in technology that can optimise Whole Life Costs for the relevant Authority; and
  - 4.1.3 the unit costs to be applied to the pricing of lifecycle replacement and maintenance is the equivalent unit rate set out in Part 2 (*Unit*

Costs of Lifecycle Maintenance) of Appendix 2 of this Schedule Part 16 (Change Protocol) (index linked);

- 4.2 any professional fees, contingencies, overheads and/or profit margins to be charged by any consultant, sub-contractor or supplier in respect of construction and/or installation and/or lifecycle and/or service provision for the Medium Value Change are the equivalent rates set out in Part **Error! Reference source not found.** (Consultant, Sub-contractor or Supplier Fees) of Appendix 2 of this Schedule Part 16 (Change Protocol), or if the professional fees, contingencies, overheads and profit margins being charged by consultants, sub-contractors and/or suppliers in current market conditions have changed significantly from those set out in Part **Error! Reference source not found.** (Consultant, Sub-contractor or Supplier Fees) of Appendix 2 of this Schedule Part 16 (Change Protocol), such other rates as the parties agree or failing agreement as may be determined under the Dispute Resolution Procedure as being consistent with those charged in current market conditions;
- 4.3 unless the relevant Authority's requirements for the Medium Value Change specify a different quality than required by the relevant Service Level Specification, the unit cost of any extension of, or change to, any Service (either in scope or area), taking into account the capacity of existing labour resources, is consistent with the equivalent unit rate set out in Part 4 of Appendix 2 to this Schedule Part 16 (Change Protocol);
- 4.4 other than as referred to in paragraphs 4.1 to 4.3 of this Section 3 (Medium Value Changes) no charge shall be made in respect of Sub-hubco's time, or that of any Sub-hubco Party spent processing, managing or monitoring the Medium Value Change (and no additional mark up or management fee shall be applied by Sub-hubco); and
- 4.5 where aspects of the Medium Value Change are not addressed by paragraphs 4.1 to 4.4 of this Section 3 (Medium Value Changes), they shall be costed on a fair and reasonable basis reflecting the then current market rates.

## 5 Standards of provision of the Estimate

In providing the Estimate Sub-hubco must:

- 5.1 use reasonable endeavours to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
- 5.2 demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, reasonably foreseeable Changes in Law at that time have been taken into account; and
- 5.3 demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Medium Value Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under paragraphs 3.7 and/or 3.8 of this Section 3; and
- 5.4 provide written evidence of Sub-hubco's compliance with paragraphs 5.1 to 5.3 of this Section 3.

## 6 Determination of the Estimate

As soon as practicable after the relevant Authority receives the Estimate, the relevant Authority and Sub-hubco shall discuss and endeavour to agree the contents of the Estimate. If the relevant Authority and Sub-hubco cannot agree on the contents of the Estimate, the



matter may be referred by either party to the Dispute Resolution Procedure to determine if the Estimate represents a fair and reasonable approach to implementing the Medium Value Change in all respects.

## **7 Confirmation or Withdrawal of the Medium Value Change Notice**

7.1 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to paragraph 3 of this Section 3, the relevant Authority shall:

7.1.1 confirm in writing to Sub-hubco the Estimate (as modified); or

7.1.2 withdraw the Authority Change Notice.

7.2 If, in any Contract Year, the relevant Authority has either not confirmed an Estimate (as modified, if applicable) within twenty (20) Business Days of the contents of the Estimate having been agreed or determined in accordance with the foregoing provisions of this Section 3 or has withdrawn an Authority Change Notice for a Medium Value Change on three or more occasions, then the relevant Authority shall pay to Sub-hubco on the third and each subsequent such occasion in that Contract Year the reasonable additional Third Party Costs incurred by Sub-hubco in preparing the Estimate provided that:

7.2.1 Sub-hubco has used all reasonable endeavours to submit a reasonably priced Estimate; and

7.2.2 Sub-hubco made available to the relevant Authority, with the Estimate, a cost break down of Third Party Costs incurred by Sub-hubco to prepare the Estimate, which shall be consistent with the estimate of such costs approved by the relevant Authority pursuant to paragraph 2.5 of this Section 3.

## **8 Implementation of the Medium Value Change**

8.1 When the relevant Authority has confirmed the Estimate in accordance with paragraph 7.1 of this Section 3, Sub-hubco shall, subject to Sub-hubco obtaining all new or amended Necessary Consents that are required and have not already been obtained, implement the required Medium Value Change in accordance with the Estimate. Where an extension of time has been agreed as part of the Estimate the relevant Phase Completion Dates shall be extended as agreed in the Estimate. Where the implementation of the Medium Value Change in accordance with the confirmed Estimate requires amendments to this Agreement and/or the Financial Model, Sub-hubco shall not be in breach of this paragraph 8.1 to the extent that the agreement of an Authority not affected by the Medium Value Change to such amendments has not been provided.

8.2 Sub-hubco shall notify the relevant Authority when it considers that the Medium Value Change has been completed.

8.3 If:

8.3.1 Sub-hubco fails to provide a response pursuant to paragraph 2.2 of this Section 3 within fifteen (15) Business Days of the date of the Medium Value Change Notice; or

8.3.2 Sub-hubco fails to provide an Estimate in accordance with paragraph 3 of this Section 3; or

8.3.3 the relevant Authority has confirmed an Estimate but Sub-hubco fails to fully implement the Medium Value Change within ten (10)

Business Days after the expiry of the time for implementing the Medium Value Change set out in the Estimate Low Value Change (as such time may be extended for any delay that is, or is equivalent to, a Delay Event);

then, subject to paragraph 14.3 of this Section 3, the relevant Authority may notify Sub-hubco that the Medium Value Change Notice is withdrawn and, following such notification, may procure the implementation of the Medium Value Change without further recourse to Sub-hubco, but the relevant Authority must ensure that the Medium Value Change is carried out in accordance with Good Industry Practice and to the standards that would have applied to Sub-hubco if it had implemented the Medium Value Change.

**9 Certification of the Medium Value Change**

- 9.1 Where the Medium Value Change is implemented at the relevant Facilities before the relevant Phase Actual Completion Date, the procedure set out at Clause 17 (*Pre-Completion Commissioning and Completion*) shall apply to the Medium Value Change at the same time as it applies to the original relevant Works.
- 9.2 Where the Medium Value Change is implemented at the relevant Facilities after the relevant Phase Actual Completion Date, and constitutes additional works, the procedure set out and agreed in the Estimate for certifying the completion of the Medium Value Change shall apply to determine whether the Medium Value Change has been completed appropriately.

**10 Method of Payment of Authority Contribution**

- 10.1 Sub-hubco shall invoice the relevant Authority for Capital Expenditure incurred by Sub-hubco to implement a Medium Value Change according to the payment schedule set out in the Estimate as referred to in paragraph 3.10.
- 10.2 The relevant Authority shall make a payment to Sub-hubco within fifteen (15) Business Days of receipt by the relevant Authority of invoices presented to that Authority (complete in all material respects) in accordance with paragraph 10.1 of this Section 3 accompanied by the relevant evidence (where applicable) that the relevant part of the Medium Value Change has been carried out.

**11 Adjustment to Annual Service Payment**

Any adjustment to the relevant Annual Service Payment that is necessary due to the implementation of a Medium Value Change shall be calculated in accordance with Section 6 of this Schedule Part 16 (*Change Protocol*).

**12 Due Diligence**

- 12.1 Sub-hubco shall procure that the Senior Lenders shall not:
  - 12.1.1 (in any event) withhold or delay any consents that are required pursuant to the Senior Financing Agreements to a Medium Value Change other than on the basis that the Senior Lenders, acting pursuant to the terms of the Senior Financing Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 apply; or
  - 12.1.2 carry out any due diligence (whether funder, legal, technical, insurance or financial) in relation to the carrying out of any Medium Value Change unless either (i) the Medium Value Change in question would result in an adjustment to the relevant Annual Service Payment that, on a full year basis, is in excess of

one percent (1%) of the relevant Annual Service Payment in the relevant Contract Year or (ii) the Senior Lenders, acting pursuant to the terms of the Senior Financing Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 apply.

12.2 Where not prohibited by paragraph 12.1 of this Section 3, the Senior Lenders may carry out legal, financial, insurance and/or technical due diligence on any proposal for a Medium Value Change. In the event that such due diligence is permitted and required, the parties shall agree a budget for the due diligence not exceeding 5% of the overall value of the Medium Value Change in question unless the parties (acting reasonably) agree otherwise. Any costs incurred by Sub-hubco as a result of the Senior Lenders due diligence shall be reimbursed by the relevant Authority following agreement or determination of the contents of the Estimate within ten (10) Business Days of Sub-hubco submitting an invoice for and evidence of such costs, subject to the invoices being in accordance with the agreed budget.

12.3 It is acknowledged that Changes (particularly where they involve a change to the Works or the Facilities) may require authorisation from the insurers under the Required Insurances. Sub-hubco shall notify the relevant insurance broker immediately upon any material Medium Value Change being agreed (materiality being judged in relation to the size and nature of the scope of the Medium Value Change).

### 13 **Project Documentation**

13.1 Unless the parties otherwise agree, no changes to the Project Documents shall be made as a result of a Medium Value Change.

13.2 Sub-hubco shall, no later than one (1) month following completion of a Medium Value Change, update the as-built drawings and the operating and maintenance manuals as necessary to reflect the Medium Value Change.

### 14 **Disputes**

14.1 Any dispute concerning any matter referred to in this Section 3 may be referred by either party to the Dispute Resolution Procedure.

14.2 Sub-hubco shall not be obliged to implement the Medium Value Change until the dispute has been determined.

14.3 An Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a Medium Value Change in respect of which there is a dispute that has been referred to the Dispute Resolution Procedure, unless that dispute has been determined in its favour and Sub-hubco has not confirmed to the relevant Authority in writing within five (5) Business Days of the date of the determination that it will implement and carry out the Medium Value Change in accordance with the determination.

## SECTION 4

### HIGH VALUE CHANGES

#### 1 High Value Changes

- 1.1 If an Authority requires a High Value Change it must serve an Authority Change Notice on Sub-hubco in accordance with paragraph 2 of this Section 4 (*High Value Changes*).
- 1.2 Sub-hubco shall be entitled to refuse a High Value Change that:
  - 1.2.1 requires the relevant Works and/or the relevant Services to be performed in a way that infringes any law or is inconsistent with Good Industry Practice;
  - 1.2.2 would cause any Necessary Consent to be revoked (or would require a new consent to be obtained to implement the relevant change in the relevant Works and/or the relevant Services which, after using reasonable efforts, Sub-hubco has been unable to obtain);
  - 1.2.3 would materially and adversely affect Sub-hubco's ability to deliver the relevant Works and/or the relevant Services (except those relevant Works and/or relevant Services which have been specified as requiring to be amended in the High Value Change Notice) in a manner not compensated pursuant to this Section 4 (*High Value Changes*);
  - 1.2.4 would materially and adversely affect the health and safety of any person;
  - 1.2.5 would, if implemented, materially and adversely change the nature of the Project (including its risk profile);
  - 1.2.6 is the subject of a High Value Change Notice that cannot reasonably be complied with;
  - 1.2.7 the relevant Authority does not have the legal power or capacity to require implementation of; or
  - 1.2.8 would if implemented adversely affect the enforceability or priority of the security held by or on behalf of the existing Senior Lenders.

#### 2 High Value Change Notice

- 2.1 An Authority Change Notice for a High Value Change must:
  - 2.1.1 state that it refers to a High Value Change;
  - 2.1.2 set out the maximum available capital and/or revenue the relevant Authority is able to commit to that High Value Change (the "Target Cost");

- 2.1.3 identify any requirements of the relevant Authority that must be satisfied as part of the High Value Change Proposal (the “**High Value Change Requirements**”); and
  - 2.1.4 identify how the relevant Authority will assess whether the High Value Change Stage 2 Submission offers it value for money.
- 2.2 An Authority and Sub-hubco may agree written protocols with express reference to this Section 4 (*High Value Changes*) which explain or clarify any aspects of the High Value Change approval procedure set out in this Section 4 (*High Value Changes*) and such protocols shall be read as if incorporated into this Section 4 (*High Value Changes*) (including accelerated procedures with reduced requirements for High Value Changes of relatively low values).
- 2.3 The relevant Authority and Sub-hubco must:
- 2.3.1 within five (5) Business Days of receipt by Sub-hubco of any High Value Change Notice, discuss and review the nature of the High Value Change, including a discussion as to which of the items set out in paragraph 3.4 of this Section 4 (*High Value Changes*) are appropriate to be included within the High Value Change Proposal; and
  - 2.3.2 within five (5) Business Days of a High Value Change Proposal becoming a Stage 1 Approved Project, discuss and review the nature of the Stage 1 Approved Project, including a discussion as to which of the items set out in paragraph 4.3 of this Section 4 (*High Value Changes*) are appropriate to be included within the High Value Change Stage 2 Submission.

### 3 High Value Change Proposal

- 3.1 Sub-hubco must notify the relevant Authority in writing as soon as practicable and in any event within fifteen (15) Business Days after having received the Authority Change Notice for a High Value Change if it considers that any of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply. If no such notice is served, Sub-hubco must (within thirty (30) Business Days after having received the Authority Change Notice) either:
- 3.1.1 submit a High Value Change Proposal to the relevant Authority; or
  - 3.1.2 notify the relevant Authority as to when the High Value Change Proposal will be provided to it (provided that Sub-hubco shall use all reasonable endeavours to obtain all the information that it requires, expeditiously).
- 3.2 If Sub-hubco notifies the relevant Authority that it considers that one or more of the grounds set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply, then unless the relevant Authority and Sub-hubco otherwise agree, the relevant Authority shall be deemed to have withdrawn the Authority Notice of Change if it has not referred the matter to the Dispute Resolution Procedure within twenty (20) Business Days of receipt of Sub-hubco’s notice. If the matter is referred to the Dispute Resolution Procedure the time for Sub-hubco to provide the High Value Change Proposal shall be counted from the date of determination of that dispute if the dispute is determined in Sub-hubco’s favour.
- 3.3 If the relevant Authority considers that Sub-hubco’s proposed time for providing the High Value Change Proposal is not reasonable, the parties shall endeavour to

agree the time, failing which the matter may be referred to the Dispute Resolution Procedure.

3.4 Unless Sub-hubco has submitted a High Value Change Proposal in accordance with paragraph 3.1.1 of this Section 4 (*High Value Changes*), Sub-hubco must deliver to the relevant Authority the High Value Change Proposal as soon as reasonably practicable and in any event within the time period agreed or determined pursuant to paragraph 3.3 of this Section 4 (*High Value Changes*). Unless the relevant Authority and Sub-hubco agree otherwise, a High Value Change Proposal will contain at least the following information in sufficient detail to enable the relevant Authority to make an informed decision under paragraph 3.6 of this Section 4 (*High Value Changes*):

- 3.4.1 a description of the High Value Change, with evidence of how the High Value Change meets the High Value Change Requirements;
- 3.4.2 an outline of the proposed building solution and design including an appropriate analysis/risk appraisal of, in each case to the extent relevant (if at all), the preferred investment solution contemplated in terms of new build, refurbishment, whole life costings;
- 3.4.3 the Change Management Fee for the High Value Change, which shall be a capped fee calculated in accordance with paragraph 10 of this Section 4 (*High Value Changes*);
- 3.4.4 details of the third party activity likely to be required by Sub-hubco in developing a High Value Change Stage 2 Submission together with a budget (or budgets) for relative Third Party Costs;
- 3.4.5 an estimated programme for submission of the High Value Change Stage 2 Submission and for the implementation of the High Value Change;
- 3.4.6 any requirement for relief from compliance with obligations, including the obligations of Sub-hubco to achieve the relevant Phase Actual Completion Date by the relevant Phase Completion Date and meet the requirements set out in the Authority's Construction Requirements and/or the relevant Service Level Specification during the implementation of the High Value Change;
- 3.4.7 any impact on the provision of the relevant Works and/or the relevant Services;
- 3.4.8 any amendment required to this Agreement and/or any Project Document as a result of the High Value Change;
- 3.4.9 any Estimated Change in Project Costs that results from the High Value Change;
- 3.4.10 an outline of how Sub-hubco proposes to finance any Capital Expenditure required for the High Value Change;
- 3.4.11 Sub-hubco's suggested payment schedule for any Capital Expenditure to be incurred in implementing the Change that is to be borne by the relevant Authority, based on milestones where relevant;

- 3.4.12 any new Necessary Consents and/or any amendments to existing Necessary Consents which are required;
- 3.4.13 costs and details of any other approvals required or due diligence permitted pursuant to paragraph 14 of this Section 4 (*High Value Changes*);
- 3.4.14 the proposed method of certification of any construction or operational aspects of the relevant Works or the relevant Services required by the proposed High Value Change if not covered by the procedures specified in Clause 17 (*Pre-Completion Commissioning and Completion*); and
- 3.4.15 a value for money assessment explaining why Sub-hubco's proposals represent value for money taking into account both the proposed Capital Cost and Whole Life Cost.

**3.5 Liaison between Sub-hubco, the relevant Authority and relevant end users**

In developing a High Value Change Proposal Sub-hubco must liaise with the relevant Authority and relevant end users (being such persons or organisations as Sub-hubco in consultation with the relevant Authority considers appropriate). The relevant Authority must provide Sub-hubco with such information about its requirements as Sub-hubco reasonably requires and must assist Sub-hubco in the review of any draft designs in relation to the High Value Change Proposal. Any and all information and other input or feedback provided by the Authority to Sub-hubco, unless expressly stated otherwise by the relevant Authority, will be without warranty and will be provided without prejudice to the relevant Authority's rights under this Section 4 (*High Value Changes*).

**3.6 Consideration of a High Value Change Proposal by the relevant Authority**

The relevant Authority will consider in good faith each High Value Change Proposal put forward by Sub-hubco and the relevant Authority will not unreasonably withhold or delay its consent to a High Value Change Proposal. If, acting reasonably, the relevant Authority finds that any material aspects of the High Value Change Proposal are unsatisfactory to it, it shall notify Sub-hubco of the same and offer reasonable assistance to Sub-hubco to enable it to revise and resubmit the High Value Change Proposal as soon as reasonably practicable.

**3.7 Authority response to a High Value Change Proposal**

If the relevant Authority approves a High Value Change Proposal (including any revised High Value Change Proposal resubmitted pursuant to paragraph 3.5 of this Section 4 (*High Value Changes*)), then it shall be a "**Stage 1 Approved Project**" or be referred to as having received "**Stage 1 Approval**", as the context requires.

**3.8 Sub-hubco not entitled to dispute non-approval**

Sub-hubco shall not be entitled to refer any dispute concerning the relevant Authority's failure to approve a High Value Change Proposal to the Dispute Resolution Procedure.

**4 Stage 2 Submission**

**4.1 Development of a High Value Change Stage 2 Submission**

- 4.1.1 Within ten (10) Business Days of a High Value Change Proposal having become a Stage 1 Approved Project, the relevant

Authority and Sub-hubco shall seek to agree the time period within which Sub-hubco must develop the Stage 1 Approved Project into a detailed submission (the “**High Value Change Stage 2 Submission**”). If the parties are unable to agree a reasonable time period for such submission any dispute may be referred to the Dispute Resolution Procedure.

- 4.1.2 Following agreement or determination of what is an appropriate time period for submission by Sub-hubco of the High Value Change Stage 2 Submission pursuant to paragraph 4.1.1 of this Section 4 (*High Value Changes*), Sub-hubco shall proceed regularly and diligently to produce and submit the same to the relevant Authority within the agreed or determined time period.

#### **4.2 Liaison between Sub-hubco, the relevant Authority and relevant end users**

In developing a High Value Change Stage 2 Submission Sub-hubco must continue to liaise with the relevant Authority and relevant end users (being such persons or organisations as the relevant Authority in consultation with Sub-hubco considers appropriate). The relevant Authority must provide Sub-hubco with such information as to its requirements as is reasonably necessary to enable Sub-hubco to submit a full and complete High Value Change Stage 2 Submission and any such other information as Sub-hubco may reasonably require and must assist Sub-hubco in the review of any draft designs in relation to the Stage 1 Approved Project and in the development of other aspects of the High Value Change Stage 2 Submission (but not where this would involve the relevant Authority incurring additional material expense). Any and all information and other input or feedback provided by the relevant Authority to Sub-hubco will be without warranty and will be provided without prejudice to the relevant Authority's rights under this Section 4 (*High Value Changes*).

#### **4.3 Content requirements in relation to a High Value Change Stage 2 Submission**

Save where the parties agree otherwise, in relation to the relevant Stage 1 Approved Project, Sub-hubco shall procure that a High Value Change Stage 2 Submission includes (but not be limited to):

- 4.3.1 draft(s) of the relevant Project Document(s) identifying (if relevant) any material changes or amendments proposed in respect of the relevant Stage 1 Approved Project, together with the reasons for any such changes or amendments proposed and including full details of which provisions of the relevant Project Documents will apply to the High Value Change so that it is implemented in equivalent manner and to an equivalent standard as required in respect of the relevant Works and/or relevant Services as appropriate;
- 4.3.2 detailed design solutions (to RIBA Level D);
- 4.3.3 appropriate plans and drawings;
- 4.3.4 relevant detailed planning permissions and any other relevant planning approvals and Necessary Consents (or such lesser confirmation or information in relation to planning as may be agreed with the relevant Authority);
- 4.3.5 a proposed revised Financial Model including the detailed price estimates for the Stage 1 Approved Project;



- 4.3.6 an explanation (together with appropriate supporting evidence) as to why the High Value Change Stage 2 Submission meets the Approval Criteria (as defined in paragraph 7 of this Section 4 (*High Value Changes*));
- 4.3.7 confirmation (or details of any requested variations to (with supporting justification)) of the Change Management Fee referred in paragraph 3.4.3 of this Section 4 (*High Value Changes*);
- 4.3.8 the proposed method of certification of any construction aspects of the High Value Change, if not covered by the procedures specified in Clause 17 (*Pre-Completion Commissioning & Completion*);
- 4.3.9 a value for money assessment explaining why Sub-hubco's proposals represent value for money taking into account both the proposed Capital Cost and Whole Life Cost;
- 4.3.10 a timetable and method statement setting out how the relevant High Value Change will be delivered, which shall include (but not be limited to) in so far as relevant:
  - (a) proposals for the effective management of the building programme;
  - (b) not used;
  - (c) an assessment as to the savings to be generated by the High Value Change, particularly on staff costs and lifecycle replacement and maintenance and operation of Services;
  - (d) details of the Sub-Contractors together with evidence and explanation of the value testing undertaken by Sub-hubco in relation to the High Value Change;
  - (e) a completed risk register showing the potential risks identified in relation to the delivery of the High Value Change the occurrence of which are capable of adversely affecting the time for completion, cost and/or quality of the project, the probability of such risks occurring and a financial estimate of the most likely consequences of each risk occurring together with the prioritisation of all continuing risks and an action plan in respect of, and risk owners for, all risks prioritised as serious risks;
- 4.3.11 any surveys and investigations and associated reports that are reasonably necessary to ascertain (in relation to Changes involving the construction of additional buildings) information as to the nature, location and condition of the relevant land (Including hydrological, geological, geotechnical and sub-surface conditions) together with information relating to archaeological finds, areas of archaeological, scientific or natural interest and (in relation to the refurbishment of any existing buildings) information on the condition and quality of existing structures and, in particular, the presence of any latent defects.

**Co-operation of the relevant Authority**

4.4 The relevant Authority will co-operate with Sub-hubco in relation to any High Value Change Stage 2 Submission being developed by Sub-hubco, including (without limitation) promptly providing:

4.4.1 written confirmation of the Target Cost and/or High Value Change Requirements and any change to such Target Cost and/or High Value Change Requirements; and

4.4.2 any information reasonably required by Sub-hubco to enable it to satisfy the requirements of paragraph 4.3 of this Section 4 (*High Value Changes*).

**5 Time periods for approval**

5.1 Each High Value Change Proposal and each High Value Change Stage 2 Submission shall be valid for a period of three (3) months from the date of its submission by Sub-hubco.

5.2 If by the end of the three (3) month period referred to in paragraph 5.1 of this Section 4 (*High Value Changes*) the relevant Authority has not:

5.2.1 in relation to a High Value Change Proposal, approved or rejected that High Value Change Proposal in accordance with the procedures set out in this Section 4 (*High Value Changes*):

(a) Sub-hubco shall be entitled to withdraw the High Value Change Proposal; and

(b) Sub-hubco shall not be entitled to any costs relating to the High Value Change Proposal unless the relevant Authority has either not responded to the High Value Change Proposal and/or is in material breach of its obligations in paragraph 3 and/or paragraph 4.4 of this Section 4 in which case paragraph 8.5 of this Section 4 (*High Value Changes*) shall apply

5.2.2 in relation to a High Value Change Stage 2 Submission, approved or rejected that High Value Change Stage 2 Submission in accordance with the procedures set out in this Section 4 (*High Value Changes*) (or has not given any notification of the relevant Authority's response to the High Value Change Stage 2 Submission or has given written notice to Sub-hubco withdrawing or cancelling the High Value Change to which the High Value Change Stage 2 Submission relates) then the High Value Change Stage 2 Submission shall be deemed to have been improperly rejected by the relevant Authority and paragraph 8.5 shall apply.

**6 Changes to the High Value Change Requirements or Approval Criteria**

6.1 If the High Value Change Requirements or Approval Criteria are subject to any material variation in relation to a High Value Change by the relevant Authority after the High Value Change Proposal has been submitted then:

6.1.1 Sub-hubco and the relevant Authority shall negotiate in good faith as to the implications on the High Value Change Proposal or High Value Change Stage 2 Submission (as the case may be) and shall seek to agree changes thereto to accommodate the variation (including any change to the Target Cost and/or to the Change Management Fee);

- 6.1.2 if agreement has not been reached pursuant to paragraph 6.1.1 of this Section 4 (*High Value Changes*) within twenty (20) Business Days (or such longer period as the parties may agree) then:
- (a) Sub-hubco shall be entitled by notice in writing to the relevant Authority to withdraw the High Value Change Proposal or the High Value Change Stage 2 Submission (as the case may be) and to be paid the Incurred Change Management Fee with the Calculation Date being the date of the variation notified by the relevant Authority; and
  - (b) the relevant Authority shall not be entitled to procure the High Value Change without issuing a new Authority Change Notice for the High Value Change and complying with the procedure in this Section 4 (*High Value Changes*) in relation to that High Value Change.
- 6.1.3 The relevant Authority may, at any time, give notice in writing to Sub-hubco that it proposes to cancel a High Value Change without completing the process set out in this Section 4 (*High Value Changes*) in which case the relevant Authority must pay Sub-hubco the Incurred Change Management Fee in respect of the cancelled High Value Change with the Calculation Date being the date of such notice.

## 7 Approval Criteria

- 7.1 For the purposes of this Section 4 (*High Value Changes*), Approval Criteria means the criteria against which any Stage 1 Approved Project is to be judged by the relevant Authority in determining whether it achieves Stage 2 Approval. The criteria are:
- 7.1.1 whether the costs of the Stage 1 Approved Project are within the Target Cost notified to Sub-hubco by the relevant Authority;
  - 7.1.2 whether it has been demonstrated that the Stage 1 Approved Project provides value for money assessed in accordance with the measures identified by the relevant Authority in accordance with paragraph 2.1.4 of this Section 4 (*High Value Changes*);
  - 7.1.3 whether the relevant Authority, acting reasonably, is satisfied that the High Value Change Stage 2 Submission meets the High Value Change Requirements;
  - 7.1.4 whether any material changes or amendments to the relevant Project Document(s) as detailed pursuant to paragraph 4.3.1 of this Section 4 (*High Value Changes*) are acceptable to the relevant Authority, acting reasonably; and
  - 7.1.5 whether the High Value Change Stage 2 Submission contains all the information required pursuant to paragraph 4.3 of this Section 4 (*High Value Changes*) (or as otherwise agreed by the relevant Authority and Sub-hubco).

## 8 Submission of the High Value Change Stage 2 Submission to the relevant Authority and consideration of that submission by the relevant Authority

- 8.1 The relevant Authority will consider in good faith High Value Change Stage 2 Submissions submitted by Sub-hubco and the relevant Authority will not

unreasonably withhold or delay its consent to a High Value Change Stage 2 Submission. The relevant Authority is entitled to call for such reasonable information and assistance as it considers appropriate to enable it to decide whether the High Value Change Stage 2 Submission meets the Approval Criteria. Sub-hubco must reply promptly to all such requests for further information and assistance.

8.2 As soon as reasonably practicable after the submission to it of a High Value Change Stage 2 Submission (including any revised High Value Change Stage 2 Submission re-submitted by Sub-hubco) the relevant Authority must give written notice of whether it:

8.2.1 approves the relevant Stage 1 Approved Project (in which case the Stage 1 Approved Project will be referred to as having received "**Stage 2 Approval**" or as being a "**Stage 2 Approved Project**" or an "**Approved Project**" as the context requires); or

8.2.2 rejects the Stage 1 Approved Project:

(a) on the ground that the High Value Change Stage 2 Submission in relation to the relevant Stage 1 Approved Project has failed to meet one or more of the Approval Criteria (except as referred to in paragraph 8.2.2(b)(i) or paragraph 8.2.2(b)(ii)), in which case (subject to resubmission under paragraph 8.2.3) paragraph 8.3 shall apply;

(b)

(i) because, as a result of any change to the Target Cost referred to in paragraph 2.1.2, the Stage 1 Approved Project is not in fact Affordable despite the High Value Change Stage 2 Submission being within the Target Cost notified by the relevant Authority pursuant to paragraph 2.1.2 of this Section 4 (*High Value Changes*); or

(ii) because Sub-hubco has failed to meet one or more of the Approval Criteria and the sole reason for that failure is that any Necessary Consent identified by Sub-hubco (in compliance with paragraph 3.4.12 of this Section 4 (*High Value Changes*)) has not been obtained; or

(iii) otherwise on grounds other than those set out in paragraphs 8.2.2(a), 8.2.2(b)(i) and 8.2.2(b)(ii) of this Section 4 (*High Value Changes*),

in which case paragraph 8.5 shall apply.

8.2.3 If the relevant Authority rejects the High Value Change Stage 2 Submission on the grounds set out in paragraph 8.2.2(a) the Authority and Sub-hubco will work together to address the reasons for such failure and attempt in good faith to produce a revised High Value Change Stage 2 Submission for Sub-hubco to re-submit to the relevant Authority.

8.2.4 If:

(a) a resubmitted High Value Change Stage 2 Submission is rejected by the relevant Authority on the ground set out in

paragraph 8.2.2(a) (subject to paragraphs 16.3 to 16.4 (if applicable) of this Section 4 (*High Value Changes*)); or

- (b) no resubmission of the High Value Change Stage 2 Submission is made within 30 Business Days of the date of the notice of rejection (or such longer period as the parties may agree),

then the relevant Stage 1 Approved Project shall be treated as having been properly rejected, the provisions of paragraph 8.3 of this Section 4 (*High Value Changes*) shall apply and neither the relevant Authority nor Sub-hubco will have any further obligations in relation to the relevant High Value Change referred to in the High Value Change Stage 2 Submission.

**If a High Value Change Stage 2 Submission is properly rejected by the relevant Authority**

8.3 Where this paragraph 8.3 applies (as set out in paragraph 8.2.2(a), paragraph 8.2.4 and paragraph 16.4.2 of this Section 4 (*High Value Changes*)) the relevant Authority shall not be required to reimburse or compensate Sub-hubco in respect of any costs relating to the High Value Change including the Change Management Fee.

8.4 If:

8.4.1 Sub-hubco fails to provide a response to an Authority Change Notice in accordance with paragraph 3.1 of this Section 4 (*High Value Changes*); or

8.4.2 (where applicable) Sub-hubco fails to provide a High Value Change Proposal in accordance with paragraph 3.4 of this Section 4 (*High Value Changes*); or

8.4.3 Sub-hubco fails to submit a High Value Change Stage 2 Submission in accordance with paragraph 4.1.2 of Section 4 (*High Value Changes*); or

8.4.4 the relevant Authority has validly rejected a High Value Change Stage 2 Submission in accordance with paragraph 8.2 and the matter has not been referred to the Dispute Resolution Procedure or any such dispute has been determined as described in paragraph 16.4.2 of this Section 4 (*High Value Changes*),

then, subject to paragraph 17 of this Section 4 (*High Value Changes*) the relevant Authority may notify Sub-hubco that the High Value Change Notice is withdrawn and, following such notification, may procure the implementation of the High Value Change without further recourse to Sub-hubco, but the relevant Authority must ensure that the High Value Change is carried out in accordance with Good Industry Practice and to the standards that would have applied to Sub-hubco if it had implemented the High Value Change.

**If a High Value Change Stage 2 Submission is improperly rejected by the Authority**

8.5 Where this paragraph 8.5 applies (as set out in paragraph 5.2.1(b), paragraph 5.2.2 paragraph 8.2.2(b) and paragraph 16.4.1)), the Incurred Change Management Fee and Third Party Costs incurred by Sub-hubco to prepare the High Value Change Proposal and Stage 2 Submission, which shall be in accordance with the activities and budget referred to in paragraph 3.4.4 of this Section 4 (*High Value Changes*), in relation to the relevant High Value Change

will be paid by the relevant Authority within ten (10) Business Days of the date on which Sub-hubco receives written notice of the rejection or the date of the deemed rejection (as the case may be) with the date of the rejection or the deemed rejection (as the case may be) being the Calculation Date for the purposes of calculating the amount of the Incurred Change Management Fee (unless a different Calculation Date is expressly stated in this Section 4 (*High Value Changes*) in relation to the circumstances giving rise to the entitlement of Sub-hubco to be paid the Incurred Change Management Fee).

**9 Information and notifications by the relevant Authority to Sub-hubco and cooperation of the relevant Authority**

9.1 The relevant Authority must notify Sub-hubco as soon as it becomes aware of any matter which may have a reasonably foreseeable material adverse effect on the viability of any High Value Change including any:

9.1.1 planning issues likely to cause a material delay in the anticipated programme for the High Value Change or material cost increases; and

9.1.2 changes to funding which the relevant Authority receives or to the way in which funding may be applied, either or both of which may affect whether a High Value Change is Affordable.

9.2 The relevant Authority shall provide reasonable assistance to Sub-hubco in relation to the procurement by Sub-hubco of all relevant Necessary Consents.

**10 Change Management Fee**

The Change Management Fee is to reimburse Sub-hubco for the time spent by its employees in project managing the development, procurement and implementation of the High Value Change and shall:

10.1 be based on actual time spent (validated by time sheets);

10.2 be calculated at the daily rates as set out in Appendix 2 Part 3 to this Schedule Part 16 (*Change Protocol*), but capped at the sum set out in the High Value Change Proposal;

10.3 not include the time of any person who is not employed by Sub-hubco;

10.4 not include any mark-up or profit or additional overheads;

10.5 be paid in three stages as follows:

10.5.1 on Stage 1 Approval;

10.5.2 on Stage 2 Approval; and

10.5.3 when any works involved in the High Value Change have been completed,

and at each stage Sub-hubco shall charge the relevant Authority (subject to the applicable cap) only for the time incurred by its staff up to completion of that stage.

**11 Implementation of the High Value Change**

Sub-hubco must implement any High Value Change approved by the relevant Authority so as to minimise any inconvenience to the relevant Authority and to the provision of

Community Services and in accordance with the Approved Project. Where an extension of time has been agreed as part of the Stage 2 Approval the relevant Phase Completion Dates shall be extended as agreed in the Approved Project. Where the implementation of the High Value Change in accordance with the Approved Project requires amendments to this Agreement and/or to the Financial Model Sub-hubco shall not be in breach of this paragraph 11 to the extent that the agreement of an Authority not affected by the High Value Change to such amendments has not been provided.

## **12 Method of Payment of Authority Contribution**

- 12.1 This paragraph 12 shall apply where Capital Expenditure for an Approved Project is to be funded in whole or part by the relevant Authority.
- 12.2 Sub-hubco shall invoice the relevant Authority for Capital Expenditure incurred by Sub-hubco to implement a High Value Change that is to be borne by the relevant Authority according to the payment schedule set out in the High Value Change Stage 2 Submission as referred to in paragraph 3.4.11 of this Section 4.
- 12.3 The relevant Authority shall make a payment to Sub-hubco within fifteen (15) Business Days of receipt by the Authority of invoices presented to the relevant Authority (complete in all material respects) in accordance with paragraph 12.2 of this Section 4, accompanied by the relevant evidence (where applicable) that the relevant part of the High Value Change has been carried out.

## **13 Adjustment to relevant Annual Service Payment**

Any adjustment to the relevant Annual Service Payment which is necessary as a result of the implementation of a High Value Change shall be calculated in accordance with Section 6 of this Schedule Part 16 (*Change Protocol*).

## **14 Due Diligence**

- 14.1 Where the relevant Authority is funding the High Value Change, Sub-hubco shall procure that the Senior Lenders shall not withhold or delay any consents which are required pursuant to the Senior Financing Agreements to such High Value Change other than on the basis that the Senior Lenders, acting pursuant to the terms of the Senior Financing Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply.
- 14.2 Where the relevant Authority is not funding the High Value Change, Sub-hubco shall procure that the Senior Lenders do not unreasonably withhold or delay any consents which are required pursuant to the Senior Financing Agreements to such High Value Change other than on the basis that the Senior Lenders, acting pursuant to the terms of the Senior Financing Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply.
- 14.3 The parties agree that the Senior Lenders may carry out legal, financial, insurance and technical due diligence on any proposal for a High Value Change. The relevant Authority and Sub-hubco shall agree a budget for the due diligence provided that the costs may not exceed the lower of (i) 3% of the overall value of the High Value Change in question or (ii) fifty thousand pounds (£50,000) unless, in either case, the parties (acting reasonably) agree otherwise. Any costs incurred by Sub-hubco as a result of the Senior Lenders due diligence will be reimbursed by the relevant Authority following the conclusion of the process in this Section 4 (*High Value Changes*) within ten (10) Business Days of Sub-hubco submitting an invoice for and evidence of such costs, subject to the invoices being in accordance with the agreed budget.

- 14.4 It is acknowledged that High Value Changes (particularly where they involve a change to the Works or the Facilities) may require authorisation from the Insurers under the Required Insurances. Sub-hubco shall notify the relevant insurance broker immediately upon any material High Value Change being agreed (materiality being judged in relation to the size and nature of the scope of the High Value Change).
- 14.5 The parties agree that paragraph 14.2 of this Section 4 (*High Value Changes*) of this Schedule Part 16 (*Change Protocol*) does not oblige the Senior Lenders to provide any additional funding for the relevant High Value Change, which shall be in their absolute discretion.

**15 Project Documentation**

- 15.1 The only changes to the Project Documents or Ancillary Documents to be made as a result of a High Value Change shall be those identified in the Approved Project (subject to any amendments to it agreed by the parties).
- 15.2 Sub-hubco shall, on completion of the Change, update the as-built drawings and the operating and maintenance manuals as necessary to reflect the High Value Change.

**16 Disputes**

- 16.1 Except as otherwise expressly provided, any dispute concerning any matter referred to in this Section 4 (*High Value Changes*) may be referred by either the relevant Authority and Sub-hubco to the Dispute Resolution Procedure.
- 16.2 The relevant Authority shall not be entitled to approve a High Value Change Proposal or a High Value Change Stage 2 Submission that is the subject of a dispute until the dispute has been determined.
- 16.3 If the relevant Authority rejects a High Value Change Stage 2 Submission pursuant to the provisions of paragraph 8.2.2(a) of this Section 4, Sub-hubco shall be entitled to refer the matter for consideration under the Dispute Resolution Procedure within ten (10) Business Days after receiving written notice of the relevant Authority's decision.
- 16.4 If, following a referral to the Dispute Resolution Procedure, it is agreed or determined:
- 16.4.1 that the High Value Change rejected by the relevant Authority pursuant to paragraph 8.2.2(a) of this Section 4 met the Approval Criteria the relevant Authority shall either:
    - (a) declare that the relevant High Value Change has received Stage 2 Approval and that High Value Change shall proceed; or
    - (b) declare that its rejection of the relevant High Value Change be treated as an improper rejection and that the provisions of paragraph 8.5 of this Section 4 (*High Value Changes*) shall apply
  - 16.4.2 the High Value Change did not meet the Approval Criteria, save in one of the respects referred to in paragraphs 8.2.2(b)(i) or 8.2.2(b)(ii) the provisions of paragraph 8.3 of this Section 4 (*High Value Changes*) shall apply.



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An Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a High Value Change in respect of which there is a dispute that has been referred to the Dispute Resolution Procedure, unless that dispute has been determined in its favour and Sub-hubco has not confirmed to that Authority in writing within five (5) Business Days of the date of the determination that it will comply with its obligations under this Section 4 in accordance with the determination.

## SECTION 5

### SUB-HUBCO CHANGES

- 1 If Sub-hubco wishes to introduce a Sub-hubco Change, it shall serve a notice containing the information required pursuant to paragraph 2 of this Section 5 (*Sub-hubco Changes*) (a "*Sub-hubco Notice of Change*") on the relevant Authority.
- 2 A Sub-hubco Notice of Change shall:
  - 2.1 set out the proposed Sub-hubco Change in sufficient detail to enable the relevant Authority to evaluate it in full;
  - 2.2 specify Sub-hubco's reasons for proposing Sub-hubco Change;
  - 2.3 indicate any implications of Sub-hubco Change;
  - 2.4 indicate what savings, if any, will be generated by Sub-hubco Change, including:
    - 2.4.1 whether a reduction of the relevant Annual Service Payment is;  
or
    - 2.4.2 whether such savings will be paid to the relevant Authority in a lump sum,

in each case giving details in accordance with paragraph 8 of this Section 5 (*Sub-hubco Changes*);

  - 2.5 indicate whether there are any critical dates by which a decision by the relevant Authority is required; and
  - 2.6 request the relevant Authority to consult with Sub-hubco with a view to deciding whether to agree to Sub-hubco Change and, if so, what consequential changes the relevant Authority requires as a result.
- 3 The relevant Authority shall evaluate Sub-hubco Notice of Change in good faith, taking into account all relevant issues, including whether:
  - 3.1 a revision of the relevant Annual Service Payment will occur;
  - 3.2 the Sub-hubco Change may affect the quality of the relevant Services and/or the relevant Works or the likelihood of successful completion of the relevant Works and/or delivery of the relevant Services (or any of them);
  - 3.3 the Sub-hubco Change will interfere with the relationship of the relevant Authority with third parties;
  - 3.4 the financial strength of Sub-hubco is sufficient to perform the relevant Works and/or relevant Services after implementation of Sub-hubco Change;
  - 3.5 the value and/or life expectancy of any of the relevant Facilities will be reduced; or
  - 3.6 the Sub-hubco Change materially affects the risks or costs to which the relevant Authority is exposed.
- 4 As soon as practicable after receiving Sub-hubco Notice of Change, the relevant Authority and Sub-hubco shall meet and discuss the matters referred to in it, including in the case of a

Relevant Change in Law those matters referred to in Clause 32.4 of this Agreement. During discussions the relevant Authority may propose modifications to, or accept or reject, Sub-hubco Notice of Change.

- 5 If the relevant Authority accepts Sub-hubco Notice of Change (with or without modification) the parties shall consult and agree the remaining details as soon as practicable and upon agreement the relevant Authority shall issue a notice confirming Sub-hubco Change which shall set out the agreed Sub-hubco Change and:
  - 5.1 shall enter into any documents to amend this Agreement or any relevant Ancillary Document which are necessary to give effect to Sub-hubco Change;
  - 5.2 subject to paragraph 7 of this Section 5 (*Sub-hubco Changes*), the relevant Annual Service Payment shall be revised in accordance with Section 6 (*Changing the Financial Model*) of this Schedule Part 16 (*Change Protocol*); and
  - 5.3 Sub-hubco Change shall be implemented within the period specified by the relevant Authority in its notice of acceptance.
- 6 If the relevant Authority rejects Sub-hubco Notice of Change, it shall not be obliged to give its reasons for such a rejection and Sub-hubco shall not be entitled to reimbursement by the relevant Authority of any of its costs involved in the preparation of Sub-hubco Notice of Change.
- 7 Unless the relevant Authority's written acceptance expressly agrees to an increase in the relevant Annual Service Payment or that Sub-hubco should be entitled to relief from any of its obligations, there shall be no increase in the relevant Annual Service Payment or relief granted from any obligations as a result of a Sub-hubco Change.
- 8 If a Sub-hubco Change causes, or will cause, Sub-hubco's costs or those of a sub-contractor to decrease, there shall be a decrease in the relevant Annual Service Payment such that any cost savings (following deduction of costs reasonably incurred by Sub-hubco in implementing such Sub-hubco Change) will be shared on the basis of fifty per cent (50%) of the saving being retained by Sub-hubco and fifty per cent (50%) of the saving being paid to the relevant Authority as a lump sum within ten (10) Business Days of agreement or determination or by way of revision of the relevant Annual Service Payment pursuant to Section 6 (*Changing the Financial Model*) of this Schedule Part 16 (*Change Protocol*).

## SECTION 6

### CHANGING THE FINANCIAL MODEL

#### Procedure

- 1 If a Relevant Event occurs, the Financial Model shall be adjusted in accordance with this Section 6 (*Changing the Financial Model*) of this Schedule Part 16 (*Change Protocol*).

#### Adjusting the Logic or Formulae

- 2 If it is necessary to make a Logic Adjustment to permit an Input Adjustment or Assumption Adjustment to be made, Sub-hubco shall make such Logic Adjustment only:
  - 2.1 to the extent necessary;
  - 2.2 in accordance with generally accepted accounting principles in the United Kingdom; and
  - 2.3 so as to leave Sub-hubco in no better and no worse a position.
- 3 In order to demonstrate that the conditions in paragraph 2 are met, Sub-hubco shall prepare:
  - 3.1 a run of the Financial Model before making any Assumption Adjustment or Input Adjustment and immediately prior to making the Logic Adjustment; and
  - 3.2 a run of the Financial Model immediately following the Logic Adjustment which shows that Sub-hubco is in no worse and no better a position following the making of the Logic Adjustment.

#### Adjusting the Assumptions

- 4 Subject to paragraph 5, Sub-hubco may make an Assumption Adjustment so that the Assumptions in the Financial Model reflect:
  - 4.1 reasonable economic assumptions prevailing at the Adjustment Date; and
  - 4.2 reasonably foreseeable changes in the prospective technical performance of the Project arising as a result of the Relevant Event.
- 5 In making Assumption Adjustments, Sub-hubco may make such adjustments only insofar as they relate to the Relevant Event, and such adjustments shall not have effect in relation to any period prior to the Adjustment Date, nor in relation to any aspect of the Project other than the Relevant Event in the period following the Adjustment Date.

#### Adjusting the Inputs

- 6 Sub-hubco may make Input Adjustments to the extent required to reflect the Estimated Change in Project Costs arising out of the Relevant Event.

#### Adjusting the relevant Annual Service Payments

- 7 In order to calculate the adjustment to be made to the relevant Annual Service Payments, Sub-hubco shall run the Financial Model after making the Logic Adjustments, the Assumption Adjustments and the Input Adjustments relating to the Relevant Event and permitted by this Section 6 (*Changing the Financial Model*) of this Schedule Part 16

(*Change Protocol*) so that, following the Relevant Event, it is in no better and no worse a position than it would have been if no Relevant Event had occurred.

- 8 The relevant Annual Service Payments shall be adjusted by such amount as leaves Sub-hubco, following the Relevant Event, in no better and no worse a position than it would have been if no Relevant Event had occurred.

**No better and no worse**

- 9 Any reference in this Agreement to "no better and no worse" or to leaving Sub-hubco in "no better and no worse a position" shall be construed by reference to Sub-hubco's:

9.1 rights, duties and liabilities under or arising pursuant to performance of this Agreement, the Funding Agreements, the Construction Contracts and Service Contracts; and

9.2 ability to perform its obligations and exercise its rights under this Agreement, the Funding Agreements, the Construction Contracts and Service Contracts,

so as to ensure that:

9.3 Sub-hubco is left in a position in relation to the Key Ratios which is no better and no worse in the relevant Post-Adjustment Financial Model than it is in the relevant Pre-Adjustment Financial Model; and

9.4 following the making of the Adjustments, the ability of Sub-hubco to comply with this Agreement is not adversely affected or improved as a consequence of the Relevant Event.

10. Where the Relevant Event is an Authority Change or Compensation Event or Qualifying Change in Law affecting only Authority A Matters or Authority B Matters, the non-affected Authority shall not be entitled to refuse consent to the adjustments required to be made to the Financial Model pursuant to this Section 6 where such adjustments have no adverse impact on the non-affected Authority's liabilities under this Agreement (whether actual, potential or contingent).

**APPENDIX 1**

**Part 1**

**Catalogue**

The Catalogue is the Catalogue in the Agreed Form.

**APPENDIX 1**

**Part 2**

**Small Works and Services Rates**

The Small Works and Services Rates are the Small Works and Services Rates in the Agreed Form

## **APPENDIX 2**

### **Part 1**

#### **Unit Cost for Construction or Installation Costs**

The Unit Cost for Construction or Installation Costs are the Unit Cost for Construction or Installation Costs in the Agreed Form



**APPENDIX 2**

**Part 2**

**Unit Costs for Lifecycle Maintenance**

The Unit Cost for Lifecycle Maintenance are the Unit Cost Lifecycle Maintenance in the Agreed Form

**APPENDIX 2**

**Part 3**

**Consultant, Sub-Constructor or Supplier Fees**

The Consultant, Sub-Constructor or Supplier Fees are the Consultant, Sub-Constructor or Supplier Fees in the Agreed Form

**APPENDIX 2**

**Part 4**

**Unit Costs for Labour Rates**

The Unit Costs for Labour Rates are the Unit Costs for Labour Rates in the Agreed Form

## SCHEDULE PART 17

### COMPENSATION ON TERMINATION

References in this Schedule Part 17 (*Compensation on Termination*) to "the Authority" shall, unless expressly stated otherwise, refer to Authority A and Authority B acting together.

#### SECTION 1

#### COMPENSATION ON TERMINATION FOR AUTHORITY DEFAULT AND VOLUNTARY TERMINATION

##### 1 Compensation on Termination for the Authority Default and Voluntary Termination

1.1 If Sub-hubco terminates this Agreement pursuant to Clause 39 (*Authority Events of Default*) or the Authority terminates this Agreement pursuant to Clause 42 (*Authority Voluntary Termination*) the Authority shall pay to Sub-hubco the "**Authority Default Termination Sum**" as set out in paragraph 1.2.

1.2 Subject to paragraphs 1.4 to 1.6 below the Authority Default Termination Sum shall be an amount equal to the aggregate of:

1.2.1 the Base Senior Debt Termination Amount;

1.2.2 Redundancy Payments and Sub-Contractor Losses; and

1.2.3 not used;

1.2.4 the amount for which the share capital of Sub-hubco and the Subordinated Debt could have been sold on an open market basis based on the Relevant Assumptions;

1.2.5 not used;

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

1.2.6 the value of any right of Sub-hubco to receive insurance proceeds (save where such insurance proceeds are held in the Insurance Proceeds Account and are to be applied in accordance with Clause 53.19 of this Agreement in reinstatement, restoration or replacement or, in the case of any third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case Sub-hubco shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Authority and give the Authority reasonable assistance in prosecuting such claims;

- 1.2.7 to the extent realised before the Invoice Date the market value of any other assets and rights of Sub-hubco (other than those transferred to an Authority pursuant to this Agreement) less liabilities of Sub-hubco properly incurred in carrying out its obligations under this Agreement as at the Termination Date provided that no account should be taken of any liabilities and obligations of Sub-hubco arising out of:
- (a) agreements or arrangements entered into by Sub-hubco to the extent that such agreements or arrangements were not entered into in connection with Sub-hubco's obligations in relation to the Project; or
  - (b) agreements or arrangements entered into by Sub-hubco to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and
- 1.2.8 amounts which an Authority is entitled to set off pursuant to Clause 46.12 of this Agreement.
- 1.3 To the extent that such assets and rights referred to in paragraph 1.2.7 above are not realised and applied by the Invoice Date, Sub-hubco shall on payment of the Authority Default Termination Sum assign such assets and rights to the Authority.
- 1.4 If the aggregate of the amounts referred to in paragraphs 1.2.1 and 1.2.3 is less than the Revised Senior Debt Termination Amount, then the Authority Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.2.2 LESS the amounts referred to in paragraphs 1.2.6 to 1.2.8 above; provided always that (a) the amount referred to in paragraph 1.2.2 shall only be paid to the extent that Sub-hubco has demonstrated to the reasonable satisfaction of the Authority that the amount will not be applied (in whole or in part) in payment of any Distribution and (b) if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Losses shall be paid in respect of any Sub Contract in circumstances where there is an event of default under such Sub-Contract which would entitle Sub-hubco to terminate such Sub-Contract.
- 1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and Sub-hubco has wilfully, or through gross negligence failed to comply with its obligations under clause 9.4.3(d) of the Funders' Direct Agreement then in addition to the deduction of the Distribution made pursuant to paragraph v of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Authority Default Termination Sum, provided that the amount of the Authority Default Termination Sum shall never be less than the Revised Senior Debt Termination Amount.
- 1.6 If Sub-hubco has wilfully or through gross negligence failed to comply with its obligations under clause 9.4.3(e) of the Funders' Direct Agreement and there has been an overstatement of the cash balances by Sub-hubco as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Section 1 (Compensation on Termination for Authority Default and Voluntary Termination), then the Authority Default Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

1.7 The Authority Default Termination Sum shall be payable in accordance with Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*).

2 **Not used.**

## SECTION 2

### COMPENSATION FOR SUB-HUBCO DEFAULT

- 1 If the Authority terminates this Agreement pursuant to Clause 40 (*Sub-hubco Events of Default*), with the exception of termination pursuant to Clause 40.1.3(b), the Authority shall pay to Sub-hubco such sum as is calculated according to this Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17 (*Compensation on Termination*).

### 2 RETENDERING ELECTION

- 2.1 The Authority shall be entitled to retender the provision of the Project Operations in accordance with paragraph 3 (*Retendering Procedure*) and the provisions of paragraph 3 (*Retendering Procedure*) shall apply if:

2.1.1 the Authority notifies Sub-hubco on or before the date falling twenty (20) Business Days after the Termination Date that it intends to retender; and

2.1.2 there is a Liquid Market; and either

(a) the Senior Funders have not exercised their rights to step-in under clause 5 (*Representative*) of the Funders' Direct Agreement; or

(b) Sub-hubco or the Senior Funders have not procured the transfer of Sub-hubco's rights and liabilities under this Agreement to a Suitable Substitute Contractor and have failed to use all reasonable efforts to do so

but otherwise the Authority shall not be entitled to re-tender the provision of the Project Operations and paragraph 4 (*No Retendering Procedure*) shall apply.

### 3 RETENDERING PROCEDURE

- 3.1 The objective of the Tender Process shall be to enter into a New Agreement with a Compliant Tenderer.

- 3.2 The Authority shall (subject to any legal requirements preventing it from doing so) use all reasonable endeavours to complete the Tender Process as soon as practicable.

- 3.3 The Authority shall as soon as reasonably practicable notify Sub-hubco of the Qualification Criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process, and shall act reasonably in setting such requirements and terms.

- 3.4 Sub-hubco authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under Clause 61 (*Confidentiality*) that is reasonably required as part of the Tender Process.

- 3.5 For all or any part of a month, falling within the period from the Termination Date to the Compensation Date, an Authority shall pay to Sub-hubco:

3.5.1 the relevant Post Termination Service Amount for each completed month, on or before the date falling ten (10) Business Days after the end of that month; and

- 3.5.2 the relevant Post Termination Service Amount for the period from the end of the last completed month until the Compensation Date, on or before the date falling twenty (20) Business Days after the Compensation Date.
- 3.6 Sub-hubco may, at its own cost, appoint a person to monitor the Tender Process for the purpose of monitoring and reporting to Sub-hubco and the Senior Funders on the Authority's compliance with the Tender Process.
- 3.7 The Tender Process Monitor shall enter into a confidentiality agreement with the Authority in a form acceptable to the Authority and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of all the tender documentation and bids and make representations to the Authority as to compliance with the Tender Process. The Authority shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by Sub-hubco in the event that Sub-hubco refers a dispute as to the Adjusted Highest Compliant Tender Price to the Dispute Resolution Procedure. The Tender Process Monitor will not disclose confidential information to Sub-hubco or the Senior Funders or any other person (and shall provide an undertaking to the Authority to such effect as a condition of his appointment) but shall be entitled to advise Sub-hubco and the Senior Funders on whether it considers that the Authority has acted in accordance with the Tender Process and correctly determined the Adjusted Highest Compliant Tender Price.
- 3.8 If any relevant Post Termination Service Amount is less than zero then it may be carried forward and may be set off against any future positive relevant Post Termination Service Amounts.
- 3.9 The Authority shall require bidders to bid on the basis that they will receive the benefit of any outstanding claims under material damage insurance policies and the amount (if any) standing to the credit of the Insurance Proceeds Account on the date that the New Agreement is entered into.
- 3.10 As soon as practicable after tenders have been received, the Authority shall (acting reasonably) review and assess the Compliant Tenders and shall notify Sub-hubco of:
- 3.10.1 the highest Compliant Tender price;
  - 3.10.2 the Tender Costs; and
  - 3.10.3 its calculation of the Adjusted Highest Compliant Tender Price.
- 3.11 If Sub-hubco refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 56 (Dispute Resolution), the Authority shall irrespective of such dispute be entitled to enter into a New Agreement.
- 3.12 The Adjusted Highest Compliant Tender Price shall be paid in accordance with Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*).
- 3.13 Subject to paragraphs 1.6 and 1.8 of Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*), if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price to Sub-hubco on or before the date falling two years after the Termination Date then the following provisions of this paragraph 3 shall not apply to that termination and the provisions of paragraph 4 (*No Retendering Procedure*) shall apply instead.



- 3.14 The Authority may elect at any time prior to the receipt of a Compliant Tender, to follow the no retendering procedure under paragraph 4 (*No Retendering Procedure*) by notifying Sub-hubco that this election has been made.

#### 4 NO RETENDERING PROCEDURE

- 4.1 Subject to paragraph 4.2, if the provisions of this paragraph 4 (*No Retendering Procedure*) apply Sub-hubco shall not be entitled to receive any Post Termination Service Amount.

- 4.2 If the Authority elects to follow the no retendering procedure in accordance with this paragraph 4 (*No Retendering Procedure*) after it has elected to follow the procedure under paragraph 3 (*Retendering Procedure*), then each Authority shall continue to pay to Sub-hubco each relevant Post Termination Service Amount until the Compensation Date, in accordance with paragraph 3 (*Retendering Procedure*).

- 4.3 In agreeing or determining the Estimated Fair Value of the Agreement the parties shall be obliged to follow the principles set out below:

- 4.3.1 all forecast amounts of revenues and costs should be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Agreement;

- 4.3.2 the total of all payments of the full Service Payments forecast to be made from the Termination Date to the Expiry Date shall be calculated and discounted at the Discount Rate;

- 4.3.3 the total of all costs reasonably forecast to be incurred by each Authority as a result of termination shall be calculated and discounted at the Discount Rate and deducted from the payment calculated pursuant to paragraph 4.3.2 above, such costs to include (without double counting):

- (a) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;

- (b) the costs of providing the Services reasonably forecast to be incurred by the relevant Authority from the Termination Date to the Expiry Date in providing the Project Operations to the standard required; and

- (c) any rectification costs required to deliver the Project Operations to the standard required (including any costs reasonably forecast to be incurred by the relevant Authority to complete the relevant Works) and additional operating costs required to restore operating services standards less (to the extent that such sums are included in any calculation of rectification costs for the purposes of this paragraph) the aggregate of:

- ix. any insurance proceeds received (or held in the Insurance Proceeds Account) or which will be received pursuant to policies maintained in accordance with Clause 53 (*Insurance*); and

- x. amounts payable by an Authority in respect of Capital Expenditure under this Agreement which have not been paid,

in each case such costs to be forecast at a level that will deliver the Services to the standards required by this Agreement.

- 4.4 If the parties cannot agree on the Estimated Fair Value of the Agreement on or before the date falling twenty (20) Business Days after the date on which the Authority elected or was required pursuant to paragraph 2 (*Retendering Election*) or paragraph 3 (*Retendering Procedure*) to follow the no retendering procedure in accordance with this paragraph 4 (*No Retendering Procedure*), then the Adjusted Estimated Fair Value of the Agreement shall be determined in accordance with Clause 56 (*Dispute Resolution*).
- 4.5 The Adjusted Estimated Fair Value of the Agreement shall be paid in accordance with Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*).

### SECTION 3

#### CONSEQUENCES OF TERMINATION FOR FORCE MAJEURE

#### 1 CONSEQUENCES OF TERMINATION FOR FORCE MAJEURE

- 1.1 If Sub-hubco or the Authority terminates this Agreement pursuant to Clause 31.1 (*Force Majeure*) or Clause 53.14.2 the Authority shall pay to Sub-hubco the "**Force Majeure Termination Sum**" as set out in paragraph 1.2.
- 1.2 Subject to paragraphs 1.4 to 1.6 below the Force Majeure Termination Sum shall be an amount equal to the aggregate of:
- 1.2.1 the Base Senior Debt Termination Amount;
  - 1.2.2 Redundancy Payments and Sub-Contractor Losses (but excluding therefrom any claims for loss of profit);
  - 1.2.3 an amount equal to the Subordinated Debt less an amount equal to the aggregate of payments of interest paid on the Subordinated Debt provided that where such figure is a negative number it shall be instead fixed at zero; and
  - 1.2.4 an amount equal to all amounts paid to Sub-hubco by way of subscription for shares in the capital of Sub-hubco less dividends and other distributions paid to the shareholders of Sub-hubco provided that where such figure is a negative number it shall be instead fixed at zero;

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

- 1.2.5 the value of any right of Sub-hubco to receive insurance proceeds (save where such insurance proceeds are held in the Insurance Proceeds Account and are to be applied in accordance with Clause 53.19 of this Agreement in reinstatement, restoration or replacement, or in the case of third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case Sub-hubco shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Authority and give the Authority reasonable assistance in prosecuting such claims;
- 1.2.6 to the extent realised before the Invoice Date, the market value of any other assets and rights of Sub-hubco (other than those transferred to an Authority pursuant to this Agreement) less liabilities of Sub-hubco properly incurred in carrying out its obligations under this Agreement as at the Termination Date provided that no account should be taken of any liabilities and obligations of Sub-hubco arising out of:
  - (a) agreements or arrangements entered into by Sub-hubco to the extent that such agreements or arrangements were not entered

into in connection with Sub-hubco's obligations in relation to the Project; and

- (b) agreements or arrangements entered into by Sub-hubco to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and

1.2.7 amounts which an Authority is entitled to set off pursuant to Clause 46.12 of this Agreement.

- 1.3 To the extent that such assets and rights referred to in paragraph 1.2.5 above are not realised and applied pursuant to that paragraph Sub-hubco shall on payment of the Force Majeure Termination Sum assign such assets and rights to the Authority.
- 1.4 If the aggregate of the amounts referred to in paragraphs 1.2.1, 1.2.3 and 1.2.4 is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.2.2 LESS the amounts referred to at paragraphs 1.2.5 to 1.2.7 above; provided always that (a) the amount referred to in paragraph 1.2.2 LESS the amounts referred to at paragraphs 1.2.5 to 1.2.7 above shall only be paid to the extent that Sub-hubco has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid (in whole or in part) in payment of any Distribution and (b) if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Losses shall be paid in respect of any Sub Contract in circumstances where there is an event of default under such Sub-Contract which would entitle Sub-hubco to terminate such Sub-Contract.
- 1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and Sub-hubco has wilfully, or through gross negligence failed to comply with its obligations under clause 9.4.3(d) of the Funders' Direct Agreement then in addition to the deduction of the Distribution made pursuant to paragraph v of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum shall never be less than the Revised Senior Debt Termination Amount.
- 1.6 If Sub-hubco has wilfully or through gross negligence failed to comply with its obligations under clause 9.4.3(e) of the Funders' Direct Agreement and there has been an overstatement of the cash balances by Sub-hubco as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Section 3 (*Compensation on Termination for Force Majeure*), then the Force Majeure Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 1.7 The Force Majeure Termination Sum shall be paid in accordance with Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*).

## SECTION 4

### CORRUPT GIFTS AND FRAUD, BREACH OF REFINANCING OR BREACH OF IRR SHARING AND CAP PROVISIONS

#### 1 CONSEQUENCES OF TERMINATION FOR CORRUPT GIFTS AND FRAUD, BREACH OF REFINANCING OR BREACH OF IRR SHARING AND CAP PROVISIONS

1.1 If the Authority terminates this Agreement pursuant to Clause 40.1.3(b), Clause 44.3 or Clause 45 (*Breach of IRR Sharing and Cap Provisions*) the Authority shall pay to Sub-hubco an amount equal to the Revised Senior Debt Termination Amount;

LESS, to the extent it is a positive number, the aggregate of (without double counting):

1.1.1 the value of any right to receive insurance proceeds (save where such insurance proceeds are held in the Insurance Proceeds Account and are to be applied in accordance with Clause 53.19 of this Agreement in reinstatement, restoration or replacement or, in the case of third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or which have been determined but not paid provided that in such case Sub-hubco shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Authority and give the Authority reasonable assistance in prosecuting such claims; and

1.1.2 to the extent realised before the Invoice Date, the market value of any other assets and rights of Sub-hubco (other than those transferred to an Authority pursuant to this Agreement) less liabilities of Sub-hubco properly incurred in carrying out its obligations under this Agreement as at the Termination Date provided that no account should be taken of any liabilities and obligations of Sub-hubco arising out of:

(a) agreements or arrangements entered into by Sub-hubco to the extent that such agreements or arrangements were not entered into in connection with Sub-hubco's obligations in relation to the Project; and

(b) agreements or arrangements entered into by Sub-hubco to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms.

1.2 To the extent that such assets and rights referred to in paragraph 1.1.2 above are not realised and applied pursuant to that paragraph, Sub-hubco shall, on payment of the sum referred to in paragraph 1.1 above, assign such assets and rights to the Authority.

1.3 The sum referred to in paragraph 1.1 above shall be paid in accordance with Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*).

## SECTION 5

### GENERAL

#### 1 PAYMENT AND INTEREST

##### **Following termination for Authority Default, Force Majeure, Corrupt Gifts and Fraud, Breach of Refinancing or Breach of IRR Sharing and Cap.**

- 1.1 In respect of the termination payments to be made pursuant to any of Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*), Section 3 (*Compensation on Termination for Force Majeure*), or Section 4 (*Corrupt Gifts and Fraud or Breach of Refinancing or Breach of IRR Sharing and Cap Provisions*) of this Schedule Part 17 (*Compensation on Termination*) as soon as practicable after, and in any event within twenty (20) Business Days of, the Termination Date, Sub-hubco shall give to an Authority an invoice for its relevant Proportion of the relevant termination sum and sufficient supporting evidence, reasonably satisfactory to that Authority, justifying the amount of the relevant termination sum including a breakdown of each of the individual elements of such sum.
- 1.2 Subject to paragraph 1.3 below, each Authority shall pay to Sub-hubco:
- 1.2.1 the relevant Proportion of the termination amount within forty (40) Business Days of the Invoice Date; and
  - 1.2.2 interest on the relevant Proportion of the termination amount (or any part of such amount that remains outstanding) from the Termination Date until the date of payment:
    - (a) at the No Default Interest Rate for the period from (but excluding) the Termination Date to (and including) the date which is forty (40) Business Days after the Invoice Date; and
    - (b) thereafter, at the Default Interest Rate.
- 1.3 An Authority shall be entitled to pay the amount payable pursuant to Section 3 or Section 4 (as the case may be) of this Schedule Part 17 (*Compensation on Termination*) ("**Termination Sum**") in 4 equal instalments by serving notice on Sub-hubco within thirty (30) Business Days of the Invoice Date, in which case the provisions of paragraph 1.4 shall apply.
- 1.4 In the event that an Authority elects to pay the Termination Sum in instalments pursuant to paragraph 1.3 then:
- 1.4.1 the first such instalment (together with interest thereon calculated pursuant to paragraph 1.4.2 below) shall be due on the first Business Day occurring six (6) months after the date of that Authority's notice served pursuant to paragraph 1.3 above and the remaining instalments (together with interest thereon calculated pursuant to paragraph 1.4.2 below) shall be due, respectively, on the first Business Day occurring twelve (12), eighteen (18) and twenty-four (24) months after the date of such notice; and
  - 1.4.2 that Authority shall pay interest on the Termination Sum (or any part of such sum that remains outstanding) from the Termination Date until the date of payment at the No Default Interest Rate.

If an Authority fails to make a payment under paragraph 1.4.1 or 1.4.2 above in full within ten (10) Business Days of the due date for payment then the relevant outstanding amount of the Termination Sum shall be immediately due and payable and, thereafter, that Authority shall pay interest on such sum at the Default Interest Rate.

### Following Retendering

1.5 Subject to paragraphs 1.6 and 1.8, following a retendering exercise under Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17 each Authority shall pay to Sub-hubco its relevant Proportion of an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling twenty (20) Business Days after the later of:

1.5.1 the date on which the Authority receives the Market Value of the New Agreement from the New Sub-hubco; and

1.5.2 if Sub-hubco has referred a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution pursuant to paragraph 3.11 of Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17, the date on which the dispute is finally determined in accordance with Clause 56 (*Dispute Resolution*),

provided that, to avoid doubt, if the dispute referred by Sub-hubco to dispute resolution (pursuant to paragraph 1.5.2 above) concerns only a proportion of the Adjusted Highest Compliant Tender Price then each Authority shall pay its relevant Proportion of the undisputed proportion of such sum no later than 20 Business Days after the date referred to in paragraph 1.5.1 above (the "**Undisputed Payment Date**") and the Authority shall pay interest to Sub-hubco on any amount of the Adjusted Highest Compliant Tender Price which has been withheld, from the Undisputed Payment Date until the date on which payment is due under paragraph 1.5.2 above at the No Default Interest Rate.

1.6 If the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify Sub-hubco of this decision and (if the Adjusted Highest Compliant Tender Price is a positive number) each Authority shall pay to Sub-hubco its relevant Proportion of an amount equal to the Adjusted Highest Compliant Tender Price within 20 Business Days of such notification.

1.7 If an Authority fails to pay its relevant Proportion of the Adjusted Highest Compliant Tender Price (or any proportion thereof) by the date on which payment is due in accordance with paragraph 1.5 or paragraph 1.6 above, that Authority shall pay to Sub-hubco interest on such unpaid amount, which shall accrue on such amount at the Default Interest Rate from (but not including) the date on which payment is due in accordance with paragraph 1.5 or paragraph 1.6 above until such amount is paid.

1.8 If the Adjusted Highest Compliant Tender Price is zero or a negative number then, on entering into the New Agreement with the New Sub-hubco, the Authority shall have no obligation to make any payment to Sub-hubco and (if a negative number) an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by Sub-hubco to each Authority (in their relevant Proportions) on the date of the New Agreement or (where paragraph 1.6 applies) within 20 Business Days of notification from the Authority pursuant to that paragraph.

### Following no retendering

- 1.9 If the Authority follows the no retendering procedure set out in paragraph 4 of Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17 (*Compensation on Termination*) then, subject to paragraph 1.10, each Authority shall pay to Sub-hubco an amount equal to their relevant Proportion of the Adjusted Estimated Fair Value of the Agreement no later than the date falling twenty (20) Business Days after the Compensation Date together with interest on such amount calculated in accordance with paragraph 1.2.2 above unless the Authority has paid Post Termination Service Amounts pursuant to paragraph 3.5 of Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17 (*Compensation on Termination*).
- 1.10 To the extent that the Adjusted Estimated Fair Value of the Agreement is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Agreement shall be due and payable by Sub-hubco to each Authority (in their relevant Proportions) on the Compensation Date.

## 2 Full and Final Settlement

- 2.1 Any and all sums irrevocably paid by an Authority to Sub-hubco under this Schedule Part 17 (*Compensation on Termination*) will be in full and final settlement of each party's rights and claims against the other for breaches and/or termination of this Agreement and any other Project Document whether under contract, delict, restitution or otherwise but without prejudice to:
- 2.1.1 any antecedent liability of Sub-hubco to an Authority which an Authority has been unable to set off pursuant to Clause 46.12 of this Agreement;
- 2.1.2 any antecedent liability of either party to the other that arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining or agreeing the Authority Default Termination Sum, Adjusted Highest Compliant Tender Price, or Adjusted Estimated Fair Value of the Agreement, the Force Majeure Termination Sum or the Corrupt Gifts Termination Sum as the case may be; and
- 2.1.3 any liabilities arising in respect of any breach by a party of their obligations under Clause 47.6 of this Agreement which arises or continues after the Termination Date.
- 2.2 If either the Adjusted Highest Compliant Tender Price or (as the case may be) the Adjusted Estimated Fair Value of the Agreement is zero or a negative number each Authority shall be released from all liability to Sub-hubco for breaches and/or termination of this Agreement and any other Project Document whether under contract, delict, restitution or otherwise save for:
- 2.2.1 any antecedent liability of an Authority which arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining the Adjusted Highest Compliant Tender Price or the Adjusted Estimated Fair Value of the Agreement (as the case may be); and
- 2.2.2 any liabilities arising in respect of any breach by a party of their obligations under Clause 47.6 of the Agreement which continues after the Termination Date.

## 3 Costs

The costs and/or expenses to be taken into account in the calculation of all termination sums due pursuant to this Schedule Part 17 (*Compensation on Termination*) shall only be



such costs and/or expenses to the extent that they are reasonable and proper in quantum and shall have been or will be reasonably and properly incurred and shall only be counted once.

**4 Undisputed Amounts**

If the calculation of any termination amount is disputed then any undisputed element of that amount shall be paid in accordance with this Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*) and the disputed element shall be dealt with in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

**5 Outstanding Senior Debt Amount**

5.1 The Authority shall be entitled to rely on the certificate of the Security Trustee as conclusive as to the amount of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount (as the case may be) outstanding at any relevant time.

5.2 The receipt by the Security Trustee of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount or elements thereof (as appropriate) (as the case may be) (and where appropriate any accrued interest or breakage costs as certified in accordance with paragraph 5.1 above) shall discharge the Authority's obligations to pay such sums to Sub-hubco.

## SECTION 6

### DEFINITIONS

**“Adjusted Estimated Fair Value of the Agreement”** means the Estimated Fair Value of the Agreement adjusted as follows:

- (a) where in respect of any month or part of a month from the Termination Date to the Compensation Date the relevant Post Termination Service Amount is a negative number, the aggregate of all such negative Post Termination Service Amounts shall be set against and shall reduce the Estimated Fair Value of the Agreement (whether or not such amounts have been set-off by the Authority pursuant to paragraph 3.8 of Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17 (*Compensation on Termination*));

and the aggregate of the following amounts shall be deducted from the Estimated Fair Value of the Agreement:

- (b) the Post Termination Service Amounts actually paid by an Authority to Sub-hubco prior to the Compensation Date;
- (c) the Tender Costs; and
- (d) amounts that an Authority is entitled to set off or deduct;

and the aggregate of the following amounts shall be added to the Estimated Fair Value of the Agreement:

- (e) all credit balances on any bank accounts held by or on behalf of Sub-hubco on the date that the Estimated Fair Value of the Agreement is calculated; and
- (f) any insurance proceeds and other amounts owing to Sub-hubco (and which Sub-hubco is entitled to retain), to the extent not included in (e);

to the extent that:

- i. (e) and (f) have not been directly taken into account in calculating the Estimated Fair Value of the Agreement; and
- ii. the Authority has received such amounts in accordance with this Agreement or such amounts are standing to the credit of the

Insurance Proceeds Account;

**"Adjusted Highest Compliant Tender Price"**

means the price offered by the Compliant Tenderer (if any) with the highest tender price, and if no Compliant Tenders are received zero, adjusted as follows:

- (a) where in respect of any month or part of a month from the Termination Date to the Compensation Date the relevant Post Termination Service Amount is a negative number, the aggregate of all such negative Post Termination Service Amounts shall be set against and shall reduce such highest tender price (whether or not such amounts have been set-off by the Authority pursuant to paragraph 3.8 of Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17 (*Compensation on Termination*));

and the aggregate of the following amounts shall be deducted from such highest tender price:

- (b) the Post Termination Service Amounts actually paid by an Authority to Sub-hubco prior to the Compensation Date;
- (c) the Tender Costs; and
- (d) amounts that an Authority is entitled to set off or deduct

and the aggregate of the following amounts shall be added to such highest tender price:

- (e) all credit balances on any bank accounts held by or on behalf of Sub-hubco on the date that the highest priced Compliant Tender is received; and
- (f) any insurance proceeds and other amounts owing to Sub-hubco (and which Sub-hubco is entitled to retain), to the extent not included in (e);

to the extent that:

- i. (e) and (f) have not been directly taken into account in that Compliant Tender; and
- ii. the Authority has received such amounts in accordance with this Agreement;

**"APB Distribution"**

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

**"Aviva Breakage Costs"**

means:

- (a) on termination of this Agreement pursuant to Clause 39 (*Authority Events of Default*), the Early Repayment Fee 1;
- (b) on termination of this Agreement pursuant to Clause 42 (*Authority Voluntary Termination*), the Early Repayment Fee 2; and
- (c) on termination of this Agreement in any other circumstance, zero

**"Base Senior Debt Termination Amount"**

means, subject to Clause 4.3:

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

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

- i. any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- ii. all amounts including costs of early

termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Funders to Sub-hubco as a result of prepayment of amounts outstanding in respect of Permitted Borrowings (other than in respect of Additional Permitted Borrowing), or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement;

- iii. all other amounts received by the Senior Funders on or after the Termination Date and before the date on which any compensation is payable by the Authority to Sub-hubco as a result of enforcing any other rights they may have; and
- iv. all credit balances on any bank accounts (but excluding the Insurance Proceeds Account) held by or on behalf of Sub-hubco on the Termination Date;

**“Compensation Date”**

means either:

- (a) if paragraph 3 (*Retendering Procedure*) of Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17 (*Compensation on Termination*) applies, the earlier of:
  - i. the date that the New Agreement is entered into; and
  - ii. the date on which the Authority pays the Adjusted Highest Compliant Tender Price to Sub-hubco; or
- (b) if paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17 (*Compensation on Termination*) applies, the date that the Adjusted Estimated Fair Value of the Agreement has been agreed or determined;

**“Compliant Tender”**

means a tender that meets all of the Qualification Criteria;

**“Compliant Tenderer”**

means a Suitable Substitute Contractor who submits a Compliant Tender;

**“Contingent Funding Liabilities”**

means any contingent liabilities of the Shareholders in respect of financial obligations owed to Sub-hubco and/or Senior Funders under the Funding Agreements in relation to the Project

which are triggered as a result of or in relation to the termination of this Agreement, including (without limitation) guarantees or letters of credit in respect of Subordinated Debt but excluding any guarantees or letters of credit issued in support of Sub-Contractors' obligations under the relevant Sub-Contracts;

**“Deemed New Agreement”**

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

- a) if this Agreement is terminated prior to the final Phase Actual Completion Date, then the period of 12 months after the Completion Date referred to in Clause 40.1.2 then the said 12 month period shall be extended by a period to allow a New Sub-hubco (had one been appointed) to achieve the final Phase Actual Completion Date prior to expiry of such period;
- b) any accrued Deductions and/or Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of an Authority to make financial deductions, be cancelled; and
- c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date;

**“Discount Rate”**

means a discount rate expressed as  $[(1 + \text{real base case project IRR} + \text{Gilt B} - \text{Gilt A}) * (1 + i) - 1]$


where:

**“real base case project IRR”** is the real pre-tax real base case period IRR as set out in the Financial Models at Financial Close;

**“i”** is the agreed assumed forecast rate of increase in RPI set out in the Agreement, for the remaining term of the Agreement;

**“Gilt A”** is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Models at Financial Close; and

**“Gilt B”** is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Models as on the Termination Date;

<b>"Early Repayment Fee"</b>	has the meaning given in the Loan Agreement
<b>"Early Repayment Fee 1"</b>	means the Early Repayment Fee save that the value of $i_m$ in the relevant formula shall be the gross redemption yield on the Treasury stock having an expiry date as close as possible to the final Repayment Date under the Loan Agreement
<b>"Early Repayment Fee 2"</b>	means the Early Repayment Fee save that the value of $i_m$ in the relevant formula shall be the gross redemption yield on the Treasury stock having an expiry date as close as possible to the final Repayment Date under the Loan Agreement plus  per annum being half of the Margin under the Loan Agreement
<b>"Estimated Fair Value of the Agreement"</b>	means the amount determined in accordance with paragraph 4 ( <i>No Retendering Procedure</i> ) of Section 2 ( <i>Compensation for Sub-hubco Default</i> ) of this Schedule Part 17 ( <i>Compensation on Termination</i> ) that a third party would pay to the Authority as the market value of the Deemed New Agreement;
<b>"Fair Value"</b>	means the amount at which an asset or liability could be exchanged in an arms length transaction between informed and willing parties, other than in a forced or liquidated sale;
<b>"Invoice Date"</b>	means, in respect of the Authority Default Termination Sum, the Force Majeure Termination Sum or the Corrupt Gifts Termination Sum (as appropriate), the date that is the later of: <ul style="list-style-type: none"> <li>(a) the date on which the relevant Authority receives an invoice from Sub-hubco for the relevant termination sum; and</li> <li>(b) the date on which an Authority receives the supporting evidence required pursuant to paragraph 1.1 of Section 5 (<i>General</i>) of this Schedule Part 17 (<i>Compensation on Termination</i>);</li> </ul>
<b>"Liquid Market"</b>	means that there are sufficient willing parties (being at least two parties, each of whom is capable of being a Suitable Substitute Contractor) in the market for design, build, finance and maintain contracts or similar contracts for the provision of services (in each case the same as or similar to this Agreement) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value provided always that any vehicle controlled and established by the Senior Funders specifically for the purposes of the Project and to which this Agreement may be novated shall be discounted in assessing whether there are sufficient willing parties in the market for such purposes;

- “Market Value Availability Deduction Amount”** means for any month or part of a month, an amount equal to the availability deduction that was made to the relevant Monthly Service Payment under Section 3 (*Deductions from Monthly Service Payments*) of Schedule Part 14 (*Payment Mechanism*) in the month immediately preceding the Termination Date, less an amount equal to any availability deduction that was made for a Functional Area which was unavailable at the Termination Date but which has subsequently become available whether as a result of an Authority incurring Rectification Costs or otherwise;
- “Market Value of the Agreement”** means the value of the consideration payable by the New Sub-hubco to the Authority in consideration for the entering into of the New Agreement;
- “Maximum Service Payment”** means one-twelfth of the Annual Service Payments payable at any time before any deductions under Section 3 (*Deductions from Monthly Service Payments*) of Schedule Part 14 (*Payment Mechanism*) but allowing for indexation under Section 2 (*Calculation of Service Payments*) of Schedule Part 14 (*Payment Mechanism*);
- “New Agreement”** means an agreement on the same terms and conditions as this Agreement at the Termination Date, but with the following amendments:
- (a) if this Agreement is terminated prior to the final Phase Actual Completion Date, then the period referred to in Clause 40.1.2 of the Project Agreement shall be extended by a period to allow a New Sub-hubco to achieve the final Phase Actual Completion Date prior to such date;
  - (b) any accrued Deductions and/or Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled;
  - (c) the term of such agreement shall be equal to the term from the Termination Date until the Expiry Date; and
  - (d) any other amendments which do not adversely affect the Sub-hubco;
- “New Sub-hubco”** means the person who has entered or who will enter into the New Agreement with the Authority;
- “No Default Interest Rate”** means the non-default interest rate (from time to time) applicable pursuant to clause 8.1.2 of the



Loan Agreement;

**“Post Termination Service Amount”**

means for the purposes of paragraph 3 (*Retendering Process*) of Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17 (*Compensation on Termination*), for the whole or any part of a month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Service Payment (pro rata for part of a month) which would have been payable under this Agreement had this Agreement not been terminated, less an amount equal to the aggregate of (without double counting):

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

**“Qualification Criteria”**

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

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

**“Rectification Costs”**

means, for the purposes of any Termination Date that occurs after a Phase Actual Completion Date, an amount equal to the reasonable and proper costs incurred by an Authority in a particular month or part of a month in ensuring

that the relevant Services are available;

**“Redundancy Payments”**

means redundancy payments and other termination payments which are required under Law to be made to employees of Sub-hubco reasonably and properly incurred by Sub-hubco arising as a direct result of terminating this Agreement (provided that Sub-hubco shall use all reasonable endeavours to mitigate its loss) and provided that in calculating such amount no account should be taken of any liabilities and obligations of Sub-hubco arising out of:

- (a) contracts of employment or other agreements or arrangements entered into by Sub-hubco to the extent that such contracts of employment agreements or arrangements were not entered into in connection with the Project; and/or
- (b) contracts of employment or other agreements or arrangements entered into by Sub-hubco to the extent that such contracts of employment agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms;

**“Relevant Assumptions”**

means the assumptions that the sale of Sub-hubco is on the basis that there is no default by the Authority, that the sale is on a going concern basis, that no restrictions exist on the transfer of share capital, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of Sub-hubco and the Project is taken into account;

**“Revised Senior Debt Termination Amount”**

means, subject to Clause 4.3 and Refinancing:

- (a) all amounts outstanding at the Termination Date, including interest and (other than in respect of Additional Permitted Borrowing) Default Interest accrued as at that date, from Sub-hubco to the Senior Funders in respect of Permitted Borrowing; and
- (b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs (including Aviva Breakage Costs), payable by Sub-hubco to the Senior Funders as a result of a prepayment in respect of Permitted Borrowing, or, in the case of early termination or interest rate hedging arrangements and Aviva Breakage Costs only, as a result of termination of this Agreement subject to

Sub-hubco and the Senior Funders mitigating all such costs (other than Aviva Breakage Costs) to the extent reasonably possible,

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

- i. all credit balances on any bank accounts (but excluding the Insurance Proceeds Account) held by or on behalf of Sub-hubco on the Termination Date;
- ii. any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- iii. all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Funders to Sub-hubco as a result of prepayment of amounts outstanding in respect of Permitted Borrowing, or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement;
- iv. all other amounts received by the Senior Funders on or after the Termination Date and before the date on which any compensation is payable by the Authority to Sub-hubco as a result of enforcing any other rights they may have; and
- v. all APB Distributions;

**“Senior Debt”**

means the financing provided by the Senior Funders under the Senior Funding Agreements;

**“Senior Funding Agreements”**

has the meaning given in Schedule Part 1 (*Definitions and Interpretation*);

**“Sub-Contractor Losses”**

means:

- (a) the amount reasonably and properly payable by Sub-hubco to the Contractor under the terms of the Construction Contract as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that Sub-hubco fails to use all reasonable endeavours to mitigate such amount; and
- (b) the amount reasonably and properly payable by Sub-hubco to the Service

Providers under their respective contracts with Sub-hubco (as the case may be) as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that Sub-hubco fails to use all reasonable endeavours to mitigate such amount;

provided that in both cases no account should be taken of any liabilities and obligation of Sub-hubco to the Sub-Contractors arising out of:

- i. agreements or arrangements entered into by Sub-hubco and/or the Sub-Contractors to the extent that such agreements or arrangements were not entered into in connection with those parties obligations in relation to the Project; and/or
- ii. agreements or arrangements entered into by Sub-hubco and/or the Sub-Contractors to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms;

**“Suitable Substitute Contractor”**

has the meaning given in the Funders' Direct Agreement;

**“Subordinated Debt”**

means all amounts from time to time outstanding under the Subscription Agreement and the Borrower Loan Notes (each as defined under the Loan Agreement) each forming part of the Initial Funding Agreements;

**“Tender Costs”**

means the reasonable and proper costs of the Authority incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Agreement;

**“Tender Process”**

means the process by which the Authority requests tenders from any parties interested in entering into a New Agreement, evaluates the responses from those interested parties and enters into a New Agreement with a new service provider, in accordance with paragraph 3 (*Retendering Process*) of Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17 (*Compensation on Termination*);

**“Tender Process Monitor”**

means the person appointed under paragraph 3.6 of Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17 (*Compensation on Termination*);

**“Termination Sum”**

has the meaning given in paragraph 1.3 of Section 5 (*General*) of this Schedule Part 17

*(Compensation on Termination).*

**SCHEDULE PART 18**  
**HANDBACK PROCEDURE**

**1 DEFINITIONS**

In this Schedule Part 18 (*Handback Procedure*) and elsewhere in this Agreement (save where Schedule Part 1 (*Definitions and Interpretations*) provides to the contrary) the following words shall have the following meanings:

<b>"Authority Amount"</b>	<b>A</b>	<b>Handback</b>	means the estimated cost of carrying out the Authority A Handback Works;
<b>"Authority Programme"</b>	<b>A</b>	<b>Handback</b>	means the programme for carrying out the Authority A Handback Works over the remainder of the Project Term describing the total works to be carried out and the method of carrying out such works during the overall period in which the relevant Authority A Handback Works are to be executed;
<b>"Authority A Handback Works"</b>			means the maintenance works (if any) required to be carried out in respect of the Authority A Facilities in order to procure that they will, on the Expiry Date, satisfy the Handback Requirements;
<b>"Authority Amount"</b>	<b>B</b>	<b>Handback</b>	means the estimated cost of carrying out the Authority B Handback Works;
<b>"Authority Programme"</b>	<b>B</b>	<b>Handback</b>	means the programme for carrying out the Authority B Handback Works over the remainder of the Project Term describing the total works to be carried out and the method of carrying out such works during the overall period in which the relevant Authority B Handback Works are to be executed;
<b>"Authority B Handback Works"</b>			means the maintenance works (if any) required to be carried out in respect of the Authority B Facilities in order to procure that they will, on the Expiry Date, satisfy the Handback Requirements;
<b>"Handback Works"</b>			means each of the Authority A Handback Works and the Authority B Handback Works;
<b>"Handback Programme"</b>			means each of the Authority A Handback Programme and the Authority B Handback Programme;

**"Handback Amount"** means each of the Authority A Handback Amount and the Authority B Handback Amount.

- 2 On the Expiry Date, each element of the Facilities shall be in a condition which is:
- 2.1 consistent with due performance by Sub-hubco of the relevant Service Level Specification and the relevant Method Statements; and
  - 2.2 consistent with the relevant Facilities and each of the elements of them having been designed and constructed in accordance with the applicable design life requirements set out in paragraph 4.3 of Sub-Section C of the Authority's Construction Requirements,
- together referred to as (the "**Handback Requirements**").
- 3 Not less than 24 months prior to the Expiry Date, Sub-hubco and the relevant Authority's Representative shall conduct a joint inspection of the relevant Facilities.
- 4 Within 20 Business Days after the completion of the inspection, if it is found that any element of the relevant Facilities is not in a condition consistent with the Handback Requirements, Sub-hubco shall forthwith provide to the relevant Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*):
- 4.1 Sub-hubco's proposal as to the relevant Handback Works;
  - 4.2 Sub-hubco's proposal as to the relevant Handback Programme; and
  - 4.3 Sub-hubco's estimate of the cost of the relevant Handback Amount.
- 5 The relevant Authority's Representative may, within 20 Business Days after receipt of the details set out in paragraph 4 from Sub-hubco, raise comments in accordance with paragraph 3 of Schedule Part 8 (*Review Procedure*) on Sub-hubco's proposals and estimate referred to in paragraph 1 above.
- 6 On agreement, or determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*), of the relevant Handback Works, the relevant Handback Programme and/or the relevant Handback Amount (as the case may be), Sub-hubco shall procure that the relevant Handback Works are carried out in accordance with the relevant Handback Programme so as to meet the Handback Requirements. Sub-hubco shall carry out the relevant Handback Works at its own cost notwithstanding that the actual cost of the relevant Handback Works may be higher than the relevant Handback Amount.
- 7 From the date of the agreement (or determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*)) of the matters identified in paragraph 6, the relevant Authority shall be entitled to withhold 15% of each subsequent Monthly Service Payment up to the amount of (i) the Authority A Handback Amount in the case of amounts withheld from the Authority A Monthly Service Payments; and (ii) the Authority B Handback Amount in the case of amounts withheld from the Authority B Monthly Service Payments (each being the relevant "**Withheld Amount**") and the provisions of paragraph 11 shall apply. The relevant Authority shall pay such amounts into an interest bearing account in its own name (the "**Retention Fund**").
- 8 Sub-hubco may elect by notice in writing to the relevant Authority within 10 Business Days of the agreement (or determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*)) of the matters identified in paragraph 6 to procure the provision of a bond (the "**Handback Bond**") in favour of the relevant Authority (and in a form acceptable to the Authority (acting in its sole discretion)) for an amount equal to the relevant Handback

Amount and from a bank or insurance company authorised to carry out business in the United Kingdom, and upon delivery of the same to the relevant Authority, the provisions of paragraph 7 shall not apply.

9 Sub-hubco shall carry out the relevant Handback Works to the satisfaction of the relevant Authority's Representative in accordance with Good Industry Practice and in accordance with the relevant Handback Programme so as to meet the Handback Requirements.

10 Notwithstanding:

10.1 the agreement of the relevant Authority's Representative to any relevant Handback Works, the relevant Handback Programme or the relevant Handback Amount;

10.2 the participation of the relevant Authority's Representative in any inspection under this Schedule Part 18 (*Handback Procedure*); and/or

10.3 the complete or partial carrying out of the relevant Handback Works,

Sub-hubco shall not be relieved or absolved from any obligation to conduct any other inspection or to perform any other works in accordance with the relevant Service Level Specification and relevant Method Statements.

11 Where this paragraph 11 applies, if and to the extent that Sub-hubco carries out any material part of the relevant Handback Works in accordance with paragraph 6, Sub-hubco may make a claim for payment for the work carried out. Any such claim shall be accompanied by a certificate by Sub-hubco setting out the works performed and the value of such works. The relevant Authority shall be entitled to require any reasonable further evidence in respect of the valuation of the works. The relevant Authority shall make payment of the amount of a valid claim within 20 Business Days of the date of the claim and shall be entitled to withdraw that amount from the relevant Retention Fund. If at any time the amount in the relevant Retention Fund is insufficient to cover the costs claimed by Sub-hubco, the relevant Authority shall pay the unpaid portion of such valid claim from any amounts which subsequently stand to the credit of the relevant Retention Fund. In the event that the amount remaining in the relevant Retention Fund on the Expiry Date is insufficient to cover Sub-hubco's costs which have not been paid, Sub-hubco shall bear the balance of such costs itself.

12 Not later than 60 Business Days before the Expiry Date, Sub-hubco and the relevant Authority's Representative shall conduct a joint inspection of the relevant Facilities. Such inspection shall confirm whether or not the condition of the relevant Facilities is in accordance with paragraph 1 above.

13 On, or within 10 Business Days after, the Expiry Date, the relevant Authority's Representative shall either:

13.1 issue to Sub-hubco a Handback Certificate and return the relevant Handback Bond or pay any balance standing to the credit of the relevant Retention Fund (as appropriate), to Sub-hubco; or

13.2 notify Sub-hubco of its decision not to issue the Handback Certificate stating the reasons for such decision.

14 Any notice given by an Authority's Representative in accordance with paragraph 13.2 shall set out each respect in which the relevant Handback Works have not been completed or the relevant Facilities do not comply with the Handback Requirements and shall state that Authority Representative's estimate of the cost of procuring that the relevant Facilities comply in all respects with the Handback Requirements.

15 Sub-hubco may, within 10 Business Days after receipt of the notice given in accordance with paragraph 13.2 by notice to the relevant Authority's Representative, object to any



matter set out in that Authority's Representative's notice. The notice from Sub-hubco shall give details of the grounds of such objection and shall set out Sub-hubco's proposals in respect of such matters.

16 If no agreement is reached between Sub-hubco and the relevant Authority's Representative as to any matter referred to in Sub-hubco's notice given in accordance with paragraph 15 within 15 Business Days of receipt of that notice by the relevant Authority's Representative, then either Sub-hubco or the relevant Authority's Representative may refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) as to:

16.1 whether the relevant Facilities comply in all respects with the Handback Requirements; and

16.2 the estimated cost of procuring that the relevant Facilities comply in all respects with the Handback Requirements, where the relevant Facilities do not comply in all respects with the Handback Requirements.

17 If it is agreed or determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) that the relevant Facilities did not, at the Expiry Date, comply in all respects with the Handback Requirements, Sub-hubco shall pay to the relevant Authority an amount equal to the estimated cost of completing such Handback Works (less, where applicable, any amounts standing to the credit of the relevant Retention Fund at that time) or procuring that the relevant Facilities comply in all respects with the Handback Requirements. Such payment shall be made not later than 15 Business Days after the estimated cost has been agreed or determined and, upon such payment being received by the relevant Authority, the relevant Authority's Representative shall issue the Handback Certificate and return (where applicable) the relevant Handback Bond to Sub-hubco.

## SCHEDULE PART 19

### RECORD PROVISIONS

#### SECTION 1

#### GENERAL REQUIREMENTS

- 1 Sub-hubco shall retain and maintain all the records (including superseded records) referred to in Section 2 (*Records to be Kept*) of this Schedule Part 19 (*Record Provisions*) in accordance with this Section 1 (*General Requirements*) of this Schedule Part 19 (*Record Provisions*), the requirements of Good Industry Practice, in chronological order, in a form that is capable of audit and at its own expense. Sub-hubco shall make such records available for inspection to the Authority where it has reasonable cause for requiring such records, on giving reasonable notice shall provide such facilities as an Authority may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Schedule Part 19 (*Record Provisions*).
- 2 Wherever practical, original records shall be retained and maintained in hard copy form. True copies of the original records may be kept by Sub-hubco where it is not practicable to retain original records.
- 3 Those records relating to the Project Operations (including the design, construction, development, enhancement and maintenance of the Facilities) shall be retained for the duration of the Agreement.
- 4 Financial and other records (including without limitation all information provided in support of any Change) shall be retained and maintained by Sub-hubco for a period of at least six (6) years after the end of the Project Term in sufficient detail, in appropriate categories and generally in such a manner to enable Sub-hubco to comply with its obligations under Clause 63.1 and where appropriate to enable the data in such records to be entered into the Financial Model so that the output from the Financial Model (on the basis of such data) can be directly compared with the actual financial cashflow and performance of Sub-hubco.
- 5 Where Sub-hubco wishes to dispose of any records maintained as provided in this Schedule Part 19 (*Record Provisions*) which are more than fifteen (15) years old, or in respect of which the required period for their retention has expired, then Sub-hubco shall notify the Authority and if, within forty (40) Business Days of such notice, the Authority elects to receive certain of those records, then Sub-hubco shall deliver up such records to the relevant Authority in the manner and at the location as the relevant Authority shall reasonably specify, and the costs of retaining those records in safe storage and delivering up the same shall be borne by Sub-hubco.
- 6 Subject to paragraph 5, for a period of not more than six (6) years following the termination for whatever reason of this Agreement in its entirety, Sub-hubco shall retain in safe storage all such records as are referred to in Section 2 (*Records to be Kept*) of this Schedule Part 19 (*Record Provisions*) which were in existence at the date of termination of this Agreement. On the expiry of such period or at the earlier request of an Authority (and the Parties acknowledge that such a request shall be deemed to have been issued by the Authority upon the occurrence of any of the events set out in Clause 40.1.1 whether prior to or following termination of this Agreement), Sub-hubco shall deliver up all those records (or where those records are required by statute to remain with Sub-hubco or a Contracting Associate of Sub-hubco, copies thereof) to the Authority in the manner and at the location as the Authority shall reasonably specify. An Authority shall make available to Sub-hubco all the records Sub-hubco delivers up pursuant to this paragraph subject to reasonable notice. The costs of retaining those records in safe storage and delivering up the same shall be borne:
  - 6.1 by Sub-hubco where the termination arises as a result of a Sub-hubco Event of Default; and

- 6.2 by the Authority where the termination arises for any other cause.
- 7 Without prejudice to the foregoing, Sub-hubco shall provide the Authority:
- 7.1 as soon as they may be available and in any event within sixty (60) Business Days after the end of the first six (6) months of each financial year of Sub-hubco which falls during the Project Term, a copy, certified as a true copy by an officer of Sub-hubco, of its unaudited interim accounts and, if appropriate, of consolidated unaudited interim accounts of Sub-hubco, its Subsidiaries and Holding Company (if any) which would (if Sub-hubco were listed on the London Stock Exchange whether or not it is) be required to be sent to shareholders as at the end of and for each such six (6) month period; and
- 7.2 as soon as they shall have been sent to its shareholders in order to be laid before an annual general meeting of Sub-hubco but not later than one hundred and thirty (130) Business Days after the end of each accounting reference period of Sub-hubco part or all of which falls in a Contract Year, a copy of Sub-hubco's audited accounts and if appropriate, of the consolidated audited accounts of Sub-hubco and, its Associated Companies (if any), in respect of that period, prepared in accordance with the Companies Act 1985 and generally accepted accounting principles and bases in Scotland, consistently applied together with copies of all related directors' and auditors' reports and all other notices/circulars to shareholders.
- 8 Sub-hubco shall provide to the Authority on 31 March, 30 June, 30 September and 31 December each year a document listing all information provided by it to the Senior Funders during the preceding three month period and, at the request of the Authority, provide to the Authority any information provided to it by the Senior Funders during the Project Term and any other information relating to the Project that an Authority may reasonably require.
- 9 Any drawings required to be made or supplied pursuant to this Agreement shall be of a size appropriate to show the detail to be depicted clearly without magnifying aids and shall conform to British Standards 1192 or 308 or equivalent as appropriate. Where by prior agreement an Authority has agreed to accept microfilm, microfiche or other storage media (which must include secure back up facilities), drawings and other documents shall be made or supplied in such form as has been agreed.
- 10 Upon termination or expiry of this Agreement, and in the event that the Authority wishes to enter into another contract for the operation and management of the Project, Sub-hubco shall (and shall ensure that the sub-contractors will) comply with all reasonable requests of an Authority to provide information relating to Sub-hubco's costs of operating and maintaining the Project.
- 11 Sub-hubco shall use all reasonable endeavours to assist an Authority in its preparation of any report and/or return required pursuant to regulations, directions or guidance applicable to that Authority (in each case as amended, replaced or consolidated from time to time) or as required by external agencies including without limitation, reports and returns regarding the physical condition of the relevant Facilities, health and safety, under the Fire (Scotland) Regulations 2005 and the Fire Safety (Scotland) Regulations 2006, relating to environmental health and to comply with The NHS and You or any document replacing it] or required by the Scottish Government Health Directorate, the Scottish Government or the Scottish Futures Trust from time to time.

## SECTION 2

### RECORDS TO BE KEPT

- 1 The Design Build Finance and Maintain Agreement, its Schedule and the Project Documents including all amendments to such agreements.
- 2 Sub-hubco shall at all times maintain a full record of particulars of the costs of performing the Project Operations, including those relating to the design, construction, maintenance, operation and finance of the Facilities. This shall require Sub-hubco to keep (and where appropriate to procure that the sub-contractors shall keep) books of account in accordance with best accountancy practice with respect to the Agreement showing in detail:
  - 2.1 administrative overheads;
  - 2.2 payments to Sub-Contractors and to sub-contractors;
  - 2.3 capital and revenue expenditure;
  - 2.4 such other items as an Authority may reasonably require to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of Clause 29.11, Schedule Part 16 (*Change Protocol*) and Clause 32 (*Changes in Law*),and Sub-hubco shall have (and procure that the sub-contractors shall have) the books of account evidencing the items listed in paragraphs 2.1 to 2.4 available for inspection by the Authority (and any expert) upon reasonable notice, and shall present a report of these to an Authority as and when requested.
- 3 All other documents, software or other information expressly referred to in this Agreement.
- 4 Records relating to the appointment and supersession of any Authority's Representative and Sub-hubco's Representative.
- 5 Project Data.
- 6 Documents, drawings, design data or submissions raised in accordance with Schedule Part 8 (*Review Procedure*).
- 7 Documents relating to planning applications, consents, refusals and appeals.
- 8 Records relating to any specialist or statutory inspections of the Facilities, including any roadways.
- 9 Notices, reports, results and certificates relating to completion of the Works and completion of the commissioning activities.
- 10 All operation and maintenance manuals and a full record of all maintenance procedures carried out during the Project Term.
- 11 Documents relating to events of Force Majeure, Delay Events and Relief Events and the consequences of the same.
- 12 All formal notices, reports or submissions made to or received from an Authority's Representative in connection with the provision of relevant Services, the Monitoring of Performance or the availability of the relevant Facilities.
- 13 All certificates, licences, registrations or warranties related to the provision of Services.

- 14 Documents in support of claims for Services Payments.
- 15 Documents submitted in accordance with Schedule Part 16 (*Change Protocol*) and all documents provided in support.
- 16 Documents related to referrals to the Dispute Resolution Procedure.
- 17 Documents related to change in ownership or any interest in any or all of the shares in Sub-hubco and/or hubco.
- 18 Documents relating to the rescheduling of the indebtedness of Sub-hubco or refinancing of the Project.
- 19 Tax invoices and records related to Value Added Tax.
- 20 Financial records, including audited and unaudited accounts of hubco and Sub-hubco and related reports
- 21 Records required by Law (including in relation to Health and Safety matters and health and safety files prepared pursuant to CDM Regulations) and all Consents.
- 22 Documents relating to insurance and insurance claims.
- 23 All other records, notices or certificates required to be produced and/or maintained by Sub-hubco pursuant to this Agreement or any Project Document.
- 24 Records of all persons employed by Sub-hubco or its sub-contractors and who are wholly or mainly engaged in the delivery of Services.

## SCHEDULE PART 20

### DISPUTE RESOLUTION PROCEDURE

- 1 The procedure set out in this Schedule Part 20 (*Dispute Resolution Procedure*) shall apply to any dispute, claim or difference arising out of or relating to this Agreement ("**Dispute**") except where it has been excluded from this procedure by an express term of this Agreement.
- 2 This Dispute Resolution Procedure shall not impose any pre-condition on either party or otherwise prevent or delay either party from commencing proceedings in any court of competent jurisdiction in relation to any Dispute in which that party requires either:
- 2.1 an order (whether interlocutory or final) restraining the other party from doing any act or compelling the other party to do any act; or
- 2.2 a decree for a liquidated sum to which there is no stateable defence.

### 3 MEDIATION

- 3.1 If the relevant parties have been unable to resolve the Dispute within twenty (20) Business Days of the Dispute arising, they may (if the relevant parties so agree) refer the Dispute to mediation on such conditions as may be agreed between the parties. Any mediation shall be completed within thirty (30) Business Days of such referral and any agreement arising therefrom shall be recorded in writing and signed by the relevant parties and shall be binding and final to the extent set out in such agreement unless otherwise agreed.
- 3.2 For the avoidance of doubt, mediation shall not be a precondition to the commencement of Adjudication or court proceedings.

### 4 ADJUDICATION

- 4.1 Any party may at any time (notwithstanding that other dispute resolution procedures are running concurrently) give the other relevant party(ies) to the Dispute notice of its intention to refer the Dispute to adjudication (the "**Notice of Adjudication**"). The party giving the Notice of Adjudication (the "**Referring Party**") shall by the same means of communication send a copy of the Notice of Adjudication to an adjudicator selected in accordance with paragraph 4.2 below or paragraph 4.11 (*Related Adjudicator*) below (the "**Adjudicator**").
- 4.2 The Adjudicator nominated to consider a Dispute referred to him shall, subject to paragraph 4.11, be selected on a strictly rotational basis from the relevant panel of adjudicators appointed in accordance with the following:
- 4.2.1 there shall be two (2) panels of adjudicators, one in respect of construction matters (the "**Construction Panel**") and one in respect of operational and maintenance matters (the "**Operational Panel**"). All the adjudicators on each panel shall be wholly independent of Sub-hubco, the Authority, the relevant Sub-Contractor and any of the major competitors of Sub-hubco or the relevant Sub-Contractor;
- 4.2.2 the Construction Panel shall be comprised of three (3) adjudicators as identified in paragraph 7 (*Panel Members*);
- 4.2.3 the Operational Panel shall be comprised of three (3) adjudicators as identified in paragraph 7 (*Panel Members*);

- 4.2.4 if any member of either panel resigns during the term of the Agreement, a replacement adjudicator shall be appointed by Sub-hubco and the Authority as soon as practicable;
- 4.2.5 if Sub-hubco and the Authority are unable to agree on the identity of any replacement adjudicator, the Chairman (or Vice Chairman) for the time being of the Chartered Institute of Arbitrators Scottish Branch shall appoint such adjudicator(s) within seven (7) days of any application for such appointment by either party;
- 4.2.6 in the event that the first panel member is unable or unwilling to confirm acceptance of his appointment as Adjudicator or where he fails to respond within two (2) days of the date of the Notice of Adjudication, then the Referring Party shall invite the person next in line to act as Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within four (4) days of the date of the Notice of Adjudication or if the parties disagree as to the relevant panel of adjudicators to be used, then the Referring Party may apply to the Chairman (or Vice Chairman) for the time being of the Chartered Institute of Arbitrators Scottish Branch who shall within seven (7) days of the date of the Notice of Adjudication, nominate an Adjudicator (who shall also within the same period, confirm acceptance of his appointment as Adjudicator) to determine the Dispute described in the Notice of Adjudication;
- 4.2.7 no member of either panel shall be entitled to accept an appointment to act as Adjudicator unless he is willing also to be appointed as the adjudicator to adjudicate any dispute which:
- (a) may arise between Sub-hubco and the Contractor and raises issues which, in the opinion of Sub-hubco, are substantially the same as or connected with the Dispute in relation to which he has been appointed; and/or
  - (b) may arise between Sub-hubco and the Service Provider and raises issues which, in the opinion of Sub-hubco, are substantially the same as or connected with the Dispute in relation to which he has been appointed; and/or
  - (c) may arise between Sub-hubco and the Independent Tester and raises issues which, in the opinion of Sub-hubco, are substantially the same as or connected with the Dispute in relation to which he has been appointed.
- 4.3 The Referring Party shall, within 7 days of the date of the Notice of Adjudication, serve its statement of case (the "**Referral Notice**") on the Adjudicator (appointed pursuant to paragraph 4.2) and the other relevant party(ies) to the Dispute (the "**Responding Party**"). The Referral Notice shall set out each element of the Referring Party's claim and the relief or remedy sought in sufficient detail so as to enable the Responding Party to understand and, where appropriate, respond to the claim and the Referral Notice shall be accompanied by copies of, or relevant extracts from, this Agreement and such other documents as the Referring Party intends to rely upon. The date of the referral of the Dispute (the "**Referral**") shall be the date of the Referral Notice.
- 4.4 Within seven (7) days of appointment in relation to a particular Dispute, the Adjudicator shall establish the procedure and timetable for the adjudication. The Adjudicator shall have absolute discretion as to how to conduct the adjudication,

including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Agreement. The relevant parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.

- 4.5 The Adjudicator shall reach a decision on the Dispute within twenty-eight (28) days of the date of the Referral (or such other period as the parties may agree). The Adjudicator may extend the period of 28 days by up to 14 days with the consent of the Referring Party. Unless the relevant parties otherwise agree, the Adjudicator shall give reasons for his decision. Unless and until the Dispute is finally determined by Court proceedings or by an agreement in writing between the relevant parties, the Adjudicator's decision shall be binding on the relevant parties who shall forthwith give effect to the decision.
- 4.6 The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the relevant parties. Each relevant party shall bear its own costs arising out of the adjudication, including legal costs and the costs and expenses of any witnesses.
- 4.7 The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an adjudicator and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.
- 4.8 The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement.
- 4.9 All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 61 (*Confidentiality*), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Adjudicator's work.
- 4.10 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.
- 4.10A.1 The Adjudicator may on his own initiative or on the request of the Referring Party or Responding Party correct his decision so as to remove a clerical or typographical error arising by accident or omission.
- 4.10A.2 Any correction of a decision shall be made within 5 days of the date upon which the Adjudicator's decision was delivered to the parties.
- 4.10A.3 Any correction of a decision shall form part of the decision.
- 4.11 If any Dispute raises issues which, in the opinion of Sub-hubco, are substantially the same as or connected with issues raised in a dispute or difference arising out of or relating to any other agreement (all such agreements being referred to as the "Related Agreements") between:
- 4.11.1 Sub-hubco and the Contractor;



4.11.2 Sub-hubco and the Service Provider; and/or,

4.11.3 Sub-hubco and the Independent Tester,

which was or has been referred to adjudication (the "**Related Adjudication**") and an adjudicator has already been appointed (the "**Related Adjudicator**") then Sub-hubco may request that the Dispute be referred to the Related Adjudicator and paragraphs 4.12 to 4.14 shall apply.

4.12 Subject to paragraphs 4.13 and 4.14 below, in the event that a Related Adjudicator orders that a Dispute under this Agreement be consolidated with a Related Adjudication with which he is dealing under the Related Agreement, then:

4.12.1 with effect from the time of such order, the Dispute shall be determined by the Related Adjudicator, who shall become the Adjudicator; and

4.12.2 such order shall be binding on Sub-hubco and the relevant Authority and both of them shall acknowledge the appointment of the Related Adjudicator as the adjudicator of the Dispute, with Sub-hubco or the Authority (as the case may be) using its best endeavours to procure that the third party who is a party to the Related Agreement shall with effect from the time of such order comply with the requirements of the Related Agreement (including if applicable any requirement or direction of the Related Adjudicator appointed under such Related Agreement) as to the future conduct of the determination of the Dispute and the Related Adjudication; and

4.12.3 notwithstanding paragraph 4.6, Sub-hubco and the relevant Authority shall be jointly responsible with the third party who is a party to the Related Agreement for the Related Adjudicator's fees and expenses including those of any specialist consultant appointed under the adjudication procedure in the Related Agreement, in respect of the period in which the Dispute is consolidated with the Related Adjudication pursuant to an order of the Related Adjudicator ("**Consolidated Adjudication Costs**"). Sub-hubco and the relevant Authority agree that the Related Adjudicator shall have the discretion to make directions to require Sub-hubco, the relevant Authority and the third party who is a party to the Related Agreement to pay or make contribution to the Consolidated Adjudication Costs in different proportions. If no such directions are made, Sub-hubco, the relevant Authority and the third party who is a party to the Related Agreement shall bear the Consolidated Adjudication Costs in equal shares, and if Sub-hubco, the relevant Authority or the third party has paid more than such equal share, that party or third party shall be entitled to a contribution from the other party, parties or third party, as the case may be.

4.13 Notwithstanding anything to the contrary a Dispute under this Agreement may only be consolidated with a Related Adjudication, if the Related Adjudicator receives particulars of the Dispute within ten (10) days of the referral of the Related Adjudication to the Related Adjudicator under the Related Agreement.

4.14 Where Sub-hubco requests that a Dispute under this Agreement be consolidated (in terms of paragraph 4.11) with a Related Adjudication and heard by the Related Adjudicator, the Dispute may only be consolidated where the relevant Authority has previously consented in writing to the identity of the Related Adjudicator appointed in respect of the Related Adjudication. The relevant Authority's consent

to such request shall not be unreasonably withheld and if the relevant Authority refuses to consent, it must give reasons in writing for its refusal. Should the relevant Authority fail to respond within two (2) days of receipt of such a request it shall be deemed to have consented to the appointment of the Related Adjudicator. Where the Related Adjudicator is on the Construction Panel or Operational Panel at the time of the Referral then the relevant Authority shall be deemed to have consented to the appointment of the Related Adjudicator.

## 5 COURT PROCEEDINGS

Subject to paragraph 4 (*Adjudication*) all Disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing provisions of this Schedule Part 20 (*Dispute Resolution Procedure*), shall be referred to the Court of Session in Edinburgh.

## 6 SUBMISSIONS IN RELATION TO ADJUDICATION

6.1 If any Dispute raises issues which relate to:

6.1.1 any dispute between Sub-hubco and the Contractor arising under the relevant Construction Contract or otherwise affects the relationship or rights of Sub-hubco and/or the Contractor under the relevant Construction Contract (the "**Construction Contract Dispute**"); or

6.1.2 any dispute between Sub-hubco and the Service Provider arising under the Service Contract or otherwise affects the relationship or rights of Sub-hubco and/or the Service Provider under the Service Contract (the "**Service Contract Dispute**"); or

6.1.3 any dispute between Sub-hubco and the Independent Tester arising under the Independent Tester Contract or otherwise affects the relationship or rights of Sub-hubco and/or the Independent Tester under the Independent Tester Contract (the "**Independent Tester Contract Dispute**"),

then Sub-hubco may include as part of its submissions made to the Adjudicator submissions made by the Contractor or by the Service Provider or the Independent Tester as appropriate.

6.2 Any submissions made by the Contractor or the Service Provider or the Independent Tester shall:

6.2.1 be made within the time limits applicable to the delivery of submissions by Sub-hubco to the Adjudicator; and

6.2.2 concern only those matters which relate to the Dispute between the relevant Authority and Sub-hubco arising out of this Agreement or in connection therewith.

6.3 Where the Contractor or the Service Provider or the Independent Tester makes submissions in any reference before the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third by the relevant Authority and two-thirds by Sub-hubco.

6.4 The relevant Authority shall have no liability to the Contractor or the Service Provider or the Independent Tester arising out of or in connection with any decision of the Adjudicator or in respect of the costs of the Contractor or the Service Provider or the Independent Tester in participating in the resolution of any Dispute under this Agreement.

6.5 Sub-hubco shall not allow the Contractor or the Service Provider or the Independent Tester access to any Confidential Information relevant to the issues in dispute between the relevant Authority and Sub-hubco save where:

6.5.1 the Confidential Information is relevant also to the issues relating to the Construction Contract Dispute or the Service Contract Dispute or the Independent Tester Contract Dispute as the case may be; and

6.5.2 Sub-hubco has first delivered to the relevant Authority a written undertaking from the Contractor and/or the Service Provider and/or the Independent Tester (as appropriate) addressed to the relevant Authority that they shall not use any such Confidential Information otherwise than for the purpose of the dispute resolution proceedings under this Agreement and that they shall not disclose such Confidential Information to any third party other than the Adjudicator or the courts or any professional adviser engaged by the Contractor or the Service Provider or Independent Tester (as appropriate) to advise in connection with the Dispute.

## 7 **PANEL MEMBERS**

The panel members referred to in paragraph 4 are as follows:

Construction Panel    John Hunter, Hunter Consulting  
   Alex Warrander, FTI Brewer Consulting  
   Bryan Porter, The Strone, Blairgowrie Road, Dunkeld PH8 0EP

Operational Panel    Heriot Currie QC  
   Gordon Reid QC  
   James McNeil QC

## 8 **NO LOSS**

Where an Authority would otherwise be expressly liable to make payment to Sub-hubco of sums which include amounts payable in turn by Sub-hubco to any Sub-Contractor, an Authority shall not be entitled to withhold, reduce or avoid any such payment to Sub-hubco in reliance only on the fact that the amount which is due from Sub-hubco to the Sub-Contractor or the entitlement of the Sub-Contractor to payment of such amount as a result of the circumstances giving rise to the relevant Authority's obligation to pay, is conditional on the entitlement of, or receipt of payment by Sub-hubco from the relevant Authority.

## 9 **CONTINUING OBLIGATIONS**

Unless this Agreement has already been repudiated or terminated, the parties shall, (notwithstanding that any Dispute is subject to the Dispute Resolution Procedure set out in this Schedule Part 20 (*Dispute Resolution Procedure*)), continue to carry out their obligations in accordance with this Agreement.

**SCHEDULE PART 21**  
**SUB-HUBCO INFORMATION**  
**SECTION 1**  
**SUB-HUBCO INFORMATION**

Name : hub North Scotland (FWT) Limited  
Date of Incorporation : 5 February 2013  
Registered number : SC441943  
Registered office : Miller House, 2 Lochside View, Edinburgh Park  
EDINBURGH EH12 9DH  
Directors :

Name	Address
Stephen Leask Barron	
Mark Baxter	
Andrew David Bruce	
Tom Delamotte	
Gerald Francis Donald	
Michael David Felton	
John Alexander Hope	

Secretary : None

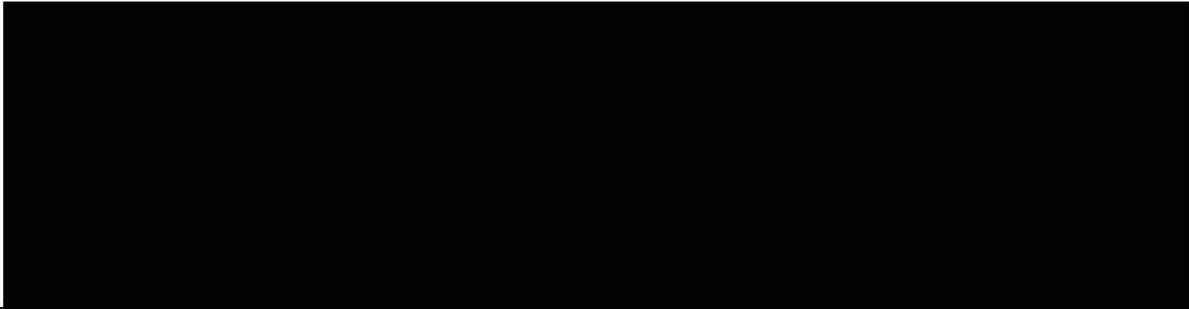
Subsidiary undertakings at the date of this Agreement : None

Authorised and issued share capital at the date of this Agreement :

Name and address of registered holder	Number and class held	Amount paid up
Hub North Scotland Limited	1000 ordinary shares of £1.00 each	£1,000

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Loan Stock at the date of this Agreement issued as follows:



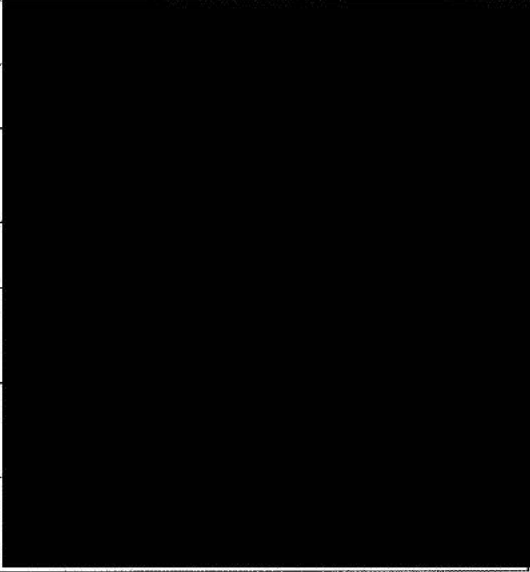
Loan Stock Provisions



**SECTION 2**

**HUBCO INFORMATION**

Name : hub North Scotland Limited  
Date of Incorporation : 21/12/2010  
Registered number : SC390666  
Registered office : Miller House, 2 Lochside View, Edinburgh Park,  
Edinburgh, EH12 9DH  
Directors :

Name	Address
Stephen Leask Barron	
Mark Baxter	
Andrew David Bruce	
Tom Delamotte	
Gerald Francis Donald	
Michael David Felton	
John Alexander Hope	

Secretary : ACP: Hub North Limited

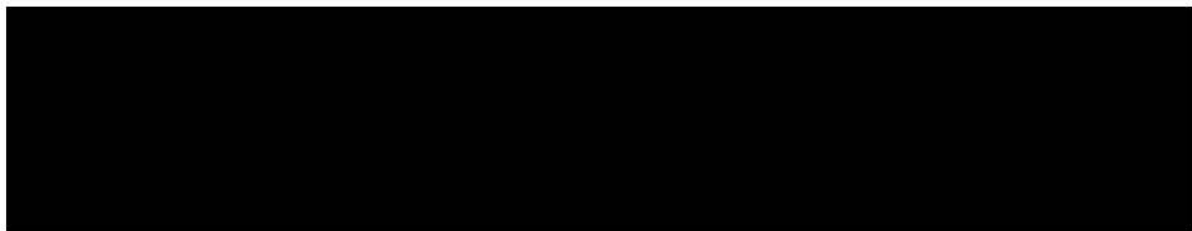
Subsidiary undertakings at the date of this Agreement : Aberdeen Community Health Care Village Limited

Authorised and issued share capital at the date of this Agreement : 170 shares

Name and address of registered holder	Number and class held	Amount paid up
Scottish Futures Trust Investments Limited	20 Ordinary A shares	£1.00
Aberdeen City Council	3 Ordinary B shares	£1.00
Aberdeenshire Council	3 Ordinary B shares	£1.00
Argyll and Bute Council	3 Ordinary B shares	£1.00

Comhairle Nan Eilean Siar	3 Ordinary B shares	£1.00
Grampian Health Board	3 Ordinary B shares	£1.00
Grampian Joint Fire and Rescue Board	3 Ordinary B shares	£1.00
Grampian Joint Police Board	3 Ordinary B shares	£1.00
Highland Health Board	3 Ordinary B shares	£1.00
Highlands and Islands Board	3 Ordinary B shares	£1.00
Northern Joint Police Board	3 Ordinary B shares	£1.00
Orkney Health Board	3 Ordinary B shares	£1.00
Orkney Islands Council	3 Ordinary B shares	£1.00
Shetland Health Board	3 Ordinary B shares	£1.00
The Highland Council	3 Ordinary B shares	£1.00
Western Isles Health Board	3 Ordinary B shares	£1.00
ACP: North Hubco Limited	102 Ordinary C shares	£1.00

Loan Stock at the date of this Agreement issued as follows:



Loan Stock Provisions



**SCHEDULE PART 22**

**CERTIFICATES**

**Handback Certificate**

Issued by: [Authority A Representative][Authority B Representative]

Address: [ ]

Authority: [AUTHORITY A][AUTHORITY B]

Address: [ ]

Sub-hubco: [SUB-HUBCO]

Address: [ ]

Issue date: .....

Works :

Situated at :

Design Build Finance and Maintain Agreement dated: .....

I/we certify that the condition of the Authority [A/B] Facilities is in accordance with paragraph 1 of Schedule Part 18 (*Handback Procedure*) of above mentioned Design Build Finance and Maintain Agreement.

To be signed by or for the issuer named above.

Signed.....  
[AUTHORITY A][AUTHORITY B]



**\*Certificate of Phase/Stage Practical Completion**

Issued by: Independent Tester – [ ]

Address: [ ]

Sub-hubco: **[SUB-HUBCO]**

Address: [ ]

Authority: **[AUTHORITY A][AUTHORITY B]**

Address: [ ]

Contractor: **[CONTRACTOR]**

Address: [ ]

Issue date: .....

Phase:

Works:

Situated at:

Design Build Finance and Maintain Agreement dated: .....

Under the terms of the above-mentioned Design Build Finance and Maintain Agreement, I/we certify that the Phase [1/2/3] Actual Completion Date was achieved on [ ].

To be signed by or for the issuer named above.

Signed.....  
**[INDEPENDENT TESTER]**

**\*Commissioning Completion Certificate**

Issued by: Independent Tester – [ ]

Address: [ ]

Sub-hubco: **[SUB-HUBCO]**

Address: [ ]

Authority: **[AUTHORITY A][AUTHORITY B]**

Address: [ ]

Contractor: **[CONTRACTOR]**

Address: [ ]

Issue date: .....

Works:

Situated at:

Design Build Finance and Maintain Agreement dated: .....

Under the terms of the above-mentioned Design Build Finance and Maintain Agreement,

I/we certify that the Actual Commissioning End Date relevant to [ ] was achieved on [ ].

To be signed by or for the issuer named above.

Signed.....  
**[INDEPENDENT TESTER]**

## SCHEDULE PART 23

### REFINANCING

References in this Schedule Part 23 (*Refinancing*) to "the Authority" shall be to Authority A and Authority B acting together.

#### Requirement for Authority Consent

- 1 Sub-hubco shall obtain the Authority's prior written consent to any Qualifying Refinancing and each of the Authority and Sub-hubco shall at all times act in good faith with respect to (a) any Refinancing or (b) any potential or proposed Refinancing under paragraph 9 below.
- 2 The Authority shall be entitled to receive:
  - 2.1 a 90% share of the Margin Gain arising from any Qualifying Refinancing which gives rise to a reduction in the Margin from the Margin as shown in the Senior Funding Agreements as at Financial Close (or, in the case of a second or subsequent Qualifying Refinancing, from the Margin as shown in the Senior Funding Agreements as updated at the immediately preceding Qualifying Refinancing); and;
  - 2.2 a share of any Refinancing Gain (arising otherwise than from a reduction in Margin) from a Qualifying Refinancing in respect of any Refinancing Gain (when considered in aggregate with all previous Qualifying Refinancings) as follows:
    - 2.2.1 for a Refinancing Gain from £1 up to £1 million, a 50% share;
    - 2.2.2 for a Refinancing Gain from £1 million up to £3 million, a 60% share; and
    - 2.2.3 for a Refinancing Gain in excess of £3 million, a 70% share.
- 3 An Authority shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater share of the Refinancing Gain than that specified in paragraph 2 above.

#### Sub-hubco Details

- 4 Sub-hubco shall promptly provide the Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial models relating to it (if any) and the basis for the assumptions used in the proposed financial models. The Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial models and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with the Refinancing whether that Refinancing is a Qualifying Refinancing or not.

#### Receipt of Gain

- 5 Each Authority shall be entitled to receive its relevant Proportion of the Authority's share of any Refinancing Gain (including any Margin Gain). An Authority shall have the right to elect to receive its share of any Refinancing Gain (including any Margin Gain) as:
  - 5.1 a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;
  - 5.2 a reduction in the relevant Annual Service Payments over the remaining term of this Agreement; or
  - 5.3 a combination of the above.

### **Method of Calculation**

- 6 The Authority and Sub-hubco will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain (including any Margin Gain) and payment of an Authority's share of the Refinancing Gain (taking into account how that Authority has elected to receive its share of the Refinancing Gain under paragraph 5 (*Receipt of Gain*) above). If the parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of an Authority's share, the dispute shall be determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

### **Costs**

- 7 The Refinancing Gain (including any Margin Gain) shall be calculated after taking into account any breakage costs necessary to facilitate the Qualifying Refinancing together with the reasonable and proper professional costs that each party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by an Authority will be paid to that Authority by Sub-hubco within twenty eight (28) days of any Qualifying Refinancing. Such costs shall be allocated pro rata between the Margin Gain (if any) and the remaining Refinancing Gain.

- 8 Without prejudice to the other provisions of this Schedule Part 23 (*Refinancing*), Sub-hubco shall:

8.1 notify the Authority of all Notifiable Financings on becoming aware of the same and again when they are entered into and provide full details of the same; and

8.2 include a provision in the Funding Agreements (other than the Subordinated Funding Agreements) whereby it is entitled to be informed of any proposals which the Senior Funders may have to refinance the Funding Agreements (other than the Subordinated Funding Agreements).

- 8A In relation to a Qualifying Refinancing:

8A.1 which is not a Restructuring Transfer under paragraph 12 (*Project Restructuring*) of this Schedule Part 23; and

8A.2 where as part of that Qualifying Refinancing, Sub-hubco's leasehold interest in the Tain Site, Woodside Site and Forres Site is no longer required as security to fund the Project, such leasehold interest is surrendered by Sub-hubco and the Authority grants Sub-hubco a contractual licence in substitution for such leasehold interest,

the Authority's share of any Margin Gain and/or Refinancing Gain shall be increased by an amount equal to the Net Tax Adjustment provided that the Authority's share shall not exceed the Margin Gain and/or Refinancing Gain (as the case may be), where the "Net Tax Adjustment" is the net amount of any increased or reduced tax payable by Sub-hubco and the Authority arising from any change in the tax treatment of the Project, including but not limited to increased corporation tax deductions which may be available, and the surrender of Project Co's leasehold interest in the Tain Site, Woodside Site and Forres Site and the grant by the Authority to Sub-hubco of a contractual licence in substitution for such leasehold interest, in each case occurring as a result of or in consequence of the Qualifying Refinancing.

### **Authority Right to Request Refinancing**

- 9 If the Authority (acting reasonably) considers the funding terms generally available in the market to be more favourable than those reflected in the Funding Agreements, the Authority may, by notice in writing to Sub-hubco, require Sub-hubco to request potential funders to provide terms for a potential Refinancing (a "**Refinancing Notice**").

- 10 The Refinancing Notice shall set out in reasonable detail the grounds upon which the Authority believes such funding terms to be available. Sub-hubco and the Authority shall meet to discuss the Refinancing Notice within twenty eight (28) days. Such a meeting will consider the evidence available to both parties about the availability of funding terms for a potential Refinancing. The Authority shall be entitled to withdraw the Refinancing Notice at or before such a meeting, or within ten days following the meeting.
- 11 If the Authority serves a Refinancing Notice which is not withdrawn pursuant to paragraph 10 above, then Sub-hubco shall:
- 11.1 act promptly, diligently and in good faith with respect to the potential Refinancing;
  - 11.2 use all reasonable endeavours to obtain the most favourable available terms from existing and/or new lenders for any potential Refinancing (provided that Sub-hubco shall not be required to propose refinancing in a manner which a prudent board of directors of a company operating the same business in the United Kingdom to that operated by Sub-hubco, in similar circumstances, would not approve), for the avoidance of doubt also being terms which are likely to generate a positive Refinancing Gain after the deduction of costs in accordance with the provisions of paragraph 7 above; and
  - 11.3 either:
    - 11.3.1 as soon as reasonably practicable after the meeting held pursuant to paragraph 10 above, provide to the Authority (i) full details of the proposed Refinancing, including a financial model and the basis for the assumptions used in the financial model and evidence to the reasonable satisfaction of the Authority that these assumptions represent the most favourable available terms for the potential Refinancing on the basis set out in paragraph 11.2 above and (ii) initial drafts of any changes to this Agreement including in relation to potential compensation on termination which might be required to give effect to the proposed Refinancing; or
    - 11.3.2 if Sub-hubco (acting reasonably) believes that it is not possible to obtain funding terms which are more favourable than those reflected in the Funding Agreements in accordance with the requirements of paragraph 11.2, provide evidence to the reasonable satisfaction of the Authority for such belief and evidence to the reasonable satisfaction of the Authority that Sub-hubco has complied with its obligations in paragraphs 11.1 and 11.2.
  - 11.4 Following receipt of the information referred to in paragraph 11.3.1 the Authority shall (in its absolute discretion) either:
    - 11.4.1 instruct Sub-hubco to implement the proposed Refinancing; or
    - 11.4.2 instruct Sub-hubco to discontinue the proposed Refinancingprovided that if the Authority reasonably considers that the requirements of paragraph 11.3.1 have not been satisfied, the Authority may require Sub-hubco to satisfy its obligations under paragraph 11.3.1 whereupon the provisions of paragraph 11 shall apply as if the Authority had served a Refinancing Notice.
  - 11.5 If the Authority instructs Sub-hubco to implement the proposed Refinancing:

- 11.5.1 Sub-hubco shall, as soon as reasonably practicable, use all reasonable endeavours to procure that such proposed Refinancing is implemented;
- 11.5.2 such proposed Refinancing shall be deemed to be a Qualifying Refinancing; and
- 11.5.3 the provisions of paragraphs 1 and 8 shall apply.

11.6 If:

- 11.6.1 the Authority instructs Sub-hubco to discontinue the potential Refinancing pursuant to paragraph 11.4.2; or
- 11.6.2 the requirements of paragraph 11.3.2 are satisfied,

then, the Authority shall reimburse Sub-hubco for the reasonable and proper professional costs incurred by Sub-hubco in relation to the potential Refinancing, such costs to be paid to Sub-hubco by each Authority in their relevant Proportions within twenty eight (28) days after receipt of valid invoices in respect of such amount. Such costs shall not include any internal management costs incurred by Sub-hubco except insofar as (a) it can be demonstrated to the reasonable satisfaction of the Authority that such costs have been incurred in place of professional costs which would in the normal course of business have been paid to third parties and (b) the Authority has, by prior written agreement, approved the use of such internal management resource.

- 11.7 The Authority shall be entitled to issue a Refinancing Notice under paragraph 9 at any time but not more than once in any two-year period. For the avoidance of doubt, a Refinancing Notice that has been withdrawn under paragraph 10 has been issued for the purpose of this paragraph 11.7.

## **Project Restructuring**

### **Initial Approval Stage**

#### **12.1**

- 12.1.1 If at any time during the Project Term, Sub-hubco becomes aware that the Senior Funder is able to offer loan facilities for PFI, PPP, NPD and/or hub accommodation projects the same or substantially similar to this Project on a basis which does not require security over any heritable or leasehold interest in real property of the Project, Sub-hubco shall promptly notify the Authority of the same. Where Sub-hubco notifies the Authority as set out in this paragraph 12.1.1, or the Authority becomes aware without notice from Sub-hubco, the Authority may issue a Restructuring Notice. Following the issue of a Restructuring Notice, Sub-hubco shall (subject to the terms of this paragraph 12.1) provide the Senior Funder with a copy of such Restructuring Notice and consult with the Senior Funder with a view to assessing whether a Restructuring Transfer has a reasonable prospect of being approved by the Senior Funder.
- 12.1.2 Following receipt of a Restructuring Notice and the consultation described in paragraph 12.1.1, Sub-hubco shall procure that the Senior Funder shall consider in good faith the Restructuring Notice and, at its discretion (acting reasonably), shall:
  - 12.1.2.1 issue to Sub-hubco a Senior Funder Initial Approval Notice; or
  - 12.1.2.2 notify Sub-hubco in writing that it does not consider a Restructuring Transfer to be suitable in the circumstances and does not intend to provide a Senior Funder Initial Approval Notice, and in such instance Sub-hubco shall procure that the Senior Funder shall

- (a) provide Sub-hubco with a brief summary of the reason(s) for not providing a Senior Funder Initial Approval Notice; and
- (b) the Senior Funder shall be under no obligation to consider any further representations from either Sub-hubco or the Authority in relation to such Restructuring Notice,

provided always that the Senior Funder may (acting reasonably) withdraw such Senior Funder Initial Approval Notice at any time prior to the submission to the Senior Funder of a Restructuring Proposal, providing reasons for the withdrawal, without incurring any liability to either Sub-hubco or the Authority, and following such withdrawal Sub-hubco and the Authority shall immediately discontinue any action resulting from such Senior Funder Initial Approval Notice.

12.1.2A The Senior Funder shall be deemed to be "acting reasonably" pursuant to this Paragraph 12.1 where it withholds consent, exercises its discretion or otherwise withdraws a Senior Funder Initial Approval Notice because the Restructuring Notice may have an adverse effect on the Senior Funder (including, but not limited to, adverse financial consequences or adverse consequences on the Senior Funder's operations and normal course of business) and references to "acting reasonably" in Paragraph 12.1 shall be construed accordingly.

12.1.3 Subject to the Senior Funder providing Sub-hubco with a Senior Funder Initial Approval Notice, Sub-hubco shall:

12.1.3.1 liaise with the Senior Funder to discuss the potential terms of a Restructuring Transfer;

12.1.3.2 consider any impact (including any tax implications) such a Restructuring Transfer may have on the Senior Funder and notify the Senior Funder if it believes (acting reasonably) that such a Restructuring Transfer has or may have an adverse effect on the Senior Funder's rights and obligations under the Senior Credit Agreement; and

12.1.3.3 use reasonable endeavours to seek from HMRC any consents or clearance in relation to both Sub-hubco and the Senior Funder's taxation position arising from Sub-hubco or the Senior Funder giving effect to the Restructuring Transfer.

12.1.4 The Authority and Sub-hubco jointly shall in consultation with the Senior Funder carry out and agree an initial assessment as to viability, benefits and likely costs of undertaking a Restructuring Transfer (the "Initial Assessment") and Sub-hubco shall procure that the Senior Funder shall use reasonable endeavours to provide such information as is reasonably requested to enable the Authority and Sub-hubco to consider fully the Initial Assessment.

12.1.5 The Authority shall:

12.1.5.1 consider any impact such a Restructuring Transfer has on the Authority and notify Sub-hubco if it believes (acting reasonably) that such a Restructuring Transfer has or would have a material adverse effect on the Authority's rights and obligations under this Agreement; and

12.1.5.2 as a result of an Initial Assessment, notify Sub-hubco as to whether it wishes to either proceed with the Restructuring Transfer in accordance with paragraph 12.1.6 or withdraw the Restructuring Notice.

### **Restructuring Proposal Stage**

- 12.1.6 If the Authority approves the Initial Assessment, Sub-hubco and the Authority shall together in good faith seek to agree terms by which a Restructuring Transfer can be implemented (the "Restructuring Proposal").
- 12.1.7 The Restructuring Proposal shall include the following conditions as a minimum:
- 12.1.7.1 maintain a post-tax nominal blended equity IRR equal to the higher of the Threshold Equity IRR and the projected post-tax nominal blended equity IRR immediately prior to the Restructuring Transfer;
  - 12.1.7.2 input any amendments to funding terms into a new financial model which shall also take account of:
    - (a) the resulting revised tax and accounting treatment;
    - (b) any costs which it is agreed pursuant to paragraph 12.1.12 shall be included within the financial model; and
    - (c) any Funder break costs (including for the avoidance of doubt any early repayment fee) arising out of or in connection with the Restructuring Transfer;
  - 12.1.7.3 acknowledge the requirement to terminate the Leases and identify any required amendment to or replacement of the Project Agreement, the Funders' Direct Agreement or existing Project Documents;
  - 12.1.7.4 leave Sub-hubco, any relevant Sub-hubco Party and the Senior Funder in a no better and no worse position had the Restructuring Transfer not occurred; and
  - 12.1.7.5 ensure that 100% (one hundred per cent) of any reduction to the Annual Service Payment shall be for the benefit of the Authority.
- 12.1.8 Sub-hubco shall submit the Restructuring Proposal to the Senior Funder, for its review within five Business Days of agreeing the Restructuring Proposal with the Authority.
- 12.1.9 Following consideration of the Restructuring Proposal, Sub-hubco shall procure that the Senior Funder shall, at its discretion (acting reasonably), notify Sub-hubco in writing that:
- 12.1.9.1 the Restructuring Proposal is agreed; or
  - 12.1.9.2 it requires certain amendment(s) to be made to the Restructuring Proposal and, in such event, Sub-hubco shall consider the amendments and resubmit a revised Restructuring Proposal to the Senior Funder in accordance with this paragraph 12.1; or
  - 12.1.9.3 the Restructuring Proposal is not agreed, giving reasons for the same (including any additional information the Authority might reasonably require),
- provided that the Senior Funder may (acting reasonably) at any time notify Sub-hubco that it does not wish to proceed with a Restructuring Proposal, providing reasons for not proceeding and after such notification Sub-hubco and the Authority shall immediately discontinue all action in relation to such Restructuring Proposal.

#### **Implementation of the Restructuring Transfer**

- 12.1.10 Subject to paragraph 12.1.11 and provided always that the Senior Funder has approved the Restructuring Proposal in accordance with paragraph 12, the Authority and Sub-hubco shall in good faith negotiate any amendments to or the replacement of the Project Agreement, the Funders' Direct Agreement or existing Project Documents as contained in the Restructuring Proposal and do all other things so necessary to give effect to the Restructuring Proposal.



12.1.11 The Authority and Sub-hubco:

12.1.11.1 shall provide the Senior Funder with a mark-up of the proposed amendments to the Project Agreement, the Funders' Direct Agreement and any other Project Document which are to be amended and shall negotiate in good faith with the Senior Funder to reach an agreed form for each document; and

12.1.11.2 acknowledge that the formal binding implementation of the Restructuring Proposal shall be subject to the Senior Funder, (in its discretion acting reasonably) giving its prior written approval to the final form of the Project Agreement, the Funders' Direct Agreement and any other Project Documents as amended in relation to the Restructuring Transfer.

12.1.12 All external costs reasonably and properly incurred by Sub-hubco (including those of any relevant Sub-hubco Party and the Senior Funder) to implement the Restructuring Transfer shall be payable by the Authority either by way of an adjustment to the revised financial model (in accordance with paragraph 12.1.7.2) or as a one-off payment, at the Authority's discretion.

12.1.13 The Parties may, acting in good faith, decide not to proceed with any Restructuring Transfer at any time.

12.1.14 If the Restructuring Transfer is not completed because:

12.1.14.1 the Authority does not give its approval in accordance with paragraph 12.1.5, and/or

12.1.14.2 the Senior Funder does not give its approval in accordance with paragraphs 12.1.2.2 or 12.1.9.3,

then all external costs reasonably and properly incurred by Sub-hubco (including those of a Sub-hubco Party and the Senior Funder) shall be payable by the Authority provided that such external costs shall be as confirmed by Sub-hubco to the Authority in writing and approved by the Authority before being incurred.

## Definitions

In this Schedule Part 23 (*Refinancing*) and elsewhere in this Agreement (save where Schedule Part 1 (*Definitions and Interpretation*) provides to the contrary) the following words and expressions shall have the following meanings:

<b>"Availability Period"</b>	has the meaning given in the Loan Agreement;
<b>"Distribution"</b>	means:
	(a) whether in cash or in kind, any:
	i. dividend or other distribution in respect of share capital;
	ii. reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
	iii. payments under the Subordinated Funding Agreements (whether of principal, interest, breakage costs

or otherwise);

iv. payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms;

v. the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms; or

(b) the early release of any Contingent Funding Liabilities, the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain;

**"EEA"**

means from time to time the European Economic Area as created by The Agreement on the European Economic Area 1992 or any successor or replacement body, association, entity or organisation which has assumed either or both the function and responsibilities of the European Economic Area;

**"Equity IRR"**

means the projected blended rate of return to the Relevant Persons over the full term of this Agreement, having regard to Distributions made and projected to be made;

**"Exempt Refinancing"**

means:

(a) any Refinancing that was fully taken into account in the calculation of the Annual Service Payments;

(b) a change in taxation or change in accounting treatment;

(c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:

i. breach of representations and warranties or undertakings;

ii. movement of monies between the Project Accounts in accordance with the terms of the Senior Funding Agreements as at Financial Close;

iii. late or non-provision of

- information, consents or licences;
- iv. amendments to Sub-Contracts;
  - v. approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Funding Agreements);
  - vi. restrictions imposed by Senior Funders on the dates at which the Senior Debt can be advanced to Sub-hubco under the Senior Funding Agreements and/or amounts released from Proceeds Account during the Availability Period, each as defined in the Senior Funding Agreements and which are given as a result of any failure by Sub-hubco to ensure that the construction work is performed in accordance with the agreed construction programme and which is notified in writing by Sub-hubco or the Senior Funders to the Authority prior to being given;
  - vii. changes to milestones for drawdown and/or amounts released from the Proceeds Account during the Availability Period set out in the Senior Funding Agreements and which are given as a result of any failure by Sub-hubco to ensure that construction work is performed in accordance with the agreed construction programme and which is notified in writing by Sub-hubco or the Senior Funders to the Authority prior to being given;
  - viii. failure by Sub-hubco to obtain any consent by statutory bodies required by the Senior Funding Agreements; or
  - ix. voting by Senior Funders and the voting arrangements between the Senior Funders in respect of the levels of approval required by them under the Senior Funding Agreements;
- (d) any amendment, variation or supplement of any agreement approved by the Authority as part of any Qualifying

Change under this Agreement;

- (e) any sale of shares in Sub-hubco or hubco by the shareholders or securitisation of the existing rights and/or interests attaching to shares in Sub-hubco or hubco provided that this paragraph (e) shall, in respect of shares in hubco, only apply for so long as hubco holds 100% of the issued share capital of Sub-hubco;
- (f) any sale or transfer of the Subordinated Funders' existing rights and/or interests under the Subordinated Funding Agreements or securitisation of the Subordinated Funders' existing rights and/or interests under the Subordinated Funding Agreements; or
- (g) any Qualifying Bank Transaction;

**"Insurance Undertaking"**

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

**"Margin"**

means

**"Margin Gain"**

means an amount equal to the lower of:

- (a) the Refinancing Gain; and
- (b) the higher of:
  - i. zero; and
  - ii.  $D - E$ ;

where:

D = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the change in Margin only in relation to the Refinancing and the senior debt repayment profile immediately prior to the Qualifying Refinancing and using the Financial Models as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing; and

E = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Models as updated (including as to the performance of the

	Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing;
<b>"Net Present Value"</b>	means the aggregate of the discounted values, calculated as at the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;
<b>"Notifiable Financings"</b>	means any Refinancing described in paragraphs (a) or (c) of the definition of Refinancing and any other arrangement which has or would have a similar effect or which has or would have the effect of limiting Sub-hubco's or any Associated Company's ability to carry out any such refinancing or other arrangements that would have a similar effect;
<b>"Pre-Refinancing Equity IRR"</b>	means the nominal post-tax (i.e. post-tax with respect to Sub-hubco, pre-tax with respect to Shareholders) Equity IRR calculated immediately prior to the Refinancing;
<b>"Proceeds Account"</b>	means the account with such name established under the Funding Agreements;
<b>"Project Accounts"</b>	means accounts referred to in and required to be established under the Senior Funding Agreements;
<b>"Qualifying Bank Transaction"</b>	means: <ul style="list-style-type: none"> <li>(a) the syndication by a Senior Funder, in the ordinary course of its business, of any of its rights or interests in the Senior Funding Agreements;</li> <li>(b) the grant by a Senior Funder of any rights of participation, or the disposition by Senior Funder of any of its rights or interests (other than as specified in paragraph (a) above in respect of the Senior Funding Agreements in favour of: <ul style="list-style-type: none"> <li>i. any other Senior Funder;</li> <li>ii. any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2006/48/EC relating to the taking up and pursuit of business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EEA</li> </ul> </li> </ul>

- member state;
  - iii. a local authority or public authority;
  - iv. a trustee of a charitable trust which has (or has had at any time during the previous two years) assets of at least £10 million (or its equivalent in any other currency at the relevant time);
  - v. a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two years) at least 50 members and assets under management of at least £10 million (or its equivalent in any other currency at the relevant time);
  - vi. an EEA or Swiss Insurance Undertaking;
  - vii. a Regulated Collective Investment Scheme;
  - viii. any Qualifying Institution; or
  - ix. any other institution in respect of which the prior written consent of the Authority has been given; and/or
- (c) the grant by a Senior Funder of any other form of benefit or interest in either the Senior Funding Agreements or the revenues or assets of Sub-hubco, whether by way of security or otherwise, in favour of:
- i. any other Senior Funder;
  - ii. any institution specified in paragraphs (b)ii to (b)vii above;
  - iii. any Qualifying Institution; or
  - iv. any other institution in respect of which the prior written consent of the Authority has been given;

**“Qualifying institution”**

means a bank that is authorized by the Financial Services Authority to accept deposits in the United Kingdom;

**“Qualifying Refinancing”**

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

**"Refinancing"**

Exempt Refinancing;

means:

- (a) any amendment, variation, novation, supplement or replacement of any Funding Agreement (other than any Subordinated Funding Agreement);
- (b) the exercise of any right, or the grant of any waiver or consent, under any Funding Agreement (other than any Subordinated Funding Agreement);
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Funding Agreements (other than the Subordinated Funding Agreements) or the creation or granting of any other form of benefit or interest in either the Funders' Agreements (other than the Subordinated Funding Agreements) or the contracts, revenues or assets of Sub-hubco whether by way of security or otherwise; or
- (d) any other arrangement put in place by Sub-hubco or another person which has an effect which is similar to any of (a)-(c) above or which has the effect of limiting Sub-hubco's or any Associated Company's ability to carry out any of (a)-(c) above;

**"Refinancing Gain"**

means an amount equal to the greater of zero and  $(A - B) - C$ , where:

- A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing using the Financial Models as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing;
- B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Models as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining

term of this Agreement following the Refinancing; and

C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR;

- "Regulated Collective Investment Scheme"** has the meaning given in the rules from time to time of the Financial Services Authority;
- "Relevant Person"** means a Shareholder and any of its Associated Companies;
- "Restructuring Notice"** means a notice issued by the Authority to Sub-hubco in accordance with Paragraph 12.1.1 of this Schedule Part 23 informing Sub-hubco that the Authority wishes Sub-hubco to consider making a Restructuring Transfer;
- "Restructuring Transfer"** means the proposed restructuring of the Senior Funding Agreements and Design Build Finance Maintain Agreement to reflect the revised loan facilities for the Project offered by the Senior Funder which do not require security over any heritable or leasehold interest in real property of the Project;
- "Senior Funder Initial Approval Notice"** means a notice issued by the Senior Funder to Sub-hubco substantially in the form provided at the Appendix of this Schedule Part 23 (Form of Senior Funder Initial Approval Notice);
- "Shareholder"** means any person from time to time holding share capital in Sub-hubco;
- "Subordinated Funder"** means a person providing finance under a Subordinated Funding Agreement;
- "Subordinated Funding Agreements"** means the Borrower Loan Note Instrument and the Subscription Agreement as described in Attachment C as at the date of this Agreement;
- "Threshold Equity IRR"** means [REDACTED]



APPENDIX

FORM OF SENIOR FUNDER INITIAL APPROVAL NOTICE

[Contractor address]

[date]

To [name of relevant director]

**Senior Funder Initial Approval Notice**

We [Aviva Public Private Finance Limited] refer to the Restructuring Notice issued to us by [Sub-hubco] (the "Company") on [INSERT DATE] and hereby provide our consent to the Company in accordance with paragraph 12.1.2.1 of Schedule Part 23 (Project Restructuring) to the project agreement made between (1) the Company, (2) [Authority A] and (3) [Authority B] on [INSERT DATE] (the "Project Agreement").

This Senior Funder Initial Approval Notice is not, and should not be considered to be, final or irrevocable approval of any Restructuring Transfer and further consent must be sought from us in relation to the final terms of any Restructuring Transfer and any amendments proposed to the Project Documents.

Unless otherwise stated, capitalised terms used but not defined in this letter shall have the same meaning as in the Project Agreement.

Yours faithfully

[Aviva]

**SCHEDULE PART 24**

**NOT USED**

**SECTION 3**  
**NOT USED**

**SCHEDULE PART 25  
INSURANCE PROCEEDS ACCOUNT AGREEMENT**

**[REDACTED]**

**SCHEDULE PART 26**

**COMMERCIALLY SENSITIVE INFORMATION**

Where information or material falls within more than one category identified in column 1 of the table below, it shall be deemed to fall within the category whose corresponding period of confidentiality identified in column 2 of the table below will expire the soonest.

<b>Category of Information/Material</b>	<b>Period for which information is to be kept confidential</b>
Each Financial Model (as at Financial Close)	From the Effective Date until the date falling 2 years after the first Phase Actual Completion Date
Each Financial Model (amended from time to time in accordance with this Agreement)	From the date of the Financial Model until the date falling 2 years after the later of: <ul style="list-style-type: none"> <li>• the first Phase Actual Completion Date; and</li> <li>• the date on which the amendments to Financial Model are agreed in accordance with this Agreement</li> </ul>
Prices within the Catalogue of Small Works and Services	Period during which the relevant prices are applicable
Small Works and Services Rates	Period during which the relevant Small Works and Services Rates are applicable
Sub-hubco bank account information	Project Term
IRR	In the case of the IRR contained in the Financial Model as at Financial Close from the Effective Date until the date falling 2 years after the first Phase Actual Completion Date  In the case of the IRR contained in the Financial Model as amended from time to time in accordance with this Agreement, from the date of the Financial Model until the date falling 2 years after the later of: <ul style="list-style-type: none"> <li>• the first Phase Actual Completion Date; and</li> <li>• the date of the Financial Model containing the relevant information</li> </ul>
Ancillary Documents	Project Term
Funding Agreements	Project Term
Information about Sub-hubco's processes, methodologies, working methods and information relating to the development of new processes and methodologies which amounts to a trade secret or which, if disclosed, could reasonably be considered to provide a commercial advantage to Sub-hubco's competitors	Trade secrets – Project Term  All other cases – 5 years from the date on which the information is produced to the Authority

Breakdown of prices within the overall contract price (to the extent not disclosed within the Financial Model)	Project Term
Information on Sub-hubco's costing mechanisms including information obtained from Sub-hubco relating to project risks and pricing of the same and cost information relating to third party contractors and the Sub-Contractors	Project Term
Financial term sheets and related funding information including any funder pricing	2 years from the date on which the information is produced to the Authority
Information relating to the appointment of Sub-hubco as the preferred bidder to the Project (including the preferred bidder letter and correspondence and minutes relating to the same)	Until the date falling 2 years after the first Phase Actual Completion Date
Information contained within or relating to Sub-hubco's bid for the Project except as otherwise listed in this Schedule Part 26 ( <i>Commercially Sensitive Information</i> ) or otherwise provided in the Agreement	Until the date falling 2 years after the first Phase Actual Completion Date

SCHEDULE PART 27

AUTHORITY PLANNING CONDITIONS

Phase 1

In relation to the Tain Planning Approval, Authority A shall satisfy the following:

Condition 12: in whole with effect from the first anniversary of the Phase 1 Actual Completion Date; and

Condition 16: the final sentence, with effect from the first anniversary of the Phase 1 Actual Completion Date, the obligation to replace plants which die, are removed or become seriously damaged or diseased within 5 years of the Phase Actual Completion Date.

Phase 2

In relation to the Woodside Planning Approval, Authority B shall satisfy the following:

Condition 8: insofar as it relates to ensuring that parking arrangements shall remain available at all times for use in conjunction with the development without prejudice to any obligations on the part of Sub-hubco to rectify any Service Events that may apply in relation to the car parking arrangements; and

Condition 10: final sentence, with effect from the first anniversary of the Phase 2 Actual Completion Date, the obligation to replace plants which die, are removed or become seriously damaged or diseased within 5 years of the Phase Actual Completion Date.

Phase 3

In relation to the Forres Planning Approval, Authority B shall satisfy the following:

Condition 3: final sentence only;

Condition 6: in relation to Group 3 Equipment and Group 4 Equipment only;

Condition 8: final sentence, with effect from the first anniversary of the Phase 3 Actual Completion Date, the obligation to replace plants which die, are removed or become seriously damaged or diseased within 5 years of the Phase Actual Completion Date;

Condition 12: in whole; and

Condition 13: for the implementation of cycle storage provision scheme.

Authority B shall make payment of £12,000 to Moray Council before the Phase 3 Completion Date as required by the Forres Section 75 Agreement.

\* Condition 12: to the extent that the football pitch is determined not to be provided in terms of that Condition when the Forres Football Pitch works are deemed to be completed by Sub-hubco pursuant to Clause 9.29.