



**hub**

Building better local  
services together

**Project Agreement**

**Between**

**The City of Edinburgh Council**

**and**

**James Gillespie's Campus Subhub Limited**

**James Gillespie's High School**

**2013**



**hub**

Building better local  
services together

## CONTENTS

	<b>PAGE</b>
<b>PART 1: GENERAL</b>	<b>1</b>
1 <b>DEFINITIONS AND INTERPRETATION</b>	<b>1</b>
2 <b>EXECUTION AND DELIVERY OF DOCUMENTS</b>	<b>1</b>
3 <b>COMMENCEMENT AND DURATION</b>	<b>2</b>
4 <b>PROJECT DOCUMENTS</b>	<b>2</b>
5 <b>THE PROJECT OPERATIONS</b>	<b>3</b>
6 <b>GENERAL OBLIGATIONS AND RESPONSIBILITIES OF SUB-HUBCO</b>	<b>5</b>
7 <b>AUTHORITY'S DATA</b>	<b>5</b>
8 <b>REPRESENTATIVES</b>	<b>6</b>
<b>PART 2: LAND ISSUES</b>	<b>8</b>
9 <b>NATURE OF LAND INTERESTS</b>	<b>8</b>
10 <b>THE SITE</b>	<b>13</b>
11 <b>CONSENTS &amp; PLANNING APPROVAL</b>	<b>15</b>
<b>PART 3: DESIGN AND CONSTRUCTION</b>	<b>17</b>
12 <b>THE DESIGN CONSTRUCTION AND COMMISSIONING PROCESS</b>	<b>17</b>
13 <b>RIGHT OF ACCESS OF AUTHORITY'S REPRESENTATIVE</b>	<b>19</b>
14 <b>PROGRAMME AND DATES FOR COMPLETION</b>	<b>20</b>
15 <b>INDEPENDENT TESTER</b>	<b>22</b>
16 <b>EQUIPMENT</b>	<b>23</b>
17 <b>PRE-COMPLETION COMMISSIONING AND COMPLETION</b>	<b>23</b>
18 <b>POST COMPLETION COMMISSIONING</b>	<b>27</b>
19 <b>FOSSILS AND ANTIQUITIES</b>	<b>28</b>
<b>PART 4: QUALITY ASSURANCE</b>	<b>30</b>
20 <b>QUALITY ASSURANCE</b>	<b>30</b>
<b>PART 5: INFORMATION TECHNOLOGY</b>	<b>32</b>
21 <b>INFORMATION TECHNOLOGY</b>	<b>32</b>
<b>PART 6: SERVICES</b>	<b>33</b>

22	THE SERVICES	33
23	MAINTENANCE	34
24	MONITORING OF PERFORMANCE	38
25	TUPE AND EMPLOYMENT MATTERS	40
26	PENSION MATTERS	42
27	SITE SECURITY AND PERSONNEL ISSUES	42
28	STOCKS, CONSUMABLES, MATERIALS AND EQUIPMENT	45
	PART 7: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE	47
29	DELAY EVENTS	47
30	RELIEF EVENTS	50
31	FORCE MAJEURE	51
	PART 8: CHANGES IN LAW & CHANGES	54
32	CHANGES IN LAW	54
33	CHANGE PROTOCOL	56
	PART 9: FINANCIAL	57
34	PAYMENT	57
35	VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION SCHEME	59
36	IRR SHARING AND CAP	62
37	FINANCIAL MODEL	63
38	RECORDS AND OPEN BOOK ACCOUNTING	64
	PART 10: TERMINATION	65
39	AUTHORITY EVENTS OF DEFAULT	65
40	SUB-HUBCO EVENT OF DEFAULT	66
41	TERMINATION RESULTING FROM FORCE MAJEURE	69
42	AUTHORITY VOLUNTARY TERMINATION	69
43	EXPIRY	69
44	CORRUPT GIFTS	69
45	BREACH OF THE IRR SHARING AND CAP PROVISIONS	71
46	COMPENSATION ON TERMINATION	72
47	CONSEQUENCES OF TERMINATION	74

48	HANDBACK PROCEDURE	77
	<b>PART 12: INDEMNITIES, WARRANTIES &amp; INSURANCE</b>	<b>78</b>
49	INDEMNITIES	78
50	TAX ON INDEMNITY PAYMENTS	82
51	EXCUSING CAUSES	82
52	WARRANTIES	84
53	INSURANCE	84
54	EXCLUSIONS AND LIMITATIONS ON LIABILITY	92
	<b>PART 13: MISCELLANEOUS</b>	<b>94</b>
55	INTELLECTUAL PROPERTY	94
56	DISPUTE RESOLUTION PROCEDURE	95
57	ASSIGNATION AND SUB-CONTRACTING	95
58	OWNERSHIP INFORMATION AND CHANGES IN CONTROL	97
59	MITIGATION	98
60	DATA PROTECTION	98
61	CONFIDENTIALITY	98
62	FREEDOM OF INFORMATION	101
63	INFORMATION AND AUDIT ACCESS	103
64	NOTICES	103
65	NO WAIVER	104
66	NO AGENCY	104
67	ENTIRE AGREEMENT	104
68	THIRD PARTY RIGHTS	105
69	SEVERABILITY	105
70	CONFLICTS OF AGREEMENTS	105
71	COSTS AND EXPENSES	105
72	FURTHER ASSURANCE	105
73	GOVERNING LAW AND JURISDICTION	105
	<b>SCHEDULE PART 1 - DEFINITIONS AND INTERPRETATION</b>	<b>107</b>
	<b>SCHEDULE PART 2 - COMPLETION DOCUMENTS</b>	<b>139</b>

SCHEDULE PART 3 - KEY WORKS PERSONNEL	142
SCHEDULE PART 4 - FUNDERS' DIRECT AGREEMENT	143
SCHEDULE PART 5 - LAND MATTERS	157
SCHEDULE PART 6 - CONSTRUCTION MATTERS	162
SCHEDULE PART 7 - THE PROGRAMME	172
SCHEDULE PART 8 - REVIEW PROCEDURE	173
SCHEDULE PART 9 - COLLATERAL AGREEMENTS	182
SCHEDULE PART 10 - OUTLINE COMMISSIONING PROGRAMME	219
SCHEDULE PART 11 - EQUIPMENT	222
SCHEDULE PART 12 - SERVICE REQUIREMENTS	230
SCHEDULE PART 13 - INDEPENDENT TESTER CONTRACT	233
SCHEDULE PART 14 - PAYMENT MECHANISM	253
SCHEDULE PART 15 - INSURANCE REQUIREMENTS	269
SCHEDULE PART 16 - CHANGE PROTOCOL	286
SCHEDULE PART 17 - COMPENSATION ON TERMINATION	325
SCHEDULE PART 18 - HANDBACK PROCEDURE	347
SCHEDULE PART 19 - RECORD PROVISIONS	350
SCHEDULE PART 20 - DISPUTE RESOLUTION PROCEDURE	354
SCHEDULE PART 21 - SUB-HUBCO INFORMATION	360
SCHEDULE PART 22 - CERTIFICATES	364
SCHEDULE PART 23 - REFINANCING	369
SCHEDULE PART 24 - EMPLOYMENT AND PENSIONS	383
SCHEDULE PART 25 - JOINT INSURANCE ACCOUNT AGREEMENT	384
SCHEDULE PART 26 - COMMERCIALLY SENSITIVE INFORMATION	392
SCHEDULE PART 27 - RELEVANT DISCHARGE TERMS	394
SCHEDULE PART 28 - LUMP SUM PAYMENTS	395

**BETWEEN:**

- (1) **THE CITY OF EDINBURGH COUNCIL**, the local authority for the said City, incorporated under the Local Government etc (Scotland) Act 1994 and having its Principal Office at City Chambers, High Street, Edinburgh (the "**Authority**"); and
- (2) **JAMES GILLESPIE'S CAMPUS SUBHUB LIMITED** (registered under number SC455364) whose registered office is 51 Melville Street, Edinburgh, EH3 7HL ("**Sub-hubco**")

**WHEREAS:**

- (A) The Authority wishes to redevelop the current James Gillespie's Schools Campus in order to provide suitable modern accommodation for the provision of education at nursery, primary and secondary level from one site.
- (B) Accordingly through the provisions of the Territory Partnering Agreement, the Authority invited hubco to develop proposals for the design and construction of the new accommodation, and the refurbishment of existing accommodation, to be comprised in the new James Gillespie's Schools Campus, and to manage the ongoing maintenance of the new high school building, by virtue of the Authority's New Project Request Letter dated 25 June 2012.
- (C) Proposals were submitted to the Authority in accordance with the terms and conditions of the Territory Partnering Agreement. Following negotiations it appears to the Authority to be expedient for the purpose of, or in connection with, the discharge of its functions, to enter into this Agreement which sets out the terms and conditions upon which Sub-hubco will carry out the Project Operations.
- (D) This Agreement is entered into pursuant to a project applying principles similar to the principles of the private finance initiative and is excluded from the Housing Grants, Construction and Regeneration Act 1996 by virtue of the Construction Contracts (Scotland) Exclusion Order 1998 (SI 1998/686).

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

**PART 1: GENERAL**

**1. DEFINITIONS AND INTERPRETATION**

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

**2. EXECUTION AND DELIVERY OF DOCUMENTS**

2.1 On or prior to execution of this Agreement:

2.1.1 Subject to Clause 2.1.2, Sub-hubco shall deliver to the 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 is waived by the Authority by written notice to Sub-hubco);

2.1.2 Sub-hubco shall not be obliged to deliver to the Authority the Design Sub-Contractor Documentation referred to in Paragraph 16 of Section 1 (*Documents to be Delivered by Sub-hubco*) of Schedule Part 2 (*Completion Documents*), until ten (10) Business Days after the date when the relevant Design Sub-Contractor commences the relevant sub-contracted works;

2.1.3 the Authority 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

- 3.1 Subject to Clause 3.2, 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.
- 3.2 Notwithstanding the provisions of Clause 3.1, the parties acknowledge and agree that any Works carried out prior to the date of execution of this Agreement, whether by Sub-hubco, the Contractor and/or persons acting on either of their behalf, shall be deemed to form part of the Works and the parties' rights and obligations in respect of such works shall be governed by this Agreement.

### 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's Representative for review 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 the Authority's Representative of the submission of the proposed course of action (and any relevant documentation), or such shorter period as may be agreed by the parties; or
- (b) Sub-hubco is acting in accordance with the comments of the Authority 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*).

#### 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 the Authority 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 the Authority's liabilities on early termination of this Agreement unless:



- 4.3.1 Sub-hubco has obtained the prior written consent of the Authority to such increased liability for the purposes of this Clause 4.3; or
- 4.3.2 it is a Permitted Borrowing.
- 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 the Authority, and shall use all reasonable endeavours to provide the Authority with a copy of the relevant agreement in settled draft form, not less than ten (10) Business Days before it enters into any Funding Agreement (other than the Initial Funding Agreements).

#### **Delivery**

- 4.6 Without prejudice to the provisions of this Clause 4.6 (*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 the Authority a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation, certified as a true copy by an officer of Sub-hubco.

#### **Funding Default**

- 4.7 Sub-hubco shall promptly upon the occurrence of a Funding Default notify the Authority of such Funding Default.
- 4.8 The Authority 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 Authority 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 the Authority of such failure (or expected failure).
- 4.10 The Authority 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 the Authority may convene to discuss the circumstances.

### **5. THE PROJECT OPERATIONS**

#### **Scope**

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

#### **General standards**

- 5.2 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 the provisions of Clause 11.1.2, 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 Not Used;
- 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 and Consents applicable to it which relate to the 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 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 Site and/or the Off-Site Works Areas for the purposes contemplated by this Agreement and any other of the 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 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 the Authority in fulfilling its statutory functions.

#### **Co-operation**

- 5.4 Each party agrees to co-operate, at its own expense, with the other party in the fulfilment of the purposes and intent of this Agreement. To avoid doubt, neither party shall be under any obligation to perform any of the other's obligations under this Agreement.
- 5.5 Not Used

## **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 Site and/or the Off-Site Works Areas (whether lawfully or not) and shall keep the Site, the Off-Site Works Areas, 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 The Authority shall not be liable to Sub-hubco for and Sub-hubco shall not seek to recover from the Authority (or from any Authority Party) any damages, losses, costs, liabilities or expenses which may arise (whether in contract, delict or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, Sub-hubco, the Independent Tester or any Sub-hubco Party.

### **No warranty**

- 7.2 The Authority gives no warranty or undertaking of whatever nature in respect of the Disclosed Data and, specifically (but without limitation), the Authority does not warrant that the Disclosed Data represents all of the information in its possession or power (either during the approval 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, the Authority shall not 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 the Authority or any Authority Party whether in contract, delict or otherwise including, without limitation, any claim in

damages, for extensions of time or for additional payments under this Agreement on the grounds:

- (a) of any misunderstanding or misapprehension in respect of the Disclosed Data; or
- (b) that incorrect or insufficient information relating to the Disclosed Data was given to it by any person, whether or not an Authority Party,

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

## 8. REPRESENTATIVES

### Representatives of the Authority

- 8.1 The Authority's Representative shall be [REDACTED] or such other person appointed pursuant to this Clause. The Authority's Representative shall exercise the functions and powers of the Authority in relation to the Project Operations which are identified in this Agreement as functions or powers to be carried out by the Authority's Representative. The Authority's Representative shall also exercise such other functions and powers of the Authority under this Agreement as may be notified to Sub-hubco from time to time.
- 8.2 The 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 Authority delegated to him pursuant to this Clause, either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Authority's Representative and all references to the "Authority's Representative" in this Agreement (apart from this Clause) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.
- 8.3 The Authority may by notice to Sub-hubco change the Authority's Representative. The Authority shall (as far as practicable) consult with Sub-hubco prior to the appointment of any replacement for the Authority's Representative, taking account of the need for liaison and continuity in respect of the Project. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to 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 the Authority's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Authority shall carry out the functions which would otherwise be performed by the Authority's Representative.
- 8.5 No act or omission of the Authority, the Authority's Representative or any officer, employee or other person engaged by the Authority shall, except as otherwise expressly provided in this Agreement:
- 8.5.1 in any way relieve or absolve 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 the Authority to Sub-hubco, Sub-hubco and Sub-hubco's Representative shall be entitled to treat any act of the Authority's Representative which is authorised by this Agreement as being expressly authorised by the Authority and 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 the Authority and the Authority's Representative shall not 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 Works and, in particular, will not, for the duration of the Works, require or request any of them to be involved in any other project on behalf of Sub-hubco or any of the Shareholders or its or their Associated Companies if, in the reasonable opinion of the Authority, this would adversely affect the Project.

## PART 2: LAND ISSUES

### 9. NATURE OF LAND INTERESTS

9.1 The Head Lease will be granted subject only to the Title Conditions and the Reserved Rights and any rights of way which are apparent from a visual inspection of the Site 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 Site and/or the Off-Site Works Areas.

#### Access During Construction

9.3 Notwithstanding the grant of the Sub-Lease, the Authority shall grant to Sub-hubco and Sub-hubco Parties, or procure that Sub-hubco and Sub-hubco Parties are granted:

9.3.1 access to the Phase 1 Site from the Commencement Date until the Phase 1 Actual Completion Date or (if earlier) the Termination Date;

9.3.2 access to the Phase 2 Site from:

(a) subject to Clause 9.3.2(b), the Phase 1 Actual Completion Date; or

(b) in the event that the Phase 1 Actual Completion Date occurs on an Inappropriate Access Date, the first day of the next Suitable Vacation Period occurring after the Phase 1 Actual Completion Date, or such other date as the parties may agree each party acting reasonably (an "Appropriate Access Date");

until the Phase 2 Actual Completion Date or (if earlier) the Termination Date;

9.3.3 access to the Bruntsfield House 2014 Site from 30 June 2014 until the Bruntsfield House 2014 Actual Completion Date or (if earlier) the Termination Date;

9.3.4 access to the Bruntsfield House 2015 Site from 29 June 2015 until the Bruntsfield House 2015 Actual Completion Date or (if earlier) the Termination Date;

9.3.5 access to the Post Completion Phase Site from the date falling 3 weeks prior to the Phase 2 Completion Date (or such other date as may be agreed between the parties, each acting reasonably and having regard to the circumstances) until the Post Completion Phase Actual Completion Date or (if earlier) the Termination Date; and

9.3.6 the Ancillary Rights,

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

#### Access Following Construction

9.4 After the occurrence of the relevant Phase Actual Completion Date, and notwithstanding the grant of the Sub-Lease the Authority shall grant to Sub-hubco and Sub-hubco Parties, or procure that Sub-hubco and Sub-hubco Parties are granted, access to the Facilities and Thirlestane Pitch following the relevant Phase Actual Completion Date subject only to the Reserved Rights, the Title Conditions and the provisions of this Agreement and solely for the purposes of:

- 9.4.1 carrying out the Project Operations (other than those Project Operations for which Sub-hubco is granted rights pursuant to Clause 9.3 (*Access During Construction*));
- 9.4.2 remedying Defects and carrying out Snagging Matters relating to that Phase and exercising its rights under Clause 23.15; and
- 9.4.3 exercising the Ancillary Rights.

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

- 9.5 The rights referred to at Clause 9.3 and Clause 9.4 are personal to Sub-hubco and Sub-hubco Parties.

#### **Grant of the Head Lease**

- 9.6 The Authority shall grant and Sub-hubco will accept the Head Lease incorporating the following provisions:

- 9.6.1 the date of entry under the Head Lease shall be the Commencement Date and the Head Lease shall endure until the expiry of the Project Term; and
- 9.6.2 the rent payable under the Head Lease shall be £1 per annum (if asked).

- 9.7 On the Commencement Date:

- 9.7.1 the Authority shall validly execute the Head Lease and deliver the same to Sub-hubco;
- 9.7.2 Sub-hubco shall validly execute the Head Lease and exhibit to the Authority signed Land Registration Forms 1 and 4 in respect of the tenant's interest; and
- 9.7.3 the Head Lease shall be binding on the Authority and Sub-hubco from the Commencement Date irrespective of whether it is validly executed on that date.

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

- 9.8.1 Form 10/11 Reports brought down as near as practicable to the Commencement Date (including personal searches against the Authority) and showing no entries which would prevent the Authority granting the Head Lease and in addition the 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 Site and, provided that the 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 Head Lease validly executed by the Authority, 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
- 9.8.2 a letter of consent from the holder of any standard security or floating charge over the Authority's interest in the Site,

but no letter of obligation will be delivered.

## **Registration of the Head Lease**

- 9.9 If the transaction is notifiable for SDLT purposes, Sub-hubco will:
- 9.9.1 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
  - 9.9.2 pay the SDLT (if any) due and payable within 30 days of the said date of substantial performance.
- 9.10 If prior to the issue of the 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:
- 9.10.1 provide the Authority with a copy of any such rejection and other relevant correspondence; and
  - 9.10.2 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).
- 9.11 Within five (5) Business Days after receipt from HMRC, Sub-hubco will deliver to the Authority's Representative the Land Transaction Return Certificate (SDLT5) or electronic submission receipt (as the case may be) issued by HMRC.
- 9.12 Sub-hubco will within five (5) Business Days after receipt of the last of the SDLT5 and the validly executed Head Lease from the Authority submit the Head Lease and the SDLT5 to the Keeper for registration in the Land Register and the Books of Council and Session for preservation and execution.
- 9.13 Sub-hubco undertakes that if it breaches the terms of the obligations to pay registration dues and SDLT in Clauses 9.7 and 9.9 to 9.11 inclusive it will indemnify the Authority in respect of any and all loss suffered by the Authority by virtue of such breach,
- 9.14 Sub-hubco will deliver to the 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.
- 9.15 Neither Sub-hubco nor any Sub-hubco Party shall be entitled to any compensation on the expiry or earlier determination of the Head Lease save as set out in this Agreement.

## **Title/Completion**

- 9.16 Without prejudice to any other provision of this Agreement, the Head Lease shall be granted subject to but, where applicable with the benefit (to the extent the Authority is capable of transferring the same) of:
- 9.16.1 all notices, orders, proposals or requirements whatsoever affecting or relating to the 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;
  - 9.16.2 all actual or proposed charges, orders, proposals, restrictions, agreements, notices or other matters whatsoever affecting or relating to the 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

9.16.3 the relevant Title Conditions and/or the relevant Reserved Rights.

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

9.17 Sub-hubco will grant and the Authority will accept the Sub-Lease incorporating the following provisions:

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

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

9.18 On the Commencement Date:

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

9.18.2 the Authority shall validly execute the Sub-Lease and exhibit to Sub-hubco signed Land Registration Forms 3 and 4 in respect of the tenant's interest; and

9.18.3 the Sub-Lease shall be binding on the Authority and Sub-hubco from the Commencement Date irrespective of whether it is validly executed on that date.

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

9.19.1 Form 12/13 Reports brought down as near as practicable to the Commencement Date and showing no entries adverse to Sub-hubco's interest in the part of the Site the subject of the 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 Authority as the registered proprietor of the Authority's interest in the whole of the part of the Site the subject of the Sub-Lease and (subject as aftermentioned) provided that the 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 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 Authority will disclose no entry, deed or diligence prejudicial to the Authority's interest other than such as (i) are created by or against the Authority or disclosed to the Authority prior to the Commencement Date or (ii) are contained in the Land Certificate issued in respect of Sub-hubco's head lease interest.

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

but no letter of obligation will be delivered.

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

9.20 If the transaction is notifiable for SDLT purposes, the 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.

- 9.21 If prior to the issue of a Land Transaction Return Certificate (SDLT5) HMRC rejects the Authority's SDLT application, the Authority will without delay:
- 9.21.1 provide Sub-hubco with a copy of any such rejection and other relevant correspondence;
- 9.21.2 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).
- 9.22 Within five (5) Business Days after receipt from HMRC, the Authority will deliver to Sub-hubco's Representative the Land Transaction Return Certificate (SDLT5) issued by HMRC.
- 9.23 The Authority will within five (5) Business Days after receipt of the SDLT5 and the executed Sub-Lease from Sub-hubco submit the 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.
- 9.24 The Authority undertakes that if it breaches the terms of Clauses 9.18 and Clauses 9.20 to 9.22 inclusive it will indemnify Sub-hubco in respect of any and all loss suffered by Sub-hubco directly by virtue of such breach.
- 9.25 The 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 Authority's interest and (2) a copy of the Land Certificate for that interest, with a colour copy of the title plan.
- 9.26 Neither the 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**

- 9.27 Notwithstanding the terms of Clauses 9.3 and 9.4 or any other rights granted under this Agreement, the Authority shall (if it is the heritable proprietor of the Site and/or the Off-Site Works Areas), or (if it is not the heritable proprietor of the Site and/or the Off-Site Works Areas) shall procure that the heritable proprietor of the Site and/or the Off-Site Works Areas 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 Site and/or the Off-Site Works Areas 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 and/or the Off-Site Works Areas) in connection with entering into such wayleaves, deeds of servitude or other similar agreements at the request of Sub-hubco.
- 9.28 Sub-hubco shall procure that:
- 9.28.1 all Project Operations carried out at the Site and the Off-Site Works Areas by or on behalf of Sub-hubco (whether before, during or after the completion of the Works) shall be carried out in a manner which does not breach any of the Title Conditions and/or the Reserved Rights; and
- 9.28.2 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 the Site and/or the Off-Site Works Areas or any part of either.

## 10. THE SITE

- 10.1 The condition of the Site and the Compound Site shall subject to Clauses 10.3 and 10.4, 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 the Site and the Compound Site and its surroundings and (where applicable) any existing structures or works on, over or under the Site and the Compound Site;
  - 10.1.2 satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Site and the Compound Site, the load bearing and other relevant properties of the Site and the Compound Site, the risk of injury or damage to property affecting the Site and the Compound Site, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution of the Works;
  - 10.1.3 satisfied itself as to the extent and adequacy of the Site and the Compound Site and of the rights of access to and through the Site and the Compound Site granted hereunder and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Site and/or the Compound Site) without prejudice to Sub-hubco's rights under this Agreement in respect of a breach by the Authority of its obligations under Clause 9.3, Clause 9.4 and the Head Lease.
  - 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 Title Conditions and the Reserved Rights.
- 10.2 To avoid doubt, Sub-hubco accepts full responsibility for all matters referred to in Clause 10.1 and, subject to Clauses 10.3 and 10.4, Sub-hubco shall:
- 10.2.1 not be entitled to make any claim against the Authority of any nature whatsoever save, if applicable, as expressly provided in Clause 29 (*Delay Events*), on any grounds including (without limitation) the fact that incorrect or insufficient information on any matter relating to the Site and/or the Compound Site was given to it by any person, whether or not the Authority or an Authority Party; and
  - 10.2.2 be responsible for, and hold the Authority harmless from, cleaning up and/or otherwise dealing with any Contamination at the Site and/or the Compound 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 the Authority or Sub-hubco).

### **Responsibility for Ground Conditions and Contamination**

- 10.3 To the extent that unforeseen ground conditions and/or Contamination exist in any parts of the Site and/or the Off-Site Works Areas which are under existing buildings as at the Execution Date and which it is not practical for Sub-hubco to investigate or survey, Sub-hubco shall not be responsible for them, unless they were discovered by the Ground Physical and Geophysical Investigation and accordingly identified in Section 3 (*Authority's Construction Requirements*) of Schedule Part 6 (*Construction Matters*) or unless they should reasonably have been discoverable if the Ground Physical and Geophysical Investigation had been properly carried out or unless they would have been identified had

Sub-hubco carried out such additional surveys as it would have been reasonable to expect an experienced contractor to have carried out in the circumstances. The Authority shall be responsible for any ground conditions and/or Contamination for which Sub-hubco is not responsible by virtue of this Clause 10.3. This Clause 10.3 applies to the following areas: those areas shown hatched on the Existing Building Plan and the Boundary Wall.

- 10.4 Where pursuant to Clause 10.3 the Authority is responsible for any of the matters referred to then the following provisions shall apply:
- 10.4.1 during the Construction Phase any such matter shall be deemed to be a Compensation Event for the purposes of this Agreement;
  - 10.4.2 where any such matter arises during the Operational Term it shall, for the avoidance of doubt, be deemed to be an Excusing Cause for the purposes of Clause 51 (*Excusing Causes*);
  - 10.4.3 further where any such matter arises during the Operational Term and any work or change to the Services is required or instructed to be done in consequence of it, it shall be deemed to be a Qualifying Change; and
  - 10.4.4 where any such matter is Contamination (whether during the Construction Phase or the Operational Term) the Authority shall further hold Sub-hubco harmless from cleaning up and otherwise dealing with the Contamination and shall indemnify Sub-hubco in respect of all Direct Losses incurred by Sub-hubco resulting from such Contamination.
- 10.5 Subject to Clauses 10.6 to 10.12 below Sub-hubco shall be responsible for and shall hold the Authority harmless from the removal of (i) the Bruntsfield House Identified Asbestos; and (ii) all Asbestos at, on or in the Site and/or the Compound Site, but outwith Bruntsfield House and the Authority shall have no liability in respect of the removal of any such Asbestos other than as set out in Clauses 10.6 to 10.12.
- 10.6 To the extent that, only as a result of the nature and/or extent and/or location of Additional Asbestos, Sub-hubco becomes aware that there will be (or is likely to be) a delay in completion of the Works relating to one or more Phase and/or where Sub-hubco comply with any instruction issued by the Authority's Representative pursuant to Clause 10.8 below ("Additional Asbestos Delay") Sub-hubco will be entitled to apply for relief from its obligations and/or compensation in accordance with Clause 29 (Delay Events).
- 10.7 Upon the discovery of Additional Asbestos during the course of the Works, Sub-hubco shall:-
- 10.7.1 immediately notify the Authority's Representative of such discovery;
  - 10.7.2 take all steps not to disturb the Additional Asbestos and, if necessary, cease any Works in so far as the carrying out of such Works would disturb the Additional Asbestos; and
- 10.8 The Authority shall procure that the Authority's Representative promptly, and in any event within five (5) Business Days of receipt of notice pursuant to Clause 10.7, issue an instruction to Sub-hubco specifying what action the Authority's Representative requires Sub-hubco to take in relation to such discovery.
- 10.9 Sub-hubco shall promptly and diligently comply with any instruction issued by the Authority's Representative referred to in Clause 10.8 above except and to the extent that such instruction constitutes a Change pursuant to Clause 10.11 below in which case the provisions of Schedule Part 16 (*Change Protocol*) shall apply at the Authority's cost.
- 10.10 If directed by the Authority's Representative, Sub-hubco shall allow representatives of the Authority to enter the Site and the Off-Site Works Areas for the purposes of removal or disposal of such Additional Asbestos provided that such entry shall be subject to the

Authority complying with all relevant safety procedures, which shall include any relevant health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.

- 10.11 If, in relation to such Additional Asbestos, the Authority requires Sub-hubco to carry out works (being any work of alteration, addition, demolition or extension or Change in the Facilities) which are not works which would be necessary for the purpose of compliance with Law or any Consents, such works shall be deemed to be an Authority Change and the provisions of Schedule Part 16 (Change Protocol) shall apply as if such instruction were an Authority Change Notice issued by the Authority in accordance with the provisions of Schedule Part 16 (Change Protocol).
- 10.12 Unless the exposure arises directly or indirectly as a result of any act or omission of Sub-hubco or any Sub-hubco Party or during periods when Sub-hubco have been allowed access to the Site and the Off-Site Works Areas in order to carry out surveys, the Authority accepts full responsibility (including any financial and other consequences which result (whether directly or indirectly) for death and personal injury in respect of exposure to Asbestos on the Site and the Off-Site Works Areas, where the exposure takes place prior to the date on which Sub-hubco is given possession of the Site and the Off-Site Works Areas for the purposes of carrying out the Works.

## 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 except to the extent identified as an obligation on the Authority in terms of the Planning Matrix set out in Part 2 of Section 1 (*Planning Consents*) of Schedule Part 6 (*Construction Matters*) implementing each Consent within the period of its validity in accordance with its terms.
- 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 the Authority is so entitled
- the 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 In the event that either party becomes aware of a Planning Challenge, the Authority shall as soon as reasonably practicable issue an Authority Change Notice varying this Agreement, the Authority's Construction Requirements and Service Level Specification to the extent necessary to remove the Dining Accommodation Works from the scope of this Agreement and to the extent necessary to allow Sub-hubco to otherwise proceed with the Works in accordance with the requirements of the Agreement.
- 11.4 To the extent that Sub-hubco is prevented from progressing the Works as a consequence of the event detailed in Clause 11.3 such event shall be deemed to be a Delay Event and a Compensation Event.

- 11.5 The parties agree that in the event the Dining Accommodation Works are removed from the Agreement pursuant to Clause 11.3 and as part of the Authority Change:
- 11.5.1 the Works shall be varied to remove the Dining Accommodation Works;
  - 11.5.2 the Lump Sum Payments in respect of the Dining Accommodation Works shall be reduced to Nine Thousand Six Hundred and Twenty Pounds Sterling (£9620.00);
  - 11.5.3 the Ancillary Right contained in Paragraph (c)(i) of Section 3 (*Ancillary Rights*) of Schedule Part 5 (*Land Matters*) shall be deleted; and
  - 11.5.4 the Post Completion Phase Site shall be varied to remove the area shown coloured brown and cross hatched on the Post Completion Phase Plan.
- 11.6 The Authority may at any time request that Sub-hubco, within ten (10) Business Days of receipt of a written request, provide the Authority with an estimate of the costs that Sub-hubco considers are likely to be incurred in respect of an application for a new Planning Permission for the Dining Accommodation Works.
- 11.7 The Authority shall reimburse Sub-hubco for any costs reasonably and properly incurred by it in complying with Clause 11.6 within twenty (20) Business Days of receipt of a valid invoice therefor. The Authority 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 Clause 11.6.
- 11.8 The Authority shall be entitled at any time following the event detailed in Clause 11.3 to issue an Authority Change Notice instructing Sub-hubco to proceed with an application for a new Planning Permission for the Dining Accommodation Works.
- 11.9 If a new Planning Permission is obtained pursuant to an instruction issued under Clause 11.8, the Authority shall issue an Authority Change Notice varying this Agreement, the Authority's Construction Requirements and 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.
- 11.10 The Authority shall not be entitled to withdraw an Authority Change Notice issued under Clause 11.3, 11.8 and Clause 11.9.

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

#### 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 the Authority to Sub-hubco in writing such proposals satisfy the 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 the Authority.

- 12.6 Sub-hubco shall develop and finalise the design and specification of the Works and the Authority shall review the Reviewable Design Data in accordance with Schedule Part 8 (*Review Procedure*) and the provisions of this Clause 12.6:
- 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 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 Facilities to which such Reviewable Design Data relates until it has submitted the appropriate Reviewable Design Data and either it is confirmed by the Authority's Representative that 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 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 the Authority's Representative, at any time, a reasonable opportunity to view any items of Design Data, which shall be made available to the Authority's Representative as soon as practicable following receipt of any written request from the Authority's Representative; and
- 12.6.4 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 the Authority's Representative being unable to access such design database, Sub-hubco shall procure that it is made available for inspection by the Authority's Representative, or any other person authorised by the Authority's Representative.

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

- 12.7 Without prejudice to Clause 12.1, if it should be found that 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 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*).
- 12.9 Sub-hubco shall ensure that all persons engaged in carrying out the Works (or part thereof) on the Site and the Off-Site Works Areas are accredited under the Construction Skills Certification Scheme or an equivalent scheme or are undergoing such accreditation and where Sub-hubco enters into a sub-contract for the purposes of carrying out the Works, Sub-hubco shall cause a term to be included in such sub-contract:-
- 12.9.1 which requires the sub-contractor to ensure that such persons are accredited under the Construction Skills Certification Scheme or an equivalent scheme or are undergoing such accreditation; and
- 12.9.2 in the same terms as that set out in this Clause 12.9 (including for the avoidance of doubt this Clause 12.9.2) subject only to modification to refer to the correct designation of the equivalent party as Sub-hubco and sub-contractor as the case may be.

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

#### **Access to the Site**

- 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 Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time, the Authority's Representative shall have unrestricted access at all reasonable times during normal working hours to:
- (a) view the Works at the Site and the Off-Site Works Areas on reasonable prior notice appropriate to the circumstances, provided that the notice procedures in this Clause 13.1.1(a) shall not apply to the right of access for the Authority's Representative and his staff and visitors to the office and other facilities provided at the Site and the Off-Site Works Areas for his use; and
- (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 Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works;
- 13.1.2 the Authority's Representative shall have such rights of access to the Site and the Off-Site Works Areas 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 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 Sub-hubco's Proposals, the Authority's Representative may (without prejudice to any other right or remedy available to the 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 the Authority that it is capable of performing and will perform all its obligations to the Authority under this Agreement. Sub-hubco shall compensate the Authority for any reasonable additional costs incurred as a result of such increased monitoring.

### **Right to Open Up**

- 13.3 Subject to Clause 13.4, the Authority's Representative shall have the right at any time prior to a 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 the 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, the 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 the Authority's Representative of his right pursuant to Clause 13.3, the inspection shows that the relevant part or parts of the Works are not defective then Clause 29.3.4 shall apply.
- 13.6 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3, the inspection shows that the relevant part or parts of the Works is or are defective, 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 the Authority and Sub-hubco shall not be entitled to any extension of time in relation to such rectification and making good of the Works.
- 13.7 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3, the Authority's Representative is of the opinion that the inspection shows that the relevant part or parts of the Works is or are defective and Sub-hubco does not agree with such opinion, the matter shall be determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).
- 13.8 Without prejudice to the rights of the Authority's Representative pursuant to this Clause 13 (*Right of Access of Authority's Representative*) the parties acknowledge that the exercise of such rights shall not in any way affect the obligations of 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 the Works relating to a 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*) the Authority shall not be entitled to claim liquidated or general damages in respect of any delay which elapses between the 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 Authority's Representative to monitor the progress including all commissioning activities and likely future progress of the Works.
- 14.3 The initial Programme is set out at Schedule Part 7 (*The Programme*). Any change to the Programme shall only be made in accordance with this Clause 14 (*Programme and Dates for Completion*) and Schedule Part 8 (*Review Procedure*). Sub-hubco shall promptly submit to the Authority's Representative a copy of any version of the Programme varied in accordance with this Clause 14 (*Programme and dates for Completion*) and Schedule Part 8 (*Review Procedure*).
- 14.4 If it appears to the Authority's Representative at any time that the actual progress of the Works has significantly fallen behind the Programme, then the Authority's Representative shall be entitled to require Sub-hubco to submit to the Authority's Representative a report identifying the reasons for the delay and, unless the event causing the delay is still subsisting and it is not possible to predict with any certainty when the delay might come to an end, require Sub-hubco (at the Authority's option):
- 14.4.1 to produce and submit to the Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*) a revised Programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or
  - 14.4.2 to produce and submit to the Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*) a revised Programme showing the steps which are to be taken to eliminate or reduce the delay.
- 14.4A.1 Subject to Clause 14.4A.2, Sub-hubco shall procure that the Works are carried out so as to ensure that no disruption is caused during the carrying out of examinations in Bruntsfield House during any of the Key Dates.
- 14.4A.2 Where Sub-hubco gives the Authority notice that the Key Dates are likely to cause disruption to the Programme, the Authority shall, acting reasonably, consider all alternative proposals or solutions which would avoid the Key Dates being set at a time which would cause disruption to the Programme.

## **Early completion**

### **14.5 Handover**

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

- 14.6 Sub-hubco shall notify the Authority's Representative if at any time the actual progress of the Works relating to a Phase is significantly ahead of the Programme such that Sub-hubco anticipates that the Phase Actual Completion Date could occur earlier than the relevant Phase Completion Date in which case the Authority's Representative shall be entitled to require Sub-hubco to produce and submit to the Authority's Representative a revised Programme showing the manner and the periods in which the Works relating to the relevant Phase will be carried out and what the revised date for completion would be to enable:
- 14.6.1 the Authority to consider (at its absolute discretion) whether to agree an earlier date for completion if requested by Sub-hubco to do so; and

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

**14.7 Unavailability of Existing Facilities**

If any area of the Existing Facilities and/or the Temporary Units (in the reasonable opinion of the Authority) cannot continue to be used for the provision of the educational services prior to a Phase Actual Completion Date through a failure by Sub-hubco to carry out the Works in accordance with Clause 12 (*The Design, Construction and Commissioning Process*) and Clause 14 (*Programme*) then, provided that the Authority shall, acting reasonably, have given due consideration to any proposals by Sub-hubco to provide alternative solutions on: (i) the Site; and/or (ii) the Primary & Nursery Site to allow the Authority to continue to provide the educational services, at the option of the Authority, acting reasonably, Sub-hubco shall either:

- 14.7.1 reimburse to the Authority the proper costs reasonably incurred by the Authority in providing alternative accommodation and associated arrangements; or
- 14.7.2 provide at Sub-hubco's expense, equivalent alternative accommodation in a location within the town boundaries of where the Existing Facilities and the Temporary Units are situated and provide such additional or alternative ancillary services as may be required to enable that accommodation to be used for the provision of the educational services.

Without prejudice to Clause 54.3 the Authority agrees that the requirement to reimburse the Authority and/or to provide alternative accommodation pursuant to this Clause 14.7 will not operate as a remedy in addition to Sub-hubco's liability to indemnify the Authority in respect of Clause 49 (Indemnities).

**14.8 In the event that access to the Phase 2 Site cannot be given until an Appropriate Access Date in accordance with the provisions of Clause 9.3.2(b), the parties agree as follows:**

- 14.8.1 the Decanting and Decommissioning activities to be carried out by the Authority and Sub-hubco pursuant Clause 18.8, shall commence on the Appropriate Access Date;
- 14.8.2 Sub-hubco will be liable for the Temporary Unit Rental Costs for the period from the Phase 1 Actual Completion Date until the Appropriate Access Date;
- 14.8.3 without prejudice to Sub-hubco's obligations pursuant to Clause 14.8.2 and for the period from the Phase 1 Actual Completion Date until the Appropriate Access Date the Parties acknowledge and agree that they will each be responsible for their own costs in connection with the extended operation and/or occupation of the Temporary Units; and
- 14.8.4 such circumstances shall be deemed to be a Delay Event.

**15. INDEPENDENT TESTER**

**Appointment**

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

**Changes to terms of appointment**

- 15.2 Neither the Authority nor 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 either of the parties to the Independent Tester shall be simultaneously copied to the other and both parties shall be entitled to attend all inspections undertaken by or meetings involving the Independent Tester.

**Replacement**

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

**16. EQUIPMENT**

**Provision of Equipment**

- 16.1 The parties shall comply with the terms of Schedule Part 11 (*Equipment*).
- 16.2 The Authority shall issue an Authority Change Notice, by close of business on 16 December 2013, varying the Room Data Sheets, this Agreement, the Authority's Construction Requirements and the Service Level Specification to the extent necessary to vary, specify and include the Authority's amended requirements for the procurement, installation, commissioning, maintenance and replacement of Equipment into the scope of this Agreement and to the extent necessary to allow Sub-hubco to otherwise proceed with the Project Operations in accordance with the requirements of this Agreement.
- 16.3 The Authority shall not be entitled to withdraw an Authority Change Notice issued under Clause 16.2.

**17. PRE-COMPLETION COMMISSIONING AND COMPLETION**

- 17.1 Not less than six (6) months (or four (4) weeks in relation to each of the Bruntsfield House Phases) before a Phase Completion Date, Sub-hubco shall provide the Authority with a draft of the Final Commissioning Programme for the relevant Phase as jointly developed by the Authority and Sub-hubco in accordance with the provisions of Clause 17.2 and Clause 17.3. The Authority shall provide Sub-hubco with comments on the draft Final Commissioning Programme for the relevant Phase submitted to it within two (2) months

(or one (1) week in relation to each of the Bruntsfield House Phases) of receipt of the draft Final Commissioning Programme for the relevant Phase. The parties shall, within fifteen (15) Business Days (or 5 Business Days in relation to each of the Bruntsfield House Phases) of receipt by Sub-hubco of the Authority's comments agree the terms of the Final Commissioning Programme for the relevant Phase provided that the Authority may by prior notice to Sub-hubco change the scope and time of the Authority's Commissioning and reimburse Sub-hubco its reasonable costs incurred as a result of such change in scope or time. If the parties are unable to agree the Final Commissioning Programme for the relevant Phase or the change in scope or time of the Authority's Commissioning by two (2) months (or two (2) weeks in relation to each of the Bruntsfield House Phases) 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 Outline Commissioning Programme and shall impose no greater or more onerous obligations on the Authority than those set out in the Outline Commissioning Programme (unless otherwise agreed by the Authority in its absolute discretion). The Final Commissioning Programme shall then replace the Outline Commissioning Programme as it relates to that Phase.
- 17.3 The 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 Authority's Commissioning will not delay the Phase Actual Completion Date from occurring by the Phase Completion Date; and
- 17.3.2 that Sub-hubco's Post Completion Commissioning and the Authority's Post Completion Commissioning are completed by the Commissioning End Date.
- 17.4 The parties shall procure that the steps that they are responsible for carrying out and completing pursuant to the Final Commissioning Programme for the relevant Phase include, in the case of Sub-hubco's activities, the activities described at paragraph Appendix G of the Authority's Construction Requirements.
- 17.5 Sub-hubco shall notify the Independent Tester and the Authority's Representative of the date when Sub-hubco (acting reasonably) considers that a Phase of the Works will be complete in accordance with the Authority's Construction Requirements, the Completion Criteria and this Agreement not less than two (2) 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 a Phase 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 Authority to undertake the Authority's Commissioning including permitting specialist contractors engaged by the Authority to deliver and install equipment on such dates as agreed between the Authority and Sub-hubco, in accordance with the Final Commissioning Programme

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

- 17.8 Sub-hubco shall give written notice to the Independent Tester and the 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 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 Authority access to the Facilities at such times as may be set out in the relevant Final Commissioning Programme to enable the Authority to undertake the Authority's Commissioning in accordance with the Final Commissioning Programme for the relevant Phase for the period prior to completion of the relevant Phase. When exercising such rights the 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 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 Authority's Representative not less than fifteen (15) Business Days (or 5 Business Days in relation to each of the Bruntsfield House Phases) notice and not more than thirty (30) Business Days' notice of the date upon which Sub-hubco considers that the Works relating to a Phase will be complete and the tests on completion required for the relevant Phase to be performed in accordance with the 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 Authority's Representative and the Independent Tester shall be entitled to inspect the Works relating to 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 The parties shall procure that the Independent Tester, within five (5) Business Days (or two (2) Business Days in relation to each of the Bruntsfield House Phases) of any inspection made pursuant to Clause 17.10 (*Pre-Completion Inspection*), notifies Sub-hubco and the 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 Final Commissioning Programme and the Completion Criteria for the relevant Phase) which are required to be attended to before the Works relating to the relevant Phase can be considered to be complete in accordance with the Authority's Construction Requirements, 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 Works relating to the relevant Phase are attended to.

#### **Phase Completion Certificate**

- 17.12 Pursuant to the terms of the Independent Tester Contract, the parties shall procure that the Independent Tester, when he is satisfied that a 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 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 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, the parties 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 Authority's Representative and in such manner as to cause as little disruption as reasonably practicable to the Authority's Post Completion Commissioning and the Authority's use of the Facilities, rectify all Snagging Matters within twenty-five (25) Business Days of the issue of the Snagging Notice or at a time otherwise agreed between Sub-hubco and the Authority.
- 17.15A It shall be open to the parties to agree (both being obliged to act reasonably) that landscaping areas, which have not been turfed, seeded or planted due to the growing season, can be treated as Snagging Matters and, if so agreed, such an agreement between the parties will not prevent the issue of the Certificate of Practical Completion in respect of a Phase or Phases. If the outstanding Snagging Matters specified in the Snagging Notice include landscaping areas which have not been turfed, seeded or planted at that stage or in respect of which the turfing, seeding or planting has not been laid or carried out (as the case may be) for six (6) full Growing Months then Sub-hubco shall be obliged to lay the turf, seed or plant (as the case may be) in the next appropriate growing season (where the turf has not already been laid or the seeding or planting carried out).
- 17.15B Pursuant to the terms of the Independent Tester Contract, the parties shall procure that the Independent Tester, when he is satisfied that the Snagging Matters have been rectified, issues a Certificate of Snagging Completion in respect of that Phase to the Authority and to Sub-hubco.
- 17.16 If, within twenty-five (25) Business Days, of the issue of the Snagging Notice, or by the expiry of such other period as has been agreed between Sub-hubco and the Authority pursuant to Clause 17.15, Sub-hubco has failed to rectify the Snagging Matters specified in the Snagging Notice the Authority may by itself (or engage others to) carry out the works necessary to rectify the Snagging Matters, at the risk and cost of 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.
- 17.17A.1 In the event that the Certificate of Practical Completion in relation to the Post Completion Phase has not been issued by the date falling fourteen (14) weeks after the date on which access is given to the Post Completion Phase Site pursuant to Clause 9.3.5, such date being subject to any extension of time permitted to the Post Completion Phase Completion Date pursuant to Clause 29 (*Delay Events*), the Authority may serve not less than 10 Business Days notice on Sub-hubco stating that the Authority intends to carry out the works necessary to complete the Post Completion Phase and, after the said period of notice has elapsed, carry out the works required so that a Certificate of Practical Completion can be issued for the Post Completion Phase (the "Authority Post Completion Works").



17.17A.2 If the Authority carries out any Authority Post Completion Works, Sub-hubco shall be responsible for the Authority Post Completion Costs, which costs shall, without prejudice to any right of the Authority under Clause 34.6 (*Set-Off*) be recoverable by the Authority from Sub-hubco as a debt.

#### **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 Authority a copy of the as-built building specification, together with all drawings relating to the Works.

### **18. POST COMPLETION COMMISSIONING**

#### **Commissioning**

18.1 Sub-hubco and the Authority shall, within twenty five (25) Business Days following a Phase Actual Completion Date, respectively undertake and complete Sub-hubco's Post-Completion Commissioning and the Authority's Post Completion Commissioning, in accordance with the Final Commissioning Programme for the relevant Phase. Both parties shall, at all times, and in particular in the period between the Phase Actual Completion Date and the Actual Commissioning End Date for the relevant Phase, use reasonable endeavours to assist the other party to ensure compliance with the Final Commissioning Programme for the relevant Phase.

#### **Information**

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

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

18.4 On the completion of Sub-hubco's Post-Completion Commissioning and the Authority's Post Completion Commissioning for a Phase the Independent Tester shall issue the Commissioning Completion Certificate for that Phase.

#### **Operational Manuals**

18.5 Sub-hubco shall make available on the Site to the Authority's Representative:

18.5.1 at least eight (8) weeks prior to each anticipated Phase Actual Completion Date (or 5 Business Days in respect of each of the Bruntsfield House Phases) two (2) paper and two (2) electronic copies of a draft operation and maintenance manual in connection with the relevant Phase (or in relation to each of the Bruntsfield House Phases the required supplement to the existing operation and maintenance manual) in sufficient detail to allow the Authority to plan for the safe and efficient operation of the Facilities;

18.5.2 on or before a Phase Actual Completion Date, two (2) paper and two (2) electronic copies of a final draft operation and maintenance manual in connection with the relevant Phase (or in relation to each of the Bruntsfield House Phases the required supplement to the existing operation and maintenance manual) in sufficient detail to allow the Authority to operate and use the Facilities safely and efficiently;

18.5.3 within two (2) weeks (or five (5) Business Days in relation to each of the Bruntsfield House Phases) following a Phase Actual Completion Date, the principal operation and maintenance manual in connection with the relevant Phase (or in relation to each of the Bruntsfield House Phases the required supplement to the existing operation and maintenance manual);

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

18.6 Sub-hubco shall provide to the Authority such information after a Phase Actual Completion Date as relates to any Snagging Matters or rectification of Defects in relation to the relevant Phase 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 not yet provided (completed as appropriate to the date of termination) to the Authority.

#### **Decanting, Decommissioning and Equipment Transfer**

18.8 The Authority and Sub-hubco shall, as appropriate, undertake any necessary decanting and decommissioning activities in accordance with the requirements of the Final Commissioning Programme for the relevant Phase and Appendix B (*Decanting and Decommissioning Protocol*) of Schedule Part 10 (*Outline Commissioning Programme*), and any Equipment transfer in accordance with Schedule Part 11 (*Equipment*), such that Sub-hubco is able to perform its obligations in subsequent Phases.

### **19. FOSSILS AND ANTIQUITIES**

#### **Property**

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

#### **Discovery**

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

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

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

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

#### **Action**

19.3 The Authority shall procure that the Authority's Representative promptly, and in any event within five (5) Business Days of receipt of notice pursuant to Clause 19.2.1, issues an instruction to Sub-hubco specifying what action the 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 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 Authority's Representative, Sub-hubco shall allow representatives of the Authority to enter the Site and the Off-Site Works Areas for the purposes of removal or disposal of such discovery provided that such entry shall be subject to the Authority complying with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.
- 19.6 If, in relation to such discovery, the Authority requires Sub-hubco to carry out works (being any work of alteration, addition, demolition or extension or variation in the Works) which are not works which would be necessary for the purpose of compliance with Law or any Consents, it must issue an Authority Change Notice in accordance with the provisions of Schedule 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;
  - 20.3.2 a Construction Quality Plan; and
  - 20.3.3 a Services Quality Plan for each Service,
- provided that the Design Quality Plan and the Construction Quality Plan may be incorporated into one document.
- 20.4 Sub-hubco shall procure that the Project Operations are carried out in compliance with the Quality Plans. All Quality Plans shall be submitted to the Authority's Representative in accordance with Schedule 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 Design Quality Plan;
  - 20.5.2 the Contractor implements the Construction Quality Plan;
  - 20.5.3 each Service Provider implements the relevant Services Quality Plan for each Service being provided by that Service Provider.
- 20.6 Where any aspect of the Project Operations is performed by more than one contractor or subcontractor, then the provisions of this Clause 20 (*Quality Assurance*) (in so far as relevant or appropriate to the activities to be performed by such contractor or subcontractor) shall apply in respect of each of such contractors or subcontractors, and references in this Clause 20 (*Quality Assurance*) to the "Contractor" or the "Service Provider" shall be construed accordingly. To avoid doubt, this Clause shall not be construed as requiring subcontractors of the Contractor or the Service Provider to have their own quality plans but only to comply with the Design Quality Plan and the Construction Quality Plan or the relevant aspects of the Services Quality Plan (as the case may be).
- 20.7 Sub-hubco shall from time to time submit to the Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*) any changes to any of the Quality Plans required for such Quality Plan to continue to comply with the requirements set out in Clause 20.2. The Authority's Representative may raise comments on any such proposed change only on the grounds set out in paragraph 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 Authority's Representative at the time that the relevant Quality Plan or part of (or change to) a Quality Plan is submitted in accordance with Schedule 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's Representative to ensure their continued suitability and effectiveness;
  - 20.10.4 require liaison with the Authority's Representative on all matters relating to quality management; and
  - 20.10.5 require production of reports and their delivery to Sub-hubco.

#### **Quality Monitoring**

- 20.11 The 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. The Authority's Representative may carry out such audits at approximate intervals of three (3) months and may carry out other periodic monitoring, spot checks and auditing of Sub-hubco's quality management systems. Sub-hubco shall procure that the Authority's Representative shall have an equivalent right in respect of the Contractor's and the Service Provider's quality management systems. Sub-hubco shall co-operate, and shall procure that any Sub-Contractor co-operates, with the Authority's Representative including providing him with all information and documentation which he reasonably requires in connection with his rights under this Clause.

## **PART 5: INFORMATION TECHNOLOGY**

### **21. INFORMATION TECHNOLOGY**

#### **ICT Responsibility Matrix**

- 21.1 The Parties agree their respective responsibilities in connection with the activities contained in the ICT Responsibility Matrix.

#### **Design and Installation Information**

- 21.2 The Authority shall in respect of those items where "Design Information required" is specified in the ICT Equipment Table, provide to Sub-hubco the required design information by the date identified in the ICT Equipment Table.

#### **Authority Access**

- 21.3 Subject always to compliance with Clause 21.4 and the Final Commissioning Programme by the Authority and all Authority Parties, Sub-hubco shall provide all reasonable access to the Works and/or the Facilities to the Authority and the Authority Parties for the purposes of installing and commissioning the ICT Equipment in accordance with the ICT Responsibility Matrix.
- 21.4 The Authority, when installing and commissioning the ICT Equipment in accordance with the ICT Responsibility Matrix, shall and shall procure that the Authority Parties shall:
- 21.4.1 act in accordance with Law, the Consents and the terms of all applicable building warrants, the relevant Quality Plans and Good Industry Practice and shall comply with all relevant safety procedures, which shall include the Contractor's Site Rules from time to time and any directions as to site safety that may be issued by or on behalf of Sub-hubco and/or the Contractor's Site Manager from time to time;
  - 21.4.2 do so in a manner that is not likely to be injurious to health or to cause damage to property;
  - 21.4.3 not damage the Works and/or the Facilities or interfere with, hinder or delay hubco in carrying out its obligations under this Agreement;
  - 21.4.4 be responsible for removing from the Site all debris, waste, packaging and surplus materials associated with the ICT Equipment on completion of such installation;
  - 21.4.5 ensure that the installed ICT Equipment is adequately protected (such levels of protection to be agreed between the Authority and the Sub-hubco) to ensure they shall not be vulnerable to damage as a result of Sub-hubco's activities at the Site prior to the relevant Phase Actual Completion Date; and
  - 21.4.6 no less than fifteen (15) Business Days prior to taking any access to the Site for such purposes, submit for approval by the Contractor (as principal contractor under the CDM Regulations), a method statement and a detailed programme and details of all individuals who are to attend the Site for such purposes.
- 21.5 The Authority shall be responsible for procuring and complying with all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations, required by law, and all necessary consents and agreements from any third party needed to install and commission the ICT Equipment.

## PART 6: SERVICES

### 22. THE SERVICES

#### General obligations

- 22.1 Throughout the Operational Term Sub-hubco shall provide (or procure that the Service Provider provides) the Services in accordance with:
- 22.1.1 the Service Level Specification;
  - 22.1.2 the Method Statements; 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 Statements 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 Statements;

provided that where there is any conflict between the Service Level Specification and the Method Statements the Authority shall be entitled (in its sole discretion) to decide which shall take precedence and inform Sub-hubco of its decision and Sub-hubco shall, at its own cost, be obliged to implement the 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 the Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*) proposals for amendments to or substitution for the Method Statements or any part of them. If there is no comment on such proposed amendment or substitution (on the grounds set out in paragraph 3 of Schedule Part 8 (*Review Procedure*)), then the Method Statements as so amended or substituted shall be the Method Statements for the purposes of this Agreement, subject to any further amendment or substitution to which there has been no comment in accordance with Schedule Part 8 (*Review Procedure*).
- 22.5 To avoid doubt, an amendment to or substitution for the Method Statements proposed pursuant to Clause 22.4 shall not be a Qualifying Change entitling 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 Site and/or in the Facilities and shall take all reasonable care to ensure that it does not interfere with the operations of the Authority or any Authority Party.

23. **MAINTENANCE**

**Programmed Maintenance Works**

- 23.1 No later than one (1) month prior to each Phase Completion Date Sub-hubco shall submit to the Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*): (i) in respect of the first Phase Completion Date, a Schedule of Programmed Maintenance in respect of that Phase; and (ii) in respect of each subsequent Phase Completion Date, an updated Schedule of Programmed Maintenance to take account of the Phase about to complete, for the period from the relevant Phase Completion Date to the expiry of that Contract Year.
- 23.2 Not later than two (2) months prior to the commencement of each subsequent Contract Year Sub-hubco shall submit to the Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*) a Schedule of Programmed Maintenance for the next succeeding Contract Year in respect of all Phases completed prior to that date.
- 23.3 Each Schedule of Programmed Maintenance shall contain the following information (the "**Programmed Maintenance Information**");
- 23.3.1 details of the proposed start and end dates for each period of Programmed Maintenance, the works to be carried out and the proposed hours of work; and
  - 23.3.2 details of any effect of the Programmed Maintenance on the delivery of any of the Services and/or the activities of the Authority.
- 23.4 Not later than forty (40) Business Days prior to the commencement of any quarter (being a three month period commencing 1 April, 1 July, 1 October or 1 January), Sub-hubco may submit to the 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 Programmed Maintenance Information. If the 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 Term.
- 23.5 Where the Authority's Representative raises comments in respect of any Programmed Maintenance periods and/or hours of work shown in a Schedule of Programmed Maintenance in accordance with paragraph 3 of Schedule 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 relevant 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 a 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 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 a Schedule of Programmed Maintenance, the Authority's Representative may, at any time, require Sub-hubco to accelerate or defer any Programmed Maintenance 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 Authority requires the Programmed Maintenance to be performed. Sub-hubco shall notify the Authority of the amount of any additional reasonable costs which it will incur as a direct consequence of such acceleration or deferment (the "**Estimated Increased Maintenance Costs**") within five (5) Business Days of the receipt of the written notice advising of the requirement for an acceleration or deferment of the Programmed Maintenance. The Authority shall, within a further period of five (5) Business Days following receipt by the Authority of notification of the amount of the Estimated Increased Maintenance Costs, at the Authority's option, either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance. If the Authority does not respond within this five (5) Business Day period, the request shall be deemed to have been confirmed. The Authority shall reimburse 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 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 Authority pursuant to Schedule Part 8 (*Review Procedure*)) shall prevent the Authority from making any deductions in calculating the Monthly Service Payments pursuant to the Payment Mechanism.
- 23.9 If, as a result of an emergency, the need arises for Unprogrammed Maintenance Works, Sub-hubco may carry out such Unprogrammed Maintenance Works provided that Sub-hubco shall notify the Authority's Representative as soon as possible (and in any event within three (3) 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 Authority from making any deductions in calculating the 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 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 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 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 the Authority's Representative not less than one (1) month prior to each Phase Completion Date, (i) in respect of the first Phase Completion Date, the 5 Year Maintenance Plan in respect of that Phase; and (ii) in respect of each subsequent Phase Completion Date, an updated 5 Year Maintenance Plan to take account of the Phase about to complete, 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 The Authority shall have a right to inspect the Facilities and the Maintenance Works to ensure that the Facilities are being maintained in accordance with the Service Level Specification and that the Facilities comply with the Authority's Construction Requirements and Sub-hubco's Proposals throughout the Project Term. The Authority may appoint an independent third party for the purposes of carrying out any such inspection and shall make known the findings to Sub-hubco and the Funders. The parties shall then meet to discuss any implications of such findings and any steps that are necessary to remedy any failure to comply with such obligations. 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 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 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 not less frequently than once in every ten (10) years from the first Phase Actual Completion Date, to renew and replace all carpets and other non-permanent floor coverings in the Functional Areas provided by Sub-hubco as part of the Works or in implementing an Authority Change;

23.13.3 not less frequently than once in every ten (10) years from the first Phase Actual Completion Date, to resurface/restore the finish of all semi-permanent floor finishes that are subject to wear such as wood floors in the Functional Areas provided by Sub-hubco as part of the Works or in implementing an Authority Change;

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

- 23.15 If the Authority is in breach of Clause 23.14, Sub-hubco may, while the breach is continuing, give a notice to the Authority requiring it to carry out the relevant Authority Maintenance Obligations. If the 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 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 Authority's Maintenance Obligations so far as necessary to prevent any reasonably foreseeable adverse effect on the 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 Sub-hubco's Remedial Services unless and until the 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 Sub-hubco's Remedial Services (together the "SRS Timetable"). Sub-hubco must give the Authority not less than twenty (20) Business Days notice of its proposed SRS Timetable. If the 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 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 The Authority must allow Sub-hubco and relevant Sub-hubco Parties access to the Site and the Facilities:
- 23.17.1 for the purpose of monitoring the carrying out of Authority's Maintenance Obligations; and
- 23.17.2 in accordance with the approved SRS Timetable for the purpose of carrying out any of Sub-hubco's Remedial Services.
- 23.18 If the Authority does not allow access to the Site and/or the Facilities as required pursuant to Clause 23.17.2, or otherwise prevents or interferes with Sub-hubco and any relevant Sub-hubco Party performing Sub-hubco's Remedial Services, 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 Facilities.
- 23.20 The Authority must reimburse Sub-hubco all reasonable costs that it incurs in carrying out and performing 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 Clauses 23.13.2 and 23.13.3 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 Clauses 23.13.2 and 23.13.3 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 Authority and Sub-hubco shall co-operate with each other to coordinate any activities that the Authority proposes to undertake to implement any of the Authority's Maintenance Obligations and Sub-hubco's Programmed Maintenance and Sub-hubco must include the Authority's intentions with regard to performing the Authority's Maintenance Obligations in the Schedule of Programmed Maintenance for each Contract Year.

#### **Energy for Repairs**

- 23.23 Subject to Clause 23.24, the Authority is entitled to be reimbursed by Sub-hubco for costs incurred by the Authority for Utilities supplied to the Facilities during the 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 the 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 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 Operational Term, in the manner and at the frequencies set out in Schedule Part 12 (*Service Requirements*). Sub-hubco shall provide the Authority's Representative with relevant particulars of any aspects of its performance which fail to meet the requirements of this Agreement (unless otherwise notified in writing by the Authority). The Authority may at all reasonable times observe, inspect and satisfy itself as to the adequacy of the monitoring procedures (including without limitation carrying out sample checks).

#### **Grounds for Warning Notices**

- 24.3 If at any time during the Operational Term (other than by reason of a Force Majeure Event, a Relief Event or an Emergency):
- 24.3.1 the total Deductions for any Contract Month amount to more than 0.75 per cent of the Annual Service Payment for the current Contract Year; or
- 24.3.2 the total Deductions in each of any three Contract Months in any six consecutive Contract Months amount to more than 0.50 per cent of the Annual Service Payment for the current Contract Year;

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

- (a) to serve more than one Warning Notice in any month;
- (b) to serve a Warning Notice in any two (2) consecutive months to the extent that the same event has contributed to the Authority's right to serve the Warning Notice, but provided that Sub-hubco demonstrates to the 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 the 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 the Authority's Representative issues a Warning Notice, the parties subsequently agree, or it is determined under the Dispute Resolution Procedure that the Warning Notice was served without justification, that Warning Notice shall be recalled or shall be cancelled and deemed not to have been served.

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

- 24.5 The provisions of Clauses 24.6 to 24.9 (inclusive) shall apply if the Authority, acting reasonably, considers that it needs to take action in connection with the Services:
- 24.5.1 because of an immediate and serious threat to the health or safety of any user of the Facilities; or
  - 24.5.2 to prevent or address material interruption in the provision of one or more of the Services; or
  - 24.5.3 because of a risk of the ability of the Authority or any Community Services Provider to provide the relevant Community Services 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 the Authority wishes to take action (either by itself or by engaging others), the 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 Services during the period such action is being taken.
- 24.7 Following service of such notice, the Authority shall take such action as has been notified under Clause 24.6 and any consequential additional action as it reasonably believes is necessary (together, the "**Required Action**") and Sub-hubco shall give all reasonable assistance to the Authority while it is taking the Required Action. To the extent that the Authority performs any of the obligations of Sub-hubco hereunder or undertakes tasks that would otherwise be undertaken by Sub-hubco pursuant to this Agreement, the 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 Services:

- 24.8.1 Sub-hubco shall be relieved from its obligations to provide such part of the Services; and
  - 24.8.2 in respect of this period in which the Authority is taking the Required Action and provided that Sub-hubco provides the Authority with reasonable assistance (such assistance to be at the expense of the Authority to the extent that additional costs are incurred), the Monthly Service Payments due from the Authority to Sub-hubco shall equal the amounts that Sub-hubco would receive if it were satisfying all of its obligations and providing the Services affected by the Required Action in full over that period and the Authority shall indemnify Sub-hubco against all Direct Losses sustained by Sub-hubco as a result of the Authority taking the Required Action.
- 24.9 If the Required Action is taken as a result of a breach by 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 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 Authority is taking the Required Action, the Monthly Service Payments due from the Authority to Sub-hubco shall equal the amounts Sub-hubco would receive if it were satisfying all of its obligations and providing the Services affected by the Required Action in full over that period, less an amount equal to all of the costs incurred by the Authority in taking the Required Action (including, without limitation, an appropriate sum in respect of general staff costs and overheads).

### **Emergencies**

- 24.10 If an Emergency arises during the Operational Term which cannot be dealt with by performance of the Services, the Authority may instruct Sub-hubco to procure that such additional or alternative services are undertaken by Sub-hubco as and when required by the Authority to ensure that the Emergency is dealt with and normal operation of the Facility resumes as soon as is reasonably practicable.
- 24.11 The cost of any additional or alternative services provided by Sub-hubco under Clause 24.10 shall be borne by the Authority and paid in accordance with Clause 34 (*Payment*). The Authority will not be entitled to levy Deductions in respect of any failure to provide the 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 The Authority and Sub-hubco agree that there are no individuals presently employed by the Authority or any other sub-contractor of the Authority whose contracts of employment will, by virtue of the transfer to 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 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 other sub-contractor of the Authority whose contracts of employment do have effect after the Relevant Service Transfer Date as if originally made between those persons and the relevant Service Provider ("**Transferring Staff**") then:

- 25.2.1 the Authority shall within ten (10) Business Days of the date on which it was so agreed or determined have the opportunity to offer or procure the offer of a position as an employee of the Authority to some or all of the Transferring Staff;
- 25.2.2 Sub-hubco shall procure that no person to whom the Authority has offered a position in accordance with Clause 25.2.1 shall be dismissed by reason of redundancy until the period for acceptance of such offer has expired and the person in question has not accepted such offer; and
- 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 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 Law 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 Authority may reasonably require, which shall include co-operation with action proposed or taken by the Authority, to ensure that the Authority complies with its duty under section 3(1) Health and Safety at Work Act 1974 regarding the conduct of the undertaking of the Authority.

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

- 25.5 Sub-hubco shall indemnify and keep indemnified in full the Authority and, at the Authority's request, each and every service provider who has or shall provide any service equivalent to any of the Services against:
  - 25.5.1 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 Authority as a result of any claim against the Authority in respect of any liability to any person who is or has been employed or engaged (whether as a consequence of the Transfer Regulations or of the provisions of this Clause 25 (*TUPE and Employment Matters*)) 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 Authority or is in respect of sums for which the 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 Co Indemnities*).

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

- 25.7 On the expiry or earlier termination of this Agreement, the 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 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 Authority shall ensure that each new provider of a service equivalent to a Service on or after the expiry or earlier termination of this Agreement (including the Authority) shall offer employment to the persons employed by 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 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. **NOT USED**

27. **SITE SECURITY AND PERSONNEL ISSUES**

**Access**

- 27.1 The Authority shall have the right to refuse admittance to, or order the removal from the Facilities of any person employed by (or acting on behalf of) Sub-hubco, any Sub-hubco Party or any sub-contractor whose presence, in the reasonable opinion of the Authority, is likely to have a material adverse effect on the provision by the Authority and/or any



Community Services Provider of the relevant Community Services at the Facilities or who is not a fit and proper person to be in the Facilities.

- 27.2 Action taken under Clause 27.1 shall forthwith be confirmed in writing by the Authority to 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 the 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 the Authority, specifying the capacities in which those persons are concerned with this Agreement and giving such other particulars as the Authority may reasonably require.
- 27.4 The decision of the Authority as to whether any person is to be refused admission 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 Authority Policies.
- 27.6 The Authority shall notify Sub-hubco of any proposed change to the Authority Policies as soon as practicable (and, in any event, prior to such change taking effect) and consult with 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 The Authority may, at its sole option, notify Sub-hubco that Sub-hubco shall not be obliged to comply with any change to any 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 where they are carrying out Regulated Work in terms of the Protecting Vulnerable Groups Scheme (which, for the avoidance of doubt, shall include, or

be deemed to include, all staff or persons performing any of the Services), are required to complete a Protecting Vulnerable Groups Scheme form.

27.10.3 where they are not carrying out Regulated Work in terms of the Protecting Vulnerable Groups Scheme, are required to complete a Basic Disclosure Check 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 a Protecting Vulnerable Groups Scheme form or Basic Disclosure Check form (as appropriate), 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 Authority's prior written consent (such consent not to be unreasonably withheld or delayed).
- 27.12 Sub-hubco shall procure that the 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 The 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 the Site and/or the Off-Site Works Areas or at work is otherwise considered by the Authority's Representative (acting reasonably) to be undesirable. The Authority shall co-operate with any such disciplinary proceedings and shall be advised in writing by 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 Authority in relation to the selection procedure for Sub-hubco's Facility Manager and such person shall not be appointed (or replaced) without the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed).
- 27.16 Sub-hubco shall provide, and shall procure that all Service Providers provide, to the Authority upon request details of their respective management organisations.

### **Lists and Records**

- 27.17 Sub-hubco shall procure that the 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 Services including numbers and categories of staff employed to perform the 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.

## 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 Service Level Specification and/or the Method Statements (where appropriate); and
  - 28.2.3 in compliance with any relevant rules, regulations, codes of practice and/or British or European Standards,
- and shall, as soon as practicable after receiving a request from the Authority's Representative, supply to the Authority's Representative evidence to demonstrate its compliance with this Clause 28.2.
- 28.3 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 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 Site or the Off-Site Works Areas 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 Authority's Representative, the unlawful emission of any such hazardous substance;
- (b) avoid the unlawful discharge into any conducting media serving the Facilities of any hazardous substance;
- (c) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and
- (d) prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

in so far as any such hazardous substance is, or should be, under the control of 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 Authority Party or used on behalf of any of them, or stored, by it or by any Authority Party or stored on behalf of any of them, on the Site or the Off-Site Works Areas 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 Facilities of any hazardous substance;
- (c) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and
- (d) prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

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

28.8 Sub-hubco shall:

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

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

28.8.3 ensure that a further copy of the COSHH register is given to the Authority as often as it is changed.

## 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 the Works relating to one or more Phase, Sub-hubco shall forthwith give notice to the Authority's Representative to that effect specifying the relevant delay or impediment. In relation to any such delay or impediment if the Authority's Representative is satisfied, or it is determined in accordance with Schedule Part 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 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 the 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 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 Site and the Off-Site Works Areas not forming part of this Agreement by the Authority or any contractors employed by the Authority;
- 29.3.4 opening up of the Works pursuant to Clauses 13.3 to 13.7 (inclusive) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other defects previously discovered by the Authority);
- 29.3.5 Force Majeure;
- 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 the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 10.4;

- 29.3.9 Not Used
  - 29.3.10 the occurrence of circumstances deemed to be a Delay Event pursuant to Clause 11.4;
  - 29.3.11 the occurrence of an Additional Asbestos Delay; or
  - 29.3.12 the occurrence of circumstances deemed to be a Delay Event pursuant to Clause 14.8.
- 29.4 Without prejudice to the generality of Clause 29 (*Delay Events*), Sub-hubco shall give notice in writing to the Authority's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event occurring or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event. 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 ten (10) 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 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 Authority's Representative.
- 29.6 The Authority's Representative shall, after receipt of written details under Clause 29.4, or of further particulars under Clause 29.5, be entitled by notice in writing to require Sub-hubco to provide such further supporting particulars as he may reasonably consider necessary. Sub-hubco shall afford the 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 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 twenty (20) Business Days of the later of:
- 29.7.1 the date of receipt by the 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 29.6), whichever is the later; and
  - 29.7.2 the date of receipt by the 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

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 Authority's Representative has prevented the Authority's Representative from assessing the consequences of the Delay Event.

29.8 If:

29.8.1 the Authority's Representative declines to fix a revised 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, or Clause 29.3.11 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 a 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; or

29.10.3 the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 10.4.

29.10.4 the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 11.4.

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 (including any cost incurred by Sub-hubco pursuant to Clause 14.8), Sub-hubco shall be entitled to such compensation 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 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 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 an original 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 the Works and/or 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 and the 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 the Authority claiming relief, any Authority Party.

- 30.2 Subject to Clauses 30.3 and 30.4, no right of termination shall arise under this Agreement by reason of any failure by a party to perform any of its obligations under this Agreement to the extent that such failure to perform occurs because of the occurrence of a Relief Event (and, to avoid doubt, and without prejudice to Clause 30.9, unless expressly stated to the contrary in this Agreement, it is acknowledged that all other rights and obligations of the parties under this Agreement remain unaffected by the occurrence of a Relief Event).
- 30.3 Without prejudice to 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 party within five (5) Business Days of it becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- 30.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days of the notice referred to in Clause 30.5 which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Relief Event on the ability of the party to perform, the action being taken in accordance with Clause 30.4, the date of the occurrence of the Relief Event and an estimate of the period of time required to overcome it (and/or its effects).
- 30.7 The party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- 30.8 If, following the issue of any notice referred to in Clause 30.6, the party claiming relief receives or becomes aware of any further information relating to the Relief Event (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 30.9 To avoid doubt, the occurrence of a Relief Event shall not entitle 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 the Works and/or the Facilities and/or the Site and/or the Off-Site Works Areas from any of the events referred to in Clause 31.1.1 above; or
- 31.1.4 pressure waves caused by devices travelling at supersonic speeds,

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

- 31.2 Subject to Clauses 31.3 and 31.4 the party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Force Majeure it is not able to perform its obligations under this Agreement. For the avoidance of doubt (but without prejudice to Clause 41 (*Termination Resulting from Force Majeure*)) the Authority shall not be entitled to terminate this Agreement for a 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 party within five (5) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 31.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the party to perform, the action being taken in accordance with Clause 31.3, the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).
- 31.7 The party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- 31.8 If, following the issue of any notice referred to in Clause 31.6, the party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.

- 31.9 Nothing in this Clause 31 shall affect the Authority's entitlement to make Deductions in the period during which any event of Force Majeure is subsisting.
- 31.10 The parties shall endeavour to agree any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule Part 20 (*Dispute Resolution Procedure*) shall not apply to a failure of the 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 parties shall be entitled to seek adjustments to the 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 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 Project Operations;

32.3.2 the occurrence of any Specific Change in Law having an impact on the cost of performance of the 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 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 Phase Completion Date and the 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 either party may give notice to the other of the occurrence of the Relevant Change in Law;
- 32.4.2 the 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 parties, within ten (10) Business Days of this meeting, have not agreed the occurrence or the effect of the Relevant Change in Law, either party may refer the question of whether a Relevant Change in Law has occurred or the effect of any Relevant Change in Law for resolution in accordance with Schedule 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 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 Authority's Representative that it objects to such an Authority Change Notice only on the grounds that the implementation of the Change would not give effect to or comply with the Relevant Change in Law;
  - (b) the Authority shall (i) agree the implementation of the Low Value Change; or (ii) confirm the estimate for the Medium Value Change; or (iii) approve the High Value Change Stage 2 Submission, (as appropriate) in respect of the Change in accordance with the relevant provisions of Schedule Part 16 (*Change Protocol*);
  - (c) the provisions of Clause 11 (*Consents and Planning Approval*) shall apply;
  - (d) the Authority shall not be entitled to withdraw any 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 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 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 Either party may give notice to the other 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 the parties 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 the parties, within ten (10) Business Days of this meeting, have not agreed the occurrence or the effect of the relevant Change in Law, either party may refer the question of whether a Change in Law has occurred or the effect of the Change in Law for resolution in accordance with Schedule Part 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 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 Authority's Representative that it objects to such an Authority Change Notice only on the grounds that the implementation of the Change would not give effect to or comply with the Change in Law;
- (b) the Authority shall (i) agree the implementation of the Low Value Change; or (ii) confirm the estimate for the Medium Value Change; or (iii) approve the High Value Change Stage 2 Submission, (as appropriate) in respect of the Change in accordance with the relevant provisions of Schedule Part 16 (*Change Protocol*);
- (c) the provisions of Clause 11 (*Consents and Planning Approval*) shall apply;
- (d) the Authority shall not be entitled to withdraw any 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 Payment Commencement Date 1. Subject to the provisions of this Agreement, the Authority shall pay Sub-hubco the Monthly Service Payments in respect of each Contract Month following Payment Commencement Date 1 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 in respect of the Monthly Service Payment by Sub-hubco under this Agreement:

- 34.2.1 On or before the twentieth day of each Contract Month Sub-hubco shall submit to the Authority an original invoice or invoices as may be required by the Authority and notified to Sub-hubco by no later than the tenth day in each Contract Month ("**Monthly Invoice**") aggregating the following:

- (a) the Monthly Service Payment for that Contract Month, calculated in accordance with Section 2 (*Calculation of Service Payments*) of Schedule 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 Monthly Invoice issued during the final Contract Month only, an amount equivalent to twice the monthly average of the Deductions incurred in the previous six 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 Monthly Invoice.

- 34.2.2 Subject to Clauses 34.2.3 and 34.3 and the submission of the supporting information referred to in Clause 34.2.1, where a Monthly Invoice shows a net amount owed by the Authority to Sub-hubco, the Authority shall pay the amount of the Monthly Invoice within twenty (20) Business Days of its submission and delivery of an original valid VAT invoice or invoices as may be required by the Authority and notified to Sub-hubco in advance in respect thereof. Where a Monthly Invoice shows a net amount owed by Sub-hubco to the Authority, Sub-hubco shall pay that amount to the Authority within twenty (20) Business Days of the Monthly Invoice or, at the option of the Authority, carry forward that amount to the next Monthly Invoice to reduce amounts which would otherwise be owed by the Authority to Sub-hubco.

- 34.2.3 Within 10 Business Days of the Expiry Date, Sub-hubco shall provide to the Authority a Monthly Service Report in respect of the final two Contract Months. If the Deductions incurred in the final two Contract Months exceed the

Estimated Deductions, Sub-hubco shall pay to the Authority an amount equal to the excess within ten (10) Business Days of receipt of an invoice therefor. If the Estimated Deductions exceed the Deductions incurred in the final two Contract Months the Authority shall pay to Sub-hubco an amount equal to the excess within twenty (20) Business Days of receipt of an original invoice or invoices as may be required by the Authority and notified to Sub-hubco in advance therefor.

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

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

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

#### **Manner of payment**

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

#### **Disputes**

34.4 If the Authority (acting in good faith) disputes all or any part of the Monthly Service Payments calculated in accordance with Clause 34.2 (*Invoicing and Payment Arrangements*), the undisputed amount of the Monthly Service Payment shall be paid by the Authority in accordance with Clause 34.2 (*Invoicing and Payment Arrangements*) and the provisions of this Clause 34.4 shall apply. The parties shall use all reasonable endeavours to resolve the dispute in question within fifteen (15) Business Days of the dispute arising. If they fail so to resolve it, either party may refer the matter to the Dispute Resolution Procedure. Following resolution of the dispute, any amount agreed or determined to have been payable shall be paid forthwith by the Authority to Sub-hubco, together with interest on such amount calculated in accordance with Clause 34.5 (*Late Payments*).

#### **Late Payments**

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



## Set-Off

- 34.6 Subject to Clause 46.12, whenever any sum of money shall be agreed, or determined, as due and payable by Sub-hubco to the Authority, such sum may at the Authority's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, to Sub-hubco from the Authority under this Agreement provided that the Authority has given Sub-hubco not less than two (2) Business Days' notice of its intention to deduct or apply such sum.
- 34.7 Whenever any sum of money shall be agreed, or determined, as due and payable by the Authority to 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 Authority under this Agreement provided that Sub-hubco has given the Authority not less than ten (10) Business Days' notice of its intention to deduct or apply such sum.

## 34A Lump Sum Payments

- 34A.1 In consideration of the continued rental of the Temporary Units in accordance with the Authority's Construction Requirements and the terms of this Agreement, the Authority shall, without deduction, withholding, set-off or counterclaim, pay the Lump Sum Rental Payments on the later of:-
- 34A.1.1 the Lump Sum Rental Payment Dates; and
  - 34A.1.2 the date falling twenty (20) Business Days after receipt of an original valid VAT invoice (or separate invoices as may be required by the Authority and notified to Sub-hubco in advance) (together with an electronic copy of such invoice) from Sub-hubco for the relevant Lump Sum Rental Payment specifying: (i) the amount of the relevant Lump Sum Rental Payment; and (ii) the relevant Lump Sum Rental Payment Date;
- 34A.2 In consideration of the satisfactory performance by Sub-hubco of the relevant Lump Sum Milestones the Authority shall, without deduction, withholding, set-off or counterclaim, pay the relevant the Lump Sum Payments in accordance with the provisions of Section 2 of Schedule Part 28 (*Lump Sum Payments*).

## 35. VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION SCHEME

### VAT

- 35.1 All amounts stated to be payable by either party under this Agreement shall be exclusive of any VAT properly chargeable on any amount.
- 35.2 Each party shall pay to the other party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.
- 35.3 If either party (referred to in this Clause as the "**First Party**") shall consider that any VAT which the other party (referred to in this Clause as the "**Second Party**") claims to be properly chargeable to the First Party in connection with this Agreement is not in fact properly so chargeable, the First Party shall be entitled to require the Second Party to obtain a 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 the Authority by Sub-hubco pursuant to this Agreement, the 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 the 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 Each of the Authority and Sub-hubco shall comply with the Legislation.
- 35.10.3 If any payment due from the Authority to Sub-hubco under this Agreement is a contract payment under section 60(1) of the Act, then the Authority, as Contractor, shall (not later than fifteen (15) Business days before the first such payment is due to be made) verify, in accordance with paragraph 6 of the Regulations, whether the sub-contractor is registered for gross payment or for payment under deduction or is not registered under Chapter 3 Part 3 of the Act.
- 35.10.4 If any payment due from the Authority to 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, the 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, the 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 the Authority and Sub-hubco as to whether any payment due by the 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 parties 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 The Authority shall be entitled to make a deduction at the rate specified in section 61(1) of the Act or at such other rate as may be in force from time to time from the whole of any payment to 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 the 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 the Authority directing the 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 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 Authority.
- 35.10.8 The 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 the 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,

the Authority 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 the Authority 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 The Authority shall have the right to receive 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 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 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 Authority elects by notice to Sub-hubco prior to the Relevant Distribution Date provided that the manner in which the Authority elects to receive 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 (such approval not to be unreasonably withheld or delayed). In the event that the parties fail to agree any proposed amendments to the Financial Model, the matter

shall be referred for resolution in accordance with Schedule 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 the Authority in the same form as the original form (or such other form as may be agreed by the parties from time to time).

38. **RECORDS AND OPEN BOOK ACCOUNTING**

**Records and Reports**

The provisions of Schedule 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 the Authority is in material breach of its obligations under Clause 9 (*Nature of Land Interests*) (other than as a consequence of a breach by 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 the Authority fails to pay any sum or sums due to Sub-hubco under this Agreement (which sums are not in dispute):-
    - (a) which, during the Construction Phase, either singly or in aggregate, exceed(s) One Hundred Thousand Pounds (£100,000) and such failure continues for ten (10) Business Days; and
    - (b) which, during the Operational Terms, either singly or in aggregate, exceed(s) the amount of the Monthly Service Payment from time to time and such failure continues for thirty (30) Business Days;from receipt by the Authority of a notice of non-payment from Sub-hubco; or
  - 39.1.3 the Authority is in breach of its obligations under Clause 57.4;
  - 39.1.4 an expropriation, sequestration or requisition of a material part of the Assets and/or shares of Sub-hubco or hubco by the Authority or any Relevant Authority; or
  - 39.1.5 the Authority is sequestrated under the Bankruptcy (Scotland) Act 1985 or otherwise becomes insolvent and its obligations are not otherwise transferred to another party such as is referred to in 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 Works, suspend performance by it of its obligations under this Agreement until such time as the Authority shall have demonstrated to the reasonable satisfaction of Sub-hubco that it is capable of performing, and will perform, its obligations under this Agreement; or
  - 39.2.2 serve notice on the Authority (or such other party as may be notified in advance in writing by the Authority to 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 the Authority (or otherwise) in respect of Clause 39.1.1 or Clause 39.1.3 within sixty (60) Business Days of such notice, and in respect of Clause 39.1.2 within thirty (30) Business Days of such notice, Sub-hubco may serve a further notice on the Authority (or its substitute notified in accordance with this Clause 39.2.2) terminating this Agreement with immediate effect.
- 39.3 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.

## 40. SUB-HUBCO EVENT OF DEFAULT

### 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: (i) the Phase 1 Actual Completion Date within a period of twelve (12) months after the Phase 1 Completion Date; or (ii) the Phase 2 Actual Completion Date, the Bruntsfield House 2014 Actual Completion Date, or the Bruntsfield House 2015 Actual Completion Date within a period of twelve (12) months after the Phase 2 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 (other than as a consequence of a breach by the 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 the 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 the Authority under the Health and Safety Regime (an "H&S Conviction") provided that an H&S



Conviction of a Sub-hubco Party or the 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 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 Deductions equal to or greater than one (1) per cent of the Annual Service Payment for the current Contract Year;

#### **Warning Notices**

40.1.9 Sub-hubco is awarded 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 the 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 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,

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**

40.6 Sub-hubco shall reimburse the Authority for all reasonable costs incurred by the 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). The Authority shall take reasonable steps to mitigate such costs.

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

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

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

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

The Authority shall be entitled to terminate this Agreement at any time on eighteen (18) 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.

### **44. CORRUPT GIFTS AND PAYMENTS**

#### **Prohibition on corruption**

44.1 The term "Prohibited Act" means:

- 44.1.1 offering, giving or agreeing to give to the Authority or any other public body or to any person employed by or on behalf of the Authority or any other public body any gift or consideration of any kind as an inducement or reward:
  - (a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with the Authority or any other public body; or
  - (b) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with the Authority or any other public body;
- 44.1.2 entering into this Agreement or any other agreement with the Authority or any other public body in connection with which commission has been paid or has been agreed to be paid by 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 the Authority or any other public body; or
- 44.1.4 defrauding or attempting to defraud or conspiring to defraud the Authority or any other public body.

### **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 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**

#### **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**

- 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 Events 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 the 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 46.1, 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 the 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 Final Completion Date, in so far as any transfer shall be necessary fully and effectively to transfer property to the Authority, Sub-hubco shall transfer to, and there shall vest in, the Authority, such part of the Works and/or the Facilities as shall have been constructed and such items of the Plant as shall have been procured by Sub-hubco if the Authority so elects;
- 47.2.2 all goods and all materials on or near to the Site and the Off-Site Works Areas not yet incorporated in the Works shall remain available to the Authority for the purposes of completing the Works and if the cost of such goods and materials has not been reflected in the payment of any compensation pursuant to Schedule Part 17 (*Compensation on Termination*), subject to the payment by the Authority (determined as between a willing vendor and willing purchaser with any disputes determined pursuant to Clause 56 (*Dispute Resolution Procedure*));
- 47.2.3 the construction plant shall remain available to the Authority for the purposes of completing the Works, subject to payment of the Contractor's reasonable charges;
- 47.2.4 Sub-hubco shall hand over to, and there shall vest in, the Authority, free from any Encumbrances (other than any created on or by or against the Authority),



the 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 Authority so elects, Sub-hubco shall procure that any of the Construction Contract, the Service Contracts and/or the Independent Tester Contract shall be novated or assigned to the Authority, provided that where termination occurs under Clause 39 (*Authority Events of Default*) the consent of the Contractor, the Service Provider or the Independent Tester (as the case may be) shall be required;
- 47.2.6 Sub-hubco shall, or shall procure that any Contracting Associate shall (as the case may be), offer to sell to the Authority at a fair value (determined as between a willing vendor and willing purchaser, with any disputes as to such fair value being determined pursuant to Schedule 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 Authority in connection with the operation of the Facilities or the provision of the Services;
- 47.2.7 Sub-hubco shall deliver to the Authority (as far as not already delivered to the Authority) one complete set of:
- (a) "as built drawings" showing all alterations made to the Facilities since the commencement of operation of the Facilities; and
  - (b) maintenance, operation and training manuals for the 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 Facilities are assigned, or otherwise transferred, to the Authority with full title guarantee; and
- 47.2.9 Sub-hubco shall deliver to the Authority information in relation to the employees employed by Sub-hubco and/or Service Providers and 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 Authority).
- 47.3 Sub-hubco shall ensure that provision is made in all contracts of any description whatsoever to ensure that the Authority will be in a position to exercise its rights, and 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 Authority services in the nature of any of the Services or any part of the Services in order to achieve a smooth transfer of the manner in which the Authority obtains services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of the Authority and members of the public;
- 47.4.2 Sub-hubco shall as soon as practicable remove from the Site and the Off-Site Works Areas all property not acquired by the Authority pursuant to Clause 47.2 (or not belonging to the Authority or any Authority Party) and if it has not done so within forty (40) Business Days after any notice from the Authority requiring it

to do so the Authority may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of Sub-hubco;

- 47.4.3 Sub-hubco shall forthwith deliver to the Authority's Representative:
- (a) any security passwords, access codes and other keys to the Facilities and equipment; and
  - (b) without prejudice to Clause 55 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities (but excluding computer programmes, which have been developed or acquired by a Service Provider for its own use and not solely for the purposes of provision of any of the Services at the Facilities or the assignation or transfer of which is otherwise restricted); and
- 47.4.4 Sub-hubco shall as soon as practicable vacate the Site and the Off-Site Works Areas and (without prejudice to Schedule Part 18 (*Handback Procedure*)) shall leave the Site, the Off-Site Works Areas and the Facilities in a safe, clean and orderly condition.
- 47.5 If the Authority wishes to conduct a competition prior to the Expiry Date with a view to entering into an agreement for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry of this Agreement, Sub-hubco shall co-operate with the Authority fully in such competition process including (without limitation) by:
- 47.5.1 providing any information which the Authority may reasonably require to conduct such competition but, to avoid doubt, information which is commercially sensitive to 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 Clause 47.2.9); and
  - 47.5.2 assisting the Authority by providing all (or any) participants in such competition process with access to the Site, the Off-Site Works Areas and the Facilities.

### **Continuing Obligations**

- 47.6 Save as otherwise expressly provided in this Agreement or as already taken into account in the calculation of any termination sum or other payment of compensation on termination pursuant to this Agreement:
- 47.6.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination; and
  - 47.6.2 termination of this Agreement shall not affect the continuing rights and obligations of Sub-hubco and the Authority under Clauses 10 (*The Site*), 25 (*TUPE and Employment Matters*), 31 (*Force Majeure*), 34 (*Payment*), 34A (*Lump Sum Payments*), 35 (*Taxation*), 36 (*IRR Sharing and Cap*), 37 (*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 Facilities to the 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 the Authority indemnified at all times from and against all Direct Losses sustained by the Authority in consequence of:
- 49.1.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, Sub-hubco or any Sub-hubco Party notwithstanding any act or omission of the Authority or any Authority Party;
  - 49.1.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 49.2.1) arising out of, or in the course of, the Project Operations, save to the extent caused (or contributed to) by any Unreasonable Act by the Authority or any Authority Party, breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party;
  - 49.1.3 any physical loss of or damage to Authority Assets arising by reason of any act or omission of 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 the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party; and
  - 49.1.4 any loss of or damage to property or assets of any third party arising by reason of any act or omission of 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 the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party.

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

- 49.2 The 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, the Authority or any 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 the Authority or any Authority Party in the course of provision of the Community Services, any Unreasonable Act by the Authority or any Authority Party, breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of Sub-hubco or any Sub-hubco Party;
  - 49.2.3 any physical damage to any part of the 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 the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of 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 the Authority or any Authority Party or any deliberate act or omission of the Authority or any

Authority Party, save to the extent caused (or contributed to) by any act or omission of 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, no such liability to the extent within any applicable excess or deductible or over the maximum amount insured or to be insured under such insurance); or
- (b) in respect of a matter which is a Compensation Event; 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 the Facilities during the Operational Term.

## 49A.2 Notification

49A.2.1 As soon as possible after a Service Event has been notified to the 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 Helpdesk and the Authority's Representative (a "**Malicious Damage Report**"). Where it is reasonably practicable for it to do so without prejudicing its ability to achieve Rectification of the Service Event within the Rectification Period and subject to any immediate steps that it requires to take to make the Facilities safe, it must allow the Authority's Representative 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 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 Time 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 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 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 Facilities safe.

49A.3.2 If the 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 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 Services and in particular the costs of Maintenance Works and Lifecycle Replacement being materially increased, it may notify the Authority's Representative to that effect and shall be entitled to proceed with Rectification in accordance with its obligations under this Agreement.

49A.3.4 If the 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 Facilities safe pursuant to Clause 49A.3.1 if it is agreed by the Authority or subsequently determined under the Dispute Resolution Procedure that the Service Event was caused by malicious damage by a person other than a 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 Monthly Invoice 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 Authority with such information as the Authority reasonably requests for the purpose of making claims for losses due to malicious damage, under the Operational Insurances.

#### 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 the Authority shall have the same rights and obligations as would apply to a Relevant Tax Liability under Clause 46.7.3 and Clauses 46.6 to 46.11 (inclusive) shall apply mutatis mutandis to the payment of the additional amount. The party making the payment shall pay such additional amount within ten (10) Business Days of receipt of such demand.

### 51. EXCUSING CAUSES

51.1 If an Excusing Cause interferes adversely with, or causes or contributes to a failure of, the performance of the Project Operations by 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 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 as if there had been no such interference with, or failure in the performance of, the Project Operations and no such occurrence of an Availability Failure and/or Performance Failure.

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

51.2.1 any breach of any express provision of this Agreement by the Authority or any Authority Party (unless, and to the extent, caused or contributed to by Sub-hubco or any Sub-hubco Party);

51.2.2 any deliberate act or omission of the Authority or of any Authority Party or any failure by the Authority or Authority Party (having regard always to the interactive nature of the activities of the Authority, 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 Project Operations, save where (and to the extent):

- (a) caused or contributed to by Sub-hubco or any Sub-hubco Party;
- (b) the Authority or 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 parties or was otherwise provided for in this Agreement;
- (d) the consequences of any such deliberate act or omission or other acts or omissions giving rise to such failure would have been prevented by the proper performance of Sub-hubco's obligations under this Agreement; or
- (e) the same arises from an act of the Authority or an Authority Party compliant with the Contractor's Site Rules and other requirements of the Contractor as referred to in Clause 13.1 (*Access to Site*) or 17.9.

51.2.3 Not Used

51.2.4 the implementation of any action taken by the Authority or any Authority Party, or any suspension of Sub-hubco's obligation to deliver any or any part of the Services or the compliance by Sub-hubco with instructions given by the 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 Authority and Sub-hubco;

51.2.6 the carrying out of planned preventative maintenance in accordance with the Schedule of Programmed Maintenance;

51.2.7 the occurrence of a Service Event that the Authority's Representative has agreed pursuant to Clause 49A.3.2 or that has been determined pursuant to the Dispute Resolution Procedure has been caused by malicious damage by a person other than a Sub-hubco Party, but only until such time as either (i) the 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 the occurrence of a matter referred to in Clause 10.4 during the Operational Term.

#### **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 the Authority to take (or to procure that any Authority Party takes) such steps and shall apply (and be construed) solely for the purpose of establishing whether an Excusing Cause has occurred.

## **52. WARRANTIES**

Not Used

## **53. INSURANCE**

#### **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 prior to the 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 (*Endorsement*) 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*).
- 53.5 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 Vitiolation**

- 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-vitiolation protection in respect of any claim made by the 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 the Authority (or any Authority Party) under an express provision of this Agreement for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent such loss or damage exceeds the maximum of such insurance required by this Agreement.

- 53.7 Neither party shall take any action or fail to take any reasonable action or (in so far as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) as a result of which any of the Insurances may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

#### **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 the Operational Term the amount recoverable from Sub-hubco shall be the difference between the premiums had Sub-hubco continued to maintain the Insurances and the premiums paid by the Authority to take out and maintain the Insurances.

#### **Acceptance and compliance**

- 53.12 The supply to the Authority of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 53 (*Insurance*) shall not imply acceptance by the Authority (or the Authority's Representative) that:
- 53.12.1 the extent of insurance cover is sufficient and its terms are satisfactory; or
- 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**

- 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 both parties agree, or it is determined in accordance with the Dispute Resolution Procedure that the risk is Uninsurable and that:
- i. the risk being Uninsurable is not caused by the actions of 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 (*Compensation on 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 (*Compensation on 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 the Annual Service Payment shall be reduced in each year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by 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 1.1 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 the 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 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 the 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 has 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 the 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 ten thousand pounds (£10,000) (index-linked) under the Insurances within ten (10) 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 Section 1 of Schedule Part 1 (*Definitions and Interpretation*) and Section 1 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 Joint Insurance Account and shall be applied in accordance with this Agreement and in accordance with the Joint Insurance Account 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 Joint Insurance Account Sub-hubco shall obtain the Authority's consent in accordance with the Joint Insurance Account Agreement. The Authority shall give its consent (or confirm that it is withholding its consent) to the release of monies from the Joint Insurance 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 thousand pounds (£100,000) (index-linked):
- (a) Sub-hubco shall deliver to the Authority as soon as practicable and in any event within twenty five (25) Business 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 53.22.3(b)(iv) below. The Reinstatement Plan shall set out:



- i. if not the Contractor, the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Authority; and
  - ii. the proposed terms and timetable or, if not then established, the reasonably anticipated terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Reinstatement Works will be complete), the final terms of which shall be subject to the prior written approval of the Authority, which approval shall not be unreasonably delayed;
- (b) provided that the Authority is satisfied that the Reinstatement Plan will enable 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 Joint Insurance Account (the "Relevant Proceeds") (together with any interest accrued) may be withdrawn by Sub-hubco from the Joint Insurance 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 Joint Insurance 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 Joint Insurance Account for the purposes of funding any Reinstatement Works;
  - iv. the 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 Authority undertakes to 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 Authority and in accordance with Clause 53.22.2 below the Authority shall permit withdrawal by Sub-hubco of any Relevant Proceeds then held in the Joint Insurance 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 the Authority's rights under the Payment Mechanism) there shall be no right to claim damages for breach of this Agreement, in delict or on any other basis whatsoever to the extent that any loss claimed by either party is for loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or is a claim for consequential loss or for indirect loss of any nature ("**Indirect Losses**") suffered or allegedly suffered by either party. The Authority agrees that, notwithstanding the foregoing, any losses of Sub-hubco arising under the Construction Contract 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 The Authority shall not be liable in delict to Sub-hubco or any Sub-hubco Party in respect of any negligent act or omission of the Authority or any Authority Party relating to or in connection with this Agreement and Sub-hubco shall procure that no Sub-hubco Party shall bring such a claim against the 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 the Authority pursuant to this Agreement; and

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

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

54.4 Subject to Clause 39 (*Authority Events of Default*) and any other express right of 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 the Authority to seek interdict or a decree of specific implement or other discretionary remedies of the court.

54.6 Notwithstanding any other provision of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other

party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement or otherwise.

54.7 Neither party shall have the right to terminate this Agreement for breach of contract save as expressly set out in this Agreement.

## PART 12: MISCELLANEOUS

### 55. INTELLECTUAL PROPERTY

#### Project Data

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

#### Intellectual Property Rights

- 55.2 Sub-hubco:

55.2.1 hereby grants to the Authority, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in 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 the Authority may at its 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 nominee to access and otherwise use (subject to the payment by the Authority of the relevant fee, if any) such data for such purposes as the Authority may at its sole discretion require. As an alternative, 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.

- 55.4 Sub-hubco shall ensure the backup 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 backup and storage in safe custody of such data, materials and documents and the Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. 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 the Authority which arises out of the infringement of any rights in or to any Intellectual Property (other than any Disclosed Data) or because the use of any materials, Plant, machinery or equipment in connection with the Project Operations infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Intellectual Property by or on behalf of the Authority otherwise than in accordance with the terms of this Agreement 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 the Authority at all times from and against all such claims and proceedings and the provisions of Clause 49.3 (*Conduct of Claims*) shall apply.

## 56. DISPUTE RESOLUTION PROCEDURE

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

## 57. ASSIGNATION AND SUB-CONTRACTING

### Assignment

- 57.1 This Agreement, the Leases and any other agreement in connection with the Project to which both the Authority and Sub-hubco are a party shall be binding on, and shall enure to the benefit of, Sub-hubco and the Authority and their respective statutory successors and permitted transferees and assignees.
- 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 Contract, the Service Contracts and any other contract 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 The 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 the Authority and Sub-hubco are both party to:
- 57.4.1 a Minister of the Crown or the Scottish Ministers);
  - 57.4.2 a local authority (as defined in the Local Government etc (Scotland) Act 1994) which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Agreement and/or the Leases or any other agreements to which such assignation, transfer or disposal relates;
  - 57.4.3 any other public body whose obligations under this Agreement and/or the Leases or any other agreements to which such assignation, transfer or disposal relates are unconditionally and irrevocably guaranteed by the Authority or a Minister of the Crown or Scottish Ministers) having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Agreement and/or the Leases or any other agreements to which such assignation, transfer or disposal relates to; or
  - 57.4.4 any other Participant which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Agreement and/or the

Leases or any other agreements to which such assignation, transfer or disposal relates,

without the consent of Sub-hubco. The prior written consent of Sub-hubco (not to be unreasonably withheld or delayed) shall be required for any other assignation, transfer or disposal by the Authority of the whole or any part of this Agreement and/or the Leases or any other agreement entered into in connection with this Agreement to which the 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	Construction Contract
Service Provider	Service Contract

without, in each case, the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed). To avoid doubt, (i) any failure to comply with Clause 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 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 or any Key Sub-Contractor or any Design Sub-Contractor shall enter into a contract upon the same or substantially similar terms as the person so replaced and shall also enter into a collateral agreement on the same or substantially the same terms as the Collateral Agreement entered into by the person so replaced.

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 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 Authority then, to the extent that it relates to such Project Operations, the invoice shall be treated as valid and payment shall be made to the sub-contractor without deduction (but without prejudice to any right to deduct or set off validly arising under the terms of the contract with the sub-contractor); and

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

- 57.8.3 in the same terms as this Clause 57.8 (including for the avoidance of doubt this Clause 57.8.3) subject only to modification to refer to the correct designation of the 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 a 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 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, the 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 The 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 the 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. 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 the Authority (such approval not to be unreasonably withheld or delayed);
- 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 twenty (20) Business Days of the transferee ceasing to be an Associate of the original transferor, transferred to the original transferor or any Associate of such transferor.

- 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 the Authority where the person acquiring control is a Restricted Person.

## 59. MITIGATION

Each of the 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 Authority in relation to the processing of any personal data made available by or on behalf of the 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 the 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 be entitled to make the documents and information listed in this Clause 61.1 freely available to the public (which may include, without limitation, publication on the Authority's website):

61.1.1 this Agreement;

61.1.2 the Independent Tester Contract;



- 61.1.3 the Collateral Agreements;
- 61.1.4 the payment and performance report;
- 61.1.5 the Financial Model (as updated from time to time in accordance with this Agreement); and

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. The 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 and each Ancillary Document and the Financial Model 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 the other party relating to this Agreement and Ancillary Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

### Permitted Disclosure

- 61.3 Clauses 61.2.2 and 61.2.3 shall not apply to:
  - 61.3.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the performance of those obligations;
  - 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 the Authority of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new contractor, its advisers and lenders, should the Authority decide to retender this Agreement;
- 61.3.8 any registration or recording of the Consents and property registration required;
- 61.3.9 any disclosure of information by the Authority to any other department, office or agency of the Government or their respective advisers or to the Scottish Futures Trust or to any person engaged in providing services to the Authority for any purpose related to or ancillary to this Agreement;
- 61.3.10 any disclosure for the purpose of:
- (a) the examination and certification of the Authority's or 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 the Authority has used its resources;
  - (c) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or
  - (d) (without prejudice to the generality of Clause 61.3.4) compliance with the FOI(S)A and/or the Environmental Information (Scotland) Regulations;
- 61.3.11 disclosure pursuant to Clause 61.1; or
- 61.3.12 disclosure to the extent required pursuant to Clause 63.2,

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

- 61.4 Where disclosure is permitted under Clause 61.3, other than under Clauses 61.3.2, 61.3.4, 61.3.5, 61.3.8 and 61.3.10, the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.
- 61.5 Sub-hubco shall not make use of this Agreement or any information issued or provided by or on behalf of the Authority in connection with this Agreement otherwise than for the purpose of this Agreement, except with the written consent of the Authority.
- 61.6 Where 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 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 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 the Authority to facilitate the Authority's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in Clauses 62.2 to 62.8.
- 62.2 Where the Authority receives a Request for Information in relation to Information that Sub-hubco is holding on its behalf and which the Authority does not hold itself the 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 Authority with a copy of all such Information in the form that the Authority requires as soon as practicable and in any event within five (5) Business Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and
  - 62.2.2 provide all necessary assistance as reasonably requested by the Authority in connection with any such Information, to enable the Authority to respond to the Request for Information within the time for compliance set out in section 10 of the FOI(S)A or Regulation 5 of the Environmental Information (Scotland) Regulations.
- 62.3 Following notification under Clause 62.2, and up until such time as Sub-hubco has provided the Authority with all the Information specified in Clause 62.2.1, Sub-hubco may make representations to the Authority as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Authority shall be responsible for determining at its absolute discretion:
  - 62.3.1 whether Information is exempt from disclosure under the FOI(S)A and the Environmental Information (Scotland) Regulations;
  - 62.3.2 whether Information is to be disclosed in response to a Request for Information, and

in no event shall 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 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 Authority Policies relating to records retention and shall permit the Authority to inspect such Information as requested from time to time.
- 62.5 Sub-hubco shall transfer to the 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 the Authority may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of FOI(S)A and the Environmental (Scotland) Regulations.
- 62.7 In the event of a request from the Authority pursuant to Clause 62.2 Sub-hubco shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of Sub-hubco's estimated costs of complying with the request to the extent these would be recoverable, if incurred by the Authority, under section 13(1) of the FOI(S)A and the Fees Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in section 12(1) of the FOI(S)A and as set out in the Fees Regulations (the "**Appropriate Limit**") the Authority shall inform 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 Authority is entitled to under section 10 of the FOI(S)A. In such case, the 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 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 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 Authority before disclosing Information about them or any agreement entered into between the Authority and Sub-hubco.



(copied in each case to the Authority)

- 64.3 Either party to this Agreement (and either 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.

**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 the 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 the Authority and Sub-hubco shall not hold itself out as having authority or power to bind the Authority in any way.
- 66.3 Without limitation to its actual knowledge, 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 the Authority 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.

**74. Local Government (Contracts) Act 1997**

74.1 Sub-hubco hereby consents to the issue by the Authority of certificates under section 3 of the Local Government (Contracts) Act 1997 in respect of this Agreement and the Funders' Direct Agreement.

74.2 The relevant discharge terms within the meaning of section 6 of the Local Government (Contracts) Act 1997 are set out in Schedule Part 27 (*Relevant Discharge Terms*).

75. **Best Value**

75.1 Sub-hubco shall take all reasonable steps necessary to facilitate, support and assist the Authority in complying with Sections 1 and 2 of the Local Government in Scotland Act 2003.

75.2 Subject to Clause 75.1, Sub-hubco shall comply with the guidance referred to in Section 2 of the Local Government in Scotland Act 2003 as directed by the Authority from time to time.

**IN WITNESS WHEREOF** these presents typewritten on this and the preceding 105 pages together with the Schedule in 29 Parts and the Attachment A are executed by the parties hereto as follows:

They are subscribed by [redacted] Proper Officer, on behalf of the  
Authority at EDINBURGH on 9 DECEMBER 2013 by:- [redacted]

WITNESS:

Signature

Full Name:

Address:

[redacted]

They are subscribed on behalf of Sub-hubco by  
at EDINBURGH on 09 DECEMBER 2013

[redacted]  
\_\_\_\_\_  
Director  
[redacted]  
\_\_\_\_\_  
Director/Secretary  
Authorised Signatory



## 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;
- "Academic Year"** means the period from the first day of the Authority's school year until the last day of the Authority's school year (excluding holiday periods) (as published from time to time prior to the commencement of each Academic Year), such period not to include more than 200 School Days;
- "Actual Commissioning End Date"** means the date specified in the 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 Asbestos"** means Asbestos discovered in Bruntsfield House to the extent only that it differs in nature and/or extent and/or location from the Bruntsfield House Identified Asbestos;
- "Additional Permitted Borrowing"** means on any date, the amount equal to any amount of principal outstanding under the Senior Funding Agreements (as the same may from time to time be amended, whether or not with the approval of the Authority) in excess of the amount of principal scheduled under the Senior Funding Agreements at Financial Close to be outstanding at that date,
- but only to the extent that:
- (a) this amount is less than or equal to the Additional Permitted Borrowings Limit; and
  - (b) in respect of any Additional Permitted Borrowing the Security Trustee 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

shall not be counted as Additional Permitted Borrowing;

**"Additional Permitted Borrowings Limit"** means an amount equal to:

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

**"Adjudicator"** has the meaning given in paragraph 4.1 of Schedule Part 20 (*Dispute Resolution Procedure*);

**"Affiliate"** means, in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company, and "holding company" and "subsidiary" shall have the meaning given to them in section 1159 of the Companies Act 2006;

**"Ancillary Documents"** means the Construction Contract, the Service Contracts and the Performance Guarantees, all as the same may be amended or replaced from time to time;

**"Ancillary Rights"** means such rights as set out in Section 3 (*Ancillary Rights*) of Schedule Part 5 (*Land Matters*);

**"Annual Service Payment"** has the meaning given in Schedule Part 14 (*Payment Mechanism*);

**"Appropriate Access Date"** has the meaning ascribed to it in Clause 9.3.2 (b)

**"Approved RDD Item"** means an item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed either "Level A – no comment" or "Level B – proceed subject to amendment as noted" by the Authority's Representative pursuant to the provisions of Clause 12 (*Design, Construction and Commissioning Process*) and Schedule Part 8 (*Review Procedure*) (provided that in the case of any item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed "Level B – proceed subject to amendment as noted" Sub-hubco has taken account of the Authority's Representative's comments), as such item of Reviewable Design Data may be varied or amended from time to time in accordance with Schedule Part 16 (*Change*

*Protocol*);

- "Asbestos"** has the meaning given to it in the Control of Asbestos Regulations 2006;
- "Associated Companies"** 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 Holdco and each of the Shareholders, and the term "Associate" shall be interpreted accordingly;
- "Authority Assets"** means the Boundary Wall, the Existing Facilities and all equipment thereon and any other assets and equipment or other property used by, or on behalf of, the Authority or any Authority Party, other than the Facilities;
- "Authority Change"** has the meaning given in Schedule Part 16 (*Change Protocol*);
- "Authority Change Notice"** has the meaning given in Schedule Part 16 (*Change Protocol*);
- "Authority Events of Default"** has the meaning given in Clause 39.1;
- "Authority Party"** means any of the Authority's agents, contractors and sub-contractors of any tier and its or their directors, officers and employees and/or Community Services Providers at the Facilities with the authority of the Authority but excluding Sub-hubco, any Sub-hubco Party and statutory undertakers and utilities and "Authority Parties" shall be construed accordingly;
- "Authority Policies"** means, subject to Clause 27.7, the policies of the Authority as set out in Schedule Part 29 (*Authority Policies*) as amended from time to time;
- "Authority's Commissioning"** means the Authority's pre-completion commissioning activities to be carried out by the Authority in accordance with Clause 17.7 (*Pre-Completion Commissioning and Completion*);
- "Authority's Construction Requirements"** means the requirements of the Authority set out or identified in Section 3 (*Authority's Construction Requirements*) of Schedule Part 6 (*Construction Matters*) as amended from time to time in accordance with the terms of this Agreement;
- "Authority's Distribution Share"** means the greater of:
- (a) half of the First Threshold Excess; and
  - (b) the Second Threshold Excess;
- "Authority's Maintenance Obligations"** has the meaning given in Clause 23.13;
- "Authority's Post Completion Commissioning"** means the Authority's post-completion commissioning activities to be carried out by the Authority in accordance with Clause 18.1 (*Post Completion Commissioning*);
- "Authority's Post Completion Works"** has the meaning given to it in Clause 17.17A.1
- "Authority's Post Completion Works Costs"** means any substantiated costs incurred by the Authority as a direct consequence of carrying out the Authority Post

	Completion Works;
<b>"Authority's Representative"</b>	means the person so appointed by the Authority pursuant to Clause 8 ( <i>Representatives</i> );
<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>"Boundary Wall"</b>	means the sections of boundary wall surrounding the Site and the Primary & Nursery Site to which Sub-hubco are required to carry out Works pursuant to the Authority's Construction Requirements;
<b>"Break-Off Property"</b>	means the subjects described in, disposed by and shown coloured pink on the Break Off Property Plan;
<b>"Break-Off Property Plan"</b>	means the plan comprising Plan K of Section 4 of Schedule Part 5 ( <i>Land Matters</i> );
<b>"Bruntsfield House"</b>	means that part of the Site shown shaded blue on the Bruntsfield House 2014 Plan
<b>"Bruntsfield House 2014 Actual Completion Date"</b>	means the later of: <ul style="list-style-type: none"> <li>(a) the date stated in the Certificate of Practical Completion issued by the Independent Tester in respect of the Bruntsfield House 2014 Phase pursuant to Clause 17.12; and</li> <li>(b) subject to Clause 14.5, the Bruntsfield House 2014 Completion Date;</li> </ul>
<b>Bruntsfield House 2014 Completion Date"</b>	means (subject to Clause 29 ( <i>Delay Event</i> )) 8 August 2014 or such other date as the parties may agree;
<b>"Bruntsfield House 2014 Phase"</b>	means the Bruntsfield House 2014 Phase as described in the Authority's Construction Requirements;
<b>"Bruntsfield House 2014 Plan"</b>	means the plan comprising Plan H of Section 4 of Schedule Part 5 ( <i>Land Matters</i> );
<b>"Bruntsfield House 2014 Site"</b>	means the upper two floors of the building coloured blue on the Bruntsfield House 2014 Plan;
<b>"Bruntsfield House 2015 Actual Completion Date"</b>	means the later of: <ul style="list-style-type: none"> <li>(a) the date stated in the Certificate of Practical Completion issued by the Independent Tester in respect of the Bruntsfield House 2015 Phase pursuant to Clause 17.12; and</li> <li>(b) subject to Clause 14.5, the Bruntsfield House 2015</li> </ul>

Completion Date;

**"Bruntsfield House 2015 Completion Date"**

means (subject to Clause 29 (*Delay Event*)) 7 August 2015 or such other date as the parties may agree;

**"Bruntsfield House 2015 Phase"**

means the Bruntsfield House 2015 Phase as described in the Authority's Construction Requirements;

**"Bruntsfield House 2015 Plan"**

means the plan forming Plan J of Section 4 of Schedule Part 5 (*Land Matters*);

**"Bruntsfield House 2015 Site"**

means: (i) the ground floor of the building coloured blue on the Bruntsfield House 2015 Plan; and (ii) the area shown shaded brown on the Bruntsfield House 2015 Plan;

**"Bruntsfield House Phases"**

means the Bruntsfield House 2014 Phase and the Bruntsfield House 2015 Phase;

**"Bruntsfield House Identified Asbestos"**

means:

(i) the Asbestos identified on the Surveys and Asbestos Management Registers all as defined below, or that ought to have been identified in such Surveys and Asbestos Management Registers had the same been properly carried out by a competent Asbestos surveyor carrying out this type of survey, to the extent that they apply to Bruntsfield House:

- The Asbestos Management Report for the High School Reference Asbestos Register and Survey for High School reference TIC:3101
- The Site Inspection Report for James Gillespie's High School dated 26 October 2010 (carried out 18 October 2010)
- Results and Reports of Asbestos Analysis dated 26 October 2010
- The Asbestos Survey Report James Gillespie High School dated 23 December 2011 (carried out 16 December 2011)
- The Asbestos Survey Report James Gillespie High School dated 28 July 2011 (carried out 13 July 2011)
- The Asbestos Survey Report James Gillespie High School dated 14 May 2010 (carried out 7 May 2010)
- The Asbestos Survey Report James Gillespie High School dated 30 April 2010 (carried out 16 April 2010)
- The Asbestos Survey Report James Gillespie High School dated 2 July 2009 (carried out 29 June 2009)
- The Asbestos Survey Report James Gillespie High School dated 30 April 2009 (carried out 27 April 2009)
- The Asbestos Survey Report Bruntsfield House dated 2 July 2012 (carried out 19 June 2012)
- Results and Reports of Asbestos Analysis dated 2 July 2012
- The Asbestos Survey Report Bruntsfield House dated 26 October 2010 (carried out 18 June 2010)
- The Asbestos Survey Report James Gillespie Primary School July 2012
- The Asbestos Survey Report James Gillespie Nursery School dated 12 May 2010 (carried out 19 March 2010)
- The Asbestos Management Survey dated 18 February

2004 Asbestos Register updated to 11 February 2013 with Tic Number 3102

- Asbestos Register updated to 12 July 2012 with Tic Number 3101
- Asbestos Register updated to 20 June 2012 with Tic number 4407

(ii) Asbestos disturbed by Sub-hubco on the Site while carrying out the Intrusive Works; and

(iii) any Asbestos disturbed as a result of any negligent act or omission of Sub-hubco or any Sub-hubco Party;

<b>"Business Day"</b>	means a day other than a Saturday, Sunday or a bank holiday in Edinburgh;
<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>"Certificate of Snagging 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>	means: <ul style="list-style-type: none"><li>(a) any sale or other disposal of any legal, beneficial or equitable interest in any or all of the equity share capital of a corporation (including the control over the exercise of voting rights conferred on that equity share capital, control over the right to appoint or remove directors or the rights to dividends); and/or</li><li>(b) any other arrangements that have or may have or which result in the same effect as paragraph (a) above;</li></ul>
<b>"Change in Law"</b>	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;
<b>"Collateral Agreements"</b>	means the Contractor's Collateral Agreement, the Service Providers' Collateral Agreements and the Key Sub-Contractor Collateral Agreements;
<b>"Commencement Date"</b>	means the date of this Agreement;
<b>"Commercially Sensitive Information"</b>	means the sub set of Confidential Information listed in the first column of the table set out in Schedule Part 26 ( <i>Commercially Sensitive Information</i> ) for the period specified in the second

	column in the table therein;
<b>"Commissioners"</b>	has the meaning given in Clause 35.3;
<b>"Commissioning Completion Certificate"</b>	means a certificate in the relevant form set out in Schedule Part 22 ( <i>Certificates</i> );
<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 the provision of: (i) educational services undertaken to deliver the curriculum in relation to pupils at the Facilities; (ii) services to deliver adult education and such extra-curricular activities and services of the Children & Families Department of the Authority as the Authority deems appropriate; and (iii) 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 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>"Compound Site"</b>	means all areas of land to which Sub-hubco are given access pursuant to Clause 9.3 falling outwith the Site, other than the Boundary Wall;
<b>"Confidential Information"</b>	means:- <ul style="list-style-type: none"> <li>(a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1988 and</li> <li>(b) 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 Contract"</b>	means the design and build contract 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;

**"Construction Phase"**

means in respect of a Phase the period from and including the date of execution of this Agreement to and including the relevant Phase Actual Completion Date;

**"Construction Quality Plan"**

means the document at Section 8 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*);

**"Contamination"**

means all or any pollutants or contaminants, including any chemical or industrial, radioactive, dangerous, toxic or hazardous substance (including Asbestos), waste or residue (whether in solid, semi-solid or liquid form or a gas or vapour) and including without limitation genetically modified organisms;

**"Contract Month"**

means a calendar month provided that:

- (a) the first Contract Month shall be the period from and including Payment Commencement Date 1 to and including the last day of the calendar month in which the Payment Commencement Date 1 falls; and
- (b) the last Contract Month shall be the period from and including the first day of the calendar month in which the Expiry Date or Termination Date (as the case may be) falls to and including the Expiry Date or the Termination Date (as the case may be);

**"Contract Year"**

means the period from the date of this Agreement to the following 31 March and subsequently each period of twelve (12) calendar months commencing on 1 April, until the final Contract Year which is the period from 1 April prior to the Expiry Date or Termination Date until the Expiry Date or Termination Date (as the case may be);

**"Contracting Associate"**

means the Contractor, any Service Provider and any other entity which performs on behalf of Sub-hubco any material function in connection with this Agreement or the Project Operations;

**"Contractor"**

means Galliford Try Construction Limited (trading as Morrison Construction Scotland) incorporated under the Companies Acts (Registered Number 02472080) and having its Registered Office at Cowley Business Park, Cowley, Uxbridge, Middlesex, UB8 2AL 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;

**"Contractor's Collateral Agreement"**

means a collateral agreement among the Authority, Sub-hubco and the Contractor in the form set out in Section 1 of Schedule Part 9 (*Collateral Agreements*);

**"Contractor's Site Manager"**

means the manager to be appointed by the Contractor for purposes of supervision of all day-to-day activities on the Site and the Off-Site Works Areas;

**"Contractor's Site Rules"**

means the Contractor's rules, applicable on the Site and the Off-Site Works Areas to the Authority, Sub-hubco, the Contractor and their respective sub-contractors and suppliers



of every tier during the construction of the Facilities;

**"Convictions"**

means other than in relation to 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);

**"Core Times"**

has the meaning given in Schedule Part 12 (*Service Level Specification*);

**"Darroch Site"**

means the area shown outlined in red on the Darroch Plan

**"Darroch Plan"**

means the plan comprising Plan L of Section 4 of Schedule Part 5 (*Land Matters*)

**"Deduction"**

means a deduction to be made in calculating a Monthly Service Payment, calculated in accordance with Section 3 (*Deductions from Monthly Service Payments*) of Schedule Part 14 (*Payment Mechanism*);

**"Deemed Liability"**

has the meaning given in Clause 46.7.3;

**"Default Interest"**

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

**"Default Interest Rate"**

means 2% over LIBOR;

**"Defects"**

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 Sub-hubco's Proposals or otherwise to comply with its obligations under this Agreement;

**"Delay Event"**

has the meaning given in Clause 29.3;

**"Derogated Low Value Change"**

has the meaning given in Schedule Part 16 (*Change Protocol*);

**"Design Data"**

means all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing and/or operation of the Facilities;

**"Design Quality Plan"**

means the document at Section 8 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*);

**"Design Sub-Contract Documentation"**

means: (i) the collateral agreements between the Authority, Sub-hubco, the Contractor and the Design Sub-Contractors in the form set out in Section 3 of Schedule Part 9 (*Collateral Agreements*) granted by each of the Design Sub-Contractors; and (ii) evidence that each of the Design Sub-Contractors has the appropriate level of professional indemnity insurance as set out in Paragraph 18 of Section 1 (*Documents to be delivered by Sub-hubco*) of Schedule Part 2 (*Completion Documents*)

**"Design Sub-Contractors"**

means the sub-contractors carrying out the following elements of the Works: (i) curtain walling; (ii) pre-cast stairs; (iii) structural steel; (iv) sprinkler systems; (v) lifts; and (vi) swimming pool;

**"Dining Accommodation Works"**

means such part of the Works required in relation to the installation and removal of a temporary unit within the Phase 1 Site for the purpose of delivering kitchen and dining facilities following the Phase 1 Actual Completion Date more particularly described in the Authority's Construction Requirements;

**"Direct Losses"**

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;

**"Disclosed Data"**

means any Design Data and any other written information, data and documents (excluding information contained within Schedule Part 5 (*Land Matters*) made available or issued to Sub-hubco or any Sub-hubco Party in connection with the Project by or on behalf of the Authority (or any Authority Party) whether on, before or after the execution of this Agreement;

**"Discriminatory Change in Law"**

means any Change in Law the effect of which is to discriminate directly against:

- (a) facilities whose design, construction, financing and operation are procured under the hub programme in relation to other similar projects; or
- (b) companies undertaking projects procured by contracts under the hub programme in relation to other companies undertaking similar projects; or
- (c) the Facilities in relation to other similar facilities; or
- (d) Sub-hubco in relation to other companies,

save:

- 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 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 (*Taxation*);

**"Dispute"**

has the meaning given in paragraph 1 of Schedule Part 20

*(Dispute Resolution Procedure);*

<b>"Dispute Resolution Procedure"</b>	means the procedure set out in Schedule Part 20 ( <i>Dispute Resolution Procedure</i> );
<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>"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 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>"Energy Centre"</b>	means the building shown hatched in green on the Sub-Station Plan;
<b>"Environmental Information (Scotland) Regulations"</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>"Equipment"</b>	means the Group 1 Equipment, the Group 2 Equipment, the Group 3 Equipment and the Group 5 Equipment;
<b>"Equipment Installation Table"</b>	means the table set out in Section 3 of Schedule Part 11 ( <i>Equipment</i> );
<b>"Equity"</b>	means the aggregate subscription price paid by the Shareholders for the ordinary share capital of Holdco;
<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>"Existing Building Plan"</b>	means the plan forming Plan B of Section 4 of Schedule Part 5 ( <i>Land Matters</i> );
<b>"Existing Facilities"</b>	means (i) the Primary & Nursery Site; and (ii) all parts of the Site in respect of which a Phase Actual Completion Date has not occurred (provided that any area which is being occupied and used by Sub-hubco for the purpose of carrying out the Works shall not be Existing Facilities other than as a consequence of Sub-hubco's failure to carry out the Works in

accordance with Clause 12 and Clause 14);

**"Expiry Date"**

means midnight on 15 July 2041;

**"Facilities"**

means:-

(a) from the Commencement Date until the Final Completion Date, the buildings and other facilities, together with all supporting infrastructure (including the Plant and the Group 1 Equipment), external hard-standings, specialist surfaces and other amenities located on the Site and the Compound Site but excluding the Sub-Station (including as a minimum all aspects detailed within Appendix B to Section 1 (*Service Level Specification*) to Schedule Part 12 (*Service Requirements*)), as required to enable Sub-hubco to comply with its obligations under this Agreement, and including the Temporary Units; and

(b) from the Final Completion Date until the Expiry Date, or the Termination Date, if earlier, the buildings and other facilities, together with all supporting infrastructure (including the Plant and the Group 1 Equipment), external hard-standings, specialist surfaces and other amenities located on the Site but excluding the Sub-Station (including as a minimum all aspects detailed within Appendix B to Section 1 (*Service Level Specification*) to Schedule Part 12 (*Service Requirements*)), as required to enable Sub-hubco to comply with its obligations under this Agreement, and excluding the Temporary Units;

all as the same may be varied, amended or supplemented from time to time in accordance with this Agreement;

**"Facility Manager"**

means Sub-hubco's duty manager who shall be present at the Facilities in accordance with the Service Level Specification;

**"Fees Regulations"**

means the Freedom of Information (Fees for Required Disclosure (Scotland) Regulations 2004;

**"Final Commissioning Programme"**

means the programme to be jointly developed and agreed by the Authority and Sub-hubco in accordance with the provisions of Clause 17.1;

**"Final Completion Date"**

means the date on which the Phase Actual Completion Date has occurred in respect of all of the Phases;

**"Financial Close"**

means the date of this Agreement;

**"Financial Model"**

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, as amended from time to time in accordance with the terms of Clause 37 (*Financial Model*), a copy of which is attached to this Agreement on disk as Attachment A;

**"First Party"**

has the meaning given in Clause 35.3;

<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>"First Whole Life Threshold Return"</b>	means [REDACTED]
<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>"Functional Area"</b>	means an area of the Facilities identified as such in Appendix 3 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 (registered under number 02334210) whose registered office is at 2 Rougier Street, York YO90 1UU and, where the context so permits, prospective financiers or funders;
<b>"Funders' Direct Agreement"</b>	means the agreement to be entered into between the Authority, 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 as that term is defined in the Loan Agreement;
<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 Site and the Compound Site and of any extraneous materials in, on or under the Site and the Compound Site (including all surface and subsoil thereof) to enable the Facilities to be designed and constructed and the Works to be carried out with due regard for those conditions and the seismic activity (if any) in the region of the Site;

<b>"Group 1 Equipment"</b>	means the Group 1 equipment identified in the quotes set out at Section 2 of Schedule Part 11 ( <i>Equipment</i> );
<b>"Group 2 Equipment"</b>	means the Group 2 equipment identified in paragraph 5.5 (Item B) of the Authority's Construction Requirements;
<b>"Group 3 Equipment"</b>	means the Group 3 equipment identified in paragraph 5.5 (Item C) of the Authority's Construction Requirements;
<b>"Group 5 Equipment"</b>	means the Group 5 equipment identified in paragraph 5.5 (Item D) of the Authority's Construction Requirements;
<b>"Growing Month"</b>	means each of the months April to September (inclusive);
<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 22 ( <i>Certificates</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 Lease"</b>	means the head lease for the Site to be entered into between the Authority 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 Authority and Sub-hubco 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>"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>"HoldCo"</b>	means James Gillespie's Campus Subhub Holdings Limited (registered under number SC380319) whose registered office is at Atholl House, 51 Melville Street, Edinburgh, EH3 7HL;
<b>"hubco"</b>	means hub South East Scotland Limited (registered under number SC380319) whose registered office is at Atholl House, 51 Melville Street, Edinburgh, EH3 7HL;
<b>"ICT Equipment"</b>	means the list of equipment identified as the responsibility of the Authority in the ICT Responsibility Matrix;
<b>"ICT Responsibility Matrix"</b>	means the ICT responsibility matrix set out at Section 4 of Schedule Part 11 ( <i>Equipment</i> );
<b>"ICT Equipment Table"</b>	means the ICT equipment table set out at Section 5 of Schedule Part 11 ( <i>Equipment</i> );
<b>"Inappropriate Access Date"</b>	means a date which either: (i) falls during the Academic Year; or (ii) falls during a school holiday period which is not a Suitable Vacation Period;
<b>"Indemnifier"</b>	has the meaning given in Clause 49.3 ( <i>Conduct of Claims</i> );
<b>"Independent Tester"</b>	means Faithful & Gould Limited (registered under number 02236832) whose registered office is Woodcote Grove, Ashley Road, Epsom, Surrey, KT18 5BW 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 the form set out in Schedule Part 13 ( <i>Independent Tester Contract</i> ) or any replacement thereof among Sub-hubco, the Authority 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>"Initial Funding Agreements"</b>	means the Senior Funding Agreements and the Subordinated Funding Agreements in the Agreed Form;
<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 Facilities, the operation, maintenance, improvement and/or testing of the Facilities or the conduct of any other Project Operation or otherwise for the purposes of this Agreement;

**"Interest"**

means any interest on Relevant Debt paid by Sub-hubco;

**"Interim Project Report"**

means a report prepared by Sub-hubco setting out all information which Sub-hubco is required to provide to the Senior Funders in respect of a Funding Default;

**"Intrusive Works"**

means works, forming part of the Works to be carried out to Bruntsfield House that would penetrate (a) any part of the structure of Bruntsfield House or (b) any surface, fixture or fitting associated internally or externally with Bruntsfield House; and including, without prejudice to the foregoing generality, (i) drilling, cutting, scraping or any other destructive tasks in relation to such structure (ii) removal of fixtures or fittings, wall mounted furniture, ceiling tiles, cladding, inspection covers and service panels (which for the avoidance of doubt would not include removal of any such items not forming part of the Works, but where asbestos is disturbed as a result of the Contractor carrying out the Works) (iii) access into voids, cavities, ducts and other sealed spaces within the structure of Bruntsfield House; and (iv) work on plant or services, insulation, membranes and coatings (other than painting);

**"Investor Return"**

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:

- (a) all actual Distributions that have been made or paid to the Investors;
- (b) the Proposed Distribution at the relevant Distribution Date and
- (c) all Projected Distributions

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;

**"Investors"**

means the Shareholders and the holders of the Subordinated Debt in each case for the time being;

**"IT"**

means information technology systems, hardware and software;

**"Joint Insurance Account"**

means the account numbered [REDACTED] in the joint names of Sub-hubco and the Authority with the Account Bank (as defined in the Funding Agreement);

**"Joint Insurance Account Agreement"**

means the agreement in the form set out in Schedule Part 25 (*Joint Insurance Account Agreement*);



**"Key Dates"**

means:

(a) a maximum of six (6) days in the period 15 January to 15 February in each Contract Year prior to the Final Completion Date; and

(b) a maximum of six (6) days in the period 25 February to 31 March in each Contract Year prior to the Final Completion Date,

provided in each case that the Authority has notified Sub-hubco of the relevant days at least three (3) months in advance;

**"Key Sub-Contractor"**

means the sub-contractors appointed to complete the following works packages: (i) architect; (ii) landscape architect; (iii) civil and structural engineer and (iv) mechanical & electrical engineer

**"Key Sub-Contractor Collateral Agreements"**

means the collateral agreements among the Authority, Sub-hubco, the Contractor and the Key Sub-Contractors in the form set out in Section 3 of Schedule Part 9 (*Collateral Agreements*);

**"Law"**

means:

(a) any applicable statute or proclamation or any delegated or subordinate legislation;

(b) any enforceable community right within the meaning of section 2(1) of the European Communities Act 1972;

(c) any applicable guidance, direction or determination with which the Authority and/or Sub-hubco is bound to comply to the extent that the same are published and publicly available or the existence or contents of them have been notified to 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 and/or the Sub-Lease, as the context may require;

**"LIBOR"**

means the British Bankers' Association Interest Settlement Rate for Sterling and assuming a period of six months displayed on the relevant page of the Reuters screen save that if the agreed page is replaced or the service ceases to be available, the Authority may specify another page or service displaying the appropriate rate after consultation with Sub-hubco, both parties being obliged to act reasonably;

**"Liquid Market"**

has the meaning given in Section 6 (*Definitions*) of Schedule Part 17 (*Compensation on Termination*);

**"Loan Agreement"**

means the loan agreement dated on or around the date of this

	Agreement between Sub-hubco and the Senior Funder;
<b>"Longstop Date"</b>	has the meaning given to it in Clause 40.1.2 ( <i>Longstop</i> );
<b>"Low Value Change"</b>	has the meaning given in Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Lump Sum Milestones"</b>	means the date or event set out in column 4 of the Lump Sum Schedule;
<b>"Lump Sum Payments"</b>	means the amounts (exclusive of VAT) shown in column 2 of the Lump Sum Schedule;
<b>"Lump Sum Payment Dates"</b>	means the dates set out in column 3 of the Lump Sum Schedule;
<b>"Lump Sum Rental Payments"</b>	means the costs set out in column 3 of the table labelled TU Rental Payment Profile and set out in Section 1 of Schedule Part 28 ( <i>Lump Sum Payments</i> );
<b>"Lump Sum Rental Payment Dates"</b>	means the date on which each Lump Sum Rental Payment is payable as set out in column 2 of the table labelled TU Rental Payment Profile and set out in Section 1 of Schedule Part 28 ( <i>Lump Sum Payments</i> );
<b>"Lump Sum Schedule"</b>	means the table set out in Section 3 of Schedule Part 28 ( <i>Lump Sum Payments</i> );
<b>"Lump Sum Works"</b>	means the works, forming part of the Works, set out in Column 1 of the Lump Sum Schedule;
<b>"Maintenance Works"</b>	means any works for maintenance or repair of the Facilities that are necessary to ensure that the Facilities are maintained in accordance with Service Level Specification and Method Statements and that the Facilities comply with the Authority's Construction Requirements and Sub-hubco's Proposals (including, without limitation, the renewal or replacement of any Plant or equipment) throughout the Project Term;
<b>"Malicious Damage Report"</b>	has the meaning given in Clause 49A.2.1;
<b>"Medium Value Change"</b>	has the meaning given in Schedule Part 16 ( <i>Change Protocol</i> );
<b>"Method Statements"</b>	means the method of providing a Service as set out or identified in Section 2 ( <i>Method Statements</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 Authority in accordance with the relevant provisions in Section 1 ( <i>Service Level Specification</i> ) of Schedule Part 12 ( <i>Service Requirements</i> );
<b>"Off-Site Works Areas"</b>	means: (i) the Compound Site; and (ii) the Boundary Wall;
<b>"Operational Functionality"</b>	means the following matters:-

(a) points of access to and within the educational establishment and departments in each relevant building forming part of the Facilities;

(b) the relationship between the buildings forming the Facilities; and

(c) adjacencies between the educational establishment and departments and rooms and, where relevant, between departments within the Facilities,

but only in so far as the above relate to or affect the provision of educational services ;

**"Operational Insurances"** means the insurances required by Clause 53.2 and "Operational Insurance" means any one of such insurances;

**"Operational Term"** means in respect of a Phase the period from the Phase Actual Completion Date until the end of the Project 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 programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the commissioning activities of the parties set out in outline in Schedule Part 10 (*Outline Commissioning Programme*);

**"Participant"** has the meaning given in the Territory Partnering Agreement;

**"Payment Commencement Date 1"** means the date on which the first Phase Actual Completion Date occurs;

**"Payment Commencement Date 2"** means date on which the second Phase Actual Completion Date occurs;

**"Payment Commencement Date 3"** means the date on which the third Phase Actual Completion Date occurs;

**"Payment Commencement Date 4"** means the date on which the fourth Phase Actual Completion Date occurs;

**"Payment Mechanism"** means Schedule Part 14 (*Payment Mechanism*);

**"Performance Failure"** has the meaning given in Section 1 of Schedule Part 14 (*Payment Mechanism*);

**"Performance Guarantees"** means the guarantees to Sub-hubco in respect of the Construction Contract and the Service Contracts which, as at the date of this Agreement are in the Agreed Form;

**"Permitted Borrowing"** means without double-counting, any:

(a) advance to Sub-hubco under the Senior Funding Agreements, provided that such advance is not made

under any Committed Standby Facility;

- (b) Additional Permitted Borrowing;
- (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
- (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,

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;

**"Phase"** means, as the context may require, Phase 1, Phase 2, the Bruntsfield House 2014 Phase, the Bruntsfield House 2015 Phase and/or the Post Completion Phase as described in the Authority's Construction Requirements and "Phases" shall be construed accordingly;

**"Phase 1"** means Phase 1 as described in the Authority's Construction Requirements;

**"Phase 1 Actual Completion Date"** means the later of:

- (a) the date specified in 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;

**"Phase 1 Completion Date"** means (subject to Clause 29 (*Delay Events*)) 3 April 2015 or such other date as the parties may agree;

**"Phase 1 Plan"** means the plan comprising Plan C of Section 4 of Schedule Part 5 (*Land Matters*);

**"Phase 1 Site"** means the areas shaded brown on the Phase 1 Plan but excluding the Sub-Station;

**"Phase 2"** means Phase 2 as described in the Authority's Construction Requirements;

**"Phase 2 Actual Completion Date"** means the later of:

- (a) the date specified in the Certificate of Practical Completion issued by the Independent Tester in respect of Phase 2 pursuant to Clause 17.12; and
- (b) subject to Clause 14.5, the Phase 2 Completion Date;

<b>"Phase 2 Completion Date"</b>	means (subject to Clause 29 ( <i>Delay Events</i> )) 15 July 2016 or such other date as the Parties may agree;
<b>"Phase 2 Plan"</b>	means the plan comprising Plan D of Section 4 of Schedule Part 5 ( <i>Land Matters</i> );
<b>"Phase 2 Site"</b>	means the area shaded brown on the Phase 2 Plan;
<b>"Phase Actual Completion Date"</b>	means, as the context may require, the Phase 1 Actual Completion Date and/or the Phase 2 Actual Completion Date and/or the Bruntsfield House 2014 Phase Actual Completion Date and/or the Bruntsfield House 2015 Phase Actual Completion Date and/or the Post Completion Phase Actual Completion Date;
<b>"Phase Completion Date"</b>	means, as the context may require, the Phase 1 Completion Date and/or the Phase 2 Completion Date and/or the Bruntsfield House 2014 Completion Date and/or the Bruntsfield House 2015 Completion Date and/or the Post Completion Phase 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 Approval"</b>	means detailed planning consents for the Project contained in Section 1 of Schedule Part 6 ( <i>Construction Matters</i> );
<b>"Planning Challenge"</b>	<p>means, in respect of the planning permission with reference 13/04129/FUL, the occurrence of either of the following within three months of the date of the grant of the said planning permission:</p> <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> <p>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;</p>
<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 Facilities (including without limitation for any Authority Change and the Planning Approval);
<b>"Plant"</b>	means the infrastructure systems, building systems, fixed and immovable equipment systems, installed as part of the Works

	or pursuant to an Authority Change as replaced from time to time;
<b>"Post Completion Commissioning"</b>	means, as appropriate, Sub-hubco's Post Completion Commissioning and/or the Authority's Post Completion Commissioning;
<b>"Post Completion Phase"</b>	means Post Completion Phase as described in the Authority's Construction Requirements;
<b>"Post Completion Phase Actual Completion Date"</b>	means the later of  (a) the date specified in the Certificate of Practical Completion issued by the Independent Tester in respect of the Post Completion Phase pursuant to Clause 17.2; and  (b) subject to Clause 14.5, the Post Completion Phase Completion Date;
<b>"Post Completion Phase Completion Date"</b>	means (subject to Clause 29 ( <i>Delay Events</i> )) 12 August 2016 or such other date as the parties may agree;
<b>"Post Completion Phase Plan"</b>	means the plan comprising Plan E of Section 4 of Schedule Part 5 ( <i>Land Matters</i> );
<b>"Post Completion Phase Site"</b>	means the area shaded brown on the Post Completion Phase Plan;
<b>"Primary &amp; Nursery Plan"</b>	means the plan comprising Plan N of Section 4 of Schedule Part 5 ( <i>Land Matters</i> );
<b>"Primary &amp; Nursery Site"</b>	means the area outlined by a broken blue line on the Primary & Nursery Plan;
<b>"Pounds Sterling"</b>	means the currency issued by the Bank of England from time to time;
<b>"Proceeds Account"</b>	means the account opened or to be opened by Sub-hubco with [REDACTED] called the "Proceeds Account" with account number [REDACTED] and sort code [REDACTED] or any successor account;
<b>"Programme"</b>	means the programme set out in Schedule Part 7 ( <i>The Programme</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>"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 in Recital A
<b>"Project Data"</b>	means:  (a) all Design Data;

- (b) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the Project Operations; and
- (c) any other materials, documents and or data acquired, brought into existence or used in relation to the Project Operations or this Agreement;

**"Project Documents"**

means the Ancillary Documents and the Funding Agreements;

**"Project Operations"**

means the carrying out of the Works, the carrying out of Sub-hubco's Pre-Completion Commissioning and Sub-hubco's Post-Completion Commissioning, the management and provision of the Services and the performance of all other obligations of Sub-hubco under this Agreement from time to time;

**"Project Term"**

means the period commencing at midnight on the date of this Agreement and ending on the earlier of the Expiry Date and the Termination Date;

**"Projected Distribution"**

means sums that are shown in the Financial Model as being paid to the Investors as Distributions at dates after the Relevant Distribution Date;

**"Proposed Distribution"**

means the aggregate amount of all Distributions that Sub-hubco proposes to make at the Relevant Distribution Date;

**"Qualifying Change"**

means (unless expressly stated otherwise):

- (a) a Low Value Change in respect of which the parties have agreed the method of implementation; or
- (b) a Medium Value Change in respect of which the Authority has issued a confirmation notice pursuant to paragraph 7.1.1 of Section 3 (*Medium Value Changes*) of Schedule Part 16 (*Change Protocol*); or
- (c) a High Value Change which has received Stage 2 Approval pursuant to paragraph 8.2.1 of Section 4 (*High Value Changes*) of Schedule Part 16 (*Change Protocol*),

in each case provided that any necessary changes required to be made to any Project Document and/or Ancillary Document pursuant to Schedule Part 16 (*Change Protocol*) have been given effect to and become unconditional;

**"Qualifying Distribution"**

has the meaning given in Clause 36.4;

**"Quality Plans"**

means the Design Quality Plan and Construction Quality Plan, prepared in accordance with Section 8 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*), and the Services Quality Plan, prepared in accordance with Section 3 (*Service Quality Plan*) of Schedule Part 12 (*Service Requirements*), as required to be implemented by Sub-hubco in accordance with Clause 20 (*Quality Assurance*);

**"Rectification"**

has the meaning given in Schedule Part 14 (*Payment Mechanism*);

<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>"Refinancing Gain"</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 matter referred to in Section 2 ( <i>Reserved Rights</i> ) 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 education services of a similar nature to those provided or contemplated by the 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 Termination</i> );
<b>"Room Data Sheets"</b>	has the meaning given in Section 6 ( <i>Room Data Sheets</i> ) of Schedule Part 6 ( <i>Construction Matters</i> );
<b>"School Days"</b>	Monday to Friday during the Academic Year
<b>"School Transfer Plan"</b>	means the plan comprising Plan M of Section 4 of Schedule Part 5 ( <i>Land Matters</i> );
<b>"Scottish Futures Trust"</b>	means Scottish Futures Trust Limited (Company Number SC348382), having its registered office at 1 <sup>st</sup> Floor, 11-15 Thistle Street, Edinburgh EH2 1DT;
<b>"Schedule of Programmed Maintenance"</b>	means the programme referred to in Clause 23.1 to be submitted to the Authority's Representative 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>	means Aviva Public Private Finance Limited (company number 02334210) having its registered office at 2 Rougier Street, York, YO90 1UU;
<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,</li> </ul>

without breaching the Senior Funding Agreements;

- "Senior Funders"** means Aviva Public Private Finance Limited (company number 02334210) having its registered office at 2 Rougier Street, York, YO90 1UU;
- "Senior Funding Agreements"** means the Direct Agreements, the Security Documents, the Account Bank Agreement, the Intercreditor Deed, the Joint Insurance Account Agreement, the Equity Letter of Credit and any other Acceptable Letter of Credit (all as defined in the Loan Agreement) and the Loan Agreement as at the date of this Agreement and as amended as permitted under Clause 4 (*Project Documents*);
- "Service Contracts"** means the contracts 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 Services (as amended or replaced from time to time in accordance with this Agreement);
- "Service Event"** has the meaning given in Schedule Part 14 (*Payment Mechanism*);
- "Service Level Specification"** means the requirements of the Authority set out in Section 1 (*Service Level Specification*) of Schedule Part 12 (*Service Requirements*) as amended from time to time in accordance with Clause 33 (*Change Protocol*);
- "Service Provider"** means Galliford Try Construction Limited (trading as Galliford Try Facilities Management) (registered number 02472080) whose registered office is Cowley Business Park, Cowley, Uxbridge, UB8 2AL 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);
- "Service Providers' Collateral Agreements"** means the collateral agreements among the Authority, Sub-hubco and each Service Provider in the form set out in Section 2 of Schedule Part 9 (*Collateral Agreements*);
- "Services"** means the services to be provided, managed and/or procured by Sub-hubco for the Authority in accordance with Schedule Part 12 (*Service Requirements*) as subsequently amended or adjusted in accordance with this Agreement;
- "Services Quality Plan"** means the document set out in Section 3 (*Services Quality Plan*) of Schedule Part 12 (*Service Requirements*);
- "Shareholder(s)"** means any person(s) who from time to time, as permitted by this Agreement, holds share capital in Sub-hubco or Holdco which persons are, as at the date of this Agreement, listed as such in Schedule Part 21 (*Sub-hubco Information*);
- "Shareholders Agreements"** 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 or Holdco;
- "Site"** means the land made available to Sub-hubco for the Project shown outlined by a broken red line on the Site Plan under

	exception of the Sub-Station;
<b>"Site Conditions"</b>	means the condition of the Site and the Compound Site including (but not limited to) climatic, hydrological, hydrogeological, ecological, environmental, geotechnical and archaeological conditions;
<b>"Site Plan"</b>	means the plan comprising Plan A of Section 4 of Schedule Part 5 ( <i>Land Matters</i> );
<b>"Snagging Matters"</b>	means minor items of outstanding work (including in relation to landscaping) which would not materially impair the Authority's use and enjoyment of the Facilities or the carrying out by the Authority or a Community Services Provider of the Community Services or the performance of the 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 Works or the Services in premises similar to the 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 Works or the Services in premises similar to the 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 Post-Completion Commissioning"</b>	means Sub-hubco's commissioning activities carried out in accordance with Clause 18.1;
<b>"Sub-hubco's Pre-Completion Commissioning"</b>	means Sub-hubco's commissioning activities carried out in accordance with Clause 17 ( <i>Pre Completion Commissioning and Completion</i> );
<b>"Sub-hubco's Proposals"</b>	means the document at Section 4 ( <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>"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-Lease"</b>	means, in respect of the Site, the Sub-Lease to the entered into between Sub-hubco and the Authority in the Agreed Form, as more particularly described therein, with such variations and/or additions as may be agreed by Authority and Sub-hubco 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>"Subordinated Funding Agreements"</b>	has the meaning given to it 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>"Sub-Station"</b>	means the area outlined in red on the Sub-Station Plan within the Energy Centre and which extends to (i) the paint and other decorative finishes of the interior surface of the walls of the Energy Centre, but not any other part of such walls; (ii) the door and door frame in the wall of the Energy Centre; (iii) all ventilators serving the substation and in the Energy Centre; and (iv) the floor and ceiling finishes of the substation, but nothing below such floor finish or above such ceiling finish;
<b>"Sub-Station Plan"</b>	means the plan comprising Plan G of Section 4 of Schedule Part 5 ( <i>Land Matters</i> );
<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>"Suitable Vacation Period"</b>	means any school holiday period as published by the Authority which is of, or leaves, a sufficient period (of at least four (4) Business Days) to allow the parties to carry out and complete their respective Decanting and Decommissioning activities pursuant to Clause 18.8;
<b>"Temporary Units"</b>	means the temporary units (including the unit installed as part of the Dining Accommodation Works) supplied by Sub-hubco for use by the Authority on the Site;
<b>"Temporary Unit Rental Costs"</b>	means the substantiated rental cost associated with the Temporary Units for the period from the Phase 1 Actual Completion Date until the Appropriate Access Date
<b>"Term"</b>	means the terms published by the Authority for each Academic Year;
<b>"Termination Date"</b>	means the date on which termination of this Agreement takes effect in accordance with its terms;
<b>"Territory Partnering Agreement"</b>	means the agreement entered into between hubco and the Authority and other participants dated 30 July and 2 August

2010;

- "Thirlestane Pitch"** means the area of ground outlined in red on the Thirlestane Pitch Plan;
- "Thirlestane Pitch Plan"** means the plan forming Plan F of Section 4 of Schedule Part 5 (*Land Matters*);
- "Title Conditions"** means title conditions set out in Section 1 of Schedule Part 5 (*Land Matters*);
- "TPL Risk"** means a risk which is required to be insured under the third party liability insurance policy;
- "Transfer Regulations"** means the Transfer of Undertaking (Protection of Employment) Regulations 2006 (SI No. 246);
- "Transferring Staff"** has the meaning given in Clause 25.2 (*No Employee Transfer*);
- "Unavoidable Fixed Costs"** means the fixed costs incurred by Sub-hubco which first fall due for payment by Sub-hubco during the period of indemnity but excluding:
- (a) costs which could have reasonably been mitigated or avoided by Sub-hubco;
  - (b) payments to Sub-hubco's Associated Companies;
  - (c) payments which are not entirely at arm's length;
  - (d) payments to holders of equity in Sub-hubco, providers of Subordinated Debt and any other financing costs other than Senior Debt Service Costs
  - (e) indirect losses suffered or allegedly suffered by any person;
  - (f) fines, penalties or damages for unlawful acts, breaches of contract or other legal obligations;
  - (g) payments 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;
  - (h) payments to the extent that Sub-hubco 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;
    - iii. payments representing any profits of the Project (to the extent not already excluded in (e) above);
- "Uninsurable"** 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 Facilities;
<b>"Utility" or "Utilities"</b>	has the meaning given in the 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>"Works"</b>	means the design (including the preparation of all Design Data), construction, testing, commissioning and completion of the Facilities (including any temporary works) and the installation of Equipment to be performed by Sub-hubco in accordance with this Agreement (as varied, amended or supplemented from time to time in accordance with this Agreement);

## SECTION 2

### INTERPRETATION

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

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 the Authority) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the relevant functions and relevant responsibilities of such public organisation.
10. Without prejudice to Clause 57.1, references to other persons (other than the Authority and Sub-hubco) shall include their successors and assignees.
11. References to a deliberate act or omission of the Authority or any Authority Party shall be construed having regard to the interactive nature of the activities of the Authority and of 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 April 2013 ("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:

$$\text{Amount or sum in 1 April 2013 prices} \quad \frac{RPI_d}{RPI_0}$$

Where  $RPI_d$  is the value of the Retail Prices Index published or determined with respect to the month of February 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 1 April 2013.

17. Save for any document (whether original or certified copy) which is being provided by either party at Financial Close, 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 either initialled by each of them or on their behalf.
18. The operation of the Housing Grants, Construction and Regeneration Act 1996 upon any Project Document shall not affect the rights or obligations of the parties under this Agreement.
19. Words in parenthesis and italics appearing after a Clause reference or a reference to a Schedule Part are inserted for ease of reference only. If there is any discrepancy between the Clause reference and the words appearing in parenthesis and italics after the Clause reference, the Clause reference shall prevail.
20. Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days after a stipulated date or event, or "no later than" or "by" a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event, the latest time for performance shall be 5pm on the last Business Day for performance of the obligations concerned.
21. Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days before a stipulated date or event or "no later than" or "by" a stipulated date or event which is a prescribed number of Business Days before a stipulated date or event, the latest time for performance shall be 5pm on the last Business Day for performance of the obligations concerned.



## SCHEDULE PART 2

### COMPLETION DOCUMENTS

#### SECTION 1

#### DOCUMENTS TO BE DELIVERED BY 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. The Consents and other authorisations, licences, permits, and approvals listed below:  

11/02585/LBC	11/02588/CON	11/03571/FUL	11/03002/FUL	11/03002/LBC
11/02585/FUL	11/02586/FUL	11/02586/LBC	11/02586/VARY	13/04129/LBC
13/04129/FUL				
2. Not Used
3. 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.
4. The Construction Contract, the Services Contract and the Performance Guarantees, executed by the parties to such agreements.
5. An original of the Funders' Direct Agreement, the Independent Tester Contract, the Joint Insurance Account Agreement, the Collateral Agreements and the brokers letters of undertaking relating to the Insurances referred to in paragraph 11 below in the Agreed Form, executed by the parties to such agreements (other than the Authority).
6. Extracts from the minutes of the meeting of the board of directors (certified as true and accurate by the Secretary of the relevant company) of each of Sub-hubco, each Shareholder, hubco and each of the other parties to the documents listed in paragraph 4 of this Section 1 (*Documents to be delivered by Sub-hubco*) of Schedule Part 2 (*Completion Documents*), at which resolutions were passed approving the execution, delivery and performance of each relevant document to which such person is expressed to be a party and in each case authorising a named person or persons to execute and deliver each such document and any other documents to be delivered by it pursuant to it. For the avoidance of doubt, this requirement shall not extend to the Senior Funders.
7. A certificate by a Director of each of the companies referred to in paragraph 6 above setting out the names and specimen signatures of the person or persons named in the relevant certified extract.
8. Evidence of the share subscriptions required under the Shareholders Agreements and other shareholder funding commitments having been made by the Shareholders in Sub-hubco and Holdco.
9. Sub-hubco's and Holdco's Certificate of Incorporation and of any Certificate of Incorporation on Change of Name.
10. The Articles of Association of Sub-hubco and Holdco.
11. 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

12. Two computer disk copies of the Financial Model.
13. Evidence that an election has been made for Sub-hubco to act as "client" for the Project for the purposes of the CDM Regulations.
14. Evidence that the Joint Insurance Account has been opened.
15. Copies of the executed appointment agreements in relation to each of the Key Sub-contractors.
16. Subject to Clause 2.1.2, copies of the Design Sub-Contractor Documentation.
17. Evidence that each of the Key Sub-Contractors have professional indemnity insurance in a sum not less than the amount set out against each Key Sub-Contractor in the following table

<b>Key Sub-Contractor</b>	<b>Level of PI Insurance Required</b>
Architect	£10m (on an each and every claim basis)
Landscape Architect	£1m (on an each and every claim basis)
Civil & Structural Engineer	£10m (on an each and every claim basis)
Mechanical & Electrical Engineer	£10m (in the aggregate)

18. Subject to Clause 2.1.2 evidence that each of the Design Sub-contractors have professional indemnity insurance in a sum not less than the amount set out against each Design Sub-Contractor in the following table

<b>Design Sub-Contractor</b>	<b>Level of PI Insurance Required</b>
Design Sub-Contractor - Curtain Walling	£5m (on an each and every claim basis)
Design Sub-Contractor - Precast Stairs	£1m (on an each and every claim basis)
Design Sub-Contractor - Structural Steel	£5m (on an each and every claim basis)
Design Sub-Contractor - Sprinkler System	£5m (on an each and every claim basis)
Design Sub-Contractor - Lifts	£1m (on an each and every claim basis)
Design Sub-Contractor - Swimming Pool	£2m (on an each and every claim basis)

19. An original duly executed copy of this Agreement.
20. The heritable creditors consent in relation to the grant of the Sub-Lease pursuant to Clause 9.19.2.

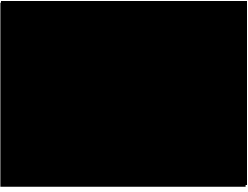
## **SECTION 2**

### **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 Joint Insurance Account Agreement and this Agreement, duly executed by the Authority.
2. A certified true copy of (i) the Report to Council dated 15 March 2012; (ii) Minutes of Council Meeting of 15 March 2012; (iii) Report to the Treasury and Resource Committee dated 28 November 2013; (iv) City of Edinburgh Council Scheme of Delegation to Officers applicable from 13 December 2012; and (v) Letter of Delegated Authority from Gillian Tee to Billy McIntyre dated 26 March 2013.
3. A certified true copy of the Letter of Funding issued by the Scottish Futures Trust to the Authority on or around the date hereof in relation to the Project.

**SCHEDULE PART 3**  
**KEY WORKS PERSONNEL**



**SCHEDULE PART 4**  
**FUNDERS' DIRECT AGREEMENT**

**[REDACTED]**

**SCHEDULE PART 5**  
**LAND MATTERS**  
**SECTION 1**  
**TITLE CONDITIONS**

**(A) In relation to the Sub-Station:-**

- (i) No alteration, installation or addition to the Site, the Off-Site Works Areas and/or the Energy Centre is permitted and nor can anything be done in or upon the Site, the Off-Site Works Areas and/or the Energy Centre which (i) may interfere with the Sub-Station or the electricity lines, telephone signalling and fibre optic cables and ancillary equipment associated works and other conducting media with the conduits or pipes for containing the same ("**Electricity Lines**") or their function or (ii) in any way would render the tenant of the Sub-Station (referred to in this Schedule Part 5 as "SP") in breach of any law, industry agreement or regulation for the time being in force including those related to the SP's statutory obligations;**
- (ii) It is not permitted to erect any building or other erection or plant, grow cultivate or permit to grow any trees, shrubs, bushes or other plants or vegetation (a) over the cable route or within a lateral distance of three metres measuring from the centre line thereof or (b) which are likely to adversely affect the Electricity Lines or SP's access thereto without the prior written consent of SP, which consent shall not be unreasonably withheld or delayed**
- (iii) It is not permitted to alter the existing ground levels along the cable route or obstruct in any way SP's access to the Sub-Station and/or the Electricity Lines without SP's prior written consent which consent shall not be unreasonably withheld or delayed;**
- (iv) It is not permitted to obstruct or diminish the full free and uninterrupted access and flow of air to and from the Sub-Station and the ventilators serving the Sub-Station;**
- (v) the Energy Centre must be kept secure and locked with such locking device as shall be agreed between the Authority and SP;**

**SECTION 2**  
**RESERVED RIGHTS**

1. The following rights are reserved in favour of the proprietors of the Break Off Property:-
  - (i) a servitude right of access from Whitehouse Loan over the strip of ground shown blue on the Break Off Plan 40 feet or thereby in width extending along the south eastern boundary of the area of ground shown coloured pink on the Break Off Plan for a distance of 135 feet or thereby (the "Strip"); and
  - (ii) a servitude right to lay and maintain in the Strip electric cables drains and other services required for the purpose of the electricity sub-station erected on the Break Off Property.
2. There is reserved in favour of the Authority, a right of access to the Site and the Off-Site Works Areas (i) to well and substantially make good any defects, decay or want of repair which affect SP's use of the Sub-Station or the electricity lines, telephone signalling and fibre optic cables and ancillary equipment associated works and other conducting media with the conduits or pipes for containing the same; and (ii) to keep the property in good and substantial condition and repair.
3. The following rights are reserved in favour of SP:-
  - (i) an exclusive right of occupation of the Sub-Station;
  - (ii) an unrestricted right of access to the Sub-Station over the Site and the Off-Site Works Areas, with or without vehicles of any description, machinery or apparatus along the routes shown coloured pink and blue on the Sub-Station Plan for all purposes connected with the use and enjoyment of the Sub-Station;
  - (iii) an unrestricted right to lay, install and keep installed, maintain, renew, alter, adjust, remove, repair, inspect, replace and/or enlarge and use the Electricity Lines along the routes shown coloured yellow and blue on the Sub-Station Plan and also through and under the walls, ceiling and/or floors of the Sub-Station, the Energy Centre, the Site or the Off-Site Works Areas and also to open up the respective surfaces, floor and walls thereof as far as may be necessary from time to time in exercising their rights in relation to the Electricity Lines and making good to the reasonable satisfaction of the Authority any physical damage caused to the Energy Centre and/or the Site and/or the Off-Site Works Areas as soon as reasonably practicable;
  - (iv) an unrestricted right of access to as much of the Site, the Off-Site Works Areas and/or the Energy Centre as is necessary for the purpose of installing, inspecting, maintaining and repairing and renewing the Sub-Station and the Electricity Lines and to open and close the Sub-Station doors and display the safety signage of SP;
  - (v) a right to fix or attach or lay and install, keep installed, maintain, renew, adjust, remove, repair, inspect and use machinery and apparatus to, in or on the walls and floor of the Sub-Station, the Off-Site Works Areas and the Site;
  - (vi) if the Authority defaults on its obligation to SP set out at Paragraph 2 above, SP and its contractors, agents and employees or any person authorised by it or them can enter and be upon the Site, the Off-Site Works Areas and/or the Energy Centre to execute such repair works as are necessary;
  - (vii) SP are entitled to lop, cut or remove the whole or any part of any trees, shrubs, bushes and other plants or vegetation causing or likely to cause interference to the Electricity Lines, the Sub-Station, the site of the Sub-Station and its enclosures;
4. There is reserved in favour of the Authority and all Authority Parties a right of access over the Site and the Off-Site Works Areas for the purposes of all necessary inspections and maintenance of

both a reactive and routine nature, provided the prior written approval of Sub-hubco has been obtained, which approval will not be unreasonably withheld or delayed.

5. During the period referred to in clause 9.3.2, the Authority shall have a non-exclusive right of access to the Phase 2 Site to carry out its obligations pursuant to Clause 18.8 in accordance with the Programme.



## SECTION 3

### ANCILLARY RIGHTS

- (a) From the Commencement Date to the Final Completion Date, the rights referred to in Clause 17 (Pre-Completion Commissioning and Completion);
- (b) From the Commencement Date to the Final Completion Date, but only to the extent permitted by Sub-hubco's occupation of the Site and the Off-Site Works Areas pursuant to Clause 9.3, rights to connect into all utilities and services located in, on under and serving the Site, the Off-Site Works Areas and the Facilities and to inspect, lay, use, maintain, repair and renew and, if required remove all such utilities and services, but that only to the extent that the Authority can competently grant the same and subject to hubco's obligations to obtain all necessary Consents and to comply with Law contained in this Agreement;
- (c) During the period referred to in Clause 9.3.1, Sub-hubco shall also be entitled to the following rights:
  - (i) an exclusive right of access to the area shown blue on the Phase 1 Plan from 23 February 2015 to 03 April 2015 (or such other dates determined in accordance with Clause 29 (*Delay Events*) or as agreed between the parties, each acting reasonably) but that only outwith the Core Times;
  - (ii) a non-exclusive right of access to the area shown shaded peach on the Phase 1 Plan; and
  - (iii) a non-exclusive right of access to the area shown shaded green on the Phase 1 Plan from 11 October 2014 to 20 October 2014 (or such other dates determined in accordance with Clause 29 (*Delay Events*) or as agreed between the parties, each acting reasonably) outwith: (i) the Core Times; and (ii) the nesting season;
- (d) During the period referred to in Clause 9.3.2, Sub-hubco shall be entitled to a non-exclusive right of access to the area shown shaded peach on the Phase 2 Plan to carry out its obligations pursuant to Clause 18.8 in accordance with the Programme;
- (e) During the period referred to in Clause 9.3.3, Sub-hubco shall be entitled to the following rights:-
  - (i) a non-exclusive right of access to the ground floor of the building shown shaded blue on the Bruntsfield House 2014 Plan; and
  - (ii) a non-exclusive right of access to the area shown shaded peach on the Bruntsfield House 2014 Plan;
- (f) During the period referred to in Clause 9.3.4, Sub-hubco shall be entitled to a non-exclusive right of access to the upper two floors of the building coloured blue on the Bruntsfield House 2015 Plan;
- (g) Following the Phase 2 Actual Completion Date, Sub-hubco shall be entitled to a non-exclusive right of access to: (i) the area shown shaded in peach on the School Transfer Plan; and (ii) the Darroch Site; to carry out its obligations pursuant to Clause 18.8 in accordance with the Programme;
- (h) During the period referred to at Paragraph (g) above, Sub-hubco shall be entitled to an exclusive right of access to the areas shown shaded in brown on the School Transfer Plan;
- (i) During the period referred to at Clause 9.3.5, Sub-hubco shall have:-
  - (i) a non-exclusive right of access to the areas shown shaded in peach on the Post Completion Phase Plan; and
  - (ii) an exclusive right of access to the areas shown shaded blue on the Post Completion Phase Plan outwith the Core Times.
- (j) From the Commencement Date to the Final Completion Date, a right of access to the Boundary Wall in accordance with the Programme (provided that such access shall only be granted from the side of the Boundary Wall bordering the Site and the Primary & Nursery Site).

## **SECTION 4**

### **PLANS**

Plan A - Site Plan

Plan B - Existing Building Plan

Plan C - Phase 1 Plan

Plan D - Phase 2 Plan

Plan E - Post Completion Phase Plan

Plan F - Thirlestane Pitch Plan

Plan G - Sub-Station Plan

Plan H - Bruntsfield House 2014 Plan

Plan J - Bruntsfield House 2015 Plan

Plan K - Break Off Property Plan

Plan L - Darroch Plan

Plan M - School Transfer Plan

Plan N – Primary & Nursery Plan

**SCHEDULE PART 6**  
**CONSTRUCTION MATTERS**  
**SECTION 1**  
**PLANNING/CONSENTS**  
**PART 1 - Consents**

## **PART 2 - Planning Matrix**

**[REDACTED]**

## 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 five (5) Business Days of the date of execution of this Agreement, Sub-hubco shall make and serve on the 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 Works for all the purposes of the CDM Regulations. Notwithstanding the election made by Sub-hubco in relation to CDM Regulation 8, the 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 Works for all the purposes of the CDM Regulations. The Authority will endorse its consent, in writing, to such election on the said election and return it to Sub-hubco within five (5) 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 Works and, where necessary, the provision of the 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 Authority's Representative:
  - 4.1 in a substantially complete form on the relevant Phase Actual Completion Date; and
  - 4.2 in final form within eight (8) weeks 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 Works and the Services and electronic or paper copies of every amendment or update made to such file during the Project Term.

### SECTION 3

#### AUTHORITY'S CONSTRUCTION REQUIREMENTS

The Authority's Construction Requirements are set out in the Agreed Form document labelled "Authority's Construction Requirements" including a disc of the Stage E Report referred to in the Authority's Construction Requirements, which shall have effect as if expressly set out in this Section 3 of Schedule Part 6 (*Construction Matters*), subject to the following qualifications:-

1. "Authority Requirements", "Authorities Requirements" and "Authority's Requirements" shall all mean the **"Authority's Construction Requirements"**;
2. "The City of Edinburgh Council", the "Council" and "CEC" shall all mean the **"Authority"**;
3. "Contractor" shall mean **"Sub-hubco"**; and
4. "Contractor's Proposals" shall mean **"Sub-hubco's Proposals"**

## **SECTION 4**

### **SUB-HUBCO'S PROPOSALS**

Sub-hubco's Proposals are set out in the Agreed Form document labelled "Sub-hubco's Proposals" which shall have effect as if expressly set out in this Section 4 of Schedule Part 6 (*Construction Matters*).

**SECTION 5**  
**REVIEWABLE DESIGN DATA**

**[REDACTED]**



**SECTION 6**  
**ROOM DATA SHEETS**

The Room Data Sheets are set out in the Agreed Form document named "Room Data Sheets" which shall have effect as if set out in this Section 6 of this Schedule Part 6 (*Construction Matters*).

**SECTION 7**

**NOT USED**

**SECTION 8**  
**QUALITY PLANS (DESIGN AND CONSTRUCTION)**

**SCHEDULE PART 7**  
**THE PROGRAMME**

**[REDACTED]**

**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 the Authority's Representative for review under this Schedule Part 8 (*Review Procedure*) shall be a matter for Sub-hubco to determine. Each submission under the 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 ten (10) Business Days of the date of receipt of a submission (or re-submission, as the case may be) of the Submitted Item to the Authority's Representative (or such other period as the parties may agree), the Authority's Representative shall return one 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 ten (10) Business Days (or within such other period as the parties may agree in writing) of the date of its submission to the Authority's Representative, then the Authority's Representative shall be deemed to have returned the Submitted Item to Sub-hubco endorsed "no comment" (and, in the case of Reviewable Design Data, endorsed "Level A - no comment"); and

1.3 If the Authority's Representative raises comments on any Submitted Item in accordance with paragraph 3 (*Grounds for Objection*) he shall state the ground upon which such comments are based and the evidence or other information necessary to substantiate that ground. To the extent that the Authority's Representative comments on a Submitted Item other than on the basis set out in this 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 ten (10) 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 the Authority's Representative to endorse and return such Submitted Item within the period specified in paragraph 1.2.2 shall be deemed to constitute an objection by the Authority's Representative to such Submitted Item. If the parties fail to agree the form and content of such Submitted Item, within ten (10) Business Days following the expiry of the period specified in paragraph 1.2.2, the matter shall be determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

## 2. FURTHER INFORMATION

Sub-hubco shall submit any further or other information, data and documents that the Authority's Representative reasonably requires in order to determine whether he has a basis for raising comments or making objections to any Submitted Item in accordance with this Schedule Part 8 (*Review Procedure*). If Sub-hubco does not submit any such information, data and documents, the Authority's Representative shall be entitled to:

- 2.1 comment on the Submitted Item on the basis of the information, data and documents which have been provided; or
- 2.2 object to the Submitted Item on the grounds that insufficient information, data and documents have been provided to enable the Authority's Representative to determine whether he has a legitimate basis for commenting or objecting in accordance with this Schedule Part 8 (*Review Procedure*).

## 3. GROUNDS OF OBJECTION

The expression "raise comments" in this paragraph shall be construed to mean "raise comments or make objections" unless the contrary appears from the context. The Authority's Representative may raise comments in relation to any Submitted Item on the grounds set out in paragraph 2 (*Further Information*) above or on the ground that the Submitted Item would (on the balance of probabilities) breach any Law but otherwise may raise comments in relation to a Submitted Item only as follows:

- 3.1 in relation to any Submitted Item if:
- 3.1.1 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 Authority under this Agreement or its ability to enforce any such right;
- 3.2 in relation to any Submitted Item submitted pursuant to Clause 4.1 (*Ancillary Documents*) if:
- 3.2.1 the Authority's ability to perform its obligations under this Agreement would be adversely affected by the proposed course of action;
- 3.2.2 the Authority's or a 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 Authority's liabilities or potential or contingent liabilities under this Agreement;

- 3.2.4 the proposed course of action would adversely affect any right of the Authority under this Agreement or its ability to enforce any such right; or
  - 3.2.5 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 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 is not in accordance with:
    - (a) the Authority's Construction Requirements; and/or
    - (b) 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 the 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 the 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 Sub-hubco's Proposals; or
    - (b) is inconsistent with the guidance contained in any current Local Authority or Government policies 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 Works submitted pursuant to Clause 12.8, on the grounds that, following the amendment and rectification proposed:
- 3.4.1 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 Facilities would not 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);
- 3.5 in relation to Finishes:
- 3.5.1 NOT USED; or

- 3.5.2 where the Submitted Item does not comply with the relevant provisions of the Authority's Construction Requirements and/or 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 the revised Programme would
- 3.6.1 not (on the balance of probabilities) enable the Works in respect of a Phase to be completed by the relevant Phase Completion Date; or
- 3.6.2 (on the balance of probabilities) cause disruption to the Authority on any of the Key Dates;
- 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 Design Quality Plan and the 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 Method Statements or any part of any 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 Services in accordance with the proposed revision or substitution would (on the balance of probabilities):
- (a) be materially different from the performance of the Services in accordance with the Method Statement prior to such proposed revision or substitution; or
- (b) be less likely to achieve compliance with the Service Level Specification; or
- (c) have an adverse effect on the provision by the Authority or any Community Services Provider of the relevant Community Services at, or on the safety of any users of, the 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 Services to the standard of performance in accordance with the Method Statement prior to such proposed revision or substitution; and
- 3.9 in relation to the submission of any Schedule of Programmed Maintenance pursuant to Clause 23.1, any revision to any Schedule of Programmed Maintenance pursuant to Clause 23.4 or any submission of Unprogrammed Maintenance Works pursuant to Clause 23.8, on the grounds that:
- 3.9.1 carrying out the Programmed Maintenance or the Unprogrammed Maintenance Works in the period or at the times suggested would (on the balance of



probabilities) interfere with the operations of the Authority and/or any Community Services Provider and such interference could be avoided or mitigated by Sub-hubco rescheduling the Programmed Maintenance or the Unprogrammed Maintenance Works; or

- 3.9.2 in relation to the Schedule of Programmed Maintenance the proposed hours for carrying out the 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 Programmed Maintenance or the Unprogrammed Maintenance Works would not be in accordance with the Service Level Specification; or
  - 3.9.4 the safety of users of the Facilities would (on the balance of probabilities) be adversely affected; or
  - 3.9.5 the period for carrying out the Programmed Maintenance or the 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 Handback Works, the Handback Programme and the Handback Amount pursuant to Schedule Part 18 (*Handback Procedure*), on the grounds that:
- 3.10.1 in the case of the Handback Works, Sub-hubco's proposals will not (on the balance of probabilities) ensure that the Handback Requirements are achieved by the Expiry Date;
  - 3.10.2 in the case of the Handback Programme, (i) performance of the Handback Works in accordance with the programme is not (on the balance of probabilities) capable of achieving satisfaction of the Handback Requirements by the Expiry Date; and/or (ii) carrying out the Handback Works in accordance with the proposed Handback Programme would (on the balance of probabilities) interfere with the operations of the Authority and/or any Community Services Provider and such interference could be avoided or mitigated by Sub-hubco rescheduling the Handback Works, provided always that Sub-hubco shall be afforded sufficient time to carry out the Handback Works by the Expiry Date; or
  - 3.10.3 in the case of the Handback Amount, it does not represent the cost of carrying out the Handback Works according to the Handback Programme and the provisions of Schedule Part 18 (*Handback Procedure*).

#### 4. EFFECT OF REVIEW

- 4.1 Any Submitted Item which is returned or deemed to have been returned by the Authority's Representative endorsed "no comment" (and in the case of Reviewable Design Data, endorsed "Level A - no comment") shall be complied with or implemented (as the case may be) by Sub-hubco.
- 4.2 In the case of any Submitted Item other than Reviewable Design Data, if the 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 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 the Authority's Representative returns the Submitted Item endorsed other than "Level A - no comment", Sub-hubco shall:

- 4.3.1 where the Authority's Representative has endorsed the Submitted Item "Level B - proceed subject to amendment as noted", either proceed to construct or proceed to the next level of design of the part of the Works to which the Submitted Item relates but take into account any amendments required by the Authority's Representative in his comments;
- 4.3.2 where the Authority's Representative has endorsed the Submitted Item "Level C - subject to amendment as noted" not act upon the Submitted Item, amend the Submitted Item in accordance with the Authority's Representative's comments and re-submit the same to the Authority's Representative in accordance with paragraph 4.4; and
- 4.3.3 where the Authority's Representative has endorsed the Submitted Item "Level D - rejected" not act upon the Submitted Item, amend the Submitted Item and re-submit the Submitted Item to the Authority's Representative in accordance with paragraph 4.4,

unless Sub-hubco disputes that any such comment or proposed amendment is on grounds permitted by this Agreement, in which case Sub-hubco or the 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 five (5) Business Days of receiving the comments of the 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 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 Authority that Sub-hubco has complied with such obligations.

## 5. DOCUMENTATION MANAGEMENT

- 5.1 Sub-hubco shall issue two (2) hard copies and one (1) electronic copy of all Submitted Items to the Authority and compile and maintain a register of the date and contents of the submission of all Submitted Items.
- 5.2 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 the 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 the Authority shall operate to exclude or limit Sub-hubco's obligations or liabilities under this Agreement (or the Authority's rights under this Agreement).

**6. CHANGES**

- 6.1 No approval or comment or any failure to give or make an approval or comment under this Schedule 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 the 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 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 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 Authority that it considers compliance with any comments of the Authority's Representative would amount to a Change shall constitute an irrevocable acceptance by Sub-hubco that any compliance with the Authority's comments shall be without cost to the Authority and without any extension of time.
- 6.3 No alteration or modification to the design, quality and quantity of the Works arising from the development of detailed design or from the co-ordination of the design shall be construed or regarded as a Change.

**7. DEEMED APPROVED RDD**

- 7.1 Without prejudice to Clause 12.1, the drawings listed in Volume 3 Part 2 and 2a of 4 of Sub-hubco's Proposals have been reviewed by the Authority and, subject to the items listed in the list of Reviewable Design Data contained in Section 5 (*Reviewable Design Data*) of Schedule Part 6 (*Construction Matters*), satisfy the Authority in respect of this Schedule Part 8 (*Review Procedure*) so far as can reasonably be determined given the level of detail comprised in them.

**APPENDIX 1**

**TABLE A**

Approved RDD Item (by category)	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 ( <i>Review Procedure</i> ) (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 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 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 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 Authority is satisfied that the design and other information contained in the relevant drawing satisfies the Operational Functionality.
Drawings - Room Layouts (including room elevations) & Reflected ceiling 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 room layout and/or reflected ceiling drawing means that Sub-hubco may proceed to construct in accordance with the Submitted Item and that the 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.
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 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 Facilities during the hours of 0800 to 1700 on School Days ("**Hours for Programmed Maintenance**")
2. Sub-hubco may, with the consent of the Authority (which consent shall not be unreasonably withheld) carry out Maintenance Works outside the Hours for Programmed Maintenance provided always that it shall take into account:
  - 2.1 the likely disturbance to the Authority and/or any Community Service Provider and/or their staff and users within the immediate area where the Maintenance Works are to be undertaken;
  - 2.2 the likely disturbance to adjacent areas, the Authority and/or any Community Service Provider and/or their staff and users in those adjacent areas that may be affected by the 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 Facilities during the hours of operation ("**Hours of Operation**") to carry out Programmed Maintenance.
4. Where Sub-hubco requires access to an area of the Facilities during the Hours of Operation, Sub-hubco will consult with and obtain the consent of the Contract Monitoring Team of the Children & Families Department of the Authority concerning dates, times and periods during which Programmed Maintenance is to be undertaken in those areas so as to minimise disruption to those areas.
5. The 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 COLLATERAL AGREEMENT**

**[REDACTED]**

**SECTION 2**

**SERVICE PROVIDER COLLATERAL AGREEMENT**

**[REDACTED]**



**SECTION 3**

**KEY SUB-CONTRACTOR COLLATERAL AGREEMENT**

**[REDACTED]**

**SCHEDULE PART 10**  
**OUTLINE COMMISSIONING PROGRAMME**

**[REDACTED]**

**APPENDIX A**  
**COMPLETION CRITERIA**

**APPENDIX B**

**DECANTING AND DECOMMISSIONING PROTOCOL**

## SCHEDULE PART 11

### EQUIPMENT

#### SECTION 1

##### 1A. Design and Installation Information

In respect of the Group 2 Equipment, the Group 3 Equipment and the Group 5 Equipment, listed in the Equipment Table, the Authority shall:

- 1A.1 in respect of those items where "Design Information required" is specified in columns E, F and/or G of the Equipment Installation Table, provide to Sub-hubco, by inclusion in the updated Room Data Sheets to be provided pursuant to Clause 16.2, key dimensions, service supplies and loads required to install structure partitions and services adjacent to and/or serving those items of Equipment by the date identified in column E of the Equipment Installation Table;
- 1A.2 in respect of those items where "Design Information required" is specified in columns E, F and/or G of the Equipment Installation Table, provide to Sub-hubco, by inclusion in the updated Room Data Sheets to be provided pursuant to Clause 16.2, dimensions, service supplies, commissioning information, fixing details and loads for those items of Equipment by a date not later than six weeks prior to the earliest date for such item identified in columns H, I and J of the Equipment Installation Table; and
- 1A.3 notify Sub-hubco of the precise locations within the relevant rooms and the nature of all wall, ceiling and/or floor fixings required by the date identified in column J of the Equipment Installation Table.

##### 1. Group 1 Equipment

- 1.1 Sub-hubco shall procure, install and commission the Group 1 Equipment, as listed in the Equipment Table, at the Facilities as part of the Works in accordance with the Authority's Construction Requirements, the Final Commissioning Programme and Sub-hubco's Proposals.
- 1.2 Sub-hubco shall maintain and replace the Group 1 Equipment in accordance with the Authority's Construction Requirements, the Service Level Specification and Sub-hubco's Proposals.

##### 2. Group 2 Equipment

###### 2.1 The Authority shall at its own cost:

- 2.1.1 procure and make available to Sub-hubco the Group 2 Equipment, for installation and commissioning by Sub-hubco at the Facilities in accordance with the Programme, the Final Commissioning Programme and the Equipment Installation Table;
- 2.1.2 without prejudice to paragraph 2.1.1 of this Section 1 of Schedule Part 11 (*Equipment*), procure that the relevant items as identified from the sub-columns headed "First Fix", "Second Fix" and "Third Fix" within columns H, I and J of the Equipment Installation Table relative to the Group 2 Equipment are delivered to the Facilities during the relevant periods set out in the Final Commissioning Programme and the Equipment Installation Table and in accordance with paragraph 2.6 of this Section 1 of Schedule Part 11 (*Equipment*);
- 2.1.3 procure that at the time of delivery of the Group 2 Equipment, such Equipment is compliant with the information supplied pursuant to paragraph 1A of this Section 1 of Schedule Part 11 (*Equipment*), the Room Data Sheets, the Consents and Law, is accompanied by current electrical testing certification (where not new) and is in such state and condition as will not constitute grounds for the Authority's Representative to conclude that the Completion Criteria have not been met.

- 2.2 Subject to the Authority complying with paragraphs 1A, 2.1, 2.6, 2.7 and 2.8 of this Section 1 of Schedule Part 11 (*Equipment*), Sub-hubco shall install and commission the Group 2 Equipment at the Facilities in accordance with the Final Commissioning Programme, the Equipment Installation Table, the Authority's Construction Requirements and Sub-hubco's Proposals.
- 2.3 Not used.
- 2.4 Sub-hubco shall give the Authority not less than twenty five (25) Business Days prior written notice of the date upon which Sub-hubco requires the Authority to procure the delivery (which date shall be by the relevant date stated in the Equipment Installation Table or as otherwise agreed in the Final Commissioning Programme) of each item of and/or pertaining to the First Fix, Second Fix and/or Third Fix (as applicable) for each item of Group 2 Equipment to be installed and commissioned by hubco in accordance with paragraph 2.2 of this Section 1 of Schedule Part 11 (*Equipment*).
- 2.5 Each notice given pursuant to paragraph 2.4 above shall specify:
- (a) the item or items of Group 2 Equipment to be delivered;
  - (b) the location on the Site to which that Group 2 Equipment is to be delivered; and
  - (c) the date upon which Sub-hubco requires the Authority to deliver the relevant item or items of Group 2 Equipment.
- 2.6 Without prejudice to paragraph 2.1 above, the Authority shall deliver, or shall procure delivery of the relevant item or items of and/or pertaining to the Group 2 Equipment by the date specified in the relevant notice issued pursuant to paragraph 2.4 above to such location as is agreed between the parties (which for the avoidance of doubt, must be safely accessible by those persons delivering the relevant item or items of Equipment) or, failing such agreement, in accordance with the Contractor's Site Rules.
- 2.7 As soon as reasonably practicable after delivery, the Authority and Sub-hubco shall jointly undertake a reasonable visual inspection of any Group 2 Equipment delivered pursuant to paragraph 2.6 above, this paragraph 2.7 or paragraph 2.8 below (as the case may be). If it is apparent from such reasonable visual inspection that such Group 2 Equipment is damaged or the quantities thereof delivered do not accord with the delivery note or otherwise does not correspond with the items to be procured by the Authority pursuant to paragraph 2.1 above, the Authority shall remove or procure the removal of any such damaged or non-compliant Group 2 Equipment and shall procure delivery of replacement Equipment and/or rectify any discrepancy between the quantities delivered and the relevant delivery note or between the items to be procured and the items delivered (as the case may be) and/or shall procure that such damaged Group 2 Equipment is repaired (as the case may be), as soon as reasonably practicable, having regard to the length of time generally taken to procure such Equipment. Following delivery of the Group 2 Equipment pursuant to paragraph 2.6 above, this paragraph 2.7 or paragraph 2.8 below, Sub-hubco shall procure the safe and appropriate storage of the same until the completion of installation by Sub-hubco.
- 2.8 If at the time of installing or commissioning the Group 2 Equipment, such Group 2 Equipment is found to be damaged, does not properly function or otherwise does not correspond with the items to be procured by the Authority pursuant to paragraph 2.1 above to allow successful completion of commissioning to occur, then the Authority shall procure the repair or replacement of such Group 2 Equipment as soon as reasonably practicable, having regard to the length of time generally taken to procure such Group 2 Equipment or procure repairs of such Group 2 Equipment provided that, to avoid doubt, where such Group 2 Equipment is damaged or does not function properly to allow commissioning to occur due to the acts or omissions of Sub-hubco or any Sub-hubco Party, then Sub-hubco shall reimburse the Authority for any costs reasonably and properly incurred by the Authority in procuring the repair of or a replacement item of Group 2 Equipment within 20 Business Days of receipt of a demand therefor together with supporting information.
- 2.9 The Authority shall be responsible for the maintenance, replacement and disposal of the Group 2 Equipment and Sub-hubco shall have no responsibility to maintain or replace or dispose of the Group 2 Equipment.

### 3. Group 3 Equipment

3.1 Without prejudice to paragraph 1A above, the Authority, or its contractors, employees, agents or representatives, shall at its own cost:

3.1.1 procure, install and commission the Group 3 Equipment, at the Facilities as part of the Authority's Commissioning in accordance with this Schedule Part 11 and the Final Commissioning Programme; and

3.1.2 without prejudice to Clause 5.3 of this Agreement, procure that at the time of installation of the Group 3 Equipment, such Group 3 Equipment is compliant with the information supplied pursuant to paragraph 1A above, the Room Data Sheets, the Consents and Law, and is accompanied by current electrical testing certification (where not new).

3.2 The Authority shall be responsible for procuring and complying with all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations, required by law, and all necessary consents and agreements from any third party needed to install, commission and/or operate the Group 3 Equipment.

3.3 The Authority shall be responsible for the maintenance, replacement and disposal of the Group 3 Equipment and Sub-hubco shall have no responsibility to maintain or replace or dispose of the Group 3 Equipment.

#### 4. Group 5 Equipment

4.1 Without prejudice to paragraph 1A above, the Authority shall at its own cost:

4.1.1 procure, install and commission the Group 5 Equipment, at the Facilities as part of the Authority's Commissioning in accordance with this Schedule Part 11 and the Final Commissioning Programme; and

4.1.2 without prejudice to Clause 5.3 of this Agreement, procure that at the time of installation of the Group 5 Equipment, such Group 5 Equipment is compliant with the information supplied pursuant to paragraph 1A above, the Authority's Construction Requirements, the Room Data Sheets, the Consents and Law, is accompanied by current electrical testing certification (where not new) and is in such state and condition as will not constitute grounds for the Authority's Representative to conclude that the Completion Criteria have not been met.

4.2 Subject always to compliance with paragraph 4.3 below and the Final Commissioning Programme by the Authority and all Authority Parties, Sub-hubco shall provide all reasonable access to Works and/or the Facilities to the Authority and the Authority Parties for the purposes of installing and commissioning the Group 5 Equipment.

4.3 The Authority, when installing and commissioning the Group 5 Equipment, shall and shall procure that the Authority Parties shall:

4.3.1 act in accordance with Law, the Consents and the terms of all applicable building warrants, the relevant Quality Plans and Good Industry Practice and shall comply with all relevant safety procedures, which shall include any relevant construction phase plan for the construction of the Facilities, the Contractor's Site Rules from time to time and any directions as to site safety that may be issued by or on behalf of Sub-hubco from time to time;

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

4.3.3 not damage the Works and/or the Facilities or interfere with, hinder or delay Sub-hubco in carrying out its obligations under this Agreement;

4.3.4 without prejudice to paragraph 4.1 above, carry out the works indicated by the entry relative to such item in the sub-column headed "First Fix" within column H of the Equipment Installation Table during a period of three consecutive weeks notified in writing to the Authority by Sub-hubco not less than 20 Business Days in advance;

- 4.3.5 without prejudice to paragraph 4.1 above, carry out the works indicated by the entry relative to such item in the sub-column headed "Second Fix" within column I of the Equipment Installation Table during a period of three consecutive weeks notified in writing to the Authority by Sub-hubco not less than 20 Business Days in advance;
  - 4.3.6 without prejudice to paragraph 4.1 above, carry out the works indicated by the entry relative to such item in the sub-column headed "Third Fix" within column J of the Equipment Installation Table in accordance with the Final Commissioning Programme;
  - 4.3.7 be responsible for removing from the Site all debris, waste, packaging and surplus materials associated with such Group 5 Equipment on completion of such installation;
  - 4.3.8 ensure that the installed Group 5 Equipment and all components installed as part of the First Fix, Second Fix and/or Third Fix are adequately protected (such levels of protection to be agreed between the Authority and Sub-hubco) to ensure they shall not be vulnerable to damage as a result of the activities of Sub-hubco or any Sub-hubco Party at the Site prior to the relevant Phase Actual Completion Date; and
  - 4.3.9 no less than 15 Business Days prior to taking any access to the Site for such purposes, submit for approval to Sub-hubco, a method statement and a detailed programme (consistent with this Schedule Part 11 and the Final Commissioning Programme) and details of all individuals who are to attend the Site for such purposes.
- 4.4 The Authority shall be responsible for procuring and complying with all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations, required by law, and all necessary consents and agreements from any third party needed to install and commission the Group 5 Equipment.
  - 4.5 The Authority shall be responsible for the maintenance, replacement and disposal of the Group 5 Equipment and Sub-hubco shall have no responsibility to maintain or replace or dispose of the Group 5 Equipment.
- 5. General**
- 5.1 The Authority shall ensure that any Group 2 Equipment, Group 3 Equipment and/or Group 5 Equipment that is not new and/or is transferred from another site prior to the relevant Phase Actual Completion Date is cleaned prior to being transferred to the Facilities.
  - 5.2 Following the relevant Phase Actual Completion Date, Sub-hubco shall not be responsible for and shall have no obligation to insure any Equipment other than the Group 1 Equipment.



## SECTION 2

### EQUIPMENT TABLE

The Equipment Table is as set out in the Agreed Form document labelled "Equipment Table" which shall have effect as if expressly set out in this Section 2 of Schedule Part 11 (*Equipment*)

**SECTION 3**  
**EQUIPMENT INSTALLATION TABLE**

**SECTION 4**  
**ICT RESPONSIBILITY MATRIX**

**SECTION 5**

**ICT EQUIPMENT TABLE**

**SCHEDULE PART 12**  
**SERVICE REQUIREMENTS**  
**SECTION 1**  
**SERVICE LEVEL SPECIFICATION**

**SECTION 2**  
**METHOD STATEMENTS**

**SECTION 3**  
**SERVICES QUALITY PLAN**

**SCHEDULE PART 13**  
**INDEPENDENT TESTER CONTRACT**

**[REDACTED]**



## 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 the sum 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*);
- "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 Service Level Specification;
- "Core Times"** has the meaning given in the 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 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 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 the Site; or
- (b) the service and facility of discharging water and sewerage from the 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 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:-

$$SUR \times SUF \times Days_n$$

where:

$Days_n$  is the number of Days in Contract Month “n”;

**“Gross Service Units” or “GSUs”** means the number of service units attributed to each Functional Area as set out in Appendix 3 to this Schedule Part 14 (*Payment Mechanism*);

**“Helpdesk”** means the helpdesk facilities established by Sub-hubco pursuant to the Service Level Specification;

**“Logged Rectification Time”** means the time which is shown in the Helpdesk records maintained by Sub-hubco in accordance with the Service Level Specification as being the time when a Service Event was Rectified or Remedied, as the case may be, or, in the event that a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by Sub-hubco;

**“Logged Report Time”** means the date and time which is shown in the Helpdesk records maintained by Sub-hubco in accordance with the Service Level Specification as being the date and time at which a Service Report was received by the Helpdesk or if a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by Sub-hubco;

**“Major Performance Failure”** means a Performance Failure which has been designated as such in the Service Level Specification or in this Schedule Part 14 (*Payment Mechanism*);

**“Medium Performance Failure”** means a Performance Failure which has been designated as such in the Service Level Specification or in this Schedule Part 14 (*Payment Mechanism*);

**“Minimum Agreed Availability Standards”** means the minimum standards with which a Functional Area must comply, as agreed between the Authority and Sub-hubco, for the period until a Permanent Repair can be undertaken;

**“Minimum Availability Deduction”** means in any Contract Year “n”, an amount in pounds sterling calculated using the following formula:-

$$MAD_n = MAD_0 \times (1 - IF) + \left( (MAD_0 \times IF) \times \left( 1 + \frac{(RPI_n - RPI_0)}{RPI_0} \right) \right)$$

Where:

	<b>MADn</b>	is the Minimum Availability Deduction applicable for the relevant Contract Year;
	<b>MADo</b>	is £90 or, where the relevant Functional Area is Unavailable but Used, is £45;
	<b>IF</b>	is the indexation factor being 16.10%;
	<b>RPI<sub>n</sub></b>	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
	<b>PRIO</b>	is the value of the Retail Prices Index published or determined with respect to the Base Date;
<b>"Minor Performance Failure"</b>		means a Performance Failure which has been designated as such in the Service Level Specification or in this Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Monthly Service Payment"</b>		means the sum in Pounds Sterling calculated in accordance with paragraph 1 of Section 2 ( <i>Calculation of Service Payments</i> ) of this Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Pass Through Costs"</b>		means costs payable to Sub-hubco pursuant to Section 6 ( <i>Pass Through Costs</i> ) of this Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Performance Failure"</b>		subject to Section 4 ( <i>Temporary Repairs</i> ) of this Schedule Part 14 ( <i>Payment Mechanism</i> ), means a Service Event relating to a Performance Standard which has not been Rectified within the relevant Rectification Period (if any);
<b>"Performance Standards"</b>		means the service requirements identified as such, set out in the Service Level Specification;
<b>"Permanent Repair"</b>		means Rectification following the agreement of a Temporary Repair;
<b>"Permanent Repair Deadline"</b>		has the meaning given in paragraph 1.2 of Section 4 ( <i>Temporary Repairs</i> ) of this Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Phase Completion Factor"</b>		means the relevant percentage contained within Table 1 of Appendix 2 of this Schedule Part 14 ( <i>Payment Mechanism</i> );
<b>"Phased Payment Commencement Date"</b>		means each of Payment Commencement Date 1, Payment Commencement Date 2, Payment Commencement Date 3 and Payment Commencement Date 4
<b>"Rectification"</b>		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 Availability Standards and the Performance Standards, as applicable, and "Rectify" and "Rectifying" shall be construed accordingly;
<b>"Rectification Period"</b>		means, where applicable, the period of time specified in the Availability Standards or the Performance Standards, as the case may be, allowed for the Rectification of the relevant Service Event, which period: <ul style="list-style-type: none"> <li>(a) shall commence at the Logged Report Time (if the Logged</li> </ul>

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 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 Authority and any Authority Party from Rectifying any failure to meet the Availability Standards or 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 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 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 Performance Standards and/or does not satisfy the Availability Standards;

**"Service Failure Time"**

means the date and time when a Service Event becomes a Performance Failure or an Availability Failure, as the case may be;

**"Service Report"**

has the meaning given in Section 1 (*Service Level Specification*) 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 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"**

means the total number of Gross Service Units attributable to the Facilities as set out in Appendix 3 of this Schedule Part 14 (*Payment*

<b>Facilities” or “SUF”</b>	<i>Mechanism</i> );
<b>“Temporary Repair”</b>	means, in respect of the occurrence of a Service Event, works of a temporary nature that do not constitute Rectification but satisfy the Minimum Agreed Availability Standards and substantially make good the relevant Service Event for the period until a Permanent Repair can be undertaken;
<b>“Unavailable”</b>	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 Availability Standards;
<b>“Unavailable but Used”</b>	means in relation to any Functional Area that it is Unavailable but is used by the Authority for its normal purpose at any time (apart from the purposes of evacuating the 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;
<b>“Utility Point”</b>	means the location at which the relevant Utility service first enters the Facilities;
<b>“Whole Facilities Unavailability Threshold”</b>	means that Functional Areas having aggregate Gross Service Units equal to or greater than 30% of the Service Units of the Facilities are Unavailable or Unavailable but Used;
<b>“Whole Facilities Unavailability Conditions”</b>	means any of the following conditions: <ul style="list-style-type: none"> <li>(a) the Whole Facilities Unavailability Threshold is exceeded; or</li> <li>(b) more than thirty (30) per cent of the total toilet provision for the Facilities is Unavailable; or</li> </ul>

## SECTION 2

### CALCULATION OF SERVICE PAYMENTS

#### 1. MONTHLY SERVICE PAYMENT

- 1.1 Calculate the Monthly Service Payment payable in respect of a Contract Month "n" using the following formula:

$$MSP_n = \left( \frac{ASP_n}{12} \times PCF \right) - \sum D_{n-2} + PTC$$

where:

- MSP<sub>n</sub>** is the Monthly Service Payment for the Contract Month n;
- ASP<sub>n</sub>** is the Annual Service Payment for the Contract Year in which Contract Month n occurs, calculated in accordance with paragraph 2 below;
- PCF** is the aggregate of the Phase Completion Factors contained within Table 1 of Appendix 2 to this Schedule Part 14 (*Payment Mechanism*), applicable to the Phases in respect of which the Phase Actual Completion Date has occurred;
- ΣD<sub>n-2</sub>** is the sum of Deductions in respect of performance of the Services during the Contract Month that was 2 months prior to Contract Month n as shown in the Monthly Service Report for that Contract Month and calculated in accordance with the provisions set out in Section 3 (*Deductions from Monthly Service Payments*) of this Schedule Part 14 (*Payment Mechanism*);
- PTC** means any Pass Through Costs due for which supporting uncontested invoices from Sub-hubco's suppliers are available;
- 1.2 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 last Contract Month up to and including the last day of the Project Term.
- 1.3 In the Contract Month in which a Phased Payment Commencement Date falls (unless the relevant Phased Payment Commencement Date is the first 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 to which the relevant percentage of PCF applies, as follows:-
- 1.3.1 in respect of Payment Commencement Date 1, the actual number of days in the relevant Contract Month from and including Payment Commencement Date 1;
- 1.3.2 in respect of a subsequent Phased Payment Commencement Date, the actual number of days in the relevant Contract Month (i) from and including the first day of the Contract Month to the day prior to relevant Phased Payment Commencement Date; and (ii) from and including the relevant Phased Payment Commencement Date;

2. **ANNUAL SERVICE PAYMENT**

Calculate the Annual Service Payment for any Contract Year "n" using the following formula:

$$ASP_n = ASP_o \times (1 - IF) + \left( (ASP_o \times IF) \times \left( 1 + \frac{(RPI_n - RPI_o)}{RPI_o} \right) \right)$$

where:

- ASP<sub>n</sub>** is the Annual Service Payment for the relevant Contract Year;
- ASP<sub>o</sub>** is the value for ASP<sub>o</sub> stated in Appendix 1 to this Schedule Part 14 (*Payment Mechanism*) (being the 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 10.0%;
- 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>o</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 Payment Commencement Date 1 an Availability Failure or a Performance Failure occurs the 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 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 Monthly Service Payment for Contract Month "n", the maximum aggregate of all Deductions that the Authority may make in respect of Contract Month "n-2" is the Gross Monthly Availability Deduction for Contract Month "n-2".
- 1.3 In any Contract Month where the value of  $\Sigma D_{n-2}$  exceeds the value of  $(ASP_n/12) \times PCF$ , , the Monthly Service Payment due by the Authority shall be an amount equal to PTC for that Contract Month but the Authority shall, in calculating the Monthly Service Payment in respect of the following and (to the extent necessary) any subsequent Contract Months, be entitled to carry forward and set off the amount of such excess against the amount by which the value of  $(ASP_n/12) \times PCF$ , exceeds the value of  $\Sigma D_{n-2}$  (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 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 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 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:

<b>D</b>	means the amount (in pounds sterling) of the Deduction in respect of the Performance Failure and
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<b>PFD</b>	means:-
	(a) in the case of a Minor Performance Failure, the sum of £35, index linked;
	(b) in the case of a Medium Performance Failure, the sum of £75, index linked;
	(c) in the case of a Major Performance Failure, the sum of £150, index linked.

- 2.2 In the case of a Service Event for which no Rectification Period is specified in the 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 Remedial Period and the 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 from the 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 in the relevant Contract Month is not more than 2.
- 2.4 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 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.

### 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%.

- 4.3 If on the relevant day any of the Whole Facilities Unavailability Conditions are met then, for the purpose of the formula in paragraph 4.1 above the SUA will be deemed to be equal to SUF.

## 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 Performance Standard; or  
5.2 an Availability Failure in respect of the same Availability Standard,

occurs four (4) or more times in a rolling period of three (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 fifth (5<sup>th</sup>) and each subsequent such Performance Failure and/or the fifth (5<sup>th</sup>) and each subsequent such Availability Failure during the relevant period of three (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 Performance Standard or Availability Standard;  
6.2 each such Service Event affects the same 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.

## 7. 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 Authority does not continue to use that Functional Area, the 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 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 the Authority that it is unable to Rectify a Service Event within the specified Rectification Period due to the need for specialised materials or personnel that are not, and cannot reasonably be expected to be, immediately available at the Facilities but that a Temporary Repair can be effected:
  - 1.1 Sub-hubco may carry out the Temporary Repair proposed by Sub-hubco unless the 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 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 the Authority and ending at the earlier of:
  - 2.1 the time at which a Permanent Repair is successfully completed; and
  - 2.2 the Permanent Repair Deadline,the Availability Standards will be replaced by the Minimum Agreed Availability Standards.
3. If an agreed Temporary Repair is completed by Sub-hubco before the Permanent Repair Deadline and results in the Functional Area affected by the relevant Service Event satisfying the Minimum Agreed Availability Standards, the date and time shown in the Helpdesk records maintained by Sub-hubco in accordance with the Service Level Specification as being the date and time when the Temporary Repair was completed (or, in the event that a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by 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 Monthly Service Report produced by Sub-hubco for any Contract Month shall be the source of the factual information regarding the performance of the Services for the relevant Contract Month for the purposes of calculating the Deductions pursuant to Section 3 (*Deductions from Monthly Service Payments*) of this Schedule Part 14 (*Payment Mechanism*).
2. Either party may give written notice to the other if it believes there is an error or omission in a Monthly Service Report provided that, save in the circumstances referred to in paragraph 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 parties 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 Authority shall be deemed to have reasonable cause to require that Sub-hubco shall make available to the Authority for inspection such of the records referred to in paragraphs 10 and 11 of Section 2 (*Records to be Kept*) of Schedule Part 19 (*Record Provisions*) as the Authority may specify.
4. Sub-hubco shall upon submission of a valid invoice pay to the Authority a sum equal to the costs reasonably incurred by the Authority in carrying out any inspection and investigation of records made available pursuant to paragraph 3 above.
5. If the Authority's inspection or investigation of records made available pursuant to paragraph 3 above reveals any further matters of the types referred to in paragraphs 2 and 3 above, those matters shall be dealt with in accordance with paragraph 2 or 3 as appropriate and the Authority shall, in addition, be entitled to make Deductions in respect of any Performance Failures or Availability Failures in the manner prescribed Section 3 (*Deductions from Monthly Service Payments*) of this Schedule Part 14 (*Payment Mechanism*). The Monthly Service Payment for the Contract Month in which any such Deduction would (but for the error or omission in the Monthly Service Report) have been made shall be re-calculated to take account of such Deduction and the amount of such Deduction shall be immediately due and payable by Sub-hubco to the Authority together with interest at the Default Interest Rate from the date on which the Authority paid the Monthly Invoice for the relevant Contract Month until the date on which payment is made by 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.
7. The provisions of this Section 5 (*Failure by Sub-hubco to Monitor or Report*) shall be without prejudice to any rights of the Authority in this Agreement pursuant to Clause 24 (*Monitoring of Performance*), Clause 40 (*Sub-hubco Events of Default*) and Clause 44 (*Corrupt Gifts and Payments*).

## SECTION 6

### PASS THROUGH COSTS

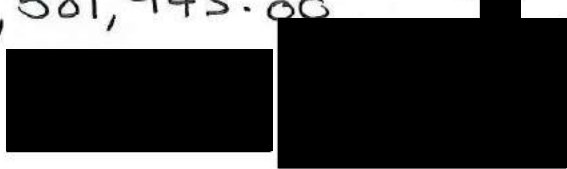
#### 1. OPERATIONAL INSURANCE PREMIUMS

- 1.1 Subject to paragraph 1.2, Sub-hubco may include the premiums paid by Sub-hubco to take out and maintain the Operational Insurances in accordance with Clause 53 in the 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.
- 1.2 There shall be excluded from the premiums referred to in paragraph 1.1, 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 Facilities or the claims history of the Authority or any Authority Party.

APPENDIX 1

ANNUAL SERVICE PAYMENTS AT BASE DATE

ASP<sub>0</sub> = £3,581,943.00



## APPENDIX 2

### PHASE COMPLETION FACTORS

The 'Phase Completion Factors' to be applied in respect of each Phase of the works shall be as set out in Table 1.

<b>Table 1</b>			
<b>Phase</b>	<b>Phase Description</b>	<b>Independent Tester Certification Required</b>	<b>Phase Completion Factor (PCF)</b>
Bruntsfield House 2014 Phase	Completion of Phase 1 remodelling works in Bruntsfield House during Summer 2014	Yes	1.23%
Phase 1	Completion of all Phase 1 new build works	Yes	65.43%
Bruntsfield House 2015 Phase	Completion of Phase 1 remodelling works in Bruntsfield House during Summer 2015	Yes	0.15%
Phase 2	Completion of all Phase 2 new build works	Yes	33.19%
All Phases (other than the Post Completion Works)		Yes	100%

**APPENDIX 3**  
**FUNCTIONAL AREAS AND GSUs**



**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 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 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;
- "Borrower Loan Notes"** has the meaning ascribed in the Loan Agreement;
- "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 Works, the Facilities and/or Services or additional works and/or services or a change in the Authority's Policies that may be made under Clause 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 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 or other income committed from third parties (without double counting);

**"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 any Low Value Change that

- (a) consists of minor works;
- (b) only affects the interior of the Facilities;
- (c) does not affect any of the mechanical and electrical equipment of the Facilities;
- (d) does not involve any interference with the service media in the Facilities;
- (e) will not conflict with any Programmed Maintenance; and
- (f) will not prejudice any of the Operational Insurances;

**"Derogated Low Value Change Notice"**

means a notice given by the Authority in accordance with paragraph 1.2 of Section 2 (*Low Value Changes*) of this Schedule 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 Authority that, in the reasonable opinion of the Authority, is likely either to Cost in excess of one hundred and twenty five thousand pounds (£125,000) (index linked) or to require an adjustment to the Annual

Service Payment that on a full year basis is 3% or more of the 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 parties agree is to be treated as a High Value Change;

**“High Value Change Proposal”**

means a proposal satisfying the requirements of paragraph 3.4 of Section 4 (*High Value Changes*) of this Schedule 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 Authority);

**“Input Adjustment”**

means any adjustment to the Financial Model other than Assumption Adjustment and Logic Adjustments;

**“Key Ratios”**

means the following ratios:

- (a) the Loan Life Cover Ratio (as defined in the Loan Agreement);
- (b) the Historic Debt Service Cover Ratio (as defined in the Loan Agreement);
- (c) the Project IRR and the Debt Service Cover Ratio (as defined in the Loan Agreement); and
- (d) the Threshold Equity IRR (as defined under Schedule Part 23 (*Refinancing*));
- (e) 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 Service Level Specification or materially and adversely

	affect Sub-hubco's ability to perform its obligations under this Agreement;
<b>"Medium Value Change"</b>	means a Change requested by the Authority which is not a Low Value Change or a High Value Change;
<b>"Post-Adjustment Financial Model"</b>	means the Financial Model in effect immediately following the making of 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 Annual Service Payments to be made;
<b>"Review Procedure"</b>	means the procedure set out in Schedule Part 8 (Review Procedure);
<b>"Small Works and Services Rates"</b>	means the rates to be applied in respect of any request from the Authority for a Low Value Change set out in Appendix 1 Part 2 ( <i>Small Works and Services Rates</i> ) to this Schedule Part 16 ( <i>Change Protocol</i> ), as amended from time to time in accordance with paragraph 8.2 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>"Stage 2 Approved Project"</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 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

**"Whole Life Cost"**

means the estimated and (to the extent that such information is available) the actual cost of operating and maintaining that High Value Change over its intended design life (consistent with Sub-hubco's Proposals).

## SECTION 2

### LOW VALUE CHANGES

#### 1. Low Value Change Notice

- 1.1 where a Low Value Change is required by the Authority, it must submit an Authority Change Notice to Sub-hubco.
- 1.2 The Authority may carry out Derogated Low Value Changes during the Operational Term. If the Authority wishes to carry out a Derogated Low Value Change it shall send 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 Authority within three (3) Business Days of receipt of a Derogated Low Value Change Notice that it does not agree that the proposed Change constitutes a Derogated Low Value Change and, unless the parties otherwise agree, the Authority must not take any steps to carry out the proposed Change unless it has referred the dispute to the Dispute Resolution Procedure and it has been determined that the proposed Change is a Derogated Low Value Change.
- 1.3 If it carries out a Derogated Low Value Change, the Authority must use Good Industry Practice to the standards that would have applied to 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 Works and/or the Services that the Authority requires including, if relevant, the applicable type of Low Value Change listed in the Catalogue; and
- 2.3 if there is no applicable type of change listed in the Catalogue, specify the time period within which the Authority requires the Change to be implemented.

#### 3. 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 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 the Low Value Change will be carried out by suitably qualified employee of Sub-hubco or a Sub-hubco Party and in that case Sub-



hubco may not charge for labour. Where there is no such suitably qualified on-site employee reasonably available to carry out the Low Value Change, the cost of the labour element will be calculated in accordance with the Small Works and Services Rates or, where such rates are not applicable, in accordance with rates which are fair and reasonable; and

4.2.2 the materials element will be charged at the cost of materials to 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.

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 Authority for processing, implementing or managing a Low Value Change.

## 5. Authority objection

The Authority may object in writing within five (5) Business Days of receipt of 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 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 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 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 Authority in accordance with paragraph 3 of this Section 2 (*Low Value Changes*) within fifteen (15) Business Days of the date of the Authority Change Notice; or

6.3.2 gives a notice pursuant to paragraph 3 of this Section 2 (*Low Value Changes*) to which the Authority has objected pursuant to paragraph 5 of this Section 2 (*Low Value Changes*) on any ground other than the cost of the Low Value Change, the parties have not reached agreement as to how the Low Value Change is to be implemented and the objection has not been referred to the Dispute Resolution Procedure; or

6.3.3 gives a notice pursuant to paragraph 3 of this Section 2 (*Low Value Changes*) to which the Authority does not object pursuant to paragraph 5 but then fails to fully implement the Low Value Change within ten (10) Business Days after the timescale specified in that notice or agreed in accordance with paragraph 5 of this Section 2 (*Low Value Changes*),

then, subject to paragraph 10.3 of this Section 2 (*Low Value Changes*), the Authority may notify 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 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 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 or invoices as may be required by the Authority and notified to Sub-hubco in advance in respect of the costs of the Low Value Change, which the 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 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 Change 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*), the Authority shall confirm in writing whether or not it agrees that the revised and the updated Catalogue shall constitute the Catalogue and the

updated Small Works and Services Rates shall constitute the Small Works and Services Rates for the purposes of this Agreement from the relevant Catalogue Review Date;

- 8.5 If the Authority does not confirm to Sub-hubco that it agrees 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 either party to the Dispute Resolution Procedure. The revised and updated Catalogue and revised and updated Small Works and Services Rates with such amendments as are agreed by the parties or determined under the Dispute Resolution Procedure shall constitute the Catalogue and the Small Works and Services Rates for the purposes of this Agreement from the relevant Catalogue Review Date.

## 9. Documentation and Monitoring

- 9.1 No due diligence (whether funder, legal, technical, insurance or financial) shall be required in relation to Low Value Changes unless otherwise agreed between the parties.
- 9.2 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 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 6 (*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 the Authority with a copy of that record whenever reasonably required by the Authority.

## 10. Disputes

- 10.1 Any dispute concerning any matter referred to in this Section 2 (*Low Value Changes*) may be referred by either party to the Dispute Resolution Procedure.
- 10.2 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 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 The Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a Low Value Change in respect of which there is a dispute that has been referred to the Dispute Resolution Procedure, unless that dispute has been determined in its favour and Sub-hubco has not confirmed to the Authority in writing within five (5) Business Days of the date of the determination that it will implement and carry out the Low Value Change in accordance with the determination.

## SECTION 3

### MEDIUM VALUE CHANGES

#### 1. Medium Value Changes

- 1.1 If the Authority requires a Medium Value Change, it must serve an Authority Change Notice on 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 Works and/or 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 Works and/or Services (except those Works and/or Services which have been specified as requiring to be amended in the Authority Change Notice) in a manner not compensated for pursuant to this Section 3 (*Medium Value Changes*);
  - 1.2.4 would materially and adversely affect the health and safety of any person;
  - 1.2.5 would, if implemented, materially and adversely change the nature of the Project (including its risk profile); or
  - 1.2.6 the 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 Works or 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 Authority.
- 2.2 Within fifteen (15) Business Days of receipt of the Medium Value Change Notice, Sub-hubco must notify the Authority in writing:
  - 2.2.1 whether it considers that it is entitled to refuse the Medium Value Change on any of the grounds set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 (*Medium Value Changes*);
  - 2.2.2 when it will provide the Estimate to the Authority bearing in mind the requirement in paragraph 7.2.2 of this Section 3 (*Medium Value Changes*); and
  - 2.2.3 its estimate of the Third Party Costs that it will incur to prepare the Estimate.

- 2.3 If Sub-hubco notifies the Authority that it considers that it is entitled to refuse the Medium Value Change on one or more of the grounds set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 (*Medium Value Changes*), then unless the parties otherwise agree, the Authority shall be deemed to have withdrawn the Authority Notice of Change if it has not referred the matter to the Dispute Resolution Procedure within twenty (20) Business Days of receipt of Sub-hubco's notice.
- 2.4 If the 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 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 (*Medium Value Changes*), Sub-hubco shall deliver to the 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 a Phase Actual Completion Date by the relevant Phase Completion Date and to meet the requirements set out in the Authority's Construction Requirements and/or Service Level Specification during the implementation of the Medium Value Change;
- 3.3 an outline of the proposed design solution and design, including an appropriate analysis/risk appraisal and, to the extent relevant, the impact on whole life costings;
- 3.4 any impact on the provision of the Works and/or the Services;
- 3.5 a value for money justification for any proposed change to the quality of the works or the services comprised in the Medium Value Change as compared to the Works and the Services;
- 3.6 any amendment required to this Agreement and/or any Project Document as a result of the Medium Value Change;
- 3.7 any Estimated Change in Project Costs that results from the Medium Value Change;
- 3.8 any Capital Expenditure or Lump Sum Payments that are 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 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 and/or Lump Sum Payments for the purposes of the Estimate, Sub-hubco shall apply the following principles wherever applicable:

- 4.1 unless the Authority's requirements for the Medium Value Change specify a different quality as compared to the Works:
- 4.1.1 the unit cost of any construction or installation works or associated preliminaries (excluding any temporary or demolition works, professional fees, contingencies, overheads and profit margins) required to implement the Medium Value Change is the equivalent unit rate set out in Part 1 (*Unit Cost for Construction or Installation Costs*) of Appendix 2 of this Schedule 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 Works) are consistent with the lifecycle and maintenance profile of the 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 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 3 (*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 3 (*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 Authority's requirements for the Medium Value Change specify a different quality than required by the Service Level Specification, the unit cost of any extension of, or change to, any Service (either in scope or area), taking into account the capacity of existing labour resources, is consistent with the equivalent unit rate set out in Part 4 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 and/or Lump Sum Payments to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, reasonably foreseeable Changes in Law at that time have been taken into account; and
- 5.3 demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Medium Value Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under paragraphs 3.7 and/or 3.8 of this Section 3 (*Medium Value Changes*); and
- 5.4 provide written evidence of Sub-hubco's compliance with paragraphs 5.1 to 5.3 of this Section 3 (*Medium Value Changes*).

**6. Determination of the Estimate**

As soon as practicable after the Authority receives the Estimate, the parties shall discuss and endeavour to agree the contents of the Estimate. If the parties cannot agree on the contents of the Estimate, the matter may be referred by either party to the Dispute Resolution Procedure to determine if the Estimate represents a fair and reasonable approach to implementing the Medium Value Change in all respects.

**7. Confirmation or Withdrawal of the Medium Value Change Notice**

- 7.1 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to paragraph 6 of this Section 3 (*Medium Value Changes*), the Authority shall:
- 7.1.1 confirm in writing to Sub-hubco the Estimate (as modified); or
- 7.1.2 withdraw the Authority Change Notice.
- 7.2 If, in any Contract Year, the Authority has either not confirmed an Estimate (as modified, if applicable) within twenty (20) Business Days of the contents of the Estimate having been agreed or determined in accordance with the foregoing provisions of this Section 3 (*Medium Value Changes*) or has withdrawn an Authority Change Notice for a Medium Value Change on three or more occasions, then the Authority shall pay to 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 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 Authority pursuant to paragraph 2.5 of this Section 3 (*Medium Value Changes*).

**8. Implementation of the Medium Value Change**

- 8.1 When the Authority has confirmed the Estimate in accordance with paragraph 7.1 of this Section 3 (*Medium Value Changes*), 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 Date shall be extended as agreed in the Estimate.
- 8.2 Sub-hubco shall notify the 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 (*Medium Value Changes*) 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 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 (as such time may be extended for any delay that is, or is equivalent to, a Delay Event);

then, subject to paragraph 14.3 of this Section 3 (*Medium Value Changes*), the Authority may notify 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 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 Facilities before the relevant Phase Actual Completion Date, the procedure set out at clause 17 (*Pre-Completion and Commissioning*) shall apply to the Medium Value Change at the same time as it applies to the original Works.
- 9.2 Where the Medium Value Change is implemented at the Facilities after the 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 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 Authority shall make a payment to Sub-hubco within fifteen (15) Business Days of receipt by the Authority of an original invoice, or invoices as may be required by the Authority and notified to Sub-hubco in advance, presented to the Authority (complete in all material respects) in accordance with paragraph 10.1 of this Section 3 (*Medium Value Changes*) accompanied by the relevant evidence (where applicable) that the relevant part of the Medium Value Change has been carried out.

## 11. Adjustment to Annual Service Payment



Any adjustment to the 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 Funders shall not:

12.1.1 (in any event) withhold or delay any consents that are required pursuant to the Senior Funding Agreements to a Medium Value Change other than on the basis that the Senior Funders, acting pursuant to the terms of the Senior Funding Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 (*Medium Value Changes*) apply; or

12.1.2 carry out any due diligence (whether funder, legal, technical, insurance or financial) in relation to the carrying out of any Medium Value Change unless either (i) the Medium Value Change in question would result in an adjustment to the Annual Service Payment that, on a full year basis, is in excess of one percent (1%) of the Annual Service Payment in the relevant Contract Year or (ii) the Senior Funders, acting pursuant to the terms of the Senior Funding Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 (*Medium Value Changes*) apply.

12.2 Where not prohibited by paragraph 12.1 of this Section 3, the Senior Funders may carry out legal, financial, insurance and/or technical due diligence on any proposal for a Medium Value Change. In the event that such due diligence is permitted and required, the parties shall agree a budget for the due diligence not exceeding 5% of the overall value of the Medium Value Change in question unless the parties (acting reasonably) agree otherwise. Any costs incurred by Sub-hubco as a result of the Senior Funders due diligence shall be reimbursed by the Authority following agreement or determination of the contents of the Estimate within ten (10) Business Days of Sub-hubco submitting an original invoice or invoices as may be required by the Authority and notified to Sub-hubco in advance for and evidence of such costs, subject to the invoices being in accordance with the agreed budget.

12.3 It is acknowledged that Changes (particularly where they involve a change to the Works or the Facilities) may require authorisation from the insurers under the Insurances. 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 (*Medium Value Changes*) 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 The Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a Medium Value Change in respect of which there is a dispute that has been referred to the Dispute Resolution Procedure, unless that dispute has been

determined in its favour and Sub-hubco has not confirmed to the Authority in writing within five (5) Business Days of the date of the determination that it will implement and carry out the Medium Value Change in accordance with the determination.

## SECTION 4

### HIGH VALUE CHANGES

#### 1. High Value Changes

- 1.1 If the Authority requires a High Value Change, it must serve an Authority Change Notice on 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 Works and/or the Services to be performed in a way that infringes any law or is inconsistent with Good Industry Practice;
  - 1.2.2 would cause any Necessary Consent to be revoked (or would require a new consent to be obtained to implement the relevant change in the Works and/or the Services which, after using reasonable efforts, Sub-hubco has been unable to obtain);
  - 1.2.3 would materially and adversely affect Sub-hubco's ability to deliver the Works and for the Services (except those Works and/or Services which have been specified as requiring to be amended in the High Value Change Notice) in a manner not compensated pursuant to this Section 4 (*High Value Changes*);
  - 1.2.4 would materially and adversely affect the health and safety of any person;
  - 1.2.5 would, if implemented, materially and adversely change the nature of the Project (including its risk profile);
  - 1.2.6 is the subject of a High Value Change Notice that cannot reasonably be complied with;
  - 1.2.7 the Authority does not have the legal power or capacity to require implementation of; or
  - 1.2.8 would if implemented adversely affect the enforceability or priority of the security held by or on behalf of the existing Senior Funders.

#### 2. High Value Change Notice

- 2.1 An Authority Change Notice for a High Value Change must:
- 2.1.1 state that it refers to a High Value Change;
  - 2.1.2 set out the maximum available capital and/or revenue the Authority is able to commit to that High Value Change (the "**Target Cost**");
  - 2.1.3 identify any requirements of the Authority that must be satisfied as part of the High Value Change Proposal (the "**High Value Change Requirements**"); and
  - 2.1.4 identify how the Authority will assess whether the High Value Change Stage 2 Submission offers it value for money.
- 2.2 The parties may agree written protocols with express reference to this Section 4 (*High Value Changes*) which explain or clarify any aspects of the High Value Change approval procedure set out in this Section 4 (*High Value Changes*) and such protocols shall be read as if incorporated into this Section 4 (*High Value Changes*) (including accelerated procedures with reduced requirements for High Value Changes of relatively low values).
- 2.3 The parties must:

- 2.3.1 within five (5) Business Days of receipt by 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 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 Authority; or
  - 3.1.2 notify the 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 Authority that it considers that one or more of the grounds set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply, then unless the parties otherwise agree, the Authority shall be deemed to have withdrawn the Authority Notice of Change if it has not referred the matter to the Dispute Resolution Procedure within twenty (20) Business Days of receipt of 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 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 Authority the High Value Change Proposal as soon as reasonably practicable and in any event within the time period agreed or determined pursuant to paragraph 3.3 of this Section 4 (*High Value Changes*). Unless the parties agree otherwise, a High Value Change Proposal will contain at least the following information in sufficient detail to enable the Authority to make an informed decision under paragraph 3.6 of this Section 4 (*High Value Changes*):
  - 3.4.1 a description of the High Value Change, with evidence of how the High Value Change meets the High Value Change Requirements;
  - 3.4.2 an outline of the proposed building solution and design including an appropriate analysis/risk appraisal of, in each case to the extent relevant (if at all), the preferred investment solution contemplated in terms of new build, refurbishment, whole life costings;
  - 3.4.3 the Change Management Fee for the High Value Change, which shall be a capped fee calculated in accordance with paragraph 10 of this Section 4 (*High Value Changes*);

- 3.4.4 details of the third party activity likely to be required by 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 a 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 Service Level Specification during the implementation of the High Value Change;
- 3.4.7 any impact on the provision of the Works and/or the Services;
- 3.4.8 any amendment required to this Agreement and/or any Project Document as a result of the High Value Change;
- 3.4.9 any Estimated Change in Project Costs that results from the High Value Change;
- 3.4.10 an outline of how 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 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 Works or the Services required by the proposed High Value Change if not covered by the procedures specified in Clause 17 (*Pre-Completion and 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 Authority and relevant end users**

In developing a High Value Change Proposal Sub-hubco must liaise with the Authority and relevant end users (being such persons or organisations as Sub-hubco in consultation with the Authority considers appropriate). The 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 Authority, will be without warranty and will be provided without prejudice to the Authority's rights under this Section 4 (*High Value Changes*).

### **3.6 Consideration of a High Value Change Proposal by the Authority**

The Authority will consider in good faith each High Value Change Proposal put forward by Sub-hubco and the Authority will not unreasonably withhold or delay its consent to a High Value Change Proposal. If, acting reasonably, the Authority finds that any material aspects of the High Value Change Proposal are unsatisfactory to it, it shall notify 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 Authority approves a High Value Change Proposal (including any revised High Value Change Proposal resubmitted pursuant to paragraph 3.6 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 Authority's failure to approve a High Value Change Proposal to the Dispute Resolution Procedure.

## **4. Stage 2 Submission**

### **4.1 Development of a High Value Change Stage 2 Submission**

4.1.1 Within ten (10) Business Days of a High Value Change Proposal having become a Stage 1 Approved Project, the parties shall seek to agree the time period within which 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 Authority within the agreed or determined time period.

### **4.2 Liaison between Sub-hubco, the Authority and relevant end users**

In developing a High Value Change Stage 2 Submission Sub-hubco must continue to liaise with the Authority and relevant end users (being such persons or organisations as the Authority in consultation with Sub-hubco considers appropriate). The 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 Authority incurring additional material expense). Any and all information and other input or feedback provided by the Authority to Sub-hubco will be without warranty and will be provided without prejudice to the Authority's rights under this Section 4 (*High Value Changes*).

### **4.3 Content requirements in relation to a High Value Change Stage 2 Submission**

Save where the parties agree otherwise, in relation to the relevant Stage 1 Approved Project, 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 Works and/or Services as appropriate;
- 4.3.2 detailed design solutions (to RIBA Level D);
  - 4.3.3 appropriate plans and drawings;
  - 4.3.4 relevant detailed planning permissions and any other relevant planning approvals and Necessary Consents (or such lesser confirmation or information in relation to planning as may be agreed with the Authority);
  - 4.3.5 a proposed revised Financial Model including the detailed price estimates for the Stage 1 Approved Project;
  - 4.3.6 an explanation (together with appropriate supporting evidence) as to why the High Value Change Stage 2 Submission meets the Approval Criteria (as defined in paragraph 7 of this Section 4 (*High Value Changes*));
  - 4.3.7 confirmation (or details of any requested variations to (with supporting justification)) of the Change Management Fee referred in paragraph 3.4.3 of this Section 4 (*High Value Changes*);
  - 4.3.8 the proposed method of certification of any construction aspects of the High Value Change, if not covered by the procedures specified in Clause 17 (*Pre-Completion Commissioning and Completion*);
  - 4.3.9 a value for money assessment explaining why 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) 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;
    - (c) 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;
    - (d) a completed risk register showing the potential risks identified in relation to the delivery of the High Value Change the occurrence of which are capable of adversely affecting the time for completion, cost and/or quality of the project, the probability of such risks occurring and a financial estimate of the most likely consequences of each risk occurring together with the prioritisation of all continuing risks and an action plan in respect of, and risk owners for, all risks prioritised as serious risks;
  - 4.3.11 any surveys and investigations and associated reports that are reasonably necessary to ascertain (in relation to Changes involving the construction of additional buildings) information as to the nature, location and condition of the relevant land (including hydrological, geological, geotechnical and sub-surface conditions) together with information relating to archaeological finds, areas of archaeological, scientific or natural interest and (in relation to the refurbishment

of any existing buildings) information on the condition and quality of existing structures and, in particular, the presence of any latent defects.

#### **Co-operation of the Authority**

4.4 The Authority will co-operate with 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 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 Authority has either not responded to the High Value Change Proposal and/or is in material breach of its obligations in paragraph 3 and/or paragraph 4.4 of this Section 4 (*High Value Changes*) in which case paragraph 8.5 of this Section 4 (*High Value Changes*) shall apply;

5.2.2 in relation to a High Value Change Stage 2 Submission, approved or rejected that High Value Change Stage 2 Submission in accordance with the procedures set out in this Section 4 (*High Value Changes*) (or has not given any notification of the Authority's response to the High Value Change Stage 2 Submission or has given written notice to 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 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 Authority after the High Value Change Proposal has been submitted then:

6.1.1 Sub-hubco and the Authority shall negotiate in good faith as to the implications on the High Value Change Proposal or High Value Change Stage 2 Submission (as the case may be) and shall seek to agree changes thereto to accommodate the variation (including any change to the Target Cost and/or to the Change Management Fee);



6.1.2 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 Authority to withdraw the High Value Change Proposal or the High Value Change Stage 2 Submission (as the case may be) and to be paid the Incurred Change Management Fee with the Calculation Date being the date of the variation notified by the Authority; and
- (b) the Authority shall not be entitled to procure the High Value Change without issuing a new Authority Change Notice for the High Value Change and complying with the procedure in this Section 4 (*High Value Changes*) in relation to that High Value Change.

6.1.3 The 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 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 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 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 Authority in accordance with paragraph 2.1.4 of this Section 4 (*High Value Changes*);
- 7.1.3 whether the 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 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 parties).

## **8. Submission of the High Value Change Stage 2 Submission to the Authority and consideration of that submission by the Authority**

8.1 The Authority will consider in good faith High Value Change Stage 2 Submissions submitted by Sub-hubco and the Authority will not unreasonably withhold or delay its consent to a High Value Change Stage 2 Submission. The Authority is entitled to call for such reasonable information and assistance as it considers appropriate to enable it to decide whether the High Value Change Stage 2 Submission meets the Approval Criteria. 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 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 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 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 Authority.

8.2.4 If:

(a) a resubmitted High Value Change Stage 2 Submission is rejected by the Authority on the ground set out in paragraph 8.2.2(a) (subject to paragraphs 16.3 to 16.4 (if applicable) of this Section 4 (*High Value Changes*)); or

(b) no resubmission of the High Value Change Stage 2 Submission is made within 30 Business Days of the date of the notice of rejection (or such longer period as the parties may agree),

then the relevant Stage 1 Approved Project shall be treated as having been properly rejected, the provisions of paragraph 8.3 of this Section 4 (*High Value Changes*) shall apply and neither the Authority nor 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 Authority**

8.3 Where this paragraph 8.3 applies (as set out in paragraph 8.2.2(a), paragraph 8.2.4 and paragraph 16.4.2 of this Section 4 (*High Value Changes*)) the Authority shall not be

required to reimburse or compensate 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 this Section 4 (*High Value Changes*); or
- 8.4.4 the Authority has validly rejected a High Value Change Stage 2 Submission in accordance with paragraph 8.2 and the matter has not been referred to the Dispute Resolution Procedure or any such dispute has been determined as described in paragraph 16.4.2 of this Section 4 (*High Value Changes*);

then, subject to paragraph 17 of this Section 4 (*High Value Changes*) the Authority may notify 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 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 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 Authority to Sub-hubco and cooperation of the Authority**

- 9.1 The 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 Authority receives or to the way in which funding may be applied, either or both of which may affect whether a High Value Change is Affordable.

- 9.2 The Authority shall provide reasonable assistance to 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 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 Authority so as to minimise any inconvenience to the 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.

#### 12. **Method of Payment of Authority Contribution**

- 12.1 This paragraph 12 shall apply where Capital Expenditure for an Approved Project is to be funded in whole or part by the Authority.
- 12.2 Sub-hubco shall invoice the Authority for Capital Expenditure incurred by Sub-hubco to implement a High Value Change that is to be borne by the Authority according to the payment schedule set out in the High Value Change Stage 2 Submission as referred to in paragraph 3.4.11 of this Section 4.

The Authority shall make a payment to Sub-hubco within fifteen (15) Business Days of receipt by the Authority of an original invoice or invoices as may be required by the Authority and notified to Sub-hubco in advance presented to the 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 Annual Service Payment**

Any adjustment to the 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 Authority is funding the High Value Change, Sub-hubco shall procure that the Senior Funders shall not withhold or delay any consents which are required pursuant to the Senior Funding Agreements to such High Value Change other than on the basis that the Senior Funders, acting pursuant to the terms of the Senior Funding Agreements,

reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply.

- 14.2 Where the Authority is not funding the High Value Change, Sub-hubco shall procure that the Senior Funders do not unreasonably withhold or delay any consents which are required pursuant to the Senior Funding Agreements to such High Value Change other than on the basis that the Senior Funders, acting pursuant to the terms of the Senior Funding Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply.
- 14.3 The parties agree that the Senior Funders may carry out legal, financial, insurance and technical due diligence on any proposal for a High Value Change. The parties shall agree a budget for the due diligence provided that the costs may not exceed the lower of (i) 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 Funders due diligence will be reimbursed by the Authority following the conclusion of the process in this Section 4 (*High Value Changes*) within ten (10) Business Days of Sub-hubco submitting an original invoice or invoices as may be required by the Authority and notified to Sub-hubco in advance for and evidence of such costs, subject to the invoices being in accordance with the agreed budget.
- 14.4 It is acknowledged that High Value Changes (particularly where they involve a change to the Works or the Facilities) may require authorisation from the insurers under the Insurances. 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 Funders to provide any additional funding for the relevant High Value Change, which shall be in their absolute discretion.

## 15. Project Documentation

- 15.1 The only changes to the Project Documents or Ancillary Documents to be made as a result of a High Value Change shall be those identified in the Approved Project (subject to any amendments to it agreed by the parties).
- 15.2 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 party to the Dispute Resolution Procedure.
- 16.2 The Authority shall not be entitled to approve a High Value Change Proposal or a High Value Change Stage 2 Submission that is the subject of a dispute until the dispute has been determined.
- 16.3 If the Authority rejects a High Value Change Stage 2 Submission pursuant to the provisions of paragraph 8.2.2(a) of this Section 4, 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 Authority's decision.
- 16.4 If, following a referral to the Dispute Resolution Procedure, it is agreed or determined:
- 16.4.1 that the High Value Change rejected by the Authority pursuant to paragraph 8.2.2(a) of this Section 4 met the Approval Criteria the Authority shall either:

- (a) declare that the relevant High Value Change has received Stage 2 Approval and that High Value Change shall proceed; or
- (b) declare that its rejection of the relevant High Value Change be treated as an improper rejection and that the provisions of paragraph 8.5 of this Section 4 (*High Value Changes*) shall apply.

16.4.2 that the High Value Change did not meet the Approval Criteria, save in one of the respects referred to in paragraphs 8.2.2(b)(i) or 8.2.2(b)(ii), the provisions of paragraph 8.3 of this Section 4 (*High Value Changes*) shall apply.

17. The Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a High Value Change in respect of which there is a dispute that has been referred to the Dispute Resolution Procedure, unless that dispute has been determined in its favour and Sub-hubco has not confirmed to the Authority in writing within five (5) Business Days of the date of the determination that it will comply with its obligations under this Section 4 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 Authority.
2. A Sub-hubco Notice of Change shall:
  - 2.1 set out the proposed Sub-hubco Change in sufficient detail to enable the 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 Annual Service Payment is; or
    - 2.4.2 whether such savings will be paid to the Authority in a lump sum,in each case giving details in accordance with paragraph 8 of this Section 5 (*Sub-hubco Changes*);
  - 2.5 indicate whether there are any critical dates by which a decision by the Authority is required; and
  - 2.6 request the 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 Authority requires as a result.
3. The 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 Annual Service Payment will occur;
  - 3.2 the Sub-hubco Change may affect the quality of the Services and/or the Works or the likelihood of successful completion of the Works and/or delivery of the Services (or any of them);
  - 3.3 the Sub-hubco Change will interfere with the relationship of the Authority with third parties;
  - 3.4 the financial strength of Sub-hubco is sufficient to perform the Works and/or Services after implementation of Sub-hubco Change;
  - 3.5 the value and/or life expectancy of any of the Facilities will be reduced; or
  - 3.6 the Sub-hubco Change materially affects the risks or costs to which the Authority is exposed.
4. As soon as practicable after receiving Sub-hubco Notice of Change, the parties shall meet and discuss the matters referred to in it, including in the case of a Relevant Change in Law those matters referred to in Clause 32.4 of this Agreement. During discussions the Authority may propose modifications to, or accept or reject, Sub-hubco Notice of Change.
5. If the 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 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 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 Authority in its notice of acceptance.
6. If the 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 Authority of any of its costs involved in the preparation of Sub-hubco Notice of Change.
  7. Unless the Authority's written acceptance expressly agrees to an increase in the Annual Service Payment or that Sub-hubco should be entitled to relief from any of its obligations, there shall be no increase in the 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 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 Authority as a lump sum within ten (10) Business Days of agreement or determination or by way of revision of the 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 Annual Service Payments

7. In order to calculate the adjustment to be made to the 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 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 Contract and Service Contracts; and

9.2 ability to perform its obligations and exercise its rights under this Agreement, the Funding Agreements, the Construction Contract and Service Contracts,

so as to ensure that:

9.3 Sub-hubco is left in a position in relation to the Key Ratios which is no better and no worse in the Post-Adjustment Financial Model than it is in the Pre-Adjustment Financial Model; and

9.4 following the making of the Adjustments, the ability of Sub-hubco to comply with this Agreement is not adversely affected or improved as a consequence of the Relevant Event.

**APPENDIX 1**

**Part 1**

**Catalogue**

Not Used

**APPENDIX 1**

**Part 2**

**Small Works and Services Rates**

Not Used

## **APPENDIX 2**

### **Part 1**

#### **Unit Cost for Construction or Installation Costs**

The Unit Cost for Construction or Installation Costs are set out in the Agreed Form document labelled "Unit Cost for Construction or Installation Costs" which shall have effect as if expressly set out in this Appendix 2 of Part 1 of Schedule Part 16 (*Change Protocol*)

**APPENDIX 2**

**Part 2**

**Unit Costs for Lifecycle Maintenance**

Not Used

**APPENDIX 2**

**Part 3**

**Consultant, Sub-Contractor or Supplier Fees**

[REDACTED]

**APPENDIX 2**

**Part 4**

**Unit Costs for Labour Rates**

**[REDACTED]**



## SCHEDULE PART 17

### COMPENSATION ON TERMINATION

#### 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 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 Joint Insurance 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 the 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 the Authority is entitled to set off pursuant to Clause 46.12 of this Agreement.
- 1.3 To the extent that such assets and rights referred to in paragraph 1.2.7 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 1.2.4 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 1.2.4 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 9.4.4(a) of the Funders' Direct Agreement then in addition to the deduction of the Distribution made pursuant to paragraph v of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Authority Default Termination Sum, provided that the amount of the Authority Default Termination Sum shall never be less than the Revised Senior Debt Termination Amount.
- 1.6 If Sub-hubco has wilfully or through gross negligence failed to comply with its obligations under clause 9.4.4(b) of the Funders' Direct Agreement and there has been an overstatement of the cash balances by 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*).

## 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, the Authority shall pay to Sub-hubco:

- 3.5.1 the Post Termination Service Amount for each completed month, on or before the date falling ten (10) Business Days after the end of that month; and

- 3.5.2 the Post Termination Service Amount for the period from the end of the last completed month until the Compensation Date, on or before the date falling twenty (20) Business Days after the Compensation Date.

- 3.6 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 Post Termination Service Amount is less than zero then it may be carried forward and may be set off against any future positive Post Termination Service Amounts.
- 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 Joint Insurance 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 Compliant Tender with the highest 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 the Authority shall continue to pay to Sub-hubco each Post Termination Service Amount until the Compensation Date, in accordance with paragraph 3 (*Retendering Procedure*).

- 4.3 In agreeing or determining the Estimated Fair Value of the Agreement the parties shall be obliged to follow the principles set out below:
- 4.3.1 all forecast amounts of revenues and costs should be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Agreement;
  - 4.3.2 the total of all payments of the full Service Payments forecast to be made from the Termination Date to the Expiry Date shall be calculated and discounted at the Discount Rate;
  - 4.3.3 the total of all costs reasonably forecast to be incurred by the Authority as a result of termination shall be calculated and discounted at the Discount Rate and deducted from the payment calculated pursuant to paragraph 4.3.2 above, such costs to include (without double counting):
    - (a) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;
    - (b) the costs of providing the Services reasonably forecast to be incurred by the Authority from the Termination Date to the Expiry Date in providing the Project Operations to the standard required; and
    - (c) any rectification costs required to deliver the Project Operations to the standard required (including any costs reasonably forecast to be incurred by the Authority to complete the Works) and additional operating costs required to restore operating services standards less (to the extent that such sums are included in any calculation of rectification costs for the purposes of this paragraph) the aggregate of:
      - i. any insurance proceeds received (or held in the Joint Insurance Account) or which will be received pursuant to policies maintained in accordance with Clause 53 (*Insurance*); and
      - ii. amounts payable by the Authority in respect of Capital Expenditure under this Agreement which have not been paid,
- in each case such costs to be forecast at a level that will deliver the Services to the standards required by this Agreement.
- 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 Joint Insurance 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 the 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 the Authority is entitled to set off pursuant to Clause 46.12 of this Agreement.
- 1.3 To the extent that such assets and rights referred to in paragraph 1.2.5 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 1.2.3 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 9.4.4(a) of the Funders' Direct Agreement then in addition to the deduction of the Distribution made pursuant to paragraph v of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum shall never be less than the Revised Senior Debt Termination Amount.
- 1.6 If Sub-hubco has wilfully or through gross negligence failed to comply with its obligations under clause 9.4.4(b) of the Funders' Direct Agreement and there has been an overstatement of the cash balances by 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, 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 Joint Insurance 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 the 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, 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 the Authority an invoice for the relevant termination sum and sufficient supporting evidence, reasonably satisfactory to the Authority, justifying the amount of the relevant termination sum including a breakdown of each of the individual elements of such sum.
- 1.2 Subject to paragraph 1.3 below, the Authority shall pay to Sub-hubco:
- 1.2.1 the relevant termination amount within forty (40) Business Days of the Invoice Date; and
- 1.2.2 interest on the relevant termination amount (or any part of such amount that remains outstanding) from the Termination Date until the date of payment:
- (a) at the No Default Interest Rate for the period from (but excluding) the Termination Date to (and including) the date which is forty (40) Business Days after the Invoice Date; and
- (b) thereafter, at the Default Interest Rate.
- 1.3 The 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 the 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 the 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 the Authority shall pay interest on the Termination Sum (or any part of such sum that remains outstanding) from the Termination Date until the date of payment at the No Default Interest Rate.

If the Authority fails to make a payment under paragraph 1.4.1 or 1.4.2 above in full within ten (10) Business Days of the due date for payment, then the outstanding amount of the Termination Sum shall be immediately due and payable and, thereafter, the Authority shall pay interest on such sum at the Default Interest Rate.

### Following Retendering

- 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 the Authority shall pay to Sub-hubco 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 the Authority shall pay 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) pay to Sub-hubco an amount equal to the Adjusted Highest Compliant Tender Price within 20 Business Days of such notification.
- 1.7 If the Authority fails to pay the Adjusted Highest Compliant Tender Price (or any proportion thereof) by the date on which payment is due in accordance with paragraph 1.5 or paragraph 1.6 above, the 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 the Authority 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, the Authority shall pay to Sub-hubco an amount equal to the Adjusted Estimated Fair Value of the Agreement no later than the date falling twenty (20) Business Days after the Compensation Date together with interest on such amount calculated in accordance with paragraph 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 the Authority on the Compensation Date.

## 2. Full and Final Settlement

- 2.1 Any and all sums irrevocably paid by the 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 the Authority which the 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 either 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 the 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 the Authority which arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining the Adjusted Highest Compliant Tender Price or the Adjusted Estimated Fair Value of the Agreement (as the case may be); and
  - 2.2.2 any liabilities arising in respect of any breach by either party of their obligations under Clause 47.6 of the Agreement which continues after the Termination Date.

## 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 Senior Funders as conclusive as to the amount of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount (as the case may be) outstanding at any relevant time.
- 5.2 The receipt by the Senior Funders 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 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 the Authority to Sub-hubco prior to the Compensation Date;
- (c) the Tender Costs; and
- (d) amounts that the Authority is entitled to set off or deduct,

and the aggregate of the following amounts shall be added to the Estimated Fair Value of the Agreement:

- (e) all credit balances on any bank accounts held by or on behalf of 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 Joint Insurance 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 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 the Authority to Sub-hubco prior to the Compensation Date;
- (c) the Tender Costs; and
- (d) amounts that the Authority is entitled to set off or deduct,

and the aggregate of the following amounts shall be added to 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;

**"Aviva Breakage Costs"**

means: (a) on termination of this Agreement pursuant to Clause 39.1 (*Authority Events of Default*), the Early Repayment Fee 1; (b) on termination of this Agreement pursuant to Clause 42.1 (*Authority Voluntary Termination*), the Early Repayment Fee 2; and (c) on termination of this Agreement in any other circumstance, zero;

**"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;

**"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 Joint Insurance 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 Suitable Substitute Contractor who meets all of the Qualification Criteria;

**"Compliant Tenderer"**

means a tenderer 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 the 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 the obligations of the Contractor and/or the Service Provider under the 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 a Phase Actual Completion Date, then the relevant Longstop Date(s) shall be extended by a period to allow a New Sub-hubco (had one been appointed) to achieve the relevant Phase Actual Completion Date(s) prior to the relevant Longstop Date(s);
- (b) any accrued Deductions and/or Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled; and
- (c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date;

**"Discount Rate"**

means a discount rate expressed as  $(1 + \text{real base case project IRR} + \text{Gilt B} - \text{Gilt A}) \cdot (1 + i)^{-1}$

where:

"**real base case project IRR**" is the real pre-tax Real Project IRR as set out in the Financial Model 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 Model at Financial Close;

and



"Gilt. B" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model as on the Termination Date;

**"Early Repayment Fee"**

has the meaning given in the Loan Agreement;

**"Early Repayment Fee 1"**

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

**"Early Repayment Fee 2"**

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

**"Estimated Fair Value of the Agreement"**

means the amount determined in accordance with paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17 (*Compensation on Termination*) that a third party would pay to the Authority as the market value of the Deemed New Agreement;

**"Fair Value"**

means the amount at which an asset or liability could be exchanged in an arms length transaction between informed and willing parties, other than in a forced or liquidated sale;

**"Invoice Date"**

means, in respect of the Authority Default Termination Sum, the Force Majeure Termination Sum or the Corrupt Gifts Termination Sum (as appropriate), the date that is the later of:

- (a) the date on which the Authority receives an invoice from Sub-hubco for the relevant termination sum; and
- (b) the date on which the Authority receives the supporting evidence required pursuant to paragraph 1.1 of Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*);

**"Liquid Market"**

means that there are sufficient willing parties (being at least two parties, each of whom is capable of being a Suitable Substitute Contractor) in the market for design, build, finance and maintain contracts or similar contracts for the provision of services (in each case the same as or similar to this Agreement) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value 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 Monthly Service Payment under paragraph 4 of Section 3 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 the 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 Payment payable at any time before any deductions under Section 3 of Schedule Part 14 (*Payment Mechanism*) but allowing for indexation under Section 2 (*Calculation of Service Payment*) 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 a Phase Actual Completion Date, then the relevant Longstop Date(s) shall be extended by a period to allow a New Sub-hubco to achieve the relevant Phase Actual Completion Date(s) prior to the relevant Longstop Date(s);
- (b) any accrued Deductions and/or Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled;
- (c) the term of such agreement shall be equal to the term from the Termination Date until the Expiry Date; and
- (d) any other amendments which do not adversely affect the 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 Post Termination Service Amounts for the previous month was less than zero;
- (b) the Market Value Availability Deduction Amount for

that month; and

- (c) the Rectification Costs incurred by the Authority in that 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; and
- (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;
- (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 the Authority in a particular month or part of a month in ensuring that the Services are available;

**"Redundancy Payments"**

means redundancy payments and other termination payments which are required under Law to be made to employees of 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 Joint Insurance 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;

<b>"Senior Debt"</b>	means the financing provided by the Senior Funders under the Senior Funding Agreements;
<b>"Senior Funding Agreements"</b>	has the meaning given in Schedule Part 1 ( <i>Definitions and Interpretation</i> );
<b>"Sub-Contractor Losses"</b>	<p>means:</p> <p>(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</p> <p>(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;</p> <p>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:</p> <p>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</p> <p>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;</p>
<b>"Suitable Substitute Contractor"</b>	has the meaning given in the Funders' Direct Agreement;
<b>"Subordinated Debt"</b>	means all amounts from time to time outstanding under the Subscription Agreement, the Borrower Loan Notes and the Holdco Loan Notes (each as defined under the Loan Agreement) each forming part of the Initial Funding Agreements;
<b>"Tender Costs"</b>	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;
<b>"Tender Process"</b>	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 ( <i>Retendering Process</i> ) of Section 2 ( <i>Compensation for Sub-hubco Default</i> ) 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*);

**"Undisputed Payment Period"**

has the meaning given in Paragraph 1.5 of Section 5 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>"Handback Works"</b>	means the maintenance works (if any) required to be carried out in respect of the Facilities in order to procure that they will on the Expiry Date, satisfy the Handback Requirements;
<b>"Handback Programme"</b>	means the programme for carrying out the Handback Works over the remainder of the Project Term describing the total works to be carried out and the method of carrying out such works during the overall period in which the Handback Works are to be executed;
<b>"Handback Amount"</b>	means the estimated cost of carrying out the Handback Works.

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 Service Level Specification and the Method Statements; and
- 2.2 consistent with the Facilities and each of the elements of them having been designed and constructed in accordance with the applicable design life requirements set out in paragraph 5.9 of the Authority's Construction Requirements,

together referred to as (the "**Handback Requirements**").

3. Not less than twelve (12) months prior to the Expiry Date, Sub-hubco and the Authority's Representative shall conduct a joint inspection of the Facilities.

4. Within thirty (30) Business Days after the completion of the inspection, if it is found that any element of the Facilities is not in a condition consistent with the Handback Requirements, Sub-hubco shall forthwith provide to the Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*):

- 4.1 Sub-hubco's proposal as to the Handback Works;
- 4.2 Sub-hubco's proposal as to the Handback Programme; and
- 4.3 Sub-hubco's estimate of the cost of the Handback Amount.

5. The Authority's Representative may, within twenty (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 4 above.

6. On agreement, or determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*), of the Handback Works, the Handback Programme and/or the Handback Amount (as the case may be), Sub-hubco shall procure that the Handback Works are carried out in accordance with the Handback Programme so as to meet the Handback Requirements. Sub-hubco shall carry out the Handback Works at its own cost notwithstanding that the actual cost of the Handback Works may be higher than the Handback Amount.

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 Authority shall be entitled to withhold 20% of each subsequent Monthly Service Payment up to the amount of the Handback Amount (the "**Withheld Amount**") and the provisions of paragraph 11 shall apply. The 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 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 Authority (and in a form acceptable to the Authority (acting in its sole discretion)) for an amount equal to the Handback Amount and from a bank or insurance company authorised to carry out business in the United Kingdom, and upon delivery of the same to the Authority, the provisions of paragraph 7 shall not apply.
9. Sub-hubco shall carry out the Handback Works to the satisfaction of the Authority's Representative in accordance with Good Industry Practice and in accordance with the Handback Programme so as to meet the Handback Requirements.
10. Notwithstanding:
  - 10.1 the agreement of the Authority's Representative to any Handback Works, the Handback Programme or the Handback Amount;
  - 10.2 the participation of the Authority's Representative in any inspection under this Schedule; and/or
  - 10.3 the complete or partial carrying out of the 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 Service Level Specification and Method Statement.

11. Where this paragraph 11 applies, if and to the extent that Sub-hubco carries out any material part of the 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 Authority shall be entitled to require any reasonable further evidence in respect of the valuation of the works. The Authority shall make payment of the amount of a valid claim within twenty (20) Business Days of the date of the claim, and provided Sub-hubco has provided the Authority with an original invoice, and shall be entitled to withdraw that amount from the Retention Fund. If at any time the amount in the Retention Fund is insufficient to cover the costs claimed by Sub-hubco, the Authority shall pay the unpaid portion of such valid claim from any amounts which subsequently stand to the credit of the Retention Fund. In the event that the amount remaining in the Retention Fund on the Expiry Date is insufficient to cover Sub-hubco's costs which have not been paid, Sub-hubco shall bear the balance of such costs itself.
12. Not later than ten (10) Business Days before the Expiry Date, Sub-hubco and the Authority's Representative shall conduct a joint inspection of the Facilities. Such inspection shall confirm whether or not the condition of the Facilities is in accordance with paragraph 1 above.
13. On, or within ten (10) Business Days after, the Expiry Date, the Authority's Representative shall either:
  - 13.1 issue to Sub-hubco a Handback Certificate and return the Handback Bond or pay any balance standing to the credit of the 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 the Authority's Representative in accordance with paragraph 13.2 shall set out each respect in which the Handback Works have not been completed or the Facilities do not



comply with the Handback Requirements and shall state the Authority Representative's estimate of the cost of procuring that the Facilities comply in all respects with the Handback Requirements.

15. Sub-hubco may, within five (5) Business Days after receipt of the notice given in accordance with paragraph 13.2 by notice to the Authority's Representative, object to any matter set out in the Authority's Representative 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 Authority's Representative as to any matter referred to in Sub-hubco's notice given in accordance with paragraph 15 within five (5) Business Days of receipt of that notice by the Authority's Representative, then either Sub-hubco or the Authority's Representative may refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) as to:
  - 16.1 whether the Facilities comply in all respects with the Handback Requirements; and
  - 16.2 the estimated cost of procuring that the Facilities comply in all respects with the Handback Requirements, where the Facilities do not comply in all respects with the Handback Requirements.
17. If it is agreed or determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) that the Facilities did not, at the Expiry Date, comply in all respects with the Handback Requirements, Sub-hubco shall pay to the Authority an amount equal to the estimated cost of completing such Handback Works (less, where applicable, any amounts standing to the credit of the Retention Fund at that time) or procuring that the Facilities comply in all respects with the Handback Requirements. Such payment shall be made not later than ten (10) Business Days after the estimated cost has been agreed or determined and, upon such payment being received by the Authority, the Authority's Representative shall issue the Handback Certificate and return (where applicable) the Handback Bond to 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 the Authority may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Schedule Part 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 Authority in the manner and at the location as the Authority shall reasonably specify, and the costs of retaining those records in safe storage and delivering up the same shall be borne by 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, 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 the Authority (and the Parties acknowledge that such a request shall be deemed to have been issued by the Authority upon the occurrence of any of the events set out in Clause 40.1.1 whether prior to or following termination of this Agreement), 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. The 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 by it to the Senior Funders during the Project Term and any other information relating to the Project that the Authority may reasonably require.
9. Any drawings required to be made or supplied pursuant to this Agreement shall be of a size appropriate to show the detail to be depicted clearly without magnifying aids and shall conform to British Standards 1192 or 308 or equivalent as appropriate. Where by prior agreement the Authority has agreed to accept microfilm, microfiche or other storage media (which must include secure back up facilities), drawings and other documents shall be made or supplied in such form as has been agreed.
10. Upon termination or expiry of this Agreement, and in the event that the Authority wishes to enter into another contract for the operation and management of the Project, Sub-hubco shall (and shall ensure that the sub-contractors will) comply with all reasonable requests of the 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 the Authority in its preparation of any report and/or return required pursuant to regulations, directions or guidance applicable to the Authority (in each case as amended, replaced or consolidated from time to time) or as required by external agencies including without limitation, reports and returns regarding the physical condition of the Facilities, health and safety, under the Fire (Scotland) Regulations 2005 and the Fire Safety (Scotland) Regulations 2006, relating to environmental health, the Scottish Government or the Scottish Futures Trust from time to time.

## SECTION 2

### RECORDS TO BE KEPT

1. This 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 the 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 the Authority as and when requested.
3. All other documents, software or other information expressly referred to in this Agreement.
4. Records relating to the appointment and supersession of the Authority's Representative and 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 the Authority's Representative in connection with the provision of Services, the Monitoring of Performance or the availability of the Facilities.
13. All certificates, licences, registrations or warranties related to the provision of Services.
14. Documents in support of claims for Services Payments.
15. Documents submitted in accordance with Schedule 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 parties have been unable to resolve the Dispute within twenty (20) Business Days of the Dispute arising, they may (if both parties so agree) refer the Dispute to mediation on such conditions as may be agreed between the parties. Any mediation shall be completed within thirty (30) Business Days of such referral and any agreement arising therefrom shall be recorded in writing and signed by the parties and shall be binding and final to the extent set out in such agreement 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 Either party may at any time (notwithstanding that other dispute resolution procedures are running concurrently) give the other party to the Dispute notice of its intention to refer the Dispute to adjudication (the "**Notice of Adjudication**"). The party giving the Notice of Adjudication (the "**Referring Party**") shall by the same means of communication send a copy of the Notice of Adjudication to an adjudicator selected in accordance with paragraph 4.2 below or paragraph 4.11 (*Related Adjudicator*) below (the "**Adjudicator**").
- 4.2 The Adjudicator nominated to consider a Dispute referred to him shall, subject to paragraph 4.11, be selected 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*) or on the application of both Sub-hubco and the Authority such other adjudicator as may be appointed by the Chairman for the time being of the Royal Institution of Chartered Surveyors;
  - 4.2.3 the Operational Panel shall be comprised of three (3) adjudicators who shall be selected jointly to the panel by Sub-hubco and the Authority. Such selections shall take place on or before the Phase 1 Actual Completion Date;
  - 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 the adjudicators to be selected for the panels or 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 party to the Dispute (the "**Responding Party**"). The Referral Notice shall set out each element of the Referring Party's claim and the relief or remedy sought in sufficient detail so as to enable the Responding Party to understand and, where appropriate, respond to the claim and the Referral Notice shall be accompanied by copies of, or relevant extracts from, this Agreement and such other documents as the Referring Party intends to rely upon. The date of the referral of the Dispute (the "**Referral**") shall be the date of the Referral Notice.
- 4.4 Within seven (7) days of appointment in relation to a particular Dispute, the Adjudicator shall establish the procedure and timetable for the adjudication. The Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Agreement. The parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.
- 4.5 The Adjudicator shall reach a decision on the Dispute within twenty-eight (28) days of the 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 parties otherwise agree, the Adjudicator shall give reasons for his decision. Unless and until the Dispute is finally determined by Court proceedings or by an

agreement in writing between the parties, the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.

- 4.6 The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the parties. Each party shall bear its own costs arising out of the adjudication, including legal costs and the costs and expenses of any witnesses.
- 4.7 The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an adjudicator and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.
- 4.8 The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any 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
- 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 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 any 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 Authority shall be jointly responsible with any 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 Authority agree that the Related Adjudicator shall have the discretion to make directions to require Sub-hubco, the Authority and any 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 Authority and any third party who is a party to the Related Agreement shall bear the Consolidated Adjudication Costs in equal shares, and if Sub-hubco, the Authority or any 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, or the Authority as the case may be, 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 Authority has previously consented in writing to the identity of the Related Adjudicator appointed in respect of the Related Adjudication. The Authority's consent to such request shall not be unreasonably withheld and if the Authority refuses to consent, it must give reasons in writing for its refusal. Should the Authority fail to respond within two (2) 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 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 Construction Contract or otherwise affects the relationship or rights of Sub-hubco and/or the Contractor under the 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 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 Authority and two-thirds by Sub-hubco.

- 6.4 The Authority shall have no liability to the Contractor or the Service Provider or the Independent Tester arising out of or in connection with any decision of the Adjudicator or in respect of the costs of the Contractor or the Service Provider or the Independent Tester in participating in the resolution of any Dispute under this Agreement.

- 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 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 Authority a written undertaking from the Contractor and/or the Service Provider and/or the Independent Tester (as appropriate) addressed to the Authority that they shall not use any such Confidential Information otherwise than for the purpose of the dispute resolution proceedings under this Agreement and that they shall not disclose such Confidential Information to any third party other than the Adjudicator or the courts or any professional adviser engaged by the Contractor or the Service Provider or Independent Tester (as appropriate) to advise in connection with the Dispute.

## 7. **PANEL MEMBERS**

The panel members referred to in paragraph 4 are as follows:

### Construction Panel

(1) Janey Milligan, Construction Dispute Resolution, Pavilion 1, Parkway Court, 291 Springwell Parkway, Glasgow, G69 6GA

(2) John Hunter, Hunter Consultants, Commercial Centre, Stirling Enterprise, Stirling, FK7 7BS

(3) Brian Eggleston, 80 Green Park, Manor Road,

**8. NO LOSS**

Where the 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, the 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 Authority's obligation to pay, is conditional on the entitlement of, or receipt of payment by Sub-hubco from the 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**

1. Name :JAMES GILLESPIE'S CAMPUS SUBHUB LIMITED
2. Date of Incorporation :26 JULY 2013
3. Registered number :SC455384
4. Registered office :Atholl House, 51 Melville Street, Edinburgh, EH3 7HL
5. Directors

Name	Address
Kevin James Bradley	
Andrew David Bruce	
John Christian Elliot	
Iain Fraser Graham	
John Alexander Hope	
Adrian John Lawton-Wallace	
Alexander Monteith McCrorie	
Paul McGirk	

6. Secretary :None
7. Subsidiary undertakings at the date of this Agreement :None
8. Authorised and issued share capital at the date of this Agreement :

Name and address of registered holder	Number and class held	Amount paid up
James Gillespie's Campus Subhub Holdings Limited	100 Shares of £1 each	£100

9. Loan Stock at the date of this Agreement issued as follows:



10. **Loan Stock Provisions** :

**SECTION 2**

**HOLDCO INFORMATION**

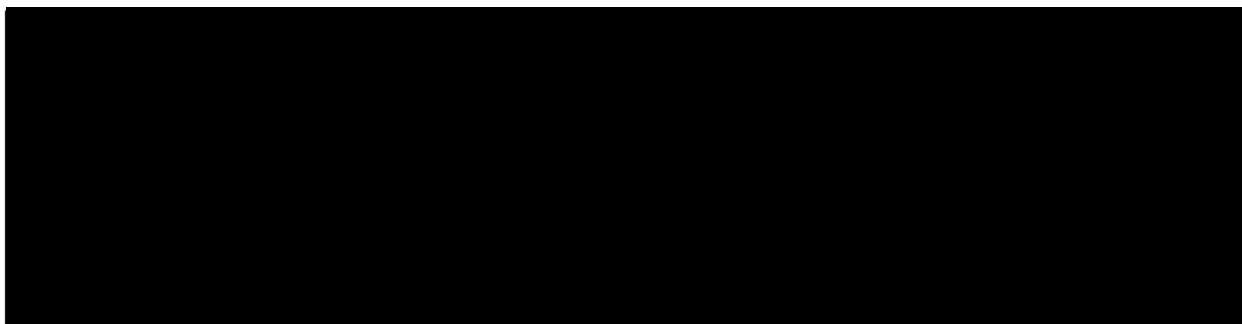
- 1. Name : JAMES GILLESPIE'S CAMPUS SUBHUB HOLDINGS LIMITED
- 2. Date of Incorporation : 12 July 2013
- 3. Registered number : SC454429
- 4. Registered office : Atholl House, 51 Melville Street, Edinburgh, EH3 7HL
- 5. Directors

Name	Address
Kevin James Bradley	
Andrew David Bruce	
John Christian Elliot	
Iain Fraser Graham	
John Alexander Hope	
Adrian John Lawton-Wallace	
Alexander Monteith McCrorie	
Paul McGirk	

- 6. Secretary : None
- 7. Subsidiary undertakings at the date of this Agreement : None
- 8. 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 South East Scotland Limited	100 Ordinary Shares of £1 each	£100

9. Loan Stock at the date of this Agreement issued as follows:



10. Loan Stock Provisions :

**SCHEDULE PART 22**

**CERTIFICATES**

**Commencement Certificate**

Issued by: **[AUTHORITY]**

Address: [ ]

Sub-hubco: **[SUB-HUBCO]**

Address: [ ]

Issue date: [ ]

Works:

Situated at:

Design Build Finance and Maintain Agreement dated: [ ]

I/we certify that this is the Commencement Certificate issued pursuant to Clauses 2 (*Execution and Delivery of Documents*) and 9 (*Nature of Land Interests*) and Section 2 (*Documents to be delivered by the Authority*) of Schedule Part 2 (*Completion Documents*) of the above mentioned Design Build Finance and Maintain Agreement.

To be signed by or for the issuer named above.

Signed .....  
**[AUTHORITY]**



**Handback Certificate**

Issued by: Authority's Representative

Address: [ ]

Authority: **[AUTHORITY]**

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 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]**

**\*Certificate of Phase Practical Completion**

Issued by: Independent Tester - [ ]

Address: [ ]

Sub-hubco: **[SUB-HUBCO]**

Address: [ ]

Authority: **[AUTHORITY]**

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 Actual Completion Date [for Phase No. [ ]] of the Works was achieved on [ ]

To be signed by or for the issuer named above.

Signed.....  
**[INDEPENDENT TESTER]**

**\*Certificate of Snagging Completion**

Issued by: Independent Tester - [ ]

Address: [ ]

Sub-hubco: **[SUB-HUBCO]**

Address: [ ]

Authority: **[AUTHORITY]**

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 rectification of the Snagging for Phase No. [ ] of the Works was achieved on [ ]

To be signed by or for the issuer named above.

Signed.....  
**[INDEPENDENT TESTER]**

**\*Commissioning Completion Certificate**

Issued by: Independent Tester - [ ]

Address: [ ]

hubco: [SUB-HUBCO]

Address: [ ]

Authority: [AUTHORITY]

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 was achieved on [ ]

To be signed by or for the issuer named above.

Signed.....  
[INDEPENDENT TESTER]

## SCHEDULE PART 23

### REFINANCING

#### Requirement for Authority Consent

1. Sub-hubco shall obtain the Authority's prior written consent to any Qualifying Refinancing and both 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 any 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. The Authority shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater share of the Refinancing Gain than that specified in 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 model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with the Refinancing whether that Refinancing is a Qualifying Refinancing or not.

#### Receipt of Gain

5. The Authority shall 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 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 the Authority's share of the Refinancing Gain (taking into account how the Authority has elected to receive its share of the Refinancing Gain under paragraph 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 the 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 the Authority will be paid to the 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).

#### **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, 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 Refinancing
- provided 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 the Authority within twenty eight (28) days after receipt of a valid invoice 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.
12. In relation to a Qualifying Refinancing:
- 12.1 which is not a Restructuring Transfer under paragraph 13 (*Project Restructuring*) of this Schedule Part 23; and
- 12.2 where as part of that Qualifying Refinancing, Sub-hubco's leasehold interest in the Site is no longer required as security to fund the Project, such leasehold interest is surrendered by Sub-hubco;

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 Sub-hubco's leasehold interest in the Site, in each case occurring as a result of or in consequence of the Qualifying Refinancing.

### 13. Initial Approval Stage

13.1 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 13.1, 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 13) 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.

13.2 Following receipt of a Restructuring Notice and the consultation described in paragraph 13.1, Sub-hubco shall procure that the Senior Funder shall consider in good faith the Restructuring Notice and, at its discretion (acting reasonably), shall:

13.2.1 issue to Sub-hubco a Senior Funder Initial Approval Notice; or

13.2.2 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.

13.3 Subject to the Senior Funder providing Sub-hubco with a Senior Funder Initial Approval Notice, Sub-hubco shall:

13.3.1 liaise with the Senior Funder to discuss the potential terms of a Restructuring Transfer;

13.3.2 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 Loan Agreement; and

13.3.3 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.

- 13.4 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.
- 13.5 The Authority shall:
- 13.5.1 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
- 13.5.2 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 13.6 or withdraw the Restructuring Notice.

#### **Restructuring Proposal Stage**

- 13.6 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").
- 13.7 The Restructuring Proposal shall include the following conditions as a minimum:
- 13.7.1 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;
- 13.7.2 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 13.12 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;
- 13.7.3 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;
- 13.7.4 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
- 13.7.5 ensure that 100% (one hundred per cent) of any reduction to the Annual Service Payment shall be for the benefit of the Authority.
- 13.8 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.
- 13.9 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:

- 13.9.1 the Restructuring Proposal is agreed; or
- 13.9.2 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 13; or
- 13.9.3 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.

- 13.10 Subject to paragraph 13.11 and provided always that the Senior Funder has approved the Restructuring Proposal in accordance with paragraph 13, 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.
- 13.11 The Authority and Sub-hubco:
  - 13.11.1 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
  - 13.11.2 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.
- 13.12 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 13.7.2) or as a one-off payment, at the Authority's discretion.
- 13.13 The Parties may, acting in good faith, decide not to proceed with any Restructuring Transfer at any time.
- 13.14 If the Restructuring Transfer is not completed because:
  - 13.14.1 the Authority does not give its approval in accordance with paragraph 13.5, and/or
  - 13.14.2 the Senior Funder does not give its approval in accordance with paragraphs 13.2.2 or 13.9.3,

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.
- 13.15 The Senior Funder shall be deemed to be "acting reasonably" pursuant to this paragraph 13 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 13 shall be construed accordingly.

#### 14. Tax Restructuring

- 14.1 Subject to the Authority's approval of Sub-hubco's costs pursuant to Clause 11.3, Sub-hubco undertakes to carry out, in consultation with the Authority, an assessment as to the viability of adopting a composite trader tax treatment for the Project (a "**Tax Restructuring**") and the likely benefits to be derived therefrom and undertakes to use its reasonable endeavours to obtain clearance from HMRC that supports a Tax Restructuring.
- 14.2 Subject to the Authority's approval of Sub-hubco's costs pursuant to Clause 11.3, if Sub-hubco obtains clearance from HMRC that supports a Tax Restructuring or otherwise determines (having considered in good faith the assessment carried out pursuant to paragraph 11.1) that a Tax Restructuring is viable, the parties shall together in good faith seek to agree the basis on which to implement the Tax Restructuring such that 100% of the Net Tax Adjustment is passed to the Authority provided that the basis on which Sub-hubco agree to implement the Tax Restructuring is permitted by the Funding Agreements and would place Sub hubco and the Senior Funder in a no better or worse position than it would have been had the Tax Restructuring not occurred. For the purposes of this paragraph 11.2 "**Net Tax Adjustment**" means the net amount of any reduced tax payable by Sub-hubco and the Authority arising from a change in the tax treatment of the Project including but not limited to increased corporation tax deductions which may be available.
- 14.3 The Authority undertakes to pay to Sub-hubco all internal and external costs reasonably and properly incurred by it (including those of hubco, any Sub-hubco Party and the Senior Funder) pursuant to paragraphs 11.1 and 11.2 above provided that such costs have been confirmed by Sub-hubco to the Authority in writing, and approved by the Authority in writing, before being incurred to place Sub-hubco and the Senior Funder in a no better or worse position than it would have been had the Tax Restructuring not occurred.

#### Definitions

In this Schedule Part 23 (*Refinancing*) and elsewhere in this Agreement (save where Schedule Part 1 (*Definitions and Interpretation*) provides to the contrary) the following words and expressions shall have the following meanings:

#### "Distribution"

means:

- (a) whether in cash or in kind, any:
- i. dividend or other distribution in respect of share capital;
  - ii. reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
  - iii. payments under the Subordinated Funding Agreements (whether of principal, interest, breakage costs or otherwise);
  - iv. payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in

the ordinary course of business nor on reasonable commercial terms;

- v. the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms, or

- (b) the early release of any Contingent Funding Liabilities, the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain;

**"EEA"**

means from time to time the European Economic Area as created by The Agreement on the European Economic Area 1992 or any successor or replacement body, association, entity or organisation which has assumed either or both the function and responsibilities of the European Economic Area;

**"Equity IRR"**

means the projected blended rate of return to the Relevant Persons over the full term of this Agreement, having regard to Distributions made and projected to be made;

**"Exempt Refinancing"**

means:

- (a) any Refinancing that was fully taken into account in the calculation of the Annual Service Payments;
- (b) a change in taxation or change in accounting treatment;
- (c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of
  - i. breach of representations and warranties or undertakings;
  - ii. movement of monies between the Project Accounts in accordance with the terms of the Senior Funding Agreements as at Financial Close;
  - iii. late or non-provision of information, consents or licences;
  - iv. amendments to Sub-Contracts;
  - v. approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Funding Agreements);
  - vi. restrictions imposed by Senior Funders on the dates at which the Senior Debt

can be advanced to Sub-hubco under the Senior Funding Agreements and/or amounts released from the 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 Initial 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 HoldCo 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 HoldCo 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;

<b>"Insurance Undertaking"</b>	has the meaning given in the rules from time to time of the Financial Services Authority;
<b>"Margin"</b>	has the meaning given to that term in the Loan Agreement in relation to the Term Loan Facility (as that term is defined in the Loan Agreement);
<b>"Margin Gain"</b>	<p>means an amount equal to the lower of:</p> <ul style="list-style-type: none"> <li>(a) the Refinancing Gain; and</li> <li>(b) the higher of: <ul style="list-style-type: none"> <li>i. zero; and</li> <li>ii. <math>D - E</math>;</li> </ul> </li> </ul> <p>where:</p> <p>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 Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing; and</p> <p>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 Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing;</p>
<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;

**"Project Accounts"**

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

**"Qualifying Bank Transaction"**

means:

- (a) the syndication by a Senior Funder, in the ordinary course of its business, of any of its rights or interests in the Senior Funding Agreements;
- (b) the grant by a Senior Funder of any rights of participation, or the disposition by Senior Funder of any of its rights or interests (other than as specified in paragraph (a) above in respect of the Senior Funding Agreements in favour of:
  - i. any other Senior Funder
  - ii. any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 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 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 or HoldCo, whether by way of security or otherwise, in favour of:

- i. any other Senior Funder
- ii. any institution specified in paragraphs (b)ii to (b)vii above
- iii. any Qualifying Institution or
- iv. any other institution in respect of which the prior written consent of the Authority has been given;

**“Qualifying Institutions”**

means a bank that is authorised 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 Exempt Refinancing;

**“Refinancing”**

means:

- (a) any amendment, variation, novation, supplement or replacement of any Funding Agreement (other than any Subordinated Funding Agreement);
- (b) the exercise of any right, or the grant of any waiver or consent, under any Funding Agreement (other than any Subordinated Funding Agreement);
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Funding Agreements (other than the Subordinated Funding Agreements) or the creation or granting of any other form of benefit or interest in either the Funders' Agreements (other than the Subordinated Funding Agreements) or the contracts, revenues or assets of 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 Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing;

B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing; and

C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR;

**"Regulated Collective Investment Scheme"**

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

**"Relevant Person"**

means a Shareholder and any of its Associated Companies;

**"Restructuring Notice"**

means a notice issued by the Authority to Sub-hubco in accordance with paragraph 13.1 of this Schedule Part 23 informing Sub-hubco that the Authority wishes Sub-hubco to consider making a Restructuring Transfer;

**"Restructuring Proposal"**

has the meaning ascribed to it in paragraph 13.6 of this Schedule Part 23 (*Refinancing*)

**"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),

**"Subordinated Funder"**

means a person providing finance under a Subordinated Funding Agreement;

**"Subordinated Funding Agreements"**

means the Borrower Loan Note Instrument, the Holdco Loan Note Instrument and the Subscription Agreement 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 [Senior Funder] 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 13.2.1 of Schedule Part 23 (Project Restructuring) to the project agreement made between (1) the Company and (2) [Authority] 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

**SCHEDULE PART 24**

**NOT USED**

**SCHEDULE PART 25**

**JOINT INSURANCE 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.

Category of Information/Material	Period for which information is to be kept confidential
Financial Model (as at Financial Close)	From the Effective Date until the date falling 2 years after the first Phase Actual Completion Date
Financial Model (amended from time to time in accordance with this Agreement)	From the date of the relevant Financial Model until the date falling 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 relevant 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

<p>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</p>	<p>Project Term</p>
<p>Financial term sheets and related funding information including any funder pricing</p>	<p>2 years from the date on which the information is produced to the Authority</p>
<p>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)</p>	<p>Until the date falling 2 years after the first Phase Actual Completion Date</p>
<p>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</p>	<p>Until the date falling 2 years after the first Phase Actual Completion Date</p>

## SCHEDULE PART 27

### RELEVANT DISCHARGE TERMS

1. The Parties hereby acknowledge and agree that:
    - 1.1 where following an application for judicial review or an audit review (within the meaning of the Local Government (Contracts) Act 1997), a court determines that the Authority did not have power to enter into this Agreement or to enter into this Agreement and the Funders' Direct Agreement and that this Agreement or that this Agreement and the Funders' Direct Agreement are unenforceable:
      - 1.1.1 Sub-hubco shall be entitled to be paid by the Authority a sum equivalent to the amount calculated in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule Part 17 (*Compensation on Termination*); and
      - 1.1.2 the relevant provisions of Clause 46 (*Compensation on Termination*) and Section 5 (*General*) of Schedule Part 17 (*Compensation on Termination*) shall apply mutatis mutandis, subject to compensation being deemed to be payable in a lump sum within 6 months of the order of the court; and
    - 1.2 where following an application for judicial review or an audit review (within the meaning of the Local Government (Contracts) Act 1997) a court determines that the Authority did not have power to enter into the Funders' Direct Agreement and the Funders' Direct Agreement is unenforceable but this Agreement remains in full force and effect then, without prejudice to the application of paragraph 1.1.1 of this Schedule Part 27 (*Relevant Discharge Terms*) at any time thereafter:
      - 1.2.1 the Monthly Service Payment shall be reduced by the amount payable by Sub-hubco in respect of the Senior Debt; and
      - 1.2.2 the Authority shall pay Sub-hubco a sum equal to the Revised Senior Debt Termination Amount (excluding, provided that the Senior Funders do not enforce any security over credit balances on any bank accounts held by or on behalf of Sub-hubco, limb (b)(i) of the definition set out in Section 6 (*Definitions*) of Schedule Part 17 (*Compensation on Termination*)) and the relevant provisions of Clause 46 (*Compensation on Termination*) and Section 5 (*General*) of Schedule Part 17 (*Compensation on Termination*) shall apply mutatis mutandis subject to any reference to the Termination Date in this Agreement shall be deemed to be the date on which the Funders' Direct Agreement was declared unenforceable in accordance with the provisions of this paragraph 1; and,
- the Parties agree that such provisions shall be deemed to be relevant discharge terms for the purposes of section 6(2) of the Local Government (Contracts) Act 1997 (the "**Relevant Discharge Terms**").
2. The parties acknowledge and agree that in the event that the circumstances envisaged by paragraph 1.2 occur prior to the circumstances envisaged by paragraph 1.1 then the amount calculated in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule Part 17 (*Compensation on Termination*) shall be calculated to ensure no double counting between that amount and any sums paid to Sub-hubco pursuant to paragraph 1.2.2.

**SCHEDULE PART 28**

**[REDACTED]**



**SCHEDULE PART 29**  
**AUTHORITY POLICIES**

Authority Policies means the policies listed in:

- 1 Section A below; and
- 2 Section B below:
  - (i) only insofar as relevant to Sub-hubco carrying out the Project Operations; and
  - (ii) in each case only insofar as the same does not conflict with or is more onerous than any equivalent policy of Sub-hubco (or the relevant Sub-Contractor) in place from time to time and provided that compliance with such policies would not cause Sub-hubco to incur additional cost and/or expense.

and which are in the Agreed Form (other than the Records Policy referred to at paragraph (g) of Section B of this Schedule Part 29 (*Authority Policies*)).

**Section A**

- (a) Smoking Info Sheet
- (b) Smoking policy
- (c) Workplace policy on Alcohol

**Section B**

- (a) Anti Bribery Policy
- (b) Anti Bribery Procedure
- (c) Corporate Health and Safety policy
- (d) Electronic Communications - Code of Conduct
- (e) Equality and Diversity in Employment (1 page summary)
- (f) Fire Safety Policy
- (g) Records Policy available at [http://www.edinburgh.gov.uk/info/704/access\\_to\\_information/390/records\\_management](http://www.edinburgh.gov.uk/info/704/access_to_information/390/records_management) or as otherwise made available by the Authority together with the Corporate Records Retention Schedules

**ATTACHMENT A**  
**FINANCIAL MODEL**