



AGREEMENT

between

THE WEST LOTHIAN COUNCIL

and

WCHS DBFMCO LIMITED

A NEW HIGH SCHOOL FOR THE WEST CALDER AREA

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BETWEEN:

- (1) THE WEST LoTHIAN COUNCIL, a local authority constituted and incorporated under the Local Government etc. (Scotland) act 1994, having its principal offices at West Lothian Civic Centre, Howden South Road, Livingston, EH54 6FF (the "Authority"); and
- (2) WCHS DBFMCO LIMITED (registered under number SC535587) whose registered office is 51 Melville Street, Edinburgh, EH3 7HL ("DBFM Co").

WHEREAS:

- (A) The Authority wishes to develop a new high school at West Calder, West Lothian to improve the efficiency of the services provided by the Authority.
- (B) Pursuant to the Territory Partnering Agreement for the hub South East Territory, the Authority issued a new project request in respect of the Project to which hubco submitted its stage 1 submission and stage 2 submission as required by the approval process for new projects detailed therein.
- (C) Following approval by the Authority of the hubco's stage 2 submission, the Authority has appointed DBFM Co (a subsidiary of hubco) to design, build, finance and provide certain maintenance services in connection with the new West Calder High School (the "Project").
- (D) This Agreement is entered into under the Scottish Government's hub initiative.
- (E) This Agreement is excluded from the application of Part II of the Housing Grants, Construction and Regeneration Act 1996 by operation of paragraph 4 of the Construction Contract (Scotland) Exclusion Order 1998 (SI 1998/686).

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

2.1.2 the Authority shall deliver to DBFM Co 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 DBFM Co by written notice to the Authority).

2.2 DBFM Co undertakes to obtain and deliver to the Authority, within the earliest to occur of:

- 2.2.1 ten (10) Business Days of the date of appointment of each Key Sub-Contractor by the Contractor; or
- 2.2.2 not later than ten (10) Business Days prior to the relevant Key Sub-Contractor commencing any relevant sub-contract works on Site and/or commencing any off-site fabrication related to the relevant sub-contract works,

a collateral warranty agreement between the relevant Key Sub-Contractor and the Authority, which collateral warranty agreement shall be in the form of the Key Sub-Contractor Collateral Agreement (subject to any reasonable amendments required by the Key Sub-Contractor and approved by the Authority, such approval not to be unreasonably withheld or delayed), validly executed in self proving form by the relevant Key Sub-Contractor, together with a certified copy of the signed sub-contract entered into between the Contractor and the relevant Key Sub-Contractor.

3. COMMENCEMENT AND DURATION

- 3.1 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 Clause 3.1, the parties acknowledge and agree that any works carried out at the Site prior to the date of this Agreement, whether by DBFM Co, hubco, the Contractor and/or persons acting on their behalf (and including, for the avoidance of doubt, any works carried out at the Site pursuant to an agreement between the Authority and hubco dated 25th August 2016 (as amended by letters of amendment between the parties dated 30th September, 19th and 28th October 2016) and/or any sub-contract or additional contract thereto entered into in relation to the carrying out of those works), 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 DBFM Co 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) DBFM Co 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, DBFM Co 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, DBFM Co 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 DBFM Co to perform its obligations under the Project Documents or this Agreement.
- 4.3 No Refinancing or 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 DBFM Co 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 Without prejudice to the provisions of Clause 4.2 and Clause 4.3, 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, DBFM Co shall liaise with the Authority, and shall use all reasonable endeavours to provide the Authority with a copy of the relevant agreement in settled draft form, not less than ten (10) Business Days before it enters into any Funding Agreement (other than the Initial Funding Agreements).

Delivery

- 4.6 Without prejudice to the provisions of this Clause 4 (*Project Documents*), if at any time an amendment is made to any Project Document, or DBFM Co enters into a new Project Document (or any agreement which affects the interpretation or application of any Project Document), DBFM Co 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 DBFM Co.

Funding Default

- 4.7 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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, DBFM Co 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 DBFM Co shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed:
- 5.2.1 in compliance with all Law and Consents (including without limitation the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents;
 - 5.2.2 in a manner that is not likely to be injurious to health or to cause damage to property;
 - 5.2.3 in a manner consistent with the Quality Plans;
 - 5.2.4 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 DBFM Co from time to time; and
 - 5.2.6 in so far as not in conflict with an express obligation of DBFM Co under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on DBFM Co 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 DBFM Co'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 DBFM Co 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 DBFM Co in the performance of its obligations under this Agreement (having regard always to the interactive nature of the activities of the Authority and of DBFM Co 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 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM CO

Other business

- 6.1 DBFM Co 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.

DBFM Co Parties

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

Safety

- 6.3 DBFM Co shall, in carrying out the Project Operations, have full regard for the safety of all persons on the Site (whether lawfully or not) and keep the Site, 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 DBFM Co for and DBFM Co 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, DBFM Co, the Independent Tester or any DBFM Co Party.

No warranty

- 7.2 The Authority gives no warranty or undertaking of whatever nature in respect of the Disclosed Data and, specifically (but without limitation), the Authority does not warrant that the Disclosed Data represents all of the information in its possession or power (either during the conduct of the tender process for the Project or at the time of execution of this Agreement) relevant or material to or in connection with the Project or the obligations of DBFM Co under this Agreement or under any of the Project Documents. In addition, the Authority shall not be liable to DBFM Co in respect of any failure to disclose or make available to DBFM Co (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 DBFM Co (whether before, on or after execution of this Agreement) of any inaccuracy, error, omission, defects or inadequacy in the Disclosed Data.

DBFM Co investigation

- 7.3 DBFM Co 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 DBFM Co 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 DBFM Co 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 the Estates Manager 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 DBFM Co from time to time.
- 8.2 The Authority's Representative shall be entitled at any time, by notice to DBFM Co, 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 DBFM Co change the Authority's Representative. The Authority shall (as far as practicable) consult with DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co, DBFM Co and DBFM Co'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 DBFM Co and DBFM Co's Representative shall not be required to determine whether an express authority has in fact been given.

Representative of DBFM Co

- 8.7 DBFM Co's Representative shall be [REDACTED] or such other person appointed pursuant to Clause 8.8. DBFM Co's Representative shall have full authority to act on behalf of DBFM Co for all purposes of this Agreement. Except as previously notified in writing before such act by DBFM Co to the Authority, the Authority and the Authority's Representative shall be entitled to treat any act of DBFM Co's Representative in connection with this Agreement as being expressly authorised by DBFM Co 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 DBFM Co may by notice to the Authority change DBFM Co's Representative. Where DBFM Co 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 DBFM Co's Key Works Personnel are identified in Schedule Part 3 (*Key Works Personnel*). DBFM Co shall, as far as it is within DBFM Co'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 DBFM Co 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

Access During Construction

9.1 From the Commencement Date until the Actual Completion Date or (if earlier) the Termination Date, the Authority shall grant to DBFM Co and DBFM Co Parties, or procure that DBFM Co and the DBFM Co Parties are granted:

9.1.1 access to the Site; and

9.1.2 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 DBFM Co's Pre-Completion Commissioning.

Access Following Construction

9.2 After the occurrence of the Actual Completion Date the Authority shall grant to DBFM Co and DBFM Co Parties, or procure that DBFM Co and DBFM Co Parties are granted, access to the Facilities subject only to the Reserved Rights, the Title Conditions and the provisions of this Agreement and solely for the purposes of:

9.2.1 carrying out the Project Operations (other than those Project Operations for which DBFM Co is granted rights pursuant to Clause 9.1 (*Access During Construction*));

9.2.2 remedying Defects and carrying out Snagging Matters and exercising its rights under Clause 23.15; and

9.2.3 exercising the Ancillary Rights.

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

Extent of Rights

9.3 The rights referred to at Clauses 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) shall not operate or be deemed to operate as a lease of the Facilities or the Site or any part of the Facilities or the Site and DBFM Co shall not have or be entitled to exclusive possession (save to the extent expressly included within the Ancillary Rights) or any estate, right, title or interest in and to the Site or the Facilities except as provided herein and shall occupy the Site as a licensee only.

9.4 The rights referred to at Clauses 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) are personal to DBFM Co and the DBFM Co Parties.

9.5 DBFM Co shall procure that:

9.5.1 all Project Operations carried out at the Site by or on behalf of DBFM Co (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

9.5.2 there shall be no action, or omission to act by DBFM Co or a DBFM Co Party, which shall give rise to a right for any person to obtain title to the Site or any part of it.

9.6 Notwithstanding the terms of Clauses 9.1 and 9.2 or any other rights granted under this Agreement, the Authority shall (if it is the heritable proprietor of the Site), or (if it is not the heritable proprietor of the Site) shall procure that the heritable proprietor of the Site shall, enter into such wayleaves, deeds of servitude or other similar agreements with any third party that DBFM Co or any DBFM Co 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 shall enter into) any such wayleave, deed of servitude or other similar agreement, as soon as reasonably practicable after DBFM Co has provided to the Authority all relevant information in connection therewith provided always that DBFM Co has obtained at its own cost the prior agreement of the third party in terms acceptable to the Authority (acting reasonably). DBFM Co shall reimburse the Authority for all costs and expenses reasonably and properly incurred by the Authority (and/or the heritable proprietor of the Site) in connection with entering into such wayleaves, deeds of servitude or other similar agreements at the request of DBFM Co.

10. THE SITE

10.1 The condition of the Site shall be the sole responsibility of DBFM Co. Accordingly (without prejudice to any other obligation of DBFM Co under this Agreement), DBFM Co 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 its surroundings and (where applicable) any existing structures or works on, over or under the 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, the load bearing and other relevant properties of the Site, the risk of injury or damage to property affecting the 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 of the rights of access to and through the Site granted hereunder and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Site) without prejudice to DBFM Co's rights under this Agreement in respect of a breach by the Authority of its obligations under Clause 9.1 and/or Clause 9.2;

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 (except where such matters can only be ascertained by a review of title conditions, not included in the Title Conditions); 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, DBFM Co accepts full responsibility for all matters referred to in Clause 10.1 and 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 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 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 DBFM Co).

11. CONSENTS & PLANNING APPROVAL

- 11.1 DBFM Co shall be responsible for:
 - 11.1.1 obtaining all Consents which may be required for the performance of the Project Operations; and
 - 11.1.2 subject to Clause 11.2A, 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 DBFM Co 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 DBFM Co, to claim or to include within its claim such sums as DBFM Co acting reasonably requests and shall pay to DBFM Co the part of any compensation that it receives under that scheme that relates to the sums claimed at the request of DBFM Co.
- 11.2A The Authority shall implement and satisfy each of the conditions and reserved matters of the Planning Approval in respect of which responsibility for the same has been allocated to the Authority in accordance with the Planning Matrix.
- 11.3 Either party shall, on becoming aware of a Planning Challenge, notify the other party and the parties shall consult and generally co-operate with each other in good faith with a view to mitigating the effects of the

Planning Challenge. Such consultation shall include discussion as to the likelihood of the Planning Challenge being successfully defended, whether either party or both parties should take any action to seek to resist the Planning Challenge and/or whether an application for a new Planning Permission should be submitted (in which case Clause 11.8 shall apply). Without prejudice to the foregoing generality, DBFM Co shall, within 10 Business Days of receipt of a written request, provide the Authority with an estimate of:

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

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

The Authority shall reimburse DBFM Co for any costs reasonably and properly incurred by it in complying with this Clause 11.3 (including taking such action as the Authority may direct it to take to seek to resist the Planning Challenge) within 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 DBFM Co in complying with this Clause 11.3.

11.4 The parties shall each:

11.4.1 provide to the Relevant Authority all relevant evidence and information that is available to DBFM Co and/or the Authority and that may be lawfully disclosed to the Relevant Authority and employed by it in the effective defence of the Planning Challenge; and

11.4.2 co-operate with the Relevant Authority in the provision of witnesses in the defence of the Planning Challenge.

11.5 DBFM Co shall continue to discharge its obligations under this Agreement save to the extent that:

11.5.1 DBFM Co, as a consequence of the Planning Challenge, is prevented by Law or any interim order of a Relevant Authority from progressing the Works (which shall include an Adverse Planning Decision); and/or

11.5.2 DBFM Co is instructed by the Authority pursuant to Clause 11.7 to suspend the carrying out of the Works.

11.6 To the extent that DBFM Co is prevented from progressing the Works as a consequence of an event listed in Clause 11.5, such event shall be deemed to be a Delay Event and a Compensation Event.

11.7 Without prejudice to Clause 29.10, the Authority shall be entitled at any time following a Planning Challenge to instruct DBFM Co, in writing, to suspend the carrying out of any of the Works to which the relevant Planning Approval relates. Such instruction shall cease to have effect upon a Planning Challenge Dismissal being notified by the Authority to DBFM Co.

11.8 The Authority shall be entitled at any time following a Planning Challenge to instruct DBFM Co to apply for a new Planning Permission for the Works

and the Authority may, without prejudice to Clause 11.9, 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 DBFM Co to proceed with the Works in accordance with the requirements of the new Planning Permission.

- 11.9 In the event that a Planning Challenge results in an Adverse Planning Decision, the Authority shall as soon as reasonably practicable either:
 - 11.9.1 serve a notice under Clause 42.1 requiring termination of this Agreement; or
 - 11.9.2 issue an Authority Change Notice instructing DBFM Co to proceed with an application for a new Planning Permission and (if and to the extent necessary) varying the Authority's Construction Requirements and/or DBFM Co's Proposals in a manner that satisfies the grounds on which the Planning Challenge was successful; or
 - 11.9.3 issue an Authority Change Notice varying this Agreement, the Authority's Construction Requirements and Service Level Specification if and to the extent necessary to allow DBFM Co to proceed with the Works in accordance with the requirements of a new Planning Permission obtained prior to the Adverse Planning Decision as referred to in Clause 11.8 above.
- 11.10 If a new Planning Permission is obtained pursuant to an instruction issued under Clause 11.9.2 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 DBFM Co to proceed with the Works in accordance with the requirements of the new Planning Permission.
- 11.11 The Authority shall not be entitled to withdraw an Authority Change Notice issued under Clause 11.8, Clause 11.9 or Clause 11.10.

PART 3: DESIGN AND CONSTRUCTION

12. THE DESIGN CONSTRUCTION AND COMMISSIONING PROCESS

Overall Responsibility

- 12.1 DBFM Co 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 DBFM Co'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 DBFM Co has complied with DBFM Co's Proposals shall not be a defence to an allegation that DBFM Co has not satisfied the Authority's Construction Requirements; and
 - 12.2.2 the fact that DBFM Co has satisfied the Authority's Construction Requirements shall not be a defence to an allegation that DBFM Co has failed to comply with DBFM Co's Proposals.

Design responsibility

- 12.3 DBFM Co 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), DBFM Co 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;
 - 12.4.3 Not Used

Authority design approval

- 12.5 The Authority confirms that, as at the date of this Agreement, it has reviewed such of DBFM Co's Proposals as have been initialled by the Authority (as such drawings are set out in Section WHS-1.11 1:50 Layouts of the DBFM Co Proposals) and that, subject to any qualifications and/or

comments notified by the Authority to DBFM Co in writing and set out in section 3.1 of the Authority's Construction Requirements 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 DBFM Co 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 DBFM Co 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*). DBFM Co 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 DBFM Co is entitled to proceed with construction in accordance with paragraph 3.3 of Schedule Part 8 (*Review Procedure*) or DBFM Co 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 DBFM Co 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 DBFM Co shall procure that the Contractor establishes and maintains a computerised design database which DBFM Co 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, DBFM Co 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 DBFM Co's Proposals

12.7 Without prejudice to Clause 12.1, if it should be found that DBFM Co's Proposals do not fulfil the Authority's Construction Requirements, DBFM

Co shall at its own expense, and in accordance with Clause 12.8 below, amend DBFM Co's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:

- 12.7.1 DBFM Co'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 DBFM Co'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, DBFM Co shall submit its proposal for amending DBFM Co'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 DBFM Co'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*).

Construction Skills Certification Scheme

- 12.9 DBFM Co shall ensure that all persons engaged in carrying out the Works (or part thereof) on the Site are accredited under the Construction Skills Certification Scheme or an equivalent scheme and where DBFM Co enters into a sub-contract for the purposes of carrying out the Works DBFM Co 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; 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 DBFM Co and sub-contractor as the case may be.

13. RIGHT OF ACCESS OF AUTHORITY'S REPRESENTATIVE

Access to the Site

- 13.1 DBFM Co 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 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 for his use; and

- (b) subject to obtaining the consent of the relevant manufacturer or supplier (which DBFM Co agrees to use all reasonable endeavours to obtain), visit any site or workshop where materials, plant or equipment are being manufactured, prepared or stored for use in the Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works;
- 13.1.2 the Authority's Representative shall have such rights of access to the Site in an emergency as he (acting reasonably) considers suitable in the circumstances; and
- 13.1.3 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 DBFM Co has failed to comply with the Authority's Construction Requirements or DBFM Co's Proposals, the Authority's Representative may (without prejudice to any other right or remedy available to the Authority) by notice to DBFM Co increase the level of monitoring of DBFM Co until such time as DBFM Co 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. DBFM Co shall compensate the Authority for any reasonable additional costs incurred as a result of such increased monitoring.

Right to Open Up

- 13.3 Subject to Clause 13.4, the Authority's Representative shall have the right at any time prior to the Actual Completion Date to request DBFM Co to open up and inspect any part or parts of the Works where the Authority's Representative reasonably believes that such part or parts of the Works is or are defective and DBFM Co shall comply with such request.
- 13.4 Prior to exercising his right pursuant to Clause 13.3 above, the Authority's Representative shall notify DBFM Co 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, DBFM Co 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 DBFM Co at no cost to the Authority and DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co shall complete the Works by the Completion Date. Without prejudice to Clauses 40 (*DBFM Co Event of Default*), 42 (*Authority Voluntary Termination*), 46 (*Compensation on Termination*) and 47 (*Consequences of Termination*) the Authority shall not be entitled to claim liquidated or general damages in respect of any delay which elapses between the Completion Date and the Actual Completion Date.

The Programme

- 14.2 Any Programme submitted in accordance with the provisions set out below shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail so as to enable the Authority's Representative to monitor the progress including all commissioning 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*). DBFM Co 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 DBFM Co 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 DBFM Co (at the Authority's option):

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

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

Early completion

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

15. INDEPENDENT TESTER

Appointment

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

Changes to terms of appointment

- 15.2 Neither the Authority nor DBFM Co 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

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

17. PRE-COMPLETION COMMISSIONING AND COMPLETION

- 17.1 Not less than six (6) months but no more than eight (8) months before the Completion Date, the Authority shall provide DBFM Co with a draft of the Final Commissioning Programme as jointly developed by the Authority and DBFM Co, in accordance with the provisions of Clause 17.2 and Clause 17.3. DBFM Co shall provide the Authority with comments on the draft Final Commissioning Programme submitted to it within one (1) month. The parties shall, within fifteen (15) Business Days of receipt by the Authority of DBFM Co's comments agree the terms of the Final Commissioning Programme provided that the Authority may by prior notice to DBFM Co change the scope and time of the Authority's Commissioning and reimburse DBFM Co 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 or the change in scope or time of the Authority's Commissioning by fifty (50) Business Days before the Completion Date, the matter shall be referred for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).
- 17.2 The Final Commissioning Programme 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.
- 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:
- 17.3.1 that DBFM Co's Pre-Completion Commissioning and the Authority's Commissioning will not delay the Actual Completion Date from occurring by the Completion Date; and
- 17.3.2 that DBFM Co'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 include, in the case of DBFM Co's activities, the activities described at paragraph 4.12 of the Authority's Construction Requirements.
- 17.5 DBFM Co shall notify the Independent Tester and the Authority's Representative of the date when DBFM Co (acting reasonably) considers that the Works will be complete in accordance with the Authority's Construction Requirements, the Completion Criteria and this Agreement not less than three (3) months prior to such anticipated completion. Such notification shall trigger the activities of the Independent Tester under this Clause.
- 17.6 The parties each undertake to co-operate with the Independent Tester to ensure that the Independent Tester is familiar with all necessary aspects of the Project for the purposes of its role as described in this Clause.

Commissioning prior to Completion Date

- 17.7 DBFM Co shall:
- 17.7.1 undertake DBFM Co's Pre-Completion Commissioning in accordance with the 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 DBFM Co, in accordance with the Final Commissioning Programme
- and the Authority shall undertake the Authority's Commissioning in accordance with the Final Commissioning Programme and so as not to cause material damage to the Works.
- 17.8 DBFM Co shall give written notice to the Independent Tester and the Authority's Representative of the commencement of DBFM Co's Pre-Completion Commissioning not less than fifteen (15) Business Days and not more than thirty (30) Business Days prior to the date when DBFM Co (acting reasonably) considers that it shall commence DBFM Co's Pre-Completion Commissioning 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, DBFM Co's Pre-Completion Commissioning and that the Independent Tester is invited to comment on DBFM Co's Pre-Completion Commissioning.
- 17.9 DBFM Co 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 Final Commissioning Programme to enable the Authority to undertake the Authority's Commissioning in accordance with the Final Commissioning Programme for the period prior to completion. 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 DBFM Co shall give the Independent Tester and the Authority's Representative not less than fifteen (15) Business Days' notice and not more than thirty (30) Business Days' notice of the date upon which DBFM Co considers that the Works will be complete and the tests on completion required to be performed in accordance with the Final Commissioning Programme 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 on the date or dates reasonably specified by DBFM Co in accordance with this Clause 17.10 (*Pre-Completion Inspection*), and to attend any of the tests on completion. DBFM Co 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 of any inspection made pursuant to Clause 17.10 (*Pre-Completion Inspection*), notifies DBFM Co 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) which are required to be attended to before the Works can be considered to be complete in accordance with the Authority's Construction Requirements, DBFM Co's Proposals and the Completion Criteria. DBFM Co 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 are attended to.

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 the Facilities are complete in accordance with the Completion Criteria, issues a Certificate of Practical Completion to that effect to the Authority and to DBFM Co.
- 17.13 Without prejudice to Clauses 17.14 and 17.17, the issue of the Certificate of Practical Completion shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence (but only for the purpose of ascertaining the Payment Commencement Date), that the Facilities were complete in accordance with the Completion Criteria on the date stated in the Certificate of Practical Completion.
- 17.14 The Independent Tester shall issue the Certificate of Practical Completion 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 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, DBFM Co 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.

- 17.16 If, within twenty five (25) Business Days of the issue of the Snagging Notice, DBFM Co 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 DBFM Co.
- 17.16A Not less than twenty (20) Business Days prior to the Completion Date the parties shall agree, (both being obliged to act reasonably) by reference to the plans titled: (i) "External General Arrangement" with drawing reference WCHS-L-G(92)-001 set out at Appendix J to Section 4 (*Site Plans*) of Schedule Part 5 (*Land Matters*); and (ii) "Planting Plan" with drawing reference WCHS-L-G(92)-005 set out at Appendix K to Section 4 (*Site Plans*) of Schedule Part 5 (*Land Matters*), any landscaping areas, which cannot be turfed, seeded or planted due to the growing season and cannot be rescheduled due to programme constraints, and therefore which can be treated as Snagging Matters ("**Landscaping Snagging Matters**"). If so agreed, such an agreement between the parties will not prevent the issue of the Certificate of Practical Completion. DBFM Co shall be obliged to lay the turf, seed or plant (as the case may be) in respect of such Landscaping Snagging Matters in the next appropriate Growing Season.
- 17.17 The issue of the Certificate of Practical Completion shall in no way affect the obligations of DBFM Co under this Agreement including in respect of any Defects.

As-built specification

- 17.18 As soon as it is available, after the issue of the Certificate of Practical Completion, DBFM Co shall provide to the Authority a copy of the as-built building specification (in electronic and hard copy formats), together with as built drawings relating to the Works (in both CAD and hard copy formats).

18. POST COMPLETION COMMISSIONING

Commissioning

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

Information

- 18.2 DBFM Co shall ensure that the Authority's Representative is provided with all the information he may reasonably require in relation to DBFM Co's Post-Completion Commissioning and the Authority shall ensure that DBFM Co is provided with all information DBFM Co 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 DBFM Co's Post-Completion Commissioning, such comments shall be taken into account by DBFM Co and if DBFM Co, 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 DBFM Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning the Independent Tester shall issue the Commissioning Completion Certificate.

Operational Manuals

- 18.5 DBFM Co shall make available on the Site to the Authority's Representative:
- 18.5.1 at least ten (10) weeks prior to the anticipated Actual Completion Date, two (2) electronic and two (2) paper copies of a draft 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 the Actual Completion Date, two (2) electronic and two (2) paper copies of a final draft operation and maintenance manual in sufficient detail to allow the Authority to operate and use the Facilities safely and efficiently and an electronic copy of the BIM model;
 - 18.5.3 within four (4) weeks following the Actual Completion Date, the principal operation and maintenance manual;
- in each case including all manufacturers' instructions relating to Equipment installed by DBFM Co or any DBFM Co Party.
- 18.6 DBFM Co shall provide to the Authority such information after the Actual Completion Date as relates to any Snagging Matters or rectification of Defect 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 DBFM Co in accordance with Clause 18.5 of the items listed therein, DBFM Co 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 Not Used

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 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, DBFM Co 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 DBFM Co specifying what action the Authority's Representative requires DBFM Co to take in relation to such discovery.
- 19.4 DBFM Co 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, DBFM Co shall allow representatives of the Authority to enter the Site 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co shall not be entitled to implement or procure the implementation of any Quality Plan unless DBFM Co is entitled to proceed with such implementation pursuant to Schedule Part 8 (*Review Procedure*).
- 20.5 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co.

Quality Monitoring

- 20.11 The Authority's Representative may carry out audits of DBFM Co's quality management system (including all relevant Quality Plans and any quality manuals and procedures) to establish that DBFM Co 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 DBFM Co's quality management systems. DBFM Co 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. DBFM Co 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

The parties shall comply with their respective obligations set out in the ICT Responsibility Matrix.

PART 6: SERVICES

22. THE SERVICES

General obligations

22.1 Throughout the Operational Term DBFM Co 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 DBFM Co has complied with the Method Statements shall not be a defence to an allegation that DBFM Co has not satisfied the Service Level Specification; and

22.2.2 the fact that DBFM Co has complied with the Service Level Specification shall not be a defence to an allegation that DBFM Co 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 DBFM Co of its decision and DBFM Co shall, at its own cost, be obliged to implement the Authority's decision.

Commencement and phase in of Services

22.3 DBFM Co shall procure that the provision of the Services commences on the Actual Completion Date.

DBFM Co Services Changes

22.4 DBFM Co 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 DBFM Co to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.

No disruption

22.6 DBFM Co 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 two (2) months prior to the Completion Date DBFM Co shall submit to the Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*) a Schedule of Programmed Maintenance for the period from the Completion Date to the expiry of that Contract Year.
- 23.2 Not later than three (3) months prior to the commencement of each Contract Year thereafter DBFM Co 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.
- 23.3 Each Schedule of Programmed Maintenance shall contain the following information (the "**Programmed Maintenance Information**"):
- 23.3.1 details of the proposed start and end dates for each period of Programmed Maintenance, the works to be carried out and the proposed hours of work; and
 - 23.3.2 details of any effect of the Programmed Maintenance on the delivery of any of the Services and/or the activities of the Authority.
- 23.4 Not later than twenty (20) Business Days prior to the commencement of any quarter (being a three month period commencing on 1 April, 1 July, 1 October or 1 January), DBFM Co 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 quarter.
- 23.5 Where the Authority's Representative raises comments in respect of any Programmed Maintenance periods and/or hours of work shown in a Schedule of Programmed Maintenance in accordance with paragraph 3 of Schedule Part 8 (*Review Procedure*), he shall indicate whether, and if so when, the Programmed Maintenance can be re-scheduled and DBFM Co shall amend the relevant Schedule of Programmed Maintenance accordingly.

Programmed and Unprogrammed Maintenance

- 23.6 DBFM Co 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 DBFM Co to accelerate or defer any Programmed Maintenance by giving written notice to DBFM Co, (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. DBFM Co 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 DBFM Co the direct and reasonable costs actually incurred by DBFM Co 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**"), DBFM Co 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, DBFM Co may carry out such Unprogrammed Maintenance Works provided that DBFM Co shall notify the Authority's Representative as soon as possible (and in any event within two (2) Business Days of the occurrence of the emergency) of the extent of the necessary Unprogrammed Maintenance Works and the reasons for them. DBFM Co 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, DBFM Co 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 DBFM Co 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 DBFM Co shall deliver to the Authority's Representative not less than twenty (20) Business Days prior to the Completion Date, and thereafter not less than twenty (20) Business Days 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 DBFM Co'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 DBFM Co 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. DBFM Co 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 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 DBFM Co as part of the Works or in implementing an Authority Change;
- 23.13.2 not less frequently than once in every five (5) years from the Actual Completion Date, to make-good, renew and replace all carpets and other non-permanent floor coverings in the Functional Areas provided by DBFM Co as part of the Works or in implementing an Authority Change;
- 23.13.3 not less frequently than once in every five (5) years from the Actual Completion Date, to make-good, 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 DBFM Co 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 Engineering and Technology.

- 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 DBFM Co carrying out Programmed Maintenance in accordance with the Schedule of Programmed Maintenance and/or interfere with DBFM Co carrying out Unprogrammed Maintenance Work in accordance with Clause 23.8.
- 23.15 If the Authority is in breach of Clause 23.14, DBFM Co 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 DBFM Co in writing within ten (10) Business Days of the date of DBFM Co'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 DBFM Co's obligations under this Agreement; or
- 23.15.2 having provided such a programme, does not comply with it,
- DBFM Co 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 DBFM Co's obligations under this Agreement consequent upon the non-performance of the relevant Authority Maintenance Obligations.
- 23.16 DBFM Co shall not carry out any DBFM Co'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 DBFM Co's Remedial Services (together the "**DRS Timetable**"). DBFM Co must give the Authority not less than twenty (20) Business Days notice of its proposed DRS Timetable. If the Authority's Representative considers that the proposed DRS Timetable is not consistent with the principles set out in Appendix 2 to Schedule Part 8 (*Review Procedure*), he may specify an alternative DRS Timetable that is consistent with those principles, which shall be as near to the DRS Timetable proposed by DBFM Co as reasonably practicable. If the Authority's Representative fails either to approve DBFM Co's proposed DRS Timetable or to specify an alternative DRS Timetable within ten (10) Business Days of receipt of DBFM Co's proposed DRS Timetable, he shall be deemed to have approved it.
- 23.17 The Authority must allow DBFM Co and relevant DBFM Co 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 DRS Timetable for the purpose of carrying out any of DBFM Co'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 DBFM Co and any relevant DBFM Co Party performing the DBFM Co Remedial Services, DBFM Co may propose a new DRS Timetable in respect of the relevant DBFM Co's Remedial Services and Clause 23.16 shall apply.
- 23.19 In carrying out and performing DBFM Co's Remedial Services, DBFM Co 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 DBFM Co all reasonable costs that it incurs in carrying out and performing DBFM Co's Remedial Services in accordance with this Clause 23.
- 23.21 Notwithstanding the terms of Clauses 23.14 to 23.19 above, DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co.
- 23.22 The Authority and DBFM Co 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 DBFM Co's Programmed Maintenance and DBFM Co 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 DBFM Co for costs incurred by the Authority for Utilities supplied to the Facilities during the Operational Term that are consumed in the process of DBFM Co or any DBFM Co 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. If the particular Availability Failure occurs prior to the first anniversary of the Actual Completion Date then the daily average cost based on bills paid by the Authority to the supplier of the relevant Utility shall be calculated by reference to the period from the Actual Completion Date to the date of the Availability Failure.

- 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 DBFM Co a statement showing its calculation of the amount claimed along with its supporting evidence. Unless DBFM Co 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, DBFM Co shall, and shall procure that all DBFM Co Parties and any other persons for whom it is responsible shall, comply with the provisions of Schedule Part 12 (*Service Requirements*).
- 24.2 DBFM Co 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*). DBFM Co 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 0.71% 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 0.61% per cent of the Annual Service Payment for the current Contract Year;

the Authority's Representative may serve a Warning Notice on DBFM Co, provided always that, to give DBFM Co 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 consecutive months to the extent that the same event has contributed to the Authority's right to serve the Warning Notice, but provided that DBFM Co demonstrates to the Authority that it has taken all reasonable steps to remedy the cause of that event.

Warning Notices Disputes

- 24.4 If DBFM Co disputes that the Authority was or is entitled to serve a Warning Notice, DBFM Co 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 (*DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co hereunder or undertakes tasks that would otherwise be undertaken by DBFM Co pursuant to this Agreement, the Authority shall perform such obligations or undertake such tasks to the same standard as would be required of DBFM Co under the terms of this Agreement.
- 24.8 If the Required Action is taken other than as a result of a breach by DBFM Co of its obligations under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents DBFM Co from providing any part of the Services:

- 24.8.1 DBFM Co 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 DBFM Co 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 DBFM Co shall equal the amounts that DBFM Co 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 DBFM Co against all Direct Losses sustained by DBFM Co 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 DBFM Co of its obligations under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents DBFM Co from providing any part of the Services:
- 24.9.1 DBFM Co 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 DBFM Co shall equal the amounts DBFM Co 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 DBFM Co to procure that such additional or alternative services are undertaken by DBFM Co 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 DBFM Co 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 DBFM Co's compliance with Clause 24.10.

25. TUPE AND EMPLOYMENT MATTERS

- 25.1 The Authority and DBFM Co 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 DBFM Co 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 DBFM Co 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, DBFM Co or any Service Provider shall be entitled to dismiss any or all of the Transferring Staff by reason of redundancy provided that DBFM Co 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 DBFM Co against any costs referred to in Clause 25.2.3 reasonably incurred by DBFM Co (or by a relevant Service Provider and for which DBFM Co is responsible) and shall reimburse any costs reasonably and properly incurred by DBFM Co 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 DBFM Co 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 DBFM Co 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). DBFM Co 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.

DBFM Co Indemnities

- 25.5 DBFM Co 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 DBFM Co or a Service Provider to any person entitled to such payments from DBFM Co or a Service Provider who is or has been employed or engaged by DBFM Co 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) by DBFM Co 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 DBFM Co 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 DBFM Co under Clause 25.5 (DBFM 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 DBFM Co 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 DBFM Co 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 DBFM Co or a Service Provider in the provision of the Service immediately before the expiry or earlier termination of this

Agreement and shall indemnify DBFM Co 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) DBFM Co, any DBFM Co 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 DBFM Co and, to avoid doubt, shall not relieve DBFM Co of any of its obligations under this Agreement.
- 27.3 If and when so directed in writing by the Authority, DBFM Co 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 DBFM Co shall, and shall procure that all DBFM Co Parties shall, comply at all times with the Authority Policies so far as applicable to the Project Operations.
- 27.6 The Authority shall notify DBFM Co 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 DBFM Co. 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 DBFM Co that DBFM Co shall not be obliged to comply with any change to any Authority Policy and that DBFM Co 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 DBFM Co 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 DBFM Co (to the extent permitted by Law) shall procure that all potential staff or persons performing any of the Project Operations who may reasonably be expected in the course of their employment or engagement to have access to children, the elderly and/or vulnerable adults:
- 27.10.1 are questioned concerning their Convictions; and
 - 27.10.2 are required to complete a Protecting Vulnerable Groups Scheme form.
- 27.11 DBFM Co shall procure that no person who discloses any Convictions, or who is found to have any Convictions following the completion of a Protecting Vulnerable Groups Scheme form, in either case of which DBFM Co 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 DBFM Co shall procure that the Authority is kept advised at all times of any person employed or engaged by DBFM Co 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 DBFM Co or a Service Provider becomes aware or whose previous Convictions become known to DBFM Co or a Service Provider.
- 27.13 The Authority's Representative (acting reasonably) may instruct DBFM Co to procure that appropriate disciplinary action is taken against any employee of DBFM Co 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 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 DBFM Co of the outcome.
- 27.14 DBFM Co 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). DBFM Co 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 DBFM Co shall consult with the Authority in relation to the selection procedure for DBFM Co'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 DBFM Co 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 DBFM Co shall procure that the Authority's Representative shall at all reasonable times have access to all material details in respect of all employees of DBFM Co 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.

27.18 Not Used

27.19 Not Used

27.20 Not Used

27.21 Not Used

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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co has complied with all relevant Law.

- 28.6 Without prejudice to the generality of its obligations, DBFM Co 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 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 DBFM Co 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 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 The Authority shall:

28.8.1 maintain 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 DBFM Co as often as it is changed.

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

PART 7: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

29. DELAY EVENTS

- 29.1 If, at any time, DBFM Co becomes aware that there will be (or is likely to be) a delay in completion of the Works, DBFM Co 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 DBFM Co an extension of time equal to the delay or impediment caused by such Delay Event (taking into account reasonably foreseeable consequences of the Delay Event) and shall revise the Completion Date accordingly but to avoid doubt, there shall be no extension to the Project Term as a result of any such delay or impediment.
- 29.2 If DBFM Co is (or claims to be) affected by a Delay Event:
- 29.2.1 it shall (and shall procure that the DBFM Co Parties shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of such an event upon the performance of its obligations under this Agreement and, where relevant, resume performance of its obligations affected by the Delay Event as soon as practicable; and
- 29.2.2 it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 29 (*Delay Events*) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 29.2.1 above.
- 29.3 For the purposes of this Agreement, a Delay Event means any of the following to the extent in each case that there will be (or is likely to be) a delay in completion of the Facilities:
- 29.3.1 the occurrence of a Qualifying Change in relation to which it has been agreed or determined that the implementation of the Authority Change would delay the completion of the Facilities;
- 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 DBFM Co or any DBFM Co Party;
- 29.3.3 the execution of works on the Site not forming part of this Agreement by the Authority or any contractors employed by the Authority;
- 29.3.4 opening up of the Works pursuant to Clauses 13.3 to 13.7 (inclusive) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with 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 Not Used;
 - 29.3.9 the exercise of any relevant rights by any third party, including statutory undertakers and/or adjoining proprietors (or their successors and assignees) having equipment, apparatus, structures, cables or service media (including public water, sewerage, drainage, electricity, gas, telephone or telecommunications) within the Site as at Financial Close which were not apparent from a visual inspection of the Site or which were not apparent or could not have been apparent from the site investigations undertaken by DBFM Co pursuant to Clause 7.3 and Clause 10 of this Agreement; or
 - 29.3.10 the occurrence of circumstances deemed to be a Delay Event pursuant to Clause 11.6.
- 29.4 Without prejudice to the generality of Clause 29 (*Delay Events*), DBFM Co 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. DBFM Co shall within fifteen (15) 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 DBFM Co 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 Facilities; and
 - 29.4.5 details of any measures which DBFM Co 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 DBFM Co (or the Contractor) receiving, or becoming aware of, any supplemental information which may further substantiate or support DBFM Co's claim then, provided that the Completion Date has not otherwise already been revised pursuant to Clause 29.7, DBFM Co 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 DBFM Co to provide such further supporting particulars as he may reasonably consider necessary. DBFM Co shall afford the Authority's Representative reasonable facilities for investigating the validity of DBFM Co's claim including, without limitation, on-site inspection.

29.7 Subject to the provisions of this Clause, the Authority's Representative shall revise the Completion Date in accordance with Clause 29.1 (*Delay Events*) as soon as reasonably practicable and in any event within ten (10) Business Days of the later of:

29.7.1 the date of receipt by the Authority's Representative of DBFM Co'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 DBFM Co 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 DBFM Co 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 DBFM Co shall not be entitled to any extension of time (and the Completion Date shall not be revised) in respect of any period of delay by DBFM Co in giving notice or providing information under Clause 29.4 and/or to the extent that its failure to maintain records or afford facilities for inspection to the Authority's Representative has prevented the Authority's Representative from assessing the consequences of the Delay Event.

29.8 If:

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

29.8.2 DBFM Co considers that a different Completion Date should be fixed; or

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

then DBFM Co 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 DBFM Co'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 DBFM Co 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 or Clause 29.3.4 for which, in each case, it has been agreed or determined pursuant to this Clause 29 (*Delay Events*) that DBFM Co is entitled to an extension of time;

- 29.10.2 in the period prior to the Actual Completion Date, in circumstances where there is no delay in completion of the Facilities 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 DBFM Co or any DBFM Co Party;
- 29.10.3 Not Used; or
- 29.10.4 the occurrence of the circumstances deemed to be a Compensation Event pursuant to Clause 11.6.
- 29.11 Subject to Clause 29.12, if it is agreed, or determined, that there has been a Compensation Event, and DBFM Co has incurred loss (including loss of revenue) and/or expense as a direct result of such Compensation Event, DBFM Co shall be entitled to such compensation as would place DBFM Co in no better or worse position than it would have been in had the relevant Compensation Event not occurred. DBFM Co 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 DBFM Co 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 DBFM Co (or any DBFM Co Party) to comply with this Clause 29.12; and
- 29.12.2 be reduced by any amount which DBFM Co 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 DBFM Co 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 DBFM Co for the actual Capital Expenditure incurred by DBFM Co within twenty (20) Business Days of its receipt of a written demand accompanied by a valid VAT invoice for the same by DBFM Co 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 DBFM Co to provide stand by power facilities in accordance with the Authority's Construction Requirements, 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 DBFM Co claiming relief, any DBFM Co 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 DBFM Co's rights under Clause 29 (Delay Events), DBFM Co shall only be relieved of failure to perform 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*) caused by Delay Events in accordance with Clause 29 (*Delay Events*).

Mitigation

- 30.4 Where a party is (or claims to be) affected by a Relief Event:
 - 30.4.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Relief Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and

- 30.4.2 it shall not be entitled to rely upon the relief afforded to it pursuant to Clause 30.2 of this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 30.4.1 above.
- 30.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- 30.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days of the notice referred to in Clause 30.5 which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Relief Event on the ability of the party to perform, the action being taken in accordance with Clause 30.4, the date of the occurrence of the Relief Event and an estimate of the period of time required to overcome it (and/or its effects).
- 30.7 The party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- 30.8 If, following the issue of any notice referred to in Clause 30.6, the party claiming relief receives or becomes aware of any further information relating to the Relief Event (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 30.9 To avoid doubt, and subject to any other express provision of this Agreement, the occurrence of a Relief Event shall not entitle DBFM Co 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 DBFM Co and/or any DBFM Co 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 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 DBFM Co Event of Default if such DBFM Co 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 DBFM Co's rights under Clause 29 (*Delay Events*), DBFM Co 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 DBFM Co to reach agreement pursuant to this Clause 31.10.

PART 8: CHANGES IN LAW & CHANGES

32. CHANGES IN LAW

General

- 32.1 DBFM Co 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 DBFM Co 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 DBFM Co 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 be the later to occur of the Completion Date and the Actual Completion Date, save where the 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 Completion Date and the date on which the Works 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 the 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 fifteen (15) 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) DBFM Co 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) DBFM Co 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 DBFM Co'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 DBFM Co 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 fifteen (15) Business Days to consult and seek to agree the effect of the Change in Law and any Change required as a consequence. If the parties, within ten (10) Business Days of this meeting, have not agreed the occurrence or the effect of the relevant Change in Law, either party may refer the question of whether a Change in Law has occurred or the effect of the Change in Law for resolution in accordance with Schedule Part 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) DBFM Co 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) DBFM Co 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 DBFM Co shall not be entitled to receive any Monthly Service Payments until the Payment Commencement Date. Subject to the provisions of this Agreement, the Authority shall pay DBFM Co the Monthly Service Payments in respect of each Contract Month following the Payment Commencement Date in accordance with the provisions of this Clause 34 and 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 DBFM Co under this Agreement:

- 34.2.1 Within five (5) Business Days of the first (1st) day of each Contract Month DBFM Co shall submit to the Authority an invoice ("**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 DBFM Co 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 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 DBFM Co, the Authority shall pay the amount of the Monthly Invoice within twenty (20) Business Days of receipt of a valid VAT invoice in respect thereof. Where a Monthly Invoice shows a net amount owed by DBFM Co to the Authority, DBFM Co 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 DBFM Co.

- 34.2.3 Within ten (10) Business Days of the Expiry Date, DBFM Co 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, DBFM Co 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 DBFM Co an amount equal to the excess within twenty (20) Business Days of receipt of an invoice therefor.
- 34.2.4 On or before the twelfth (12th) day of each Contract Month DBFM Co 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 in Pounds Sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice, quoting the invoice number against which payment is made.

Disputes

- 34.4 If the Authority (acting in good faith) disputes all or any part of the Monthly 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 ten (10) Business Days of the dispute arising. If they fail so to resolve it, either party may refer the matter to the Dispute Resolution Procedure. Following resolution of the dispute, any amount agreed or determined to have been payable shall be

paid forthwith by the Authority to DBFM Co, 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 DBFM Co 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 DBFM Co from the Authority under this Agreement provided that the Authority has given DBFM Co not less than five (5) Business Days' notice of its intention to deduct or apply such sum.
- 34.7 Whenever any sum of money shall be agreed, or determined, as due and payable by the Authority to DBFM Co, such sum may at DBFM Co'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 DBFM Co to the Authority under this Agreement provided that DBFM Co has given the Authority not less than five (5) Business Days' notice of its intention to deduct or apply such sum.

35. **VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION 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 clearance from the Commissioners for Revenue and Customs (or, if relevant, such other body as is charged at the time with the collection and management of VAT) (referred to in this Clause as the "**Commissioners**") as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request the Commissioners for such a clearance.
- 35.4 The following further provisions shall apply in respect of the application for a clearance in accordance with Clause 35.3:
- 35.4.1 prior to submitting its request for such a clearance and any further communication to the Commissioners in connection with the obtaining of the clearance, the Second Party shall first obtain the agreement of the First Party to the contents of such request

and any such further communication, such agreement not to be unreasonably withheld or delayed;

- 35.4.2 the Second Party shall provide to the First Party copies of all communications received from the Commissioners in connection with the application for a clearance as soon as practicable after receipt; and
 - 35.4.3 the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as the Commissioners may require) to obtain such a clearance as soon as reasonably practicable following the initial request.
- 35.5 If a clearance is required by the First Party under Clause 35.3, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until a clearance is received from the Commissioners which states that a sum of VAT (the “**VAT Sum**”) is properly so chargeable or the Commissioners state that they are not prepared to give any clearance on the matter. In this case, then subject to Clauses 35.6 and 35.7 and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III VAT Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum (and any interest or penalties attributable to the VAT Sum) to the Second Party.
- 35.6 If the First Party disagrees with any clearance obtained pursuant to Clause 35.3 by the Second Party from the Commissioners, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses including interest and penalties which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such clearance or otherwise to resist or avoid the imposition of VAT on the relevant supply.
- 35.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 35.6:
- 35.7.1 the action which the First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of the Commissioners before any VAT tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;
 - 35.7.2 if the Second Party shall be required to pay to or deposit with the Commissioners a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to the Commissioners on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with the Commissioners the First Party shall pay such sum to the Second Party;
 - 35.7.3 save as specifically provided in Clause 35.5, the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either

determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and

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

Changes in recoverability of VAT

- 35.8 Subject to Clause 35.9, if, following a Change in Law, DBFM Co becomes unable to recover VAT attributable to supplies to be made to the Authority by DBFM Co pursuant to this Agreement, the Authority shall ensure that DBFM Co 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 DBFM Co and the Authority shall agree acting reasonably), provided that DBFM Co 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 DBFM Co shall comply with the Legislation.
- 35.10.3 If any payment due from the Authority to DBFM Co 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 DBFM Co under this Agreement is a contract payment under section 60(1) of the Act, then:
- (a) if DBFM Co is registered for gross payment under section 63(2) of the Act, the Authority shall make a payment to DBFM Co without any deduction;
 - (b) if DBFM Co is not registered for gross payments under section 63(2) of the Act, the Authority shall make a payment to DBFM Co, 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 DBFM Co as to whether any payment due by the Authority to DBFM Co under this Agreement is or is not a contract payment by virtue of the exemption in Regulation 23 of the Regulations, the parties will jointly apply to HM Revenue and Customs for a written clearance and until such clearance is received it shall be assumed that such payment is a contract payment and the provisions of Clause 35.10 (*Construction Industry Tax Deduction Scheme*) shall apply accordingly.
- 35.10.6 The Authority shall be entitled to make a deduction at the rate specified in section 61(1) of the Act or at such other rate as may be in force from time to time from the whole of any payment to DBFM Co (and not just that part of such payment which does not represent the direct cost to DBFM Co 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 DBFM Co) 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 DBFM Co.
- 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 DBFM Co; and

- (b) in the case of an under deduction, DBFM Co 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 DBFM Co 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 DBFM Co in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail.

36. **NOT USED**

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, DBFM Co 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 DBFM Co of its obligations under this Agreement) and such breach materially adversely affects the ability of DBFM Co 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 DBFM Co under this Agreement (which sums are not in dispute) which, 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 DBFM Co; or
 - 39.1.3 the Authority is in breach of its obligations under Clause 57.4; or
 - 39.1.4 an expropriation, sequestration or requisition of a material part of the Assets and/or shares of Holdco, DBFM Co 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.

DBFM Co's options

- 39.2 On the occurrence of an Authority Event of Default, or within a reasonable time after DBFM Co becomes aware of the same, and while the same is still subsisting, DBFM Co 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 DBFM Co 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 DBFM Co) 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, Clause 39.1.3, Clause 39.1.4 or Clause 39.1.5, within sixty (60) Business Days of such notice, and in respect of Clause 39.1.2 within thirty (30) Business Days of such notice, DBFM Co 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 DBFM Co 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. DBFM CO EVENT OF DEFAULT

DBFM Co Event of Default

40.1 For the purposes of this Agreement, DBFM Co 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 DBFM Co, 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 DBFM Co;
 - (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 DBFM Co;
 - (c) DBFM Co 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 DBFM Co; or
 - (e) if DBFM Co 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 DBFM Co failing to achieve the Actual Completion Date within a period of twelve (12) months after the Completion Date.

Default

- 40.1.3
- (a) DBFM Co 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) Not Used; or
 - (c)
 - (i) DBFM Co (or an employee not acting independently of DBFM Co) commits a Prohibited Act; or

- (ii) a DBFM Co Party (or anyone employed by or acting on behalf of them) commits a Prohibited Act and DBFM Co has failed to comply with the requirements of the Authority specified in Clauses 44.3.2 to 44.3.5 (as the case may be).

40.1.4 DBFM Co abandoning this Agreement;

Health and safety

40.1.5 at any time after the Actual Completion Date DBFM Co 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 DBFM Co or any DBFM Co Party or the Authority under the Health and Safety Regime (an "**H&S Conviction**") provided that an H&S Conviction of a DBFM Co Party or the Authority shall not constitute a DBFM Co 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 DBFM Co Party (which in the case of an individual director, officer or employee shall be deemed to include the DBFM Co Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by DBFM Co 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 DBFM Co 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 DBFM Co failing to comply with the provisions of Clauses 57.2 or 57.5;

Deductions

40.1.8 the total Deductions in each of any three Contract Months in any six consecutive Contract Months is equal to or greater than 1.20% per cent of the Annual Service Payment for the current Contract Year;

Warning Notices

40.1.9

- (a) DBFM Co is awarded a total of five or more Warning Notices; and
- (b) all of the Deductions to which at least five of the Warning Notices relate have been previously suffered in any period of 12 consecutive months; and
- (c) none of the Warning Notices referred to in paragraph (b) has been awarded later than 6 months after the expiry of such 12 month period;

Payment

- 40.1.10 DBFM Co failing to pay (i) any Refinancing Gain payment arising from a Qualifying Refinancing which is due and payable to the Authority in accordance with Schedule Part 23 (Refinancing) or (ii) any other sum or sums due to the Authority under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) £100,000 (index linked) and such failures continue for sixty (60) Business Days from receipt by DBFM Co of a notice of non payment from the Authority; or

Insurance

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

Notification

- 40.2 DBFM Co shall notify the Authority of the occurrence, and details, of any DBFM Co 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 DBFM Co Event of Default, in either case promptly on DBFM Co becoming aware of its occurrence.

Authority's options

- 40.3 On the occurrence of a DBFM Co 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 DBFM Co Events of Default referred to in Clauses 40.1.1 (*Insolvency*), 40.1.2 (*Long Stop*), 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 DBFM Co Event of Default referred to in Clause 40.1.3(a) and 40.1.4, serve notice of default on DBFM Co requiring DBFM Co at DBFM Co's option either:
 - (a) to remedy the DBFM Co 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 DBFM Co Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such DBFM Co Event of Default is proposed to be remedied (DBFM Co 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 DBFM Co Event of Default referred to in Clause 40.1.11 (*Insurance*) serve notice of default on DBFM Co requiring DBFM Co to remedy the DBFM Co Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default.

40.3.4 in the case of any DBFM Co Event of Default referred to in Clause 40.1.3(c)(i) or 40.1.3(c)(ii), terminate this Agreement in its entirety by notice in writing having immediate effect.

Remedy provisions

40.4 Where DBFM Co 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 DBFM Co (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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co with immediate effect. Provided that for the purposes of Clause 40.5.2 if DBFM Co's performance of the programme is

adversely affected by the occurrence of Force Majeure, a Relief Event or an Excusing Cause then, subject to DBFM Co 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 DBFM Co shall reimburse the Authority for all reasonable costs incurred by the Authority in exercising any of its rights pursuant to this Clause 40 (*DBFM Co 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 DBFM Co (or to take any action other than termination of this Agreement).

41. TERMINATION RESULTING FROM FORCE MAJEURE

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

42. AUTHORITY VOLUNTARY TERMINATION

The Authority shall be entitled to terminate this Agreement at any time on six (6) months' written notice to DBFM Co. 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 DBFM Co, 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, DBFM Co 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 DBFM Co or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Authority;
 - 44.1.3 committing any offence:
 - (a) under the Bribery Act 2010;
 - (b) under any Law creating offences in respect of fraudulent acts; or
 - (c) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with the Authority or any other public body; or
 - 44.1.4 defrauding or attempting to defraud or conspiring to defraud the Authority or any other public body;
 - 44.1.5 committing any breach of the Employment Relations 1999 Act (Blacklists Regulations) 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992; or
 - 44.1.6 committing any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities.

Warranty

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

Remedies

- 44.3 If DBFM Co or any DBFM Co 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 DBFM Co or by an employee not acting independently of DBFM Co, then (without prejudice to the terms of the Funders Direct Agreement) the Authority may terminate this Agreement with immediate effect in accordance with Clauses 40.1.3(c)(i) and 40.3.4 and for the purposes of Clause 40.1.3(c)(i) and this Clause 44.3.1, all references to DBFM Co shall not be deemed to include a DBFM Co Party and the provisions of Clause 6.2 shall not apply;
 - 44.3.2 if the Prohibited Act is committed by an employee of DBFM Co acting independently of DBFM Co, then the Authority may give written notice to DBFM Co in accordance with Clause 44.3.6 below requiring that within twenty (20) Business Days of receipt of such notice DBFM Co terminates the employee's employment;
 - 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 DBFM Co in accordance with Clause 44.3.6 below requiring that within twenty (20) Business Days of receipt of such notice DBFM Co terminates the relevant Sub-Contract;
 - 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 DBFM Co in accordance with Clause 44.3.6 below requiring that within twenty (20) Business Days of receipt of such notice DBFM Co procures the termination of the employee's employment;
 - 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 DBFM Co in accordance with Clause 44.3.6 below requiring that within twenty (20) Business Days of receipt of such notice DBFM Co 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 DBFM Co or the Contracting Associate); and
 - 44.3.6 any notice under this Clause shall specify:
 - (a) the nature of the Prohibited Act; and
 - (b) the identity of the party who the Authority believes has committed the Prohibited Act.
- 44.4 Without prejudice to its other rights or remedies under this Clause, the Authority shall be entitled to recover from DBFM Co:
- 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 DBFM Co from paying any proper commission or bonus to its employees within the agreed terms of their employment.

Notification

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

Interim Management

44.7 Not Used.

45. **NOT USED**

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 DBFM Co 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 (*DBFM Co Events of Default*) then the Authority shall pay compensation to DBFM Co in accordance with Section 2 (*Compensation on DBFM Co 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 DBFM Co 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 DBFM Co in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule Part 17 (*Compensation on Termination*).

46.5 Not Used.

Tax equalisation

46.6 Where a payment is to be made to DBFM Co pursuant to Clause 46.1, Clause 46.3 or Clause 46.4 (a "**Compensation Payment**") and DBFM Co has a Relevant Tax Liability in respect of such payment, then the amount of the Compensation Payment to be made by the Authority to DBFM Co shall be increased so as to ensure that DBFM Co 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 DBFM Co (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 DBFM Co 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 DBFM Co 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 DBFM Co (or would have been so available but for a surrender by DBFM Co 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 DBFM Co 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. DBFM Co 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 DBFM Co 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 DBFM Co 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, DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co.

Rights of Set-Off

- 46.12 To avoid doubt, the Authority's obligations to make any payment of compensation to DBFM Co 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 DBFM Co to the Authority against any payment of termination compensation (whether payable as a lump sum or in instalments) under Clauses 46.1, 46.3 or 46.4 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 DBFM Co in relation to any termination of this Agreement and/or any Project Document (and the circumstances leading to such termination) and DBFM Co 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 DBFM Co and DBFM Co 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 DBFM Co, the parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the Termination Date.

Transfer to Authority of Assets, Contracts etc.

- 47.2 On the service of a notice of termination in accordance with this Agreement for any reason:
- 47.2.1 if prior to the Actual Completion Date, in so far as any transfer shall be necessary fully and effectively to transfer property to the Authority, DBFM Co 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 and Equipment as shall have been procured by DBFM Co if the Authority so elects:
 - 47.2.2 all goods and all materials on or near to the Site not yet incorporated in the Works shall remain available to the Authority for the purposes of completing the Works and if the cost of such goods and materials has not been reflected in the payment of any compensation pursuant to 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 DBFM Co 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, DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co under this Agreement and included in the Facilities are assigned, or otherwise transferred, to the Authority with full title guarantee; and
- 47.2.9 DBFM Co shall deliver to the Authority the records referred to in Clause 38 (*Records and Open Book Accounting*) except where such documents are required by Law to be retained by DBFM Co or its Contracting Associates (in which case complete copies shall be delivered to the Authority).
- 47.3 DBFM Co 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 DBFM Co 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, DBFM Co shall have the following duties:
 - 47.4.1 DBFM Co 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 DBFM Co shall as soon as practicable remove from the Site 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 DBFM Co;
 - 47.4.3 DBFM Co shall forthwith deliver to the Authority's Representative:
 - (a) any security passwords, access codes and other keys to the Facilities and the equipment; and
 - (b) without prejudice to Clause 55 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the 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 DBFM Co shall as soon as practicable vacate the Site and (without prejudice to Schedule Part 18 (*Handback Procedure*)) shall leave the Site and the Facilities in a safe, clean and orderly condition.
- 47.5 If the Authority wishes to conduct a competition prior to the Expiry Date with a view to entering into an agreement for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry of this Agreement, DBFM Co 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 DBFM Co 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 DBFM Co give that competitor a competitive advantage over DBFM Co and thereby prejudice the business of DBFM Co but shall, to avoid doubt, exclude any information to be disclosed in terms of Clause 25 (*TUPE and Employment matters*)); and
- 47.5.2 assisting the Authority by providing all (or any) participants in such competition process with access to the Site and the 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 DBFM Co and the Authority under Clauses 10 (*The Site*), 25 (*TUPE and Employment Matters*), 31 (*Force Majeure*), 34 (*Payment*), 35 (*Construction Industry Tax Deduction Scheme*), 37 (*Custody of Financial Model*), 38 (*Records and Open Book Accounting*), 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*), 53 (*Insurance*), 54 (*Exclusions and Limitations on Liability*), 55 (*Intellectual Property*), 56 (*Dispute Resolution Procedure*), 59 (*Mitigation*), 61 (*Confidentiality*), 64 (*Notices*) and 75 (*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

DBFM Co indemnities to Authority

- 49.1 DBFM Co 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, DBFM Co or any DBFM Co 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 DBFM Co or any DBFM Co 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 DBFM Co or any DBFM Co 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 DBFM Co

- 49.2 The Authority shall indemnify and keep DBFM Co indemnified at all times from and against all Direct Losses sustained by DBFM Co 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 DBFM Co or any DBFM Co 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 DBFM Co or any DBFM Co Party;

49.2.3 any physical damage to any part of the Facilities or any assets or other property of DBFM Co or any DBFM Co 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 DBFM Co or any DBFM Co 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 DBFM Co or any DBFM Co 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 DBFM Co is obliged to insure under this Agreement (but for the avoidance of doubt, not such liability to the extent within any applicable excess or deductible or over the maximum amount insured or to be insured under such insurance); or

(b) in respect of a matter which is a Compensation Event; or

(c) in respect of malicious damage.

Conduct of claims

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

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

49.3.2 subject to Clauses 49.3.3, 49.3.4 and 49.3.5 below, on the giving of a notice by the Beneficiary pursuant to Clause 49.3.1 above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with an indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise,

or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable co operation, access and assistance for the purposes of considering and resisting such claim;

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

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

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

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

49.3.5 the Beneficiary shall be free at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which Clause 49.3.2 above applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable co operation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Clause 49.3.5, then the Indemnifier shall be released from any liability under its indemnity under Clause 49.1 (DBFM Co Indemnities to Authority) or Clause 49.2 (*Authority Indemnities to DBFM Co*) (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*).

49.A MALICIOUS DAMAGE

49A.1 Remit of Clause

This Clause 49.A 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 DBFM Co 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 DBFM Co Party, DBFM Co 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, DBFM Co 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 DBFM Co has complied with the requirements of Clause 49A.2.1, unless within twenty four (24) hours of receipt of a Malicious Damage Report or within twenty four (24) hours of

the start of the next Core Times where the Malicious Damage Report is made outside Core Times, or, if applicable, within one (1) Business Day of receipt of the evidence or record of the alleged malicious damage concerned the Authority's Representative notifies DBFM Co 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 DBFM Co 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 DBFM Co Party.

49A.3 Rectification of Malicious Damage

49A.3.1 In relation to any Service Event referred to in a Malicious Damage Report, DBFM Co 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 DBFM Co Party, except when Clause 49A.3.3 applies, DBFM Co 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 DBFM Co, 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 DBFM Co Party, DBFM Co shall be entitled to proceed with Rectification in accordance with its obligations under this Agreement.

49A.4 Costs of rectifying malicious damage

DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co to Provide Information

DBFM Co 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 49.A 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 DBFM Co, DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co;

51.1.2 such failure by DBFM Co to perform or interference or occurrence shall not 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 DBFM Co 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 DBFM Co or any DBFM Co 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 DBFM Co) to take reasonable steps to carry out its activities in a manner which minimises undue interference with DBFM Co's performance of the Project Operations, save where (and to the extent):

(a) caused or contributed to by DBFM Co or any DBFM Co Party;

(b) the Authority or Authority Party is acting in accordance with a recommendation or instruction of DBFM Co or any DBFM Co 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 DBFM Co'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 DBFM Co's obligation to deliver any or any part of the Services or the compliance by DBFM Co 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 DBFM Co;

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 it has been determined pursuant to the Dispute Resolution Procedure, has been caused by malicious damage by a person other than a DBFM Co Party, but only until such time as either (i) the Authority has instructed DBFM Co to Rectify the Service Event as an Authority Change and the time period for implementation of such Authority Change has expired or (ii) DBFM Co has Rectified the Service Event pursuant to Clause 49A.3.3;
- 51.2.8 Not Used;or
- 51.2.9 DBFM Co complying with an instruction of the Authority pursuant to Clause 24.10 (*Emergencies*)

Insured exposure

- 51.3 Without prejudice to Clause 53 (*Insurance*), DBFM Co 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 DBFM Co is or should be able to recover under any policy of insurance required to be maintained by DBFM Co or any DBFM Co 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 DBFM Co (or any DBFM Co Party), including but not limited to non disclosure or under insurance) or any other policy of insurance which DBFM Co has taken out and maintained.

Mitigation of Excusing Cause

- 51.4 DBFM Co shall take all reasonable steps to mitigate the consequences of an Excusing Cause on DBFM Co's ability to perform its obligations under this Agreement. To the extent that DBFM Co does not take such steps, DBFM Co 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**

DBFM Co Insurances

- 53.1 DBFM Co shall, procure that the insurances, details of which are set out in Section 1 (*Policies to be taken out by DBFM Co 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 DBFM Co and maintained during the Design and Construction Phase*) of Schedule Part 15 (*Insurance Requirements*).
- 53.2 DBFM Co shall, procure that the insurances, details of which are set out in Section 2 (*Policies to be taken out by DBFM Co and maintained from the*

Actual Completion Date) of Schedule Part 15 (*Insurance Requirements*), are taken out prior to the Actual Completion Date and are maintained for the periods specified in Section 2 (*Policies to be taken out by DBFM Co and maintained from the Actual Completion Date*) of Schedule Part 15 (*Insurance Requirements*).

- 53.3 Without prejudice to the other provisions of this Clause 53 (*Insurance*), DBFM Co 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 DBFM Co and maintained during the Design and Construction Phase*) and Section 2 (*Policies to be taken out by DBFM Co and maintained from the Actual Completion Date*) of Schedule Part 15 (*Insurance Requirements*).
 - 53.4.5 provide for 30 days prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with Endorsement 1 in Section 3 (*Endorsements*) of Schedule Part 15 (*Insurance Requirements*);
 - 53.4.6 in respect of the Physical Damage Policies provide for payment of any proceeds received by DBFM Co 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 DBFM Co 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 Vitiatio

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

53.6.2 provide for non-vitiation protection in respect of any claim made by 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 DBFM Co 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 DBFM Co 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 DBFM Co must comply with the provisions of Section 4 of Schedule Part 15 (*Insurance Requirements*)), DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co as a debt provided that if the default occurs during the Operational Term the amount recoverable from the DBFM Co shall be the difference between the premiums had DBFM Co 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 DBFM Co 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) DBFM Co 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 DBFM Co or any sub-contractor of DBFM Co (of any tier); and
 - (ii) DBFM Co has demonstrated to the Authority that DBFM Co and a prudent board of directors of a company operating the same or substantially similar businesses in the United Kingdom to that operated by DBFM Co 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 DBFM Co an amount equal to the amount calculated in accordance with Section 3 (*Consequences of Termination for Force Majeure*) of Schedule Part 17 (*Compensation on Termination*) and this Agreement will terminate, or elect to allow this Agreement to continue and Clause 53.14.2(b) below shall thereafter apply in respect of such risk; and
- (b) where such requirements are satisfied in respect of contractors' 'all risks' insurance, property damage insurance, third party liability insurance (if the Authority elects to allow this Agreement to continue in accordance with Clause 53.14.2(a)), delay in start up and business interruption insurance (but not loss of profits) or statutory insurances this Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to DBFM Co an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and this Agreement will continue, or an amount equal to the amount calculated in accordance with Section 3 (*Consequences of Termination for Force Majeure*) of Schedule Part 17 (*Compensation on Termination*) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon this Agreement will terminate; and
- (c) where pursuant to Clauses 53.14.2(a) and/or 53.14.2(b) this Agreement continues then 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 DBFM Co 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 DBFM Co pursuant to paragraph 3.1 of Section 6 (*Pass Through Costs*) of Schedule Part 14 (*Payment Mechanism*). Where the risk is Uninsurable for part of a year only the reduction in 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 DBFM Co shall

approach the insurance market at least every four months to establish whether the risk remains Uninsurable. As soon as DBFM Co is aware (and the parties agree or it is determined pursuant to the Dispute Resolution Procedure) that the risk is no longer Uninsurable, DBFM Co 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 the DBFM Co 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 DBFM Co 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, DBFM Co 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 DBFM Co (such that this Agreement will terminate)(the "**Relevant Payment**"), DBFM Co 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 DBFM Co'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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co and/or any sub-contractor of DBFM Co (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 DBFM Co's obligations in Clauses 53.1 to 53.3 and/or Schedule Part 15 (*Insurance Requirements*) in respect of that particular Insurance Term and DBFM Co 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 DBFM Co in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address DBFM Co'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, DBFM Co shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition.

53.15.4 DBFM Co 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 DBFM Co 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). DBFM Co 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) DBFM Co 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 DBFM Co 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, DBFM Co 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 DBFM Co 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 DBFM Co's case the relevant insurer, of any circumstances which may give rise to a claim of a value equal to or in excess of fifty thousand pounds (£50,000) (index linked) under the Insurances within five (5) Business Days of becoming aware of the same (or earlier, if so requested by the terms of the relevant insurance policy). If any insurer disputes any such claim, DBFM Co 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 DBFM Co under the insurances referred to in 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 DBFM Co and Maintained from the Actual Completion Date*) of Schedule Part 15 (*Insurance Requirements*) shall be paid into the Insurance Proceeds Account and shall be applied in accordance with this Agreement and in accordance with the Insurance Proceeds Accounts Agreement.
- 53.19 Subject to the provisions of the Funders' Direct Agreement and Clause 53.22 (*Reinstatement*), DBFM Co 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 DBFM Co of its obligations under this

Agreement, including where necessary the reinstatement, restoration or replacement of the Facilities, assets, materials or goods affected by the event giving rise to the insurance claim and consequent payment of proceeds.

53.20 Where reinstatement monies are required to be released from the Insurance Proceeds Account DBFM Co shall obtain the Authority's consent in accordance with the Insurance Proceeds Account Agreement. The Authority shall give its consent (or confirm that it is withholding its consent) to the release of monies from the Insurance Proceeds Account within one (1) Business Day of a request from DBFM Co (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, DBFM Co will make good any deficiency forthwith.

53.22 **Reinstatement**

53.22.1 All insurance proceeds received under any Physical Damage Policy shall be applied to repair, reinstate and replace each part or parts of the Facilities in respect of which the proceeds were received.

53.22.2 Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the ("**Relevant Incident**") in an amount in excess of one hundred and fifty thousand pounds (£150,000) (index-linked):

(a) DBFM Co shall deliver as soon as practicable and in any event within 28 days after the making of the claim a plan prepared by DBFM Co for the carrying out of the works necessary (the "**Reinstatement Works**") to repair, reinstate or replace (the "**Reinstatement Plan**") the assets which are the subject of the relevant claim or claims in accordance with Clause (b)(iv) below. The Reinstatement Plan shall set out:

(i) if not the Contractor, the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Authority; and

(ii) the proposed terms and timetable or, if not then established, the reasonably anticipated terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Authority, which approval shall not be unreasonably delayed;

(b) provided that the Authority is satisfied that the Reinstatement Plan will enable DBFM Co 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 DBFM Co;
- (ii) DBFM Co shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the Reinstatement Plan approved by the Authority;
- (iii) prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Insurance Proceeds Account (the "**Relevant Proceeds**") (together with any interest accrued) may be withdrawn by DBFM Co from the Insurance Proceeds Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in Clause 53.22.2(b)(ii) above, and to meet any other reasonable costs and expenses of DBFM Co for the sole purposes of funding the Reinstatement Works and the parties shall operate the signatory requirements of the Insurance Proceeds Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Authority may withdraw amounts standing to the credit of the Insurance Proceeds Account for the purposes of funding any Reinstatement Works;
- (iv) the Authority agrees and undertakes that, subject to compliance by DBFM Co with its obligations under this Clause, and provided that DBFM Co 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 DBFM Co 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 53.22.3 below the Authority shall permit withdrawal by DBFM Co of any Relevant Proceeds then held in the Insurance Proceeds Account that have not been paid under Clause 53.22.2(b)(ii) above, in respect of the Relevant Incident, together with any interest accrued.

- (vii) subject to the provisions of Clause 49.1 (*DBFM Co Indemnities to Authority*) DBFM Co 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, DBFM Co 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 DBFM Co of its obligations under Clause 53.22.2(b) leads to a delay in the completion of the Reinstatement Works, any entitlement that DBFM Co 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 DBFM Co 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 DBFM Co or any DBFM Co 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 DBFM Co shall procure that no DBFM Co Party shall bring such a claim against the Authority. DBFM Co has accepted this on the basis that it and each DBFM Co 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 DBFM Co 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 DBFM Co pursuant to this Agreement, DBFM Co'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 DBFM Co 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 DBFM Co 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 DBFM Co nor any DBFM Co 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 DBFM Co:

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 DBFM Co; 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.

DBFM Co 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 DBFM Co and DBFM Co shall enter into appropriate agreements with any DBFM Co 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, DBFM Co 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, DBFM Co 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 DBFM Co shall ensure the back up and storage in safe custody of the data, materials and documents referred to in Clause 55.3 in accordance with Good Industry Practice. Without prejudice to this obligation, DBFM Co shall submit to the Authority's Representative for approval its proposals for the back up and storage in safe custody of such data, materials and documents and the Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. DBFM Co shall comply, and shall cause all DBFM Co Parties to comply, with all procedures to which the Authority's Representative has given its approval. DBFM Co 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, DBFM Co 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

Assigation

- 57.1 This Agreement and any other agreement in connection with the Project to which both the Authority and DBFM Co are a party shall be binding on, and shall enure to the benefit of, DBFM Co and the Authority and their respective statutory successors and permitted transferees and assignees.
- 57.2 Subject to Clause 57.3, DBFM Co 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, and the Service Contract entered into by DBFM Co 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 DBFM Co 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 of any agreement entered into in connection with this Agreement to which the Authority and DBFM Co 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 any other agreements to which such assignment, transfer or disposal relates;
- 57.4.3 any Permitted Transfer Participant which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Agreement and any other agreements to which such assignment, transfer or disposal relates; or
- 57.4.4 any Participant or other public body (to which neither Clause 57.4.1 nor Clause 57.4.2 nor Clause 57.4.3 applies) whose obligations under this Agreement and any other agreements to which such assignment, transfer or disposal relates are unconditionally and irrevocably guaranteed by the Authority or a Minister of the Crown or the 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 any other agreements to which such assignment, transfer or disposal relates to,

without the consent of DBFM Co. The prior written consent of DBFM Co (not to be unreasonably withheld or delayed) shall be required for any other assignment, transfer or disposal by the Authority of the whole or any part of this Agreement or of any agreement entered into in connection with this Agreement to which the Authority and DBFM Co 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 DBFM Co shall, without prejudice to Clause 57.1, procure that none of the persons listed below shall sub-contract all (or substantially all) of their obligations under or in the agreement set out next to its name:

Person	Contract
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, DBFM Co

shall forthwith appoint a replacement (subject to compliance with Clause 57.5).

- 57.7 DBFM Co shall procure that any replacement for any person referred to in Clause 57.5 or any Key Sub-Contractor shall enter into a contract upon the same or substantially similar terms as the person so replaced and shall also enter into a collateral agreement on the same or substantially the same terms as the Collateral Agreement entered into by the person so replaced.
- 57.8 Where DBFM Co 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, DBFM Co 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 DBFM Co 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, DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co represents and warrants to the Authority that at the date of this Agreement the legal and beneficial ownership of DBFM Co is as set out in Schedule Part 21 (*DBFM Co Information*) and that, other than any security granted to the Senior Funders under the Senior Funding Agreements and 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 DBFM Co or Holdco. DBFM Co further represents and warrants to the Authority that as at the date of this Agreement it has adopted the Articles of Association.
- 58.2 DBFM Co 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 DBFM Co or Holdco.
- 58.3 The Authority may, not more than twice in any Contract Year, or at any time when a DBFM Co Event of Default is outstanding, require DBFM Co 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 DBFM Co or Holdco.
- 58.4 DBFM Co'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 DBFM Co's awareness having made all reasonable enquiry.
- 58.5 Subject to Clause 58.6, prior to the expiry of a period of twelve (12) months commencing on the Actual Completion Date, no Change in Control in any or all of the shares in DBFM Co or Holdco 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 DBFM Co or Holdco, provided that any document conferring security over any shares has been approved by the Authority (such approval not to be unreasonably withheld or delayed); or
 - 58.5.2 any transfer by a Shareholder to an Associate of such transferor; or
 - 58.5.3 any change in the beneficial or legal ownership of any shares that are listed on a recognised investment exchange (as defined in section 285 of the Financial Services and Markets Act 2000),
- shall be disregarded for the purpose of this Clause 58.5 above. Where Clause 58.5.2 applies and subsequent to any such transfer (the "**Original Transfer**") the transferee ceases to be an 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 DBFM Co (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 Holdco, DBFM Co 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 DBFM Co 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 terms “data controller”, “data subject”, “personal data” and “process” shall have the meaning given to it in the Data Protection Act 1998.
- 60.2 DBFM Co undertakes to the Authority that it shall comply with the obligations of a “data controller” under the provisions of the Data Protection Act 1998 and 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. In addition, DBFM Co, (to the extent that it processes personal data):
- 60.2.1 shall comply with the provisions of the Seventh Data Protection Principle as set out in Schedule 1 of the Data Protection Act 1998 and 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 to allow the Authority access to any relevant premises on reasonable notice to inspect its procedures described at Clause 60.2.1 above; and
- 60.2.4 shall promptly, and in any event within twenty-four (24) hours, notify the Authority about any actual or suspected breach of Clause 60.2.1 and shall:
- (a) implement any measures necessary to restore the security of compromised personal data; and

- (b) support the Authority in making any required notifications to any regulatory authority and affected data subjects; and

60.2.5 shall promptly, and in any event within forty-eight (48) hours of receipt of any request or correspondence, notify the Authority if DBFM Co receives a subject access request or notice from a data subject exercising its rights under the Data Protection Act 1998 in respect of any personal data or any correspondence from a regulatory authority in relation to the processing of any personal data on behalf of the Authority.

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; and
- 61.1.5 the Financial Model (as updated from time to time in accordance with this Agreement);

and DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co and/or Holdco to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in DBFM Co and/or Holdco 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; or
 - 61.3.8 any registration or recording of the Consents and property registration required;
 - 61.3.9 any disclosure of information by the Authority to any other department, office or agency of the Government or their respective advisers or to the Scottish Futures Trust or to any person engaged in providing services to the Authority for any purpose related to or ancillary to this Agreement;

- 61.3.10 any disclosure for the purpose of:
- (a) the examination and certification of the Authority's or DBFM Co'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;

61.3.13 Not Used,

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 DBFM Co 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 DBFM Co, in carrying out its obligations under this Agreement, is provided with information relating to any Authority Party, DBFM Co shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless DBFM Co 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, DBFM Co shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any Authority Party including any documents in the possession, custody or control of a Sub-Contractor, are delivered up to the Authority.
- 61.8 The parties acknowledge that Audit Scotland has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.
- 61.9 The provisions of this Clause 61 (*Confidentiality*) are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

Announcements

- 61.10 Unless otherwise required by any Law or any regulatory or governmental authority (but only to that extent), neither party shall make or permit or procure to be made any public announcement or disclosure (whether for publication in the press, the radio, television screen or any other medium) of any Confidential Information or in the case of DBFM Co of its (or any DBFM Co 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 DBFM Co 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 DBFM Co is holding on its behalf and which the Authority does not hold itself the Authority shall refer to DBFM Co such Request for Information as soon as practicable and in any event within five (5) Business Days of receiving such Request for Information and DBFM Co 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 DBFM Co has provided the Authority with all the Information specified in Clause 62.2.1, DBFM Co 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 DBFM Co 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 DBFM Co shall ensure that all Information held on behalf of the Authority is retained for disclosure for at least twelve (12) years from the Actual Completion Date and shall permit the Authority to inspect such Information as requested from time to time.
- 62.5 DBFM Co shall transfer to the Authority any Request for Information received by DBFM Co as soon as practicable and in any event within two (2) Business Days of receiving it.
- 62.6 DBFM Co 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 Information (Scotland) Regulations.
- 62.7 In the event of a request from the Authority pursuant to Clause 62.2 DBFM Co shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of DBFM Co'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 DBFM Co in writing whether or not it still requires DBFM Co to comply with the request and where it does require DBFM Co 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 DBFM Co of such additional days as soon as practicable after becoming aware of them and shall reimburse DBFM Co for such costs as DBFM Co 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 DBFM Co 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 DBFM Co or the Project:
- 62.8.1 in certain circumstances without consulting with DBFM Co; or
- 62.8.2 following consultation with DBFM Co 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 DBFM Co prior to any disclosure.
- 62.9 In the event that DBFM Co 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 DBFM Co.

63. **INFORMATION AND AUDIT ACCESS**

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

63.2 For the purpose of:

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

63.2.2 any examination pursuant to section 23 of the Public Finance and Accountability (Scotland) Act 2000 of the economy, efficiency and effectiveness with which the Authority has used its resources,

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

63.3 DBFM Co shall provide and shall procure that its Sub-Contractors shall provide such information as the Authority may reasonably require from time to time to enable it to meet its obligations to provide reports and returns pursuant to regulations, directions or guidance applicable to the Authority including, without limitation, reports and returns regarding the physical condition of buildings occupied by the Authority, health and safety, relating to environmental health.

64. **NOTICES**

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

If to DBFM Co Address: 51 Melville Street, Edinburgh, EH3 7HL

If to the Authority Address: Estate Manager, Property Management and Development, Finance and Estates Services, West Lothian Council, West Lothian Civic Centre, Howden South Road, Livingston, EH54 6FF

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

If to DBFM Co's Representative Address: 51 Melville Street, Edinburgh, EH3 7HL

If to the Authority's Representative Address: Estate Manager, Property Management and Development, Finance and Estates Services, West Lothian Council, West Lothian Civic Centre, Howden South Road, Livingston, EH54 6FF

(copied in each case to the Authority)

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

64.4 Notices given by post shall be effective upon the earlier of (i) actual receipt, and (ii) five (5) Business Days after mailing. Notices delivered by hand shall be effective upon delivery.

65. **NO WAIVER**

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

Continued effect – no waiver

65.2 Notwithstanding any breach of this Agreement by either party, and without prejudice to any other rights which the other party may have in relation to it, the other party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement. The failure of either party to exercise any right under this Agreement, including any right to terminate 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 DBFM Co.

66.2 Save as expressly provided otherwise in this Agreement, DBFM Co shall not be, or be deemed to be, an agent of the Authority and DBFM Co 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, DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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. **LOCAL GOVERNMENT (CONTRACTS) ACT 1997**

- 73.1 DBFM Co 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.
- 73.2 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).

74. **BEST VALUE**

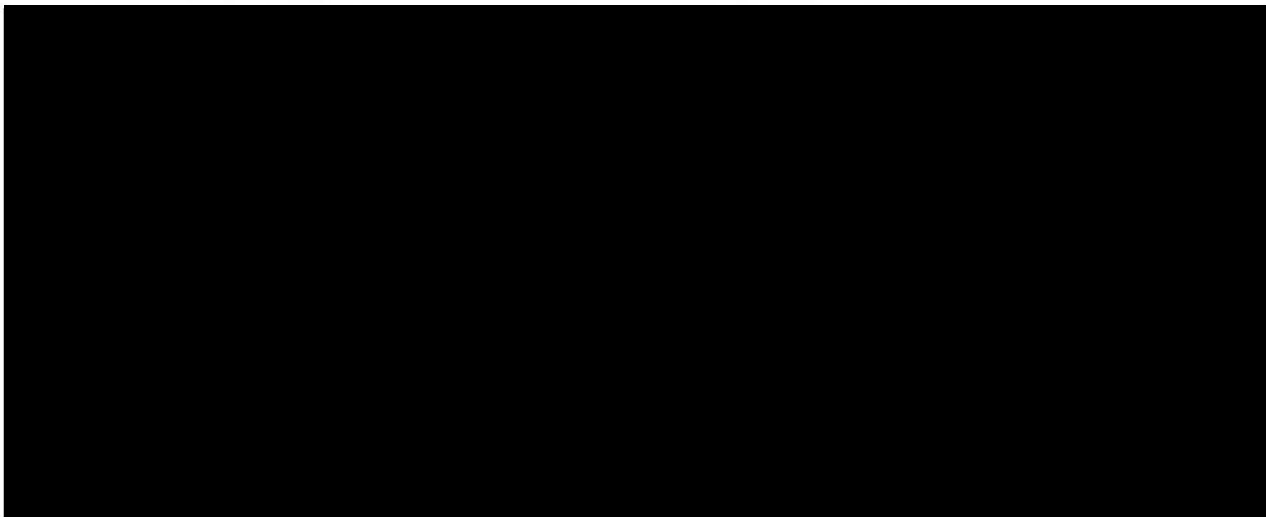
- 74.1 DBFM Co shall take all reasonable steps necessary to facilitate, support and assist the Authority in complying with Sections 1 and 2 of the Local Government in Scotland Act 2003.
- 74.2 Subject to Clause 74.1, DBFM Co shall comply with the guidance referred to in Section 2 of the Local Government in Scotland Act 2003 as directed by the Authority from time to time.

75. **GOVERNING LAW AND JURISDICTION**

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

IN WITNESS WHEREOF these presents typewritten on this and the preceding 109 pages together with the Schedule in 27 Parts and Appendix A are executed by the parties hereto as follows:

SUBSCRIBED for and on behalf of
the said **THE WEST LOTHIAN
COUNCIL**
at *Edinburgh*
on *14/12/2016*



SUBSCRIBED for and on behalf of
the said **WCHS DBFM CO LIMITED**



SCHEDULES

SCHEDULE PART 1

DEFINITIONS AND INTERPRETATION

SECTION 1

In this Agreement unless the context otherwise requires:

- "5 Year Maintenance Plan"** means the plan, to be prepared by or on behalf of DBFM Co, 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;
- "Actual Commissioning End Date"** means the date specified in the Commissioning Completion Certificate issued by the Independent Tester pursuant to Clause 18.4;
- "Actual Completion Date"** means the later of:
- (a) the date stated in the Certificate of Practical Completion issued by the Independent Tester pursuant to Clause 17.12; and
 - (b) subject to Clause 14.5, the Completion Date;
- "Actual Liability"** has the meaning given in Clause 46.7.3;
- "Additional Permitted Borrowing"** means on any date, the amount equal to any amount of principal outstanding under the Senior Funding Agreements (as the same may from time to time be amended, whether or not with the approval of the Authority) in excess of the amount of principal scheduled under the Senior Funding Agreements at Financial Close to be outstanding at that date;
- but only to the extent that:
- (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
- (iv) shall not be counted as Additional Permitted Borrowing;

“Additional Permitted Borrowings Limit” means an amount equal to:

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

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

“Adverse Planning Decision” means a decision by a Relevant Authority pursuant to which the Top Soil Planning Approval is amended, revoked, quashed or otherwise rendered ineffective;

“Affiliate” means, in relation to any person, any holding company or subsidiary of that person or any 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;

“Agent” has the meaning given to the term “Facility Agent” in the Credit Agreement;

“Agreement” means this agreement including the Schedule;

"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 (<i>Ancillary Rights</i>) of Schedule Part 5 (<i>Land Matters</i>);
"Ancillary Works Area"	means the area outwith the Site referred to in paragraphs 11, 12, 13, 14 and 15 of Section 3 (<i>Ancillary Rights</i>) of Schedule Part 5 (<i>Land Matters</i>);
"Annual Service Payment"	has the meaning given in Schedule Part 14 (<i>Payment Mechanism</i>);
"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 (<i>Design, Construction and Commissioning Process</i>) and Schedule Part 8 (<i>Review Procedure</i>) (provided that in the case of any item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed "Level B – proceed subject to amendment as noted" DBFM Co 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 (<i>Change Protocol</i>);
"Articles of Association"	means the articles of association for DBFM Co that are in the Agreed Form;
"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 DBFM Co shall include Holdco and each of the Shareholders, and the term " Associate " shall be interpreted accordingly;
"Authority Assets"	means the assets and equipment or other property used by, or on behalf of, the Authority or any Authority Party at the Site, other than the Facilities;
"Authority Change"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>);

"Authority Change Notice"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>);
"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 DBFM Co, the DBDA Contractor, any DBFM Co 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 set out in the document annexed to this Agreement as Appendix A (<i>Authority Policies</i>) as amended from time to time in accordance with the provisions of Clause 27.6 and Schedule Part 16 (<i>Change Protocol</i>);
"Authority's Commissioning"	means the Authority's pre-completion commissioning activities to be carried out by the Authority in accordance with Clause 17 (<i>Pre-Completion Commissioning and Completion</i>);
"Authority's Construction Requirements"	means the requirements of the Authority set out or identified in Section 3 (<i>Authority's Construction Requirements</i>) of Schedule Part 6 (<i>Construction Matters</i>) as amended from time to time in accordance with the terms of this Agreement;
"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 (<i>Post Completion Commissioning</i>);
"Authority's Representative"	means the person so appointed by the Authority pursuant to Clause 8 (<i>Representatives</i>);
"Availability Failure"	has the meaning given in Schedule Part 14 (<i>Payment Mechanism</i>);
"Base Case IRR"	means [REDACTED]

"Base Date"	has the meaning given in paragraph 16 of Section 2 (<i>Interpretation</i>) of Schedule Part 1 (<i>Definitions and Interpretation</i>);
"Base Senior Debt Termination Amount"	has the meaning given in Section 6 (<i>Definitions</i>) of Schedule Part 17 (<i>Compensation on Termination</i>);
"Beneficiary"	has the meaning given in Clause 49.3 (<i>Conduct of Claims</i>);
"Business Day"	means a day other than a Saturday, Sunday or a bank holiday in Edinburgh;
"Capital Expenditure"	means capital expenditure (as such term is interpreted in accordance with generally accepted accounting principles in the United Kingdom from time to time);
"CDM Regulations"	has the meaning given in Section 2 (<i>Safety During Construction</i>) of Schedule Part 6 (<i>Construction Matters</i>);
"Certificate of Practical Completion"	means a certificate in the relevant form set out in Schedule Part 22 (<i>Certificates</i>);
"Change"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>);
"Change in Control"	means: <ul style="list-style-type: none"> (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 (b) any other arrangements that have or may have or which result in the same effect as paragraph (a) above;
"Change in Law"	means the coming into effect or repeal (without re-enactment or consolidation) in Scotland of any Law, or any amendment or variation to any Law, or any judgement of a relevant court of law which changes binding precedent in Scotland in each case after the date of this Agreement;

"Collateral Agreements"	means the Contractor's Collateral Agreement, the Service Providers' Collateral Agreements and the Professional Team Collateral Agreements;
"Commencement Date"	means the date of this Agreement;
"Commercially Sensitive Information"	means the sub set of Confidential Information listed in column 1 of Schedule Part 26 (<i>Commercially Sensitive Information</i>) in each case for the period specified in column 2 of Schedule Part 26 (<i>Commercially Sensitive Information</i>);
"Commissioners"	has the meaning given in Clause 35.3;
"Commissioning Completion Certificate"	means a certificate in the relevant form set out in Schedule Part 22 (<i>Certificates</i>);
"Commissioning End Date"	means the date by which the parties' commissioning activities are programmed to be completed in accordance with the Final Commissioning Programme;
"Community Services"	means all services provided from the Facilities as envisaged by the Authority's Construction Requirements and/or the Services Level Specification and such other services as may be notified to DBFM Co by the Authority from time to time;
"Community Services Provider"	means any organisation (excluding for the avoidance of doubt the Authority providing any of the Community Services at the Facilities from time to time;
"Compensation Event"	has the meaning given in Clause 29.10;
"Compensation Payment"	has the meaning given in Clause 46.6;
"Completion Criteria"	means the completion tests set out in Appendix B of Schedule Part 10 (<i>Outline Commissioning Programme</i>);
"Completion Date"	means 29 June 2018 or such revised date as may be specified by the Authority's Representative pursuant to Clause 29 (<i>Delay Events</i>) or such other date as may be agreed by the parties;
"Confidential Information"	means: (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

(b) Commercially Sensitive Information;

"Consents"

means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations required by Law, and all necessary consents and agreements from any third parties (including, without limitation, any Planning Permission), needed to carry out the Project Operations in accordance with this Agreement;

"Construction Contract"

means the design and build contract dated the same date as this Agreement between DBFM Co 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 Period 1"

means (subject to Clause 29 (*Delay Events*)) the period from the commencement of week -3 until the end of week 14 as detailed on the Programme or such other period as the parties may agree in writing (each acting reasonably);

"Construction Period 1 Plan"

means the plan titled "ROAD ACCESS DURING CONSTRUCTION PERIOD 1" with drawing reference number "WCHS-MCS-DBFM-SP5-101" and set out at Appendix C to Section 4 (*Site Plans*) of Schedule Part 5 (*Land Matters*);

"Construction Period 2"

means (subject to Clause 29 (*Delay Events*)) the period from the commencement of week 15 until the end of week 30 as detailed on the Programme or such other period as the parties may agree in writing (each acting reasonably);

"Construction Period 2 Plan"

means the plan titled "ROAD ACCESS DURING CONSTRUCTION PERIOD 2" with drawing reference number "WCHS-MCS-DBFM-SP5-102" and set out at Appendix D to Section 4 (*Site Plans*) of Schedule Part 5 (*Land Matters*);

"Construction Period 3"

means (subject to Clause 29 (*Delay Events*)) the period from the commencement of week 31 until the end of week 91 as detailed on the Programme or such other period as the parties may agree in writing (each acting reasonably);

"Construction Period 3 Plan"	means the plan titled "ROAD ACCESS DURING CONSTRUCTION PERIOD 3" with drawing reference number "WCHS-MCS-DBFM-SP5-103" and set out at Appendix E to Section 4 (<i>Site Plans</i>) of Schedule Part 5 (<i>Land Matters</i>);
"Construction Phase"	means the period from and including the date of execution of this Agreement to and including the Actual Completion Date;
"Construction Quality Plan"	means the document at Section 8 (<i>Quality Plans (Design and Construction)</i>) of Schedule Part 6 (<i>Construction Matters</i>);
"Construction Site"	means the land made available to DBFM Co for the Project outlined in red on the the plan titled "CONSTRUCTION RED LINE BOUNDARIES" with drawing reference WCHS-MCS-DBFM-SP5-001 and set out at Appendix A to Section 4 (<i>Site Plans</i>) of Schedule Part 5 (<i>Land Matters</i>);
"Contamination"	means all or any pollutants or contaminants, including any chemical or industrial, radioactive, dangerous, toxic or hazardous substance, waste or residue (whether in solid, semi-solid or liquid form or a gas or vapour) and including without limitation genetically modified organisms;
"Contract Month"	means a calendar month provided that: <ul style="list-style-type: none"> (a) the first Contract Month shall be the period from and including the Payment Commencement Date to and including the last day of the calendar month in which the Payment Commencement Date 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: <ul style="list-style-type: none"> (a) for the first contract year, the period from the date of this Agreement to the subsequent 31 March; and (b) for all subsequent contract years, the period of twelve (12) calendar months commencing on each anniversary of 1 April,

provided that the final contract year shall be such period as commences on 1 April and ends on and includes the date of expiry or earlier termination of this Agreement (as the case may be);

"Contracting Associate"

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

"Contractor"

means Galliford Try Building 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 DBFM Co to carry out the Works and any substitute design and/or building contractor engaged by DBFM Co as may be permitted by this Agreement;

"Contractor's Collateral Agreement"

means a collateral agreement among the Authority, DBFM Co and the Contractor in the form identified 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;

"Contractor's Site Rules"

means the Contractor's rules, applicable on the Site to the Authority, DBFM Co, 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 Path Plan"

means the plan titled "TEMPORARY CORE PATH CLOSURE" with drawing reference number WCHS-MCS-DBFM-SP5-301 and set out at Appendix H to Section 4 (*Site Plans*) of Schedule Part 5 (*Land Matters*);

“Credit Agreement”	means the credit agreement entered into on or around the date of this Agreement between amongst others, DBFM Co and the Agent;
“DBDA Contractor”	means hub South East Scotland Limited incorporated under the Companies Acts (Registered Number SC380319) and having its Registered Office at Atholl House, 51 Melville Street, Edinburgh, Scotland, EH3 7HL and its sub-contractors of any tier;
“DBDA Plan”	means the plan titled “Planning – Land Matters” set out at Appendix I to Section 4 (<i>Site Plans</i>) of Schedule Part 5 (<i>Land Matters</i>);
“DBFM Co Event of Default”	has the meaning given in Clause 40 (<i>DBFM Co Events of Default</i>);
“DBFM Co Party”	means DBFM Co'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. “DBFM Co Parties” shall be construed accordingly;
“DBFM Co's Post-Completion Commissioning”	means DBFM Co's commissioning activities carried out in accordance with Clause 18.1;
“DBFM Co's Pre-Completion Commissioning”	means DBFM Co's commissioning activities carried out in accordance with Clause 17 (<i>Pre-Completion Commissioning and Completion</i>);
“DBFM Co's Proposals”	means the document at Section 4 (<i>DBFM Co'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>);
“DBFM Co's Remedial Services”	means any activities to be performed by or on behalf of DBFM Co pursuant to its rights under Clause 23.15;
“DBFM Co's Representative”	means the person appointed by DBFM Co pursuant to Clause 8 (<i>Representatives</i>);
“Deduction”	means a deduction to be made in calculating a Monthly Service Payment, calculated in accordance with Section 3 (<i>Deductions from Monthly Service Payments</i>) of Schedule Part 14 (<i>Payment Mechanism</i>);

"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 DBFM Co to meet the Authority's Construction Requirements and/or DBFM Co'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 (<i>Change Protocol</i>);
"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 (<i>Quality Plans (Design and Construction)</i>) of Schedule Part 6 (<i>Construction Matters</i>);
"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 made available or issued to DBFM Co or any DBFM Co 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 the private finance initiative (or any successor initiative applying principles similar to those of the Scottish Government hub programme or the private finance initiative); or
- (b) companies undertaking projects procured by contracts under the private finance initiative or the Scottish Government hub programme (or any successor initiative or programme applying principles similar to that initiative or that programme, as relevant) in relation to other companies undertaking similar projects; or
- (c) the West Calder high school in relation to other similar facilities; or
- (d) DBFM Co in relation to other companies,

save:

- i. where such Change in Law is in response to any act or omission on the part of DBFM Co 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 DBFM Co is greater than its effect on other companies; and
- iii. that a change in taxes or the introduction of a tax affecting companies generally or a change in VAT shall be deemed not to be discriminatory in any circumstances (to avoid doubt, such changes being given effect in accordance with Clause 35 (*VAT and Construction Industry Tax Deduction Scheme*));

"Distribution"

has the meaning given to it in Schedule Part 23 (*Refinancing*) (excluding limb (b) of that definition);

"Distribution Date"

means a date during the Project Term or after its expiry on which DBFM Co intends to make a Distribution;

"Dividend"

means any dividend or distribution made or paid by DBFM Co on its share capital;

"Dispute"

has the meaning given in paragraph 1 of Schedule Part 20 (*Dispute Resolution Procedure*);

"Dispute Resolution Procedure"	means the procedure set out in Schedule Part 20 (<i>Dispute Resolution Procedure</i>);
"DRS Timetable"	has the meaning given in Clause 23.16;
"Emergency"	means an event causing or, in the reasonable opinion of a party, threatening to cause death or injury to any individual, or serious disruption to the lives of a number of people or extensive damage to property, or contamination of the environment, in each case on a scale beyond the capacity of the emergency services or preventing the Services operating under normal circumstances and requiring the mobilisation and organisation of the emergency services;
"Encumbrance"	means any option, right of pre-emption, pledge, security, interest, lien, charge, mortgage, lease, licence, claim, condition, retention or other encumbrance or restriction whether imposed by agreement, by law or otherwise;
"Environmental Information (Scotland) Regulations"	means the Environmental Information (Scotland) Regulations 2004 together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Government Department in relation to such regulations;
"Equipment"	has the meaning given to it in Schedule Part 11 (<i>Equipment</i>);
"Equipment Installation Table"	has the meaning given to it in Schedule Part 11 (<i>Equipment</i>);
"Equity"	means the aggregate subscription price paid by the Shareholders for the ordinary share capital of DBFM Co;
"Estimated Deductions"	has the meaning given in Clause 34.2.1;
"Estimated Increased Maintenance Costs"	has the meaning given in Clause 23.7;
"Excusing Cause"	has the meaning given in Clause 51.2;
"Expiry Date"	means midnight on 29 JUNE 2043 ;

"Facilities"	means the buildings and other facilities, together with all supporting infrastructure (including the Plant and the Group 1 Equipment), external hard-standings, specialist surfaces and other amenities located on the Site (including as a minimum all aspects detailed within Appendix B to Section 1 (<i>Service Level Specification</i>) of Schedule Part 12 (<i>Service Requirements</i>), as required to enable DBFM Co to comply with its obligations under this Agreement, all as the same may be varied, amended or supplemented from time to time in accordance with this Agreement;
"Facility Manager"	means DBFM Co'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 jointly developed and agreed by the Authority and DBFM Co in accordance with the provisions of Clause 17.1;
"Financial Close"	means the date of this Agreement;
"Financial Model"	means the computer spreadsheet model for the Project incorporating statements of DBFM Co's cashflows including all expenditure, revenues, financing and taxation of the Project Operations together with the profit and loss accounts and balance sheets for DBFM Co 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 (<i>Financial Model</i>), a copy of which is in the Agreed Form on disc;
"First Party"	has the meaning given in Clause 35.3;
"FOI(S)A"	means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation (as defined in section 73 of the Freedom of Information (Scotland) Act 2002) made under the Freedom of Information (Scotland) Act 2002 from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Government department in relation to such Act;

"Force Majeure"	has the meaning given in Clause 31 (<i>Force Majeure</i>);
"Functional Area"	means an area of the Facilities identified as such in Appendix 2 to Schedule Part 14 (<i>Payment Mechanism</i>);
"Funders"	means all or any of the persons who provide financing or funding in respect of the Project Operations under the Funding Agreements including Norddeutsche Landesbank Girozentrale and NORD/LB Luxembourg S.A. Covered Bond Bank and, where the context so permits, prospective financiers or funders;
"Funders' Direct Agreement"	means the agreement to be entered into between the Authority, the Senior Funders and DBFM Co in the form identified in Schedule Part 4 (<i>Funders' Direct Agreement</i>);
"Funding Agreements"	means all or any of the agreements or instruments to be entered into by DBFM Co 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 DBFM Co or any of its Associates relating to the rescheduling of their indebtedness or the refinancing of the Project Operations);
"Funding Default"	means an Event of Default as that term is defined in the Credit Agreement;
"Good Industry Practice"	means using standards, practices, methods and procedures conforming to the Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances;
"Government"	means the government of the United Kingdom or the Scottish Ministers;
"Ground Physical and Geophysical Investigation"	means the investigation of all the ground physical and geophysical conditions of and surrounding the Site and of any extraneous materials in, on or under the Site (including its surface and subsoil) to enable the Facilities to be designed and constructed and the Works to be carried out with due regard for those conditions and the seismic activity (if any) in the region of the Site;

"Growing Season"	means each of the months April to September (inclusive);
"H&S Conviction"	has the meaning given in Clause 40.1.5;
"Handback Amount"	has the meaning given in Schedule Part 18 (<i>Handback Procedure</i>);
"Handback Bond"	has the meaning given in Schedule Part 18 (<i>Handback Procedure</i>);
"Handback Certificate"	means the certificate of confirmation that the Facilities comply with the Handback Requirements in the relevant form set out in Schedule Part 18 (<i>Handback Procedure</i>);
"Handback Programme"	has the meaning given in Schedule Part 18 (<i>Handback Procedure</i>);
"Handback Requirements"	has the meaning given in Schedule Part 18 (<i>Handback Procedure</i>);
"Handback Works"	has the meaning given in Schedule Part 18 (<i>Handback Procedure</i>);
"Health and Safety Regime"	means the Food Safety Act 1990 (and associated regulations), the Health & Safety at Work etc Act 1974 (and associated regulations), the Fire (Scotland) Act 2005 (and associated regulations including the Fire Safety (Scotland) Regulations 2006), 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;
"High Value Change"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>)
"High Value Change Stage 2 Submission"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>);
"Holdco"	means WCHS DBFM Holdco Limited (registered number SC535579) whose registered office is at Atholl House, 51 Melville Street, Edinburgh, EH3 7HL;
"Holding Company"	has the meaning given to it in section 1159 of the Companies Act 2006;

"Hours for Programmed Maintenance"	has the meaning given in Appendix 2 of Schedule Part 8 (<i>Review Procedure</i>);
"Hours of Operation"	has the meaning given in Appendix 2 of Schedule Part 8 (<i>Review Procedure</i>);
"hubco"	means Hub South East Scotland Limited (registered under number SC380319) whose registered office is at Atholl House, 51 Melville Street, Edinburgh, EH3 7HL;
"ICT Responsibility Matrix"	means the responsibilities matrix set out in Appendix B of the Authority's Construction Requirements;
"Indemnifier"	has the meaning given in Clause 49.3 (<i>Conduct of Claims</i>);
"Independent Tester"	means Currie and Brown UK Limited a company registered under the Companies Acts (Company Number 01300409) and having its registered office at Dashwood House, 69 Old Broad Street, London, EC2M 1QS or such substitute independent tester as may be permitted pursuant to this Agreement;
"Independent Tester Contract"	means the contract dated on or around the date of this Agreement in the form identified in Schedule Part 13 (<i>Independent Tester Contract</i>) or any replacement thereof among DBFM Co, the Authority and the Independent Tester;
"Indirect Losses"	has the meaning given in Clause 54.1 (<i>Exclusions and Limits on Liability</i>);
"Information"	has the meaning given under section 73 of the Freedom of Information (Scotland) Act 2002;
"Initial Funding Agreements"	means the Senior Funding Agreements and Subordinated Funding Agreements in the Agreed Form;
"Insurance Proceeds Account"	means the account numbered [REDACTED] with sort code [REDACTED] in the joint names of DBFM Co and the Authority with the Account Bank (as defined in the Credit Agreement);
"Insurance Proceeds Account Agreement"	means the agreement in the form identified in Schedule Part 25 (<i>Insurance Proceeds Account Agreement</i>);

"Insurance Term"	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;
"Insurances"	means, as the context requires, all or any of the insurances required to be maintained by DBFM Co pursuant to this Agreement;
"Insured Revenue"	means the projected Unavoidable Fixed Costs and Senior Debt Service Costs of DBFM Co;
"Intellectual Property"	means all registered or unregistered trademarks, service marks, patents, registered designs, utility models, applications for any of the foregoing, copyrights, unregistered designs, the sui generis rights of extraction relating to databases, trade secrets and other confidential information or know-how;
"Intellectual Property Rights"	means the Intellectual Property which (or the subject matter of which) is created, brought into existence, acquired, used or intended to be used by DBFM Co, any DBFM Co Party or by other third parties (for the use by or on behalf of or for the benefit of DBFM Co) 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 in Relevant Debt paid by DBFM Co;
"Interim Project Report"	<p>means (i) the report to be produced by DBFM Co on request by the Authority pursuant to Clause 4.8 (Funding Default), which report shall contain all information pertaining to the occurrence of the relevant Funding Default (including without limitation details of any action taken by the Funders under the Credit Agreement, any discussions that have taken place with the Funders and if the funders intend to issue a waiver in respect of the Funding Default) as the Authority (acting reasonably) deems necessary including (but not limited to):</p> <ol style="list-style-type: none"> 1. details of the circumstances leading to the Funding Default or Funding Defaults 2. details of the provisions of the Senior Funding Agreements of which DBFM Co is in default 3. details of DBFM Co's performance against cover ratios and covenants prior to the Funding

- Default and projections of performance going forward
4. details of the discussions held between DBFM Co and the Senior Funders regarding the steps to be put in place to remedy the Funding Default
 5. detail of the intentions (in so far as they are ascertained) of the Senior Funder with regard to the Funding Default including confirmation of whether the Senior Lender intends to waive in respect the Funder Default
 6. details of the intentions (in so far as they are ascertained) of the equity and subordinated lenders with regard to the Funding Default including confirmation of whether the equity and subordinated lenders intend to issue a waiver in respect of the Funding Default
 7. details of any action taken by the Senior Funders under the Senior Funding Agreements

together with a programme of action which will, if performed, remedy or otherwise resolve the matters which gave rise to the Funding Default; and (ii) where the Senior Funders have requested that DBFM Co provides them with a report in relation to the relevant Funding Default, a copy of such report, together with any updates or follow on reports requested by the Senior Funders;

"IT"

means information technology systems, hardware and software;

"Key Sub-Contractor"

means sub-contractors appointed to complete the following works packages: (i) steel to steel connections only; (ii) swimming pool (iii) sprinklers; (iv) lifts; (v) pre-cast stairs; (vi) fire detection and alarms; (vii) intruder alarm and CCTV system; (viii) BMS; and (ix) kitchen installation;

"Key Sub-Contractor Collateral Agreements"

means the collateral agreements among the Authority, DBFM Co, the Contractor and the Key Sub-Contractors in the form identified 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 DBFM Co 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 DBFM Co 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;

"LIBOR"

has the meaning given to it in the Credit Agreement;

"Low Value Change"

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

"Maintenance Works"

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 DBFM Co's Proposals (including, without limitation, the renewal or replacement of any Plant or equipment) throughout the Project Term;

"Malicious Damage Report"

has the meaning given in Clause 49A.2.1;

"Medium Value Change"

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

"Method Statements"

means the method of providing a Service as set out or identified in Section 2 (*Method Statements*) of Schedule Part 12 (*Service Requirements*) as amended from time to time in accordance with Clause 33 (*Change Protocol*) and Clause 22 (*The Services*);

"Monthly Service Payment"

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

"Monthly Service Report"

means a monthly report to be prepared by DBFM Co and provided to the Authority in accordance with the relevant provisions in Section 1 (*Service Level Specification*) of Schedule Part 12 (*Service Requirements*);

"Operational Functionality"

means;

- (a) points of access to the rooms and departments in each of the buildings forming part of the Facility;
- (b) the relationship between the buildings forming the Facility; and
- (c) adjacencies between the rooms and, where relevant, between departments within the Facility;

but only in so far as the above relate to or affects the provision of Community Services;

“Operational Insurances”

means the insurances required by Clause 53.2 and “Operational Insurance” means any one of such insurances;

“Operational Site”

means the land made available to DBFM Co for the Project outlined in red on the the plan titled “OPERATIONAL RED LINE BOUNDARY” with drawing reference WCHS-MCS-DBFM-SP5-002 and set out at Appendix B to Section 4 (*Site Plans*) of Schedule Part 5 (*Land Matters*);

“Operational Term”

means the period from the 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;

“Pathway”

means the public right of way shown by the purple line; the route of which is to be temporarily diverted during the Construction Phase along the route shown by the broken black line marked “EXISTING WOODLAND TRAIL” on the Core Path Plan;

"Payment Commencement Date"	means the Actual Completion Date;
"Payment Mechanism"	means Schedule Part 14 (<i>Payment Mechanism</i>);
"Performance Failure"	has the meaning given in Section 1 of Schedule Part 14 (<i>Payment Mechanism</i>);
"Performance Guarantees"	means the guarantees to DBFM Co in respect of the Construction Contract and the Service Contract which, as at the date of this Agreement are in the Agreed Form;
"Permitted Borrowing"	<p>means without double-counting, any:</p> <ul style="list-style-type: none"> (a) advance to DBFM Co under the Senior Funding Agreements, provided that such advance is not made under any committed standby facility; (b) Additional Permitted Borrowing; (c) advance to DBFM Co under any committed standby facility which is made solely for the purpose of funding any cost overruns, increased expenses or loss of revenue which DBFM Co 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, <p>except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing;</p>
"Permitted Transfer Participant"	<p>means each of the following:</p> <ul style="list-style-type: none"> (a) a Participant which is a health board established under section 2 of the National Health Service (Scotland) Act 1978; or (b) the Scottish Fire and Rescue Service constituted under the Police and Fire Reform (Scotland) Act 2012; or (c) the Police Service of Scotland constituted under the Police and Fire Reform (Scotland) Act 2012; or

(d) the Scottish Ambulance Service constituted in terms of the Scottish Ambulance Service Board Order 1999/686,

but specifically excluding their successors or assignees (the provisions of Section 2, Paragraphs 9 and 10 of Schedule Part 1 being specifically disapplied for the purposes of this definition);

“Physical Damage Policies”

means the policies of insurance referred to in paragraph 1 (*Contractors’ ‘All Risk’ Insurance*) of Section 1 (*Policies to be Taken Out by DBFM Co and Maintained During the Design and Construction Phase*) and paragraph 1 (*Property Damage*) of Section 2 (*Policies to be Taken Out By DBFM Co and Maintained from the Actual Completion Date*) of Schedule Part 15 (*Insurance Requirements*);

“Planning Approval”

means detailed planning consent for the Project dated 30 May 2016 in response to Application Reference 0083/FUL/16 and a copy of which is identified in Section 1 of Schedule Part 6 (*Construction Matters*);

“Planning Challenge”

means, in respect of the Top Soil Planning Approval, the occurrence of either of the following within three months of the date of the grant of the Top Soil Planning Approval:

- (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
- (b) a statutory challenge under section 239 of the Town and Country Planning (Scotland) Act 1997

in either case (i) other than by DBFM Co or any DBFM Co Party and (ii) on grounds other than DBFM Co's or a DBFM Co Party's failure to comply with statutory procedure and other than the commission of an unlawful act or acts by DBFM Co or a DBFM Co Party;

“Planning Challenge Dismissal”

means, in relation to a Planning Challenge:

- (a) a decision by a Relevant Authority pursuant to which the Planning Challenge is dismissed or otherwise rejected and in respect of which any rights of appeal have expired, been rejected or otherwise lost; or
- (b) the withdrawal of that Planning Challenge;

“Planning Matrix”

means the planning discharge tracker in Agreed Form on disc;

"Planning Permission"	means any planning permission, approval of reserved matters, listed building consent, conservation areas consent and/or other consent or approval reasonably required from time to time for construction and/or operation of the Facilities (including without limitation for any Authority Change, the Planning Approval and the Top Soil Planning Approval);
"Plant"	means the infrastructure systems, building systems, fixed, and immovable equipment systems, installed as part of the Works or pursuant to an Authority Change as replaced from time to time;
"Post Completion Commissioning"	means, as appropriate, DBFM Co's Post Completion Commissioning and/or the Authority's Post Completion Commissioning;
"Pounds Sterling"	means the currency issued by the Bank of England from time to time;
"Professional Team"	means the architect, mechanical and electrical services engineer and structural engineers employed by the Contractor in connection with the Works;
"Professional Team Collateral Agreements"	means the form of collateral warranty forming part of the appointment of the relevant member of the Professional Team being in the form identified in Section 3 of Schedule Part 9 (<i>Warranties</i>);
"Programme"	means the programme set out in Schedule Part 7 (<i>The Programme</i>) as revised and issued by DBFM Co (or on its behalf) from time to time pursuant to Clause 14 (<i>Programme and Dates for Completion</i>);
"Programmed Maintenance"	means the maintenance work which DBFM Co is to carry out in accordance with Schedule of Programmed Maintenance;
"Programmed Maintenance Information"	has the meaning given in Clause 23.3;
"Prohibited Act"	has the meaning given in Clause 44 (<i>Corrupt Gifts and Payments</i>);
"Project"	has the meaning given to it in Recital 3;
"Project Data"	means:

- (a) all Design Data;
- (b) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the provision of the Services; 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 IRR"

means [REDACTED] [REDACTED] %;

"Project Operations"

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

"Project Term"

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

"Qualifying Change"

means (unless expressly stated otherwise):

- (a) 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;

"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 DBFM Co in accordance with Clause 20 (*Quality Assurance*);

"Rectification Period"	has the meaning given in Schedule Part 14 (<i>Payment Mechanism</i>);
"Refinancing"	has the meaning given to it in Schedule Part 23 (<i>Refinancing</i>);
"Reinstatement Plan"	has the meaning given in Clause 53.22 (<i>Reinstatement</i>);
"Reinstatement Works"	has the meaning given in Clause 53.22.2 (<i>Reinstatement</i>);
"Relevant Authority"	means any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom, or of the European Union, (or of the Scottish Government or the Scottish Parliament);
"Relevant Change in Law"	has the meaning given in Clause 32.3 (<i>Changes in Law</i>);
"Relevant Debt"	means all sums advanced to DBFM Co from time to time under a Funding Agreement other than Senior Debt;
"Relevant Event"	has the meaning given in Schedule Part 16 (<i>Change Protocol</i>);
"Relevant Incident"	has the meaning given in Clause 53.22.2 (<i>Reinstatement</i>);
"Relevant Payment"	has the meaning given in Clause 53.14.3;
"Relevant Proceeds"	has the meaning given in Clause 53.22.2 (<i>Reinstatement</i>);
"Relevant Service Transfer Date"	has the meaning given in Clause 25.1;

"Relevant Tax Liability"	has the meaning given in Clause 46.7.3;
"Relief"	has the meaning given in Clause 46.7.1;
"Relief Events"	has the meaning given in Clause 30 (<i>Relief Events</i>);
"Request for Information"	has the meaning set out in the FOI(S)A or the Environmental Information (Scotland) Regulations as relevant (where the meaning set out for the term "request" shall apply);
"Required Action"	has the meaning given in Clause 24.7;
"Reserved Rights"	means the matters referred to in Section 2 (<i>Reserved Rights</i>) of Schedule Part 5 (<i>Land Matters</i>);
"Restricted Person"	means either: <ul style="list-style-type: none"> (a) a person (other than a Participant) providing or proposing to provide education or community use services of a similar nature to those provided or contemplated by the Authority at the time in question; or (b) any person who has a material interest in the production of tobacco products and/or alcoholic beverages;
"Retail Prices Index" or "RPI"	means the Retail Prices Index (All Items) as published by the Office for National Statistics from time to time (the "Index"), or, failing such publication or in the event of a fundamental change to the Index, such other index as the parties may agree, or such adjustments to the Index as the parties may agree (in each case with the intention of putting the parties in no better nor worse position than they would have been in had the Index not ceased to be published or the relevant fundamental change not been made) or, in the event that no such agreement is reached, as may be determined in accordance with the Dispute Resolution Procedure;
"Reviewable Design Data"	means the Design Data listed at Section 5 (<i>Reviewable Design Data</i>) of Schedule Part 6 (<i>Construction Matters</i>);
"Revised Senior Debt Termination Amount"	has the meaning given in Section 6 (<i>Definitions</i>) of Schedule Part 17 (<i>Compensation on Termination</i>);

"Room Data Sheets"	has the meaning given in Section 6 (<i>Room Data Sheets</i>) of Schedule Part 6 (<i>Construction Matters</i>);
"Schedule"	means the schedule (comprising 27 parts) attached to this Agreement;
"Schedule of Programmed Maintenance"	means the programme referred to in Clause 23.1 to be submitted to the Authority's Representative by DBFM Co in accordance with Schedule Part 8 (<i>Review Procedure</i>);
"Scottish Futures Trust"	means Scottish Futures Trust Limited (Company Number SC348382), having its registered office at 1st Floor, 11-15 Thistle Street, Edinburgh EH2 1DT;
"Second Party"	has the meaning given in Clause 35.3;
"Secured Finance Party"	has the meaning given thereto in the Security Trust and Intercreditor Deed;
"Security Trust and Intercreditor Deed"	has the meaning given thereto in the Credit Agreement;
"Security Trustee"	means Norddeutsche Landesbank Girozentrale in its capacity as agent and trustee for the Secured Finance Parties or such other party as may be appointed to perform the role of security trustee pursuant to the Security Trust and Intercreditor Deed;
"Senior Debt"	has the meaning given in Section 6 (<i>Definitions</i>) of Schedule Part 17 (<i>Compensation on Termination</i>);
"Senior Debt Service Costs"	means interest and debt service costs incurred in respect of the Senior Funding Agreements less: <ul style="list-style-type: none"> (a) sums which are in arrears; (b) all sums reserved by DBFM Co and which DBFM Co is entitled to use to make such payments, without breaching the Senior Funding Agreements;
"Senior Funders"	has the meaning given to the term "Original Lender" in the Credit Agreement and any other party providing senior debt finance under the Senior Funding Agreements to DBFM Co from time to time as successors, assignees or transferees of the Original Lender;

"Senior Funding Agreements"	shall have the meaning given to "Finance Documents" in the Credit Agreement as at the date of this Agreement (save that for the purposes of this Agreement limb (p) of such definition shall be deemed to be deleted) and as amended as permitted under Clause 4 (<i>Project Documents</i>);
"Service Contract"	means the contract dated the same date as this Agreement between DBFM Co and the Service Provider (which as at the date of this Agreement are in the Agreed Form), by which DBFM Co 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 (<i>Payment Mechanism</i>);
"Service Level Specification"	means the requirements of the Authority set out in Section 1 (<i>Service Level Specification</i>) of Schedule Part 12 (<i>Service Requirements</i>) as amended from time to time in accordance with Clause 33 (<i>Change Protocol</i>);
"Service Provider"	means Galliford Try Building Limited (trading as Galliford Try Facilities Management) incorporated under the Companies Acts (Registered Number 02472080) and having its Registered Office at Cowley Business Park, Cowley, Uxbridge, Middlesex, UB8 2AL or any other person engaged by DBFM Co 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 Agreement"	means the collateral agreement among the Authority, DBFM Co and the Service Provider in the form identified in Section 2 of Schedule Part 9 (<i>Collateral Agreements</i>);
"Services"	means the services to be provided, managed and/or procured by DBFM Co for the Authority in accordance with Schedule Part 12 (<i>Service Requirements</i>) as subsequently amended or adjusted in accordance with this Agreement;
"Services Quality Plan"	means the document set out in Section 3 (<i>Services Quality Plan</i>) of Schedule Part 12 (<i>Service Requirements</i>);
"Shareholder(s)"	means any person(s) who from time to time, as permitted by this Agreement, holds share capital in DBFM Co or Holdco which persons are, as at the date of this Agreement, listed as such in Schedule Part 21 (<i>DBFM Co Information</i>);

"Site"	means (as the context requires): <ul style="list-style-type: none"> (a) the Construction Site during the Construction Phase; and (b) the Operational Site during the Operational Term;
"Site Compound"	means the area coloured green on the Site Support Period Plan;
"Site Conditions"	means the physical condition of the Site including (but not limited to) climatic, hydrological, hydrogeological, ecological, environmental, geotechnical and archaeological conditions;
"Site Support Period"	means (subject to Clause 29 (Delay Events)) the period from the commencement of week 92 until the end of week 95 as detailed on the Programme or such other period as the parties may agree in writing (each acting reasonably);
"Site Support Period Plan"	means the plan titled "POST HANDOVER SITE SUPPORT PERIOD" with drawing reference number "WCHS-MCS-DBFM-SP5-104" and set out at Appendix F to Section 4 (Site Plans) of Schedule Part 5 (Land Matters);
"Snagging Matters"	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 DBFM Co;
"Snagging Notice"	means the notice to be issued by the Independent Tester in accordance with Clause 17.14;
"Specific Change in Law"	means any Change in Law which specifically refers to: <ul style="list-style-type: none"> (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 (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;

"Sub-Contractor"	means any third party (including the Contractor and a Services Provider) who enters into any Sub-Contract;
"Sub-Contracts"	means the contracts entered into by or between DBFM Co, the Contractor and/or a Service Provider and other third parties in relation to any aspect of the Project Operations;
"Subordinated Debt"	has the meaning given in Section 6 (<i>Definitions</i>) of Schedule Part 17 (<i>Compensation on Termination</i>);
"Subordinated Debt Rate"	means ██████████ ;
"Subordinated Funder"	has the meaning given in Schedule Part 23 (<i>Refinancing</i>);
"Subordinated Funding Agreements"	has the meaning given in Schedule Part 23 (<i>Refinancing</i>);
"Subsidiary"	has the meaning given to it in section 1159 of the Companies Act 2006;
"Suitable Substitute Contractor"	has the meaning given in Section 6 (<i>Definitions</i>) of Schedule Part 17 (<i>Compensation on Termination</i>);
"Termination Date"	means the date on which termination of this Agreement takes effect in accordance with its terms;
"Title Conditions"	means title conditions set out in Section 1 of Schedule Part 5 (<i>Land Matters</i>);
"Top Soil Planning Approval"	means planning consent for the relocation of top soil dated 25 November 2016 in response to Application Reference 0569/FUL/16 and a copy of which is identified in Section 1 of Schedule Part 6 (<i>Construction Matters</i>);
"Topsoil Relocation Areas"	means the areas hatched in grey on the Construction Period 2 Plan;
"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);

"Unavoidable Fixed Costs"

means the fixed costs incurred by DBFM Co which first fall due for payment by DBFM Co during the period of indemnity but excluding:

- (a) costs which could have reasonably been mitigated or avoided by DBFM Co;
- (b) payments to DBFM Co's Associated Companies;
- (c) payments which are not entirely at arm's length;
- (d) payments to holders of equity in DBFM Co, 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 DBFM Co can recover under contract or in respect of which DBFM Co has a remedy against another person in respect of the same liability;
- (h) payments to the extent that DBFM Co has available to it including:
 - (i) reserves which DBFM Co can draw upon without breaching the Senior Funding Agreements;
 - (ii) standby or contingent facilities or funds of Senior Debt or equity which DBFM Co is entitled to have available;
- (i) 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 DBFM Co 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;

"Unprogrammed Maintenance Work"

has the meaning given in Clause 23.8;

"Unreasonable Act"	means any act or omission which is contrary to any reasonable instruction, guidance or rules for the operation or management of the Facilities;
"Utilities"	has the meaning given in the Service Level Specification;
"Utility Ancillary Rights Plan"	means the plan titled "ACCESS FOR UTILITY CONNECTIONS TO ANCILLARY RIGHTS" with drawing reference number "WCHS-MCS-DBFM-SP5-201" and set out at Appendix G to Section 4 (Site Plans) of Schedule Part 5 (Land Matters);
"VAT"	means value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994;
"VAT Sum"	has the meaning given in Clause 35 (<i>VAT and Construction Industry Tax Deduction Scheme</i>);
"Vitiating Act"	has the meaning given in Endorsement 2, Section 3 (<i>Endorsement</i>) of Schedule Part 15 (<i>Insurance Requirements</i>);
"Warning Notice"	means a notice validly served by the Authority's Representative on DBFM Co 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;
"West Calder/Polbeth Path"	means the core path and public right of way shown by the red and blue lines on the Core Path Plan; the route of which is to be temporarily diverted during the Construction Phase along the route shown green on the Core Path Plan;
"Works"	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 DBFM Co 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 DBFM Co) 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 DBFM Co 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 DBFM Co's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Authority and to be performed at DBFM Co'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 2015 ("**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:

$$\text{Amount or sum in 1 April 2015 prices} \times \frac{\text{RPI}_d}{\text{RPI}_0}$$

Where RPI_d is the value of the Retail Prices Index published or determined with respect to the month of 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 February 2015 being 256.7.
17. Reference to a document being in the Agreed Form is a reference to the form of the relevant document (or where appropriate the form of relevant document on disc) agreed between the parties and for the purpose of identification either (i) initialled by each of them or on their behalf; or (ii) entered into on or around the Commencement Date.
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 DBFM CO

Unless an original document is specifically requested, a copy (certified by an officer of DBFM Co as being a true copy) of each of the following documents is to be delivered by DBFM Co to the Authority in accordance with Clause 2.1.1 (*Execution and Delivery of Documents*) of this Agreement:

1. Not Used
2. The Initial Funding Agreements and certification from DBFM Co 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 DBFM Co under the Initial Funding Agreements have been satisfied or waived, accompanied by evidence of the same.
3. The Construction Contract, the Services Contract and the Performance Guarantees, executed by the parties to such agreements.
4. An original of the Funders' Direct Agreement, the Independent Tester Contract, the Insurance Proceeds Account Agreement, the Collateral Agreements and the brokers letters of undertaking relating to the Insurances referred to in paragraph 11 below in the Agreed Form, executed by the parties to such agreements (other than the Authority).
5. Extracts from the minutes of the meeting of the board of directors (certified as true and accurate by the Secretary, a director or an authorised officer of the relevant company) of each of DBFM Co, the Contractor, the Service Provider, the Shareholders, Holdco, and the guarantors under the Performance Guarantees and each of the other parties to the documents listed in Section 1 (*Documents to be delivered by DBFM Co*) 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 nor to any third party provider of credit enhancement required under any of the Project Documents.
6. A certificate of the Secretary a director or an authorised officer of each of the companies referred to in paragraph 5 above setting out the names and specimen signatures of the person or persons named in the relevant certified extract.
7. Evidence of the share subscriptions required under the Note Holder Support Agreement and other shareholder funding commitments having been made by the Shareholders in DBFM Co and Holdco.
8. Evidence that DBFM Co has agreed to be treated as the only client for the Project for the purposes of the CDM Regulations.
9. DBFM Co's and Holdco's Certificate of Incorporation and of any Certificate of Incorporation on Change of Name.
10. The Articles of Association of DBFM Co 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 DBFM Co 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 disc copies of the Financial Model audited by Mazars LLP, Tower Bridge House, St Katharine's Way, E1W 1DD, London.
13. Evidence that the Insurance Proceeds Account has been opened.
14. An original duly executed copy of this Agreement.

SECTION 2

DOCUMENTS TO BE DELIVERED BY THE AUTHORITY

The Authority shall deliver to DBFM Co the following documents:

1. An original copy of the Funders' Direct Agreement, the Collateral Agreements, the Independent Tester Contract, the Insurance Proceeds Account Agreement and this Agreement, duly executed by the Authority.
2. A certified copy of:
 - (a) the report and minutes of the Authority dated 26 April 2016 relating to the Project; and
 - (b) the report and minutes of the Authority dated 22 November 2016 relating to the Project,

which, together, (i) approve the execution, delivery and performance of the documents referred to in paragraph 1 above (ii) approve the subscription for equity and subordinated debt by the Authority and (iii) authorise a named person or persons to execute and deliver each such document and any documents to be delivered by it pursuant thereto.

3. A certificate of the relevant officer of the Authority setting out the names and specimen signatures of the person or persons named in the resolution of the Authority referred to in paragraph 2 above.
4. A certificate issued pursuant to the Local Government (Contracts) Act 1997.
5. A certified copy of the letter from the Scottish Government to the Authority confirming the initial terms of the revenue grant funding to be provided to the Authority in respect of the Project.
6. A copy of the Authority's scheme of delegation, scheme of administration, standing orders and financial instructions certified as being the most up to date and accurate versions.

SCHEDULE PART 3

KEY WORKS PERSONNEL

[REDACTED]

SCHEDULE PART 4

FUNDERS' DIRECT AGREEMENT

The Funders' Direct Agreement is in the Agreed Form

SCHEDULE PART 5

LAND MATTERS

SECTION 1

TITLE CONDITIONS

1. DBFM Co and any DBFM Co Party shall not be permitted to use any part of the Site except (a) as otherwise provided for in this Agreement, or (b) with the express permission of the Authority.
2. All conditions contained in any wayleaves, deeds of servitude or other similar agreements entered into or to be entered into pursuant to Clause 9.6
3. The West Calder/Polbeth Path will be a public right of way and core path under the Land Reform (Scotland) Act 2003.
4. The Pathway will be a public right of way.

SECTION 2
RESERVED RIGHTS

1. There are reserved rights for all third parties, including statutory undertakers and adjoining proprietors (or their successors and assignees) having equipment, apparatus, structures, cables or service media (including public water, sewerage, drainage, electricity, gas, telephone or telecommunications) within the Site as at Financial Close which were or should have been apparent from a visual inspection of the Site or which were or should have been apparent from the site investigations undertaken by DBFM Co pursuant to Clause 7.3 and Clause 10 of this Agreement.
2. There are reserved in favour of the DBDA Contractor the ancillary rights of access to the area shown marked green on the DBDA Plan pursuant to the terms of a Design and Build Development Agreement entered into between the DBDA Contractor and the Authority dated 29 April 2016.
3. There are reserved in favour of the Authority during the Operational Term rights of access to the area shown yellow on the plan titled "OPERATIONAL RED LINE BOUNDARY" with drawing reference WCHS-MCS-DBFM-SP5-002 and set out at Appendix B to Section 4 (*Site Plans*) of Schedule Part 5 (*Land Matters*) for the purposes of carrying out routine maintenance.

SECTION 3
ANCILLARY RIGHTS

1. From the Commencement Date until the Actual Completion Date, an exclusive right to occupy and remain on the Construction Site.
2. For the duration of the Construction Period 1, an exclusive right of access and egress for pedestrians and vehicles, including construction vehicles, over the area coloured yellow on the Construction Period 1 Plan for the purposes of accessing and egressing the Construction Site in order to carry out the Works.
3. For the duration of the Construction Period 1, a non-exclusive right of access and egress for pedestrians and vehicles, including construction vehicles, over the area coloured blue on the Construction Period 1 Plan for the purposes of accessing and egressing the Construction Site in order to carry out the Works.
4. For the duration of the Construction Period 2, an exclusive right of access and egress for pedestrians and vehicles, including construction vehicles, over the areas coloured yellow on the Construction Period 2 Plan for the purposes of accessing and egressing the Construction Site and/or the Topsoil Relocation Areas in order to carry out the Works.
5. For the duration of the Construction Period 2, a non-exclusive right of access and egress for pedestrians and vehicles, including construction vehicles, over the areas coloured blue on the Construction Period 2 Plan for the purposes of accessing and egressing the Construction Site and/or the Topsoil Relocation Areas in order to carry out the Works.
6. For the duration of the Construction Period 2, the right to occupy the Topsoil Relocation Areas on an exclusive basis (together with a right of pedestrian and vehicular (including construction traffic) access thereto and egress therefrom, either directly from the Construction Site or in accordance with the Ancillary Rights outlined in paragraphs 4 and 5 above), for the purposes of carrying out the topsoil relocation elements of the Works.
7. For the duration of the Construction Period 3, an exclusive right of access and egress for pedestrians and vehicles, including construction vehicles, over the area coloured yellow on the Construction Period 3 Plan for the purposes of accessing and egressing the Construction Site in order to carry out the Works.
8. For the duration of the Construction Period 3, a non-exclusive right of access and egress for pedestrians and vehicles, including construction vehicles, over the area coloured blue on the Construction Period 3 Plan for the purposes of accessing and egressing the Construction Site in order to carry out the Works.
9. For the duration of the Site Support Period, a non-exclusive right of access and egress for pedestrians and vehicles, including construction vehicles, over the area coloured blue on the Site Support Period Plan for the purposes of accessing and egressing the Site Compound.
10. For the duration of the Site Support Period, the right to occupy the Site Compound on an exclusive basis (together with a right of pedestrian and vehicular (including construction traffic) access thereto and egress therefrom, in accordance with the Ancillary Right outlined in paragraph 9 above).

11. The right to occupy the area coloured green on the Utility Ancillary Rights Plan on a non-exclusive basis for the purposes of carrying out and completing drainage works forming part of the Works.
12. The right to occupy the area coloured pink on the Utility Ancillary Rights Plan on a non-exclusive basis for the purposes of carrying out and completing private water main diversion works forming part of the Works.
13. The right to occupy the area coloured purple on the Utility Ancillary Rights Plan on a non-exclusive basis for the purposes of carrying out and completing power and street lighting connection works forming part of the Works.
14. The right to occupy the area coloured orange on the Utility Ancillary Rights Plan on a non-exclusive basis for the purposes of carrying out and completing gas main connection works forming part of the Works.
15. The right to occupy the area coloured blue on the Utility Ancillary Rights Plan on a non-exclusive basis for the purposes of carrying out and completing both permanent and temporary water main connection works forming part of the Works.
16. Where a non-exclusive right to occupy an Ancillary Works Area has been granted to DBFM Co under this Section 3 (Ancillary Rights) of this Schedule Part 5 (Land Matters), DBFM Co shall be entitled to restrict the access of any other parties (including the Authority) to parts of such Ancillary Works Area during the carrying out of the relevant Works in such Ancillary Works Area and during any such period, the relevant part of the Ancillary Works Area will be either fenced or hoarded off by DBFM Co as required pursuant to the CDM Regulations and/or as otherwise agreed with the Authority pursuant to this paragraph 16 (such agreement not to be unreasonably withheld or delayed).
17. From the Actual Completion Date until the Expiry Date, a non-exclusive right of passage over and within, access to, occupation of, egress from and storage within the Facilities.

SECTION 4
SITE PLANS

Appendix A

Appendix B

Appendix C

Appendix D

Appendix E

Appendix F

Appendix G

Appendix H

Appendix I

Appendix J

Appendix K

SCHEDULE PART 6
CONSTRUCTION MATTERS
SECTION 1
PLANNING/CONSENTS

The Planning Approval, Top Soil Planning Approval and Planning Matrix are in the Agreed Form on disc.

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 2015 (and “**CDM Regulation**” shall be construed accordingly); and
 - 1.2 “**the client**”, “**the Principal Designer**” 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, DBFM Co shall make and serve on the Authority a notice in writing pursuant to CDM Regulation 4(8) that DBFM Co agrees to be treated as the only client in relation to the Works for the purposes of the CDM Regulations. Notwithstanding DBFM Co agreeing in writing to be the only client in relation to CDM Regulation 4(8), the Authority will comply with its remaining duties as set out in CDM Regulation 4(8). During the Project Term, DBFM Co 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 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 DBFM Co within five (5) Business Days of receipt.
3. DBFM Co warrants that it has skills, knowledge, organisational capability and experience to, and shall, observe, perform and discharge or shall procure the observance, performance and discharge of:
 - 3.1 all the obligations, requirements and duties of the client arising under the CDM Regulations in connection with the Works and, where necessary, the provision of the Services; and
 - 3.2 all obligations incumbent on the client under any Code of Practice or Guidance for the time being approved by the Health and Safety Commission pursuant to the Health and Safety at Work etc Act 1974 or issued in connection with the CDM Regulations.
4. DBFM Co shall provide to the Authority's Representative:
 - 4.1 in a substantially complete form on the Actual Completion Date; and
 - 4.2 in final form within eight (8) weeks of the Actual Completion Date,

one (1) electronic copy (on computer disc, tape or other format) of the revised and updated health and safety file and construction phase plan (current at that date) prepared pursuant to the CDM Regulations in relation to the Works and 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 in the Agreed Form on disc.

SECTION 4
DBFM CO'S PROPOSALS

DBFM Co's Proposals are in the Agreed Form on disc.

SECTION 5
REVIEWABLE DESIGN DATA

The Reviewable Design Data is in the Agreed Form on disc.

SECTION 6
ROOM DATA SHEETS

The Room Data Sheets are in the Agreed Form on disc.

SECTION 7

THERMAL AND ENERGY EFFICIENCY TESTING PROCEDURE

REDACTED

SECTION 8

QUALITY PLANS (DESIGN AND CONSTRUCTION)

The Quality Plans (Design and Construction) are in the Agreed Form on disc.

SECTION 9
NOT USED

SCHEDULE PART 7

THE PROGRAMME

The Programme is in the Agreed Form.

SCHEDULE PART 8

REVIEW PROCEDURE

1. REVIEW

1.1 The provisions of this Schedule Part 8 (*Review Procedure*) shall apply whenever any item, document or course of action is required to be reviewed, approved or otherwise processed in accordance with Schedule Part 8 (*Review Procedure*).

1.2 Subject to any express provision of this Agreement, the manner, form and timing of any submission to be made by DBFM Co to the Authority's Representative for review under this Schedule Part 8 (*Review Procedure*) shall be a matter for DBFM Co to determine. Each submission under this Schedule Part 8 (*Review Procedure*) shall be accompanied by a copy of the proposed document to be reviewed (including, where applicable, any Reviewable Design Data) or a statement of the proposed course of action (the entire contents of a submission being referred to in this Schedule Part 8 (*Review Procedure*) as a "**Submitted Item**"). In relation to each Submitted Item, the following procedure shall apply:

1.2.1 as soon as possible and, if the Submitted Item comprises:

- (a) an item of Reviewable Design Data;
- (b) a revised Programme submitted pursuant to Clause 14 (*Programme and Dates for Completion*); or
- (c) a document or proposed course of action submitted in the case of (an emergency),

within fifteen (15) Business Days of the date of receipt of a submission (or re-submission, as the case may be) of the Submitted Item to the Authority's Representative (or such other period as the parties may agree), the Authority's Representative shall return one copy of the relevant Submitted Item to DBFM Co endorsed "no comment" or (subject to and in accordance with paragraph 3 (*Grounds for Objection*)) "comments" as appropriate; and

1.2.2 subject to paragraph 1.4, if the Authority's Representative fails to return a copy of any Submitted Item (including any re submitted Submitted Item) duly endorsed in accordance with paragraph 1.2.1, within fifteen (15) Business Days (or within such other period as the parties may agree in writing) of the date of its submission to the Authority's Representative, then the Authority's Representative shall be deemed to have returned the Submitted Item to DBFM Co endorsed "no comment" (and, in the case of Reviewable Design Data, endorsed "Level A - no comment").

1.3 If the Authority's Representative raises comments on any Submitted Item in accordance with paragraph 3 (*Grounds for Objection*) he shall state the ground upon which such comments are based and the evidence or other information necessary to substantiate that ground. To the extent that the Authority's Representative comments on a Submitted Item other than on the basis set out in this Schedule Part 8 (*Review Procedure*), or fails to comply with the provisions of this paragraph, DBFM Co 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 DBFM Co, 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

DBFM Co 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 DBFM Co 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 DBFM Co'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 DBFM Co'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) DBFM Co'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 is not in accordance with the Authority's Construction Requirements and/or DBFM Co's Proposals;
- 3.4 in relation to a proposal to amend DBFM Co'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 DBFM Co'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 DBFM Co'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 Not Used
- 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 not (on the balance of probabilities) enable the Works to be completed by the Completion Date;
- 3.7 in relation to the submission of any Quality Plan or part of a Quality Plan or any changes to any Quality Plan pursuant to Clause 20.4 or Clause 20.7 or any quality manual or procedure in accordance with Clause 20.9 (*Quality Manuals and Procedures*), on the grounds that such Quality Plans, or parts of or changes to such Quality Plans, quality manuals or procedures, or the quality management systems which they reflect, would not comply with:
 - 3.7.1 in the case of the 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 DBFM Co 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 DBFM Co'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, DBFM Co'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, performance of the Handback Works in accordance with the programme is not (on the balance of probabilities) capable of achieving satisfaction of the Handback Requirements by the Expiry Date; and
 - 3.10.3 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 DBFM Co.

- 4.2 In the case of any Submitted Item other than Reviewable Design Data, if the Authority's Representative returns the Submitted Item to DBFM Co endorsed "comments", DBFM Co shall comply with such Submitted Item after amendment in accordance with the comments unless DBFM Co disputes that any such comment is on grounds permitted by this Agreement, in which case DBFM Co or the Authority's Representative may refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) and DBFM Co 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", DBFM Co 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 DBFM Co disputes that any such comment or proposed amendment is on grounds permitted by this Agreement, in which case DBFM Co or the Authority's Representative may refer the matter for determination in accordance with Schedule Part 20 (*Dispute Resolution Procedure*) and DBFM Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed except at its own risk in accordance with paragraph 1.3.2.
- 4.4 Within ten (10) Business Days of receiving the comments of the Authority's Representative on any Submitted Item comprising Reviewable Design Data, DBFM Co 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 DBFM Co of its obligations under this Agreement nor is it

an acknowledgement by the Authority that DBFM Co has complied with such obligations.

5. DOCUMENTATION MANAGEMENT

- 5.1 DBFM Co shall issue one (1) electronic and three (3) paper copies of all Submitted Items to the Authority and compile and maintain a register of the date and contents of the submission of all Submitted Items.
- 5.2 DBFM Co 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 DBFM Co'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, DBFM Co considers that compliance with those comments would amount to a Change, DBFM Co 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 DBFM Co 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 DBFM Co 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.

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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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) &	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 DBFM Co may proceed to construct in accordance with the Submitted Item and that

Reflected ceiling plans

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 –

1:50

Departmental plans

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 DBFM Co 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, DBFM Co shall carry out Programmed Maintenance at the Facilities during the hours of 07:30 to 18:00 on Monday to Friday ("**Hours for Programmed Maintenance**")
2. DBFM Co 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, DBFM Co shall have access to the Facilities during the Hours for Programmed Maintenance to carry out Programmed Maintenance.
4. Where DBFM Co requires access to an area of the Facilities during the Hours for Programmed Maintenance, DBFM Co will consult with and obtain the consent of the Authority's Representative concerning dates, times and periods during which Programmed Maintenance is to be undertaken in the relevant areas so as to minimise disruption to those areas.
5. The Authority may request DBFM Co to carry out Programmed Maintenance outside the Hours for Programmed Maintenance in the event that the carrying out of such Programmed Maintenance during the Hours for Programmed Maintenance would adversely affect the use of the department or area.

SCHEDULE PART 9
COLLATERAL AGREEMENTS

SECTION 1
CONTRACTOR'S COLLATERAL AGREEMENT
COLLATERAL WARRANTY

The Contractor's Collateral Agreement is in the Agreed Form

SECTION 2
SERVICE PROVIDER COLLATERAL AGREEMENT
COLLATERAL WARRANTY

The Service Provider Collateral Agreement is in the Agreed Form

SECTION 3

KEY SUB-CONTRACTOR COLLATERAL AGREEMENT COLLATERAL WARRANTY

REDACTED

SCHEDULE PART 10

OUTLINE COMMISSIONING PROGRAMME

REDACTED

SCHEDULE PART 10: OUTLINE COMMISSIONING PROGRAMME

REDACTED

SCHEDULE PART 11

EQUIPMENT

SECTION 1

1. Definitions:

For the purposes of this Part 11 of the Schedule (*Equipment*), unless the context otherwise requires.

“Equipment”	means the equipment listed in the Equipment List and Responsibilities Matrix;
“Equipment Installation Table”	means the equipment installation table contained in Appendix 2 of this Part 11 of the Schedule (<i>Equipment</i>);
“Equipment List and Responsibilities Matrix”	means the equipment list and responsibilities matrix contained in Appendix 1 of this Part 11 of this Schedule (<i>Equipment</i>);
“Group 1 Equipment”	means those items of equipment identified as being “Group 1” in the Equipment List and Responsibilities Matrix;
“Group 2 Equipment”	means those items of equipment identified as being “Group 2” in the Equipment List and Responsibilities Matrix;
“Group 3 Equipment”	means those items of equipment identified as being “Group 3” in the Equipment List and Responsibilities Matrix
“Group 4 Equipment”	means those items of equipment identified as being “Group 4” in the Equipment List and Responsibilities Matrix.
“Heritage Item(s)”	means those items of equipment identified as being “Heritage Items” in the Equipment List and Responsibilities Matrix.

2. Group 1 Equipment

- 2.1 DBFM Co shall at its own cost procure, install and commission the Group 1 Equipment at the Facilities as part of the Works in accordance with the Authority's Construction Requirements, the Final Commissioning Programme and DBFM Co's Proposals.

- 2.2 DBFM Co shall at its own cost repair, maintain and replace the Group 1 Equipment in accordance with the Service Level Specification and the Method Statements

3. Group 2 Equipment

- 3.1 The Authority shall at its own cost:
- 3.1.1 procure and deliver to DBFM Co the Group 2 Equipment for installation by DBFM Co at the Facilities in accordance with the Final Commissioning Programme;
 - 3.1.2 without prejudice to paragraph 3.1.1, ensure that the relevant items are delivered to the Facilities during the relevant periods set out in the Final Commissioning Programme and in accordance with paragraph 3.6; and
 - 3.1.3 provide to DBFM Co the design information relating to Group 2 Equipment listed in the Equipment Installation Table within the relevant time periods specified therein or otherwise as agreed between the parties.
- 3.2 Subject to the Authority complying with its obligations contained in paragraph 3.1 above DBFM Co shall install and commission the Group 2 Equipment at the Facilities in accordance with the Final Commissioning Programme, the Authority's Construction Requirements and DBFM Co's Proposals.
- 3.3 3.3 The Authority shall be responsible for the maintenance, replacement, repair and disposal of Group 2 Equipment and DBFM Co shall have no responsibility to maintain or replace or dispose of the Group 2 Equipment.
- 3.4 3.4 DBFM Co shall give the Authority not less than twenty five (25) Business Days prior written notice of the date upon which DBFM Co requires the Authority to procure the delivery of Group 2 Equipment to be installed and commissioned by DBFM Co in accordance with paragraph 3.2 above.
- 3.5 Each notice given pursuant to paragraph 3.4 shall specify:
- 3.5.1 the item or items of Group 2 Equipment to be delivered by the Authority;
 - 3.5.2 the location on the Site to which that Group 2 Equipment is to be delivered by the Authority; and
 - 3.5.3 the date upon which DBFM Co requires the Authority to deliver the relevant item or items of Group 2 Equipment.
- 3.6 Without prejudice to paragraph 3.1, the Authority shall deliver, or shall procure delivery of relevant item or items of and /or pertaining to the Group 2 Equipment on the date specified in the relevant notice issued by DBFM Co pursuant to paragraph 3.4 to such location as set out in paragraph 3.5.2 (which for the avoidance of doubt, must be safely accessible by those persons delivering the relevant item or items of Equipment).
- 3.7 Following delivery of the Group 2 Equipment by the Authority, pursuant to paragraph 3.6, DBFM Co shall procure the safe and appropriate storage of the same until the completion of the installation of the Group 2 Equipment by DBFM Co.
- 3.8 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 item to be procured by the Authority pursuant to paragraph 3.1 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 to such Group 2 Equipment provided that where such Group 2 Equipment is damaged or does not function properly to allow commissioning to occur due to an act or omission of DBFM Co or any DBFM Co Party, then DBFM Co shall reimburse the Authority for any costs reasonably and properly incurred by the Authority in procuring the repair or replacement of such item of Group 2 Equipment within twenty (20) Business Days of receipt of a demand thereof together with supporting information.

- 3.9 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 3.1 to allow successful completion of installation or commissioning to occur then the relevant Group 2 Equipment shall be disregarded for the purposes of assessing whether the Facilities are complete in accordance with the Completion Criteria and Clause 17.12 and 17.17 of this Agreement save where such Group 2 Equipment is damaged or does not function properly to allow installation or commissioning to occur due to an act or omission of DBFM Co or any DBFM Co Party.
- 3.10 In the event that paragraph 3.9 applies, as soon as reasonably practicable and in any event within 3 months (the "Group 2 Longstop Date") of the date that the Authority delivers the repaired or replacement item of Group 2 Equipment DBFM Co shall complete the installation and commissioning of such item of Group 2 Equipment provided that the Authority shall reimburse DBFM Co in respect of any additional costs reasonably and properly incurred by DBFM Co in installing and commissioning such item of Group 2 Equipment pursuant to this paragraph 3.10. In the event that DBFM Co has not completed the installation and commissioning of such item of Group 2 Equipment by the Group 2 Longstop Date the Authority shall have the right to complete the installation and commissioning of such item of Group 2 Equipment itself and DBFM Co shall reimburse the Authority in respect of all costs, reasonably and properly incurred by the Authority in respect of such installation and commissioning of such item of Group 2 Equipment.

4. Group 3 Equipment

- 4.1 DBFM Co shall at its own cost procure, install and commission the Group 3 Equipment at the Facilities as part of the Works in accordance with the Authority's Construction Requirements, the Final Commissioning Programme and DBFM Co's Proposals.
- 4.2 The Authority shall at its own cost repair, maintain and replace the Group 3 Equipment and DBFM Co shall have no responsibility to maintain or replace or dispose of the Group 3 Equipment.

5. Group 4 Equipment

- 5.1 The Authority shall at its own cost procure, install and commission the Group 4 Equipment at the Facilities as part of the Authority's Post Completion Commissioning and shall provide to DBFM Co the design information relating to Group 4 Equipment listed in the Equipment Installation Table within the relevant time periods specified therein or as otherwise agreed between the parties.
- 5.2 The Authority shall be responsible for the maintenance, replacement and disposal of the Group 4 Equipment and DBFM Co shall have no responsibility to maintain or replace or dispose of the Group 4 Equipment.

6. Heritage Items

- 6.1 The Authority shall at its own cost transfer, install and commission the Heritage Items at the Facilities as part of the Authority's Post Completion Commissioning and shall provide to DBFM Co the design information relating to Heritage Items listed in

the Equipment Installation Table within the relevant time periods specified therein or otherwise agreed between the Parties.

- 6.2 The Authority shall be responsible for maintenance, replacement and disposal of Heritage Items and DBFM Co shall have no responsibility to maintain or replace or dispose of Heritage Items.

7. General

Each Party shall at its own expense perform its obligations described in this Schedule Part 11 (*Equipment*).

Appendix 1

Equipment List and Responsibilities Matrix

The Equipment List and Responsibilities Matrix is in the Agreed Form on disc.

Appendix 2

Equipment Installation Table

The Equipment Installation Table is in the Agreed Form on disc.

SCHEDULE PART 12

SERVICE REQUIREMENTS

SECTION 1

SERVICE LEVEL SPECIFICATION

_____The Service Level Specification is in the Agreed Form on disc.

SECTION 2
METHOD STATEMENTS

The Method Statements are in the Agreed Form on disc.

SECTION 3
SERVICES QUALITY PLAN

The Services Quality Plan is in the Agreed Form on disc

SCHEDULE PART 13

INDEPENDENT TESTER CONTRACT

The Independent Tester Contract is in the Agreed Form.

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 DBFM Co or a DBFM Co Party;

"Gross Monthly Availability Deduction"

means, for Contract Month "n", the amount in pounds sterling calculated by the formula:

$SUR \times TMGSUF$

where:

TMGSUF means, for Contract Month "n", the aggregate of the Daily SUF of all the Days in that Contract Month;

"Gross Service Units" or "GSUs"

means the number of service units attributed to each Functional Area as set out in Appendix 2 to this Schedule Part 14 (*Payment Mechanism*);

"Helpdesk"

means the helpdesk facilities established by DBFM Co pursuant to the Service Level Specification;

"Logged Rectification Time"

means the time which is shown in the Helpdesk records maintained by DBFM Co 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 DBFM Co;

“Logged Report Time” means the date and time which is shown in the Helpdesk records maintained by DBFM Co 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 DBFM Co;

“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 DBFM Co, 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:

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

where

MAD_n is the Minimum Availability Deduction applicable for the relevant Contract Year;

MAD_o is £50, or, where the relevant Functional Area is Unavailable but Used, is £25;

IF is the indexation factor being 23.00%;

RPI_n is the value of the Retail Price Index published or determined with respect to the month of February which most recently precedes the relevant Contract Year; and

RPI_o is the value of the Retail Price Index published or determined with respect to the Base Date;

“Minor 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*);

“Monthly Service Payment” means the sum in pounds sterling calculated in accordance with paragraph 1 of Section 2 (*Calculation of Service Payments*) of this Schedule Part 14 (*Payment Mechanism*);

"Pass Through Costs"	means costs payable to DBFM Co pursuant to Section 6 (<i>Pass Through Costs</i>) of this Schedule Part 14 (<i>Payment Mechanism</i>);
"Performance Failure"	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);
"Performance Standards"	means the service requirements identified as such, set out in the Service Level Specification;
<hr/>	
"Permanent Repair"	means Rectification following the agreement of a Temporary Repair;
"Permanent Repair Deadline"	has the meaning given in paragraph 1.2 of Section 4 (<i>Temporary Repairs</i>) of this Schedule Part 14 (<i>Payment Mechanism</i>);
"Rectification"	means, 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;
"Rectification Period"	<p>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:</p> <p>(a) shall commence at the Logged Report Time (if the Logged Report Time occurs during Core Time for the relevant Functional Area); or</p> <p>(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;</p> <p>provided that:</p> <p>(c) subject to DBFM Co 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 DBFM Co was prevented or interrupted by the Authority and any Authority Party from Rectifying any failure to meet the Availability Standards or Performance Standards; and</p> <p>(d) if the Rectification Period would otherwise expire outside</p>

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 DBFM Co 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:

$$SUR = \left(\frac{ASP_n}{TAGSUF} \right)$$

where:

ASP_n 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

TAGSUF means, for Contract Year "n", the aggregate of the Daily SUF in respect of all of the Days in that Contract Year;

"Service Units Affected" or "SUA" means the total Gross Service Units of the Functional Areas affected by an Availability Failure;

"Service Units of the Facilities" or "SUF" means the total number of Gross Service Units attributable to the Facilities as set out in Appendix 2 of this Schedule Part 14 (*Payment Mechanism*);

"Temporary Repair" means, in respect of the occurrence of a Service Event, works of a temporary nature that do not constitute Rectification but satisfy the Minimum Agreed Availability Standards and substantially make good the relevant Service Event for the period until a Permanent Repair can be undertaken;

"Unavailable" means in relation to a Functional Area that such Functional Area is in a state or condition which does not comply with any one or more of the Availability Standards;

"Unavailable but Used" 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;

"Utility Point" means the location at which the relevant Utility first enters the Facilities;

"Whole Facilities Unavailability Threshold" 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;

"Whole Facilities Unavailability Conditions" means any of the following conditions:

- (a) the Whole Facilities Unavailability Threshold is exceeded; or
- (b) more than twenty five percent (25%) of the total toilet provision for the Facilities, for either sex, is Unavailable;

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:

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

where:

MSP is the Monthly Service Payment for the Contract Month n;

ASP_n is the Annual Service Payment for the Contract Year in which Contract Month n occurs, calculated in accordance with paragraphs 1.2 and 2 below;

ΣD_{n-2} is the sum of Deductions in respect of performance of the Services during the Contract Month that was two (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 DBFM Co's suppliers are available;

- 1.2 In the Contract Month in which the Payment Commencement Date falls, unless the Payment Commencement Date is the first day of that Contract Month, and in the last Contract Month of the Project Term, unless the last day of the Project Term is the last day of that Contract Month, adjust ASP_n for the purposes of paragraph 1.1 above pro rata to reflect the actual number of days in the relevant Contract Month from and including the Payment Commencement Date (for the first month) and (for the last month) up to and including the last day of the Project Term (for the last month).

2. ANNUAL SERVICE PAYMENT

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

$$ASP_n = ASP_0 \times (1 - IF) + \left[(ASP_0 \times IF) \times \left[1 + \frac{(RPI_n - RPI_0)}{RPI_0} \right] \right]$$

where:

ASP_n is the Annual Service Payment for the relevant Contract Year;

ASP₀ is the value for ASP₀ 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 23.00 %;

RPI_n 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

RPI₀ is the value of the Retail Prices Index published or determined with respect to the Base Date.

SECTION 3

DEDUCTIONS FROM MONTHLY SERVICE PAYMENTS

1. ENTITLEMENT TO MAKE DEDUCTIONS

- 1.1 If at any time after the Payment Commencement Date an Availability Failure or a Performance Failure occurs the 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*), 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 $\sum D_{n-2}$ exceeds the value of $ASP_{n/12}$, 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 $ASP_{n/12}$ exceeds the value of $\sum D_{n-2}$ (as such values are calculated in the following Contract Month and (to the extent necessary) any subsequent Contract Months) until the amount of such excess has been set-off in full. To the extent that any such excess has not been set off as at the earlier to occur of the Expiry Date and the Termination Date, then an amount equal to such excess shall be immediately due and payable by DBFM Co 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*) and subject also to paragraph 2.3 below, the amount of the Deduction in respect of a Performance Failure is calculated using the following formula:

$$D = PFD \times DP$$

where:

D means the amount (in pounds sterling) of the Deduction in respect of the Performance Failure; and

PFD means: (a) in the case of a Minor Performance Failure, the sum of fifty Pounds Sterling (£50), index linked;

(b) in the case of a Medium Performance Failure, the sum of one hundred Pounds Sterling (£100), index linked;

(c) in the case of a Major Performance Failure, the sum of one hundred and fifty Pounds Sterling (£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 three (3).

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 DBFM Co 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 5 of Section 5 (*Failure by DBFM Co 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

- 5.1 Subject to paragraph 1 (*Entitlement to make Deductions*) of this Section 3 (*Deductions from Monthly Service Payments*) if:

5.1.1 a Performance Failure in respect of the same Performance Standard (excluding Performance Standard FM65); or

5.1.2 an Availability Failure in respect of the same Availability Standard,

occurs three (3) 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 fourth (4th) and each subsequent such Performance Failure and/or the fourth (4th) and each subsequent such Availability Failure during the relevant period of three (3) consecutive Contract Months shall be multiplied by 1.5.

- 5.2 Subject to paragraph 1 (*Entitlement to make Deductions*) of this Section 3 (*Deductions from Monthly Service Payments*), if in respect of Performance Standard FM65 twelve (12) or more Performance Failures relating to Service Events that are Routine (as defined in the Service Level Specification) occur in a rolling period of three (3) consecutive Contract Months, then the Deduction calculated pursuant to paragraph 2 (*Deductions for Performance Failures*) of this Section 3 (*Deductions from Monthly Service Payments*) for the thirteenth (13th) (respectively) and each subsequent such Performance 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 DBFM Co 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 DBFM Co 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 DBFM Co may carry out the Temporary Repair proposed by DBFM Co unless the Authority, acting reasonably, considers that, if the Temporary Repair proposed by DBFM Co 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 DBFM Co must act reasonably to agree a date and time (the "**Permanent Repair Deadline**") by which a Permanent Repair must be made, giving DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM CO TO MONITOR OR REPORT

Subject to paragraphs 1 to 3 inclusive of this Section 5 (*Failure by DBFM Co to Monitor or Report*), the Monthly Service Report produced by DBFM Co 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*).

- 1 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 5 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 DBFM Co. 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 1, failing which either party may, on giving written notice to the other, refer the matter to the Dispute Resolution Procedure.
- 2 Where DBFM Co fails to monitor or accurately to report a Performance Failure or an Availability Failure in the circumstances referred to in paragraph 5 of this Section 5 (*Failure by DBFM Co 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 DBFM Co 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.
- 3 DBFM Co 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 2 above.
- 4 If the Authority's inspection or investigation of records made available pursuant to paragraph 2 above reveals any further matters of the types referred to in paragraphs 1 and 2 above, those matters shall be dealt with in accordance with paragraph 1 or 2 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 DBFM Co 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 DBFM Co.
- 5 For the purposes of paragraphs 1 and 2 of this Section 5 (*Failure by DBFM Co to Monitor or Report*) the relevant circumstances are:
 - 5.1 fraudulent action or inaction; or
 - 5.2 deliberate misrepresentation; or
 - 5.3 gross misconduct or gross incompetence,in each case on the part of DBFM Co or a DBFM Co Party.
- 6 The provisions of this Section 5 (*Failure by DBFM Co 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 (*DBFM Co Events of Default*) and Clause 44 (*Corrupt Gifts and Payments*).

SECTION 6

PASS THROUGH COSTS

1. UTILITY CHARGES AND CRC ENERGY EFFICIENCY SCHEME PAYMENTS

- 1.1 The Authority is responsible for all connection, line rental and usage telephone charges.
 - 1.2 The Authority is responsible for any past and future payments in connection with the CRC Energy Efficiency Scheme relating to the Facilities.
-

2. RATES

NOT USED

3. OPERATIONAL INSURANCE PREMIUMS

- 3.1 Subject to paragraph 3.2, DBFM Co may include the premiums paid by DBFM Co 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 DBFM Co and supported by an appropriate premium notices from the relevant insurer.
- 3.2 There shall be excluded from the premiums referred to in paragraph 3.1, a sum equal to any portion of the premiums attributable to any issue or factor other than (a) circumstances generally prevailing in the relevant insurance market or (b) circumstances attributable to malicious damage to the Facilities or (c) the claims history or re-rating of the Authority or any Authority Party.

APPENDIX 1

ANNUAL SERVICE PAYMENTS AT BASE DATE

Total base value for the ASP₀ is £ 2,618,375.00

APPENDIX 2

FUNCTIONAL AREAS AND GSUs

Part 1 GSUs

Gross Service Units or GSUs means the number of service units attributed to each Functional Area as set out in the payment mechanism model in the Agreed Form on disc.

Part 2 Zoning Drawings

The Zoning Drawings (version 1) are the Zoning Drawings in the Agreed Form on disc.

Lower Ground Floor Plan

Ground Floor Plan

First Floor Plan

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 DBFM Co as available for a proposed High Value Change;
"Approval Criteria"	has the meaning given in paragraph 7 (<i>Approval Criteria</i>) of Section 4 (<i>High Value Changes</i>) of this Schedule Part 16 (<i>Change Protocol</i>);
"Approved Project"	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>);
"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 (<i>Change Protocol</i>) requiring an Authority Change;
"Calculation Date"	means the relevant date for the purposes of calculating the Incurred Change Management Fee in accordance with Section 4 (<i>High Value Changes</i>) of this Schedule Part 16 (<i>Change Protocol</i>);
"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 (*DBFM Co 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 DBFM Co 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 DBFM Co of financing any Relevant Event (and the consequences thereof) including commitment fees and capital costs interest and hedging costs, lost interest on any of DBFM Co'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 DBFM Co (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 DBFM Co and/or any Service Provider from any 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 DBFM Co 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 DBFM Co to implement the relevant Change, disregarding any Whole Life Costs;

“DBFM Co Change”

means a Change that is initiated by DBFM Co by submitting a DBFM Co Notice of Change to the Authority pursuant to Section 5 (*DBFM Co Changes*) of this Schedule Part 16 (*Change Protocol*);

“DBFM Co Notice of Change”

has the meaning given in paragraph 1 of Section 5 (*DBFM Co Changes*) of this Schedule Part 16 (*Change Protocol*);

“Derogated Low Value Change”

means:

- (a) Not Used; and
- (b) any other Low Value Change that:

- i. consists of minor works;
- ii. only affects the interior of the Facilities;
- iii. does not affect any of the mechanical and electrical equipment of the Facilities;
- iv. does not involve any interference with the service media in the Facilities;
- v. will not conflict with any Programmed Maintenance; and
- vi. 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 DBFM 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 thousand pounds (£100,000) (index linked) or to require an adjustment to the Annual Service Payment that on a full year basis is two per cent (2%) 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 (<i>High Value Changes</i>) of this Schedule Part 16 (<i>Change Protocol</i>);
"Incurred Change Management Fee"	means the amounts actually incurred or payable by or on behalf of DBFM Co up to the Calculation Date in respect of matters identified by DBFM Co pursuant to paragraphs 3.4.3 and/or 4.3.7 of Section 4 (<i>High Value Changes</i>) 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: <ul style="list-style-type: none"> (a) the LLCR (as defined in the Credit Agreement); (b) the ADSCR (as defined in the Credit Agreement); (c) the Base Case IRR; and (d) the Subordinated Debt Rate;
"Logic Adjustment"	means an adjustment to the logic or formulae contained in the Financial Model;
"Low Value Change"	means a Change which is either: <ul style="list-style-type: none"> (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 ten thousand pounds (£10,000) (index linked), or as otherwise agreed from time to time, except for any request that would (if implemented) increase the likelihood of DBFM Co failing to meet the Authority's Construction Requirements and/or the Service Level Specification or materially and adversely affect DBFM Co's ability to perform its obligations under this Agreement;
"Medium Value Change"	means a Change requested by the Authority which is not a Low Value Change or a High Value Change;
"Post-Adjustment Financial Model"	means the Financial Model in effect immediately following the making of the relevant Adjustments;
"Pre-Adjustment Financial Model"	means the Financial Model in effect immediately prior to the making of the relevant Adjustments;

"Relevant Event"	means an event or circumstance in which this Agreement expressly provides for an adjustment to the Annual Service Payments to be made;
"Review Procedure"	means the procedure set out in Schedule Part 8 (<i>Review Procedure</i>);
"Small Works and Services Rates"	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 of Section 2 (<i>Low Value Changes</i>) of this Schedule Part 16 (<i>Change Protocol</i>);
"Stage 1 Approval"	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>);
"Stage 1 Approved Project"	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>);
"Stage 2 Approval"	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>);
"Target Cost"	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>);
"Third Party Costs"	means the costs incurred by DBFM Co 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 DBFM Co's Proposals).

SECTION 2
LOW VALUE CHANGES

1 Low Value Change Notice

- 1.1 Subject to paragraph 1.2 of this Section 2 (Low Value Changes), where a Low Value Change is required by the Authority, it must submit an Authority Change Notice to DBFM Co.
- 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 DBFM Co 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 DBFM Co to satisfy itself that the proposed Change constitutes a Derogated Low Value Change. DBFM Co 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 DBFM Co 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 DBFM Co Response and Authority Confirmation

Within five (5) Business Days of receipt of an Authority Change Notice for a Low Value Change, DBFM Co 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 an existing on-site and suitably qualified employee of DBFM Co or a DBFM Co Party and in that case DBFM Co 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 DBFM Co or to the DBFM Co 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*) DBFM Co 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 DBFM Co'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 DBFM Co 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 DBFM Co 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 DBFM Co shall notify the Authority when it considers that the Low Value Change has been completed.
- 6.3 If DBFM Co:
- 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 DBFM Co 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 DBFM Co, 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 DBFM Co if it had implemented the Low Value Change.

7 **Payment**

Unless the Authority notifies DBFM Co within five (5) Business Days of receipt of a notice from DBFM Co pursuant to paragraph 6.2 above that the Low Value Change has not been implemented to its reasonable satisfaction:

- 7.1 DBFM Co shall, where the Low Value Change is implemented prior to the Operational Term, issue an invoice in respect of the costs of the Low Value Change, which the Authority must pay within 20 Business Days of receipt; or
- 7.2 DBFM Co 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 Changes shall be invoiced and paid in accordance with the procedure described in Clause 34 of this Agreement.

8 **Update of Catalogue and Small Works and Services Rates**

- 8.1 From the Commencement Date the Catalogue shall be that set out in Part 1 of Appendix 1 to this Schedule Part 16 (*Change Protocol*) and the Small Works and Services Rates shall be those set out in Part 2 of Appendix 1 to this Schedule Part 16 (*Change Protocol*).
- 8.2 Subject to paragraph 8.3 of this Section 2 (*Low Value Changes*), the unit prices and the Small Works and Services Rates set out in the Catalogue and the Small Works and Services Rates shall be index linked 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, DBFM Co 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 DBFM Co 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 DBFM Co that it agrees with the revised and updated Catalogue and/or Small Works and Services Rates provided by DBFM Co 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 4 (*Changing the Financial Model*) of this Schedule Part 16 (*Change Protocol*).
- 9.4 DBFM Co 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 DBFM Co 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, DBFM Co 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 DBFM Co 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 DBFM Co in accordance with paragraph 2 (*Medium Value Change Notice*) of this Section 3 (*Medium Value Changes*).
- 1.2 DBFM Co 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 Consent to be revoked (or would require a new consent to be obtained or any existing Consent to be amended which, after using reasonable efforts, DBFM Co has been unable to obtain);
 - 1.2.3 would materially and adversely affect DBFM Co'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 DBFM Co to calculate and provide the Estimated Change in DBFM 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, DBFM Co 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, DBFM Co 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;
 - 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; and
 - 2.2.3 its estimate of the Third Party Costs that it will incur to prepare the Estimate.
- 2.3 If DBFM Co 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, 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 DBFM Co's notice.
- 2.4 If the Authority considers that DBFM Co'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 DBFM Co'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 DBFM Co to provide the Estimate shall be counted from the date of determination of that dispute if the dispute is determined in DBFM Co'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, DBFM Co 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 DBFM Co to achieve the Actual Completion Date by the Completion Date and to meet the requirements set out in the Authority's Construction Requirements and/or the Service Level Specification during the implementation of the 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 DBFM Costs that results from the Medium Value Change;
- 3.8 any Capital Expenditure that is required or no longer required as a result of the Medium Value Change;
- 3.9 amendments to existing 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 DBFM Costs and/or the Capital Expenditure for the purposes of the Estimate, DBFM Co 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 (*DBFM Co’s Proposals*) of Schedule Part 6 (*Construction Matters*) including (without limitation) in terms of the replacement cycles for equipment, provided that DBFM Co 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 DBFM Co's time, or that of any DBFM Co Party spent processing, managing or monitoring the Medium Value Change (and no additional mark up or management fee shall be applied by DBFM Co); 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 DBFM Co must:

- 5.1 use reasonable endeavours to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
- 5.2 demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, reasonably foreseeable Changes in Law at that time have been taken into account; and
- 5.3 demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Medium Value Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under paragraphs 3.7 and/or 3.8 of this Section 3; and
- 5.4 provide written evidence of DBFM Co's compliance with paragraphs 5.1 to 5.3 of this Section 3.

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, the Authority shall:
 - 7.1.1 confirm in writing to DBFM Co 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 or has withdrawn an Authority Change Notice for a Medium Value Change on three or more occasions, then the Authority shall pay to DBFM Co on the third and each subsequent such occasion in that Contract Year the reasonable additional Third Party Costs incurred by DBFM Co in preparing the Estimate provided that:

7.2.1 DBFM Co has used all reasonable endeavours to submit a reasonably priced Estimate; and

7.2.2 DBFM Co made available to the Authority, with the Estimate, a cost break down of Third Party Costs incurred by DBFM Co 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.

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, DBFM Co shall, subject to DBFM Co obtaining all new or amended 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 Completion Date shall be extended as agreed in the Estimate.

8.2 DBFM Co shall notify the Authority when it considers that the Medium Value Change has been completed.

8.3 If:

8.3.1 DBFM Co fails to provide a response pursuant to paragraph 2.2 of this Section 3 within fifteen (15) Business Days of the date of the Medium Value Change Notice; or

8.3.2 DBFM Co 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 DBFM Co 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, the Authority may notify DBFM Co 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 DBFM Co, 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 DBFM Co if it had implemented the Medium Value Change.

8.4 If DBFM Co considers that the implementation of a Medium Value Change by the Authority pursuant to paragraph 8.3 impacts on the performance (and/or the cost of performance (including, without limitation, lifecycle costs)) of the Project Operations then it may notify the Authority (providing full details) of the same (including the DBFM Co's proposals for changes required to the Project Operations or changes to the cost of performance (including, without limitation, lifecycle costs)) of the Project

Operations in either case as a result of the relevant Medium Value Change (the “**MV Required Changes**”)) and the parties shall seek to agree:

8.4.1 The impact of the relevant Medium Value Change on the performance (and/or the cost of performance (including, without limitation, lifecycle costs)) of the Project Operations; and

8.4.2 The MV Required Changes.

If the parties have been unable to reach agreement on these matters within 20 Business Days of notification by DBFM Co pursuant to this paragraph 8.4 then either party may refer the matter to the Dispute Resolution Procedure.

8.5 Any MV Required Changes agreed or determined pursuant to paragraph 8.4 above shall be dealt with by the Authority’s Representative issuing an Authority Change Notice and the relevant provisions of this Schedule Part 16 (*Change Protocol*) shall apply except that:

8.5.1 DBFM Co 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 MV Required Changes;

8.5.2 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 this Schedule Part 16 (*Change Protocol*);

8.5.3 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 the estimate for the Medium Value Change or approval of a High Value Change Stage 2 Submission (as appropriate), issued in accordance with this paragraph 8.5.

9 Certification of the Medium Value Change

9.1 Where the Medium Value Change is implemented at the Facilities before the Actual Completion Date, the procedure set out at Clause 17 (*Pre-Completion Commissioning and Completion*) shall apply to the Medium Value Change at the same time as it applies to the original Works.

9.2 Where the Medium Value Change is implemented at the Facilities after the 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 DBFM Co shall invoice the Authority for Capital Expenditure incurred by DBFM Co 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 DBFM Co within fifteen (15) Business Days of receipt by the Authority of invoices presented to the Authority (complete in all material respects) in accordance with paragraph 10.1 of this Section 3 accompanied by the relevant evidence (where applicable) that the relevant part of the Medium Value Change has been carried out.

11 **Adjustment to Annual Service Payment**

Any adjustment to the 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 DBFM Co shall procure that the Senior Lenders shall not:

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

12.1.2 carry out any due diligence (whether funder, legal, technical, insurance or financial) in relation to the carrying out of any Medium Value Change unless either (i) the Medium Value Change in question would result in an adjustment to the 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 Lenders, acting pursuant to the terms of the Senior Financing Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 apply.

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

12.3 It is acknowledged that Changes (particularly where they involve a change to the Works or the Facilities) may require authorisation from the insurers under the Insurances. DBFM Co 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 DBFM Co shall, no later than one (1) month following completion of a Medium Value Change, update the as-built drawings and the operating and maintenance manuals as necessary to reflect the Medium Value Change.

14 **Disputes**

14.1 Any dispute concerning any matter referred to in this Section 3 may be referred by either party to the Dispute Resolution Procedure.

14.2 DBFM Co 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 DBFM Co 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 DBFM Co in accordance with paragraph 2 of this Section 4 (*High Value Changes*).

1.2 DBFM Co 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 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, DBFM Co has been unable to obtain);

1.2.3 would materially and adversely affect DBFM Co's ability to deliver the Works and/or the Services (except those Works and/or Services which have been specified as requiring to be amended in the 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 Lenders.

2 High Value Change Notice

2.1 An Authority Change Notice for a High Value Change must:

2.1.1 state that it refers to a High Value Change;

2.1.2 set out the maximum available capital and/or revenue the 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 DBFM Co 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 DBFM Co 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, DBFM Co 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 DBFM Co shall use all reasonable endeavours to obtain all the information that it requires, expeditiously).
- 3.2 If DBFM Co 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 DBFM Co's notice. If the matter is referred to the Dispute Resolution Procedure the time for DBFM Co to provide the High Value Change Proposal shall be counted from the date of determination of that dispute if the dispute is determined in DBFM Co's favour.
- 3.3 If the Authority considers that DBFM Co'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 DBFM Co has submitted a High Value Change Proposal in accordance with paragraph 3.1.1 of this Section 4 (*High Value Changes*), DBFM Co 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 DBFM Co 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 DBFM Co to achieve the Actual Completion Date by the 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 DBFM Costs that results from the High Value Change;
- 3.4.10 an outline of how DBFM Co proposes to finance any Capital Expenditure required for the High Value Change;
- 3.4.11 DBFM Co'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 Consents and/or any amendments to existing 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 Commissioning and Completion*); and
- 3.4.15 a value for money assessment explaining why DBFM Co's proposals represent value for money taking into account both the proposed Capital Cost and Whole Life Cost.

3.5 **Liaison between DBFM Co, the Authority and relevant end users**

In developing a High Value Change Proposal DBFM Co must liaise with the Authority and relevant end users (being such persons or organisations as DBFM Co in consultation with the Authority considers appropriate). The Authority must provide DBFM Co with such information about its requirements as DBFM Co reasonably requires and must assist DBFM Co 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 DBFM Co, 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 DBFM Co 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 DBFM Co of the same and offer reasonable assistance to DBFM Co 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 3.5 of this Section 4 (*High Value Changes*)), then it shall be a "**Stage 1 Approved Project**" or be referred to as having received "**Stage 1 Approval**", as the context requires.

3.8 **DBFM Co not entitled to dispute non-approval**

DBFM Co 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 DBFM Co 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 DBFM Co of the High Value Change Stage 2 Submission pursuant to paragraph 4.1.1 of this Section 4 (*High Value Changes*), DBFM Co 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 DBFM Co, the Authority and relevant end users**

In developing a High Value Change Stage 2 Submission DBFM Co must continue to liaise with the Authority and relevant end users (being such persons or organisations as the Authority in consultation with DBFM Co considers appropriate). The Authority must provide DBFM Co with such information as to its requirements as is reasonably necessary to enable DBFM Co to submit a full and complete High Value Change

Stage 2 Submission and any such other information as DBFM Co may reasonably require and must assist DBFM Co 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 DBFM Co 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, DBFM Co 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 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 & Completion*);
- 4.3.9 a value for money assessment explaining why DBFM Co's proposals represent value for money taking into account both the proposed Capital Cost and Whole Life Cost;
- 4.3.10 a timetable and method statement setting out how the relevant High Value Change will be delivered, which shall include (but not be limited to) in so far as relevant:
 - (a) proposals for the effective management of the building programme;
 - (b) Not Used

- (c) an assessment as to the savings to be generated by the High Value Change, particularly on staff costs and lifecycle replacement and maintenance and operation of Services;
- (d) details of the Sub-Contractors together with evidence and explanation of the value testing undertaken by DBFM Co in relation to the High Value Change;
- (e) a completed risk register showing the potential risks identified in relation to the delivery of the High Value Change the occurrence of which are capable of adversely affecting the time for completion, cost and/or quality of the project, the probability of such risks occurring and a financial estimate of the most likely consequences of each risk occurring together with the prioritisation of all continuing risks and an action plan in respect of, and risk owners for, all risks prioritised as serious risks;

4.3.11 any surveys and investigations and associated reports that are reasonably necessary to ascertain (in relation to Changes involving the construction of additional buildings) information as to the nature, location and condition of the relevant land (including hydrological, geological, geotechnical and sub-surface conditions) together with information relating to archaeological finds, areas of archaeological, scientific or natural interest and (in relation to the refurbishment of any existing buildings) information on the condition and quality of existing structures and, in particular, the presence of any latent defects.

Co-operation of the Authority

- 4.4 The Authority will co-operate with DBFM Co in relation to any High Value Change Stage 2 Submission being developed by DBFM Co, 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 DBFM Co 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 DBFM Co.
- 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) DBFM Co shall be entitled to withdraw the High Value Change Proposal; and
 - (b) DBFM Co 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 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 DBFM Co 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 DBFM Co 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) DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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. DBFM Co 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 DBFM Co) 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 DBFM Co has failed to meet one or more of the Approval Criteria and the sole reason for that failure is that any Consent identified by DBFM Co (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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co in respect of any costs relating to the High Value Change including the Change Management Fee.

8.4 If:

8.4.1 DBFM Co 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) DBFM Co 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 DBFM Co fails to submit a High Value Change Stage 2 Submission in accordance with paragraph 4.1.2 of Section 4 (*High Value Changes*); or

8.4.4 the 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 DBFM Co 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 DBFM Co, 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 DBFM Co if it had implemented the High Value Change.

8.4A If DBFM Co considers that the implementation of a High Value Change by the Authority pursuant to paragraph 8.4 impacts on the performance (and/or the cost of performance (including, without limitation, lifecycle costs)) of the Project Operations then it may notify the Authority (providing full details) of the same (including the DBFM Co's proposals for changes required to the Project Operations or changes to the cost of performance (including, without limitation, lifecycle costs) of the Project Operations in either case as a result of the relevant High Value Change (the "**HV Required Changes**")) and the parties shall seek to agree:

(a) The impact of the relevant High Value Change on the performance (and/or the cost of performance (including, without limitation, lifecycle costs)) of the Project Operations, and

(b) The HV Required Changes.

If the parties have been unable to reach agreement on these matters within 20 Business Days of notification by DBFM Co pursuant to this paragraph 8.4A then either party may refer the matter to the Dispute Resolution Procedure.

8.4B Any HV Required Changes agreed or determined pursuant to paragraph 8.4A above shall be dealt with by the Authority's Representative issuing an Authority Change Notice and the relevant provisions of this Schedule Part 16 (*Change Protocol*) shall apply except that:

(a) DBFM Co 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 HV Required Changes;

(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 this Schedule Part 16 (*Change Protocol*);

(c) 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 the estimate for the Medium Value Change or approval of a High Value Change Stage 2 Submission (as appropriate), issued in accordance with this paragraph 8.4B.

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 DBFM Co 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 DBFM Co 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 DBFM Co to be paid the Incurred Change Management Fee).

9 **Information and notifications by the Authority to DBFM Co and cooperation of the Authority**

9.1 The Authority must notify DBFM Co 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 DBFM Co in relation to the procurement by DBFM Co of all relevant Consents.

10 **Change Management Fee**

The Change Management Fee is to reimburse DBFM Co 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 DBFM Co;

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 DBFM Co 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**

DBFM Co 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 Completion Date 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 DBFM Co shall invoice the Authority for Capital Expenditure incurred by DBFM Co 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.
- 12.3 The Authority shall make a payment to DBFM Co within fifteen (15) Business Days of receipt by the Authority of invoices presented to the Authority (complete in all material respects) in accordance with paragraph 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, DBFM Co shall procure that the Senior Lenders shall not withhold or delay any consents which are required pursuant to the Senior Financing Agreements to such High Value Change other than on the basis that the Senior Lenders, acting pursuant to the terms of the Senior Financing Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply.
- 14.2 Where the Authority is not funding the High Value Change, DBFM Co shall procure that the Senior Lenders do not unreasonably withhold or delay any consents which are required pursuant to the Senior Financing Agreements to such High Value Change other than on the basis that the Senior Lenders, acting pursuant to the terms of the Senior Financing Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply.
- 14.3 The parties agree that the Senior Lenders may carry out legal, financial, insurance and technical due diligence on any proposal for a High Value Change. The 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 DBFM Co as a result of the Senior Lenders 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 DBFM Co submitting an invoice for and evidence of such costs, subject to the invoices being in accordance with the agreed budget.
- 14.4 It is acknowledged that High Value Changes (particularly where they involve a change to the Works or the Facilities) may require authorisation from the insurers under the Insurances. DBFM Co shall notify the relevant insurance broker immediately upon any material High Value Change being agreed (materiality being judged in relation to the size and nature of the scope of the High Value Change).
- 14.5 The parties agree that paragraph 14.2 of this Section 4 (*High Value Changes*) of this Schedule Part 16 (*Change Protocol*) does not oblige the Senior Lenders to provide any additional funding for the relevant High Value Change, which shall be in their absolute discretion.

15 **Project Documentation**

- 15.1 The only changes to the Project Documents or Ancillary Documents to be made as a result of a High Value Change shall be those identified in the Approved Project (subject to any amendments to it agreed by the parties).
- 15.2 DBFM Co 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, DBFM Co 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 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 DBFM Co 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

DBFM CO CHANGES

- 1 If DBFM Co wishes to introduce a DBFM Co Change, it shall serve a notice containing the information required pursuant to paragraph 2 of this Section 5 (*DBFM Co Changes*) (a "*DBFM Co Notice of Change*") on the Authority.
- 2 A DBFM Co Notice of Change shall:
- 2.1 set out the proposed DBFM Co Change in sufficient detail to enable the Authority to evaluate it in full;
 - 2.2 specify DBFM Co's reasons for proposing DBFM Co Change;
 - 2.3 indicate any implications of DBFM Co Change;
 - 2.4 indicate what savings, if any, will be generated by DBFM Co 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 (*DBFM Co 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 DBFM Co with a view to deciding whether to agree to DBFM Co Change and, if so, what consequential changes the Authority requires as a result.
- 3 The Authority shall evaluate DBFM Co 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 DBFM Co 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 DBFM Co Change will interfere with the relationship of the Authority with third parties;
 - 3.4 the financial strength of DBFM Co is sufficient to perform the Works and/or Services after implementation of DBFM Co Change;
 - 3.5 the value and/or life expectancy of any of the Facilities will be reduced; or
 - 3.6 the DBFM Co Change materially affects the risks or costs to which the Authority is exposed.
- 4 As soon as practicable after receiving DBFM Co 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, DBFM Co Notice of Change.

- 5 If the Authority accepts DBFM Co 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 DBFM Co Change which shall set out the agreed DBFM Co 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 DBFM Co Change;
 - 5.2 subject to paragraph 7 of this Section 5 (*DBFM Co 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 DBFM Co Change shall be implemented within the period specified by the Authority in its notice of acceptance.
- 6 If the Authority rejects DBFM Co Notice of Change, it shall not be obliged to give its reasons for such a rejection and DBFM Co shall not be entitled to reimbursement by the Authority of any of its costs involved in the preparation of DBFM Co Notice of Change.
- 7 Unless the Authority's written acceptance expressly agrees to an increase in the Annual Service Payment or that DBFM Co 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 DBFM Co Change.
- 8 If a DBFM Co Change causes, or will cause, DBFM Co'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 DBFM Co in implementing such DBFM Co Change) will be shared on the basis of fifty per cent (50%) of the saving being retained by DBFM Co 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, DBFM Co 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 DBFM Co in no better and no worse a position.
- 3 In order to demonstrate that the conditions in paragraph 2 are met, DBFM Co 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 DBFM Co is in no worse and no better a position following the making of the Logic Adjustment.

Adjusting the Assumptions

- 4 Subject to paragraph 5, DBFM Co 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, DBFM Co 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 DBFM Co may make Input Adjustments to the extent required to reflect the Estimated Change in DBFM 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, DBFM Co 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 DBFM Co, 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 DBFM Co in “no better and no worse a position” shall be construed by reference to DBFM Co’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 DBFM Co 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 DBFM Co to comply with this Agreement is not adversely affected or improved as a consequence of the Relevant Event.

APPENDIX 1

Part 1

Catalogue

The Catalogue is in the Agreed Form on disc.

APPENDIX 1

Part 2

Small Works and Services Rates

The Small Works and Services Rates are in the Agreed Form on disc.

APPENDIX 2

Part 1

Unit Cost for Construction or Installation Costs

The Unit Cost for Construction or Installation Costs is in the Agreed Form on disc.

APPENDIX 2

Part 2

Unit Costs for Lifecycle Maintenance

The Unit Costs for Lifecycle Maintenance are in the Agreed Form on disc.

APPENDIX 2

Part 3

Consultant, Sub-Contractor or Supplier Fees

The Consultant, Sub-Contractor or Supplier Fees are in the Agreed Form on disc.

APPENDIX 2

Part 4

Unit Costs for Labour Rates

The Unit Costs for Labour Rates are in the Agreed Form on disc.

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 DBFM Co terminates this Agreement pursuant to Clause 39 (*Authority Events of Default*) or the Authority terminates this Agreement pursuant to Clause 42 (*Authority Voluntary Termination*) the Authority shall pay to DBFM Co 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 DBFM Co 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 DBFM Co to receive insurance proceeds (save where such insurance proceeds are held in the Insurance Proceeds Account and are to be applied in accordance with Clause 53.19 of this Agreement in reinstatement, restoration or replacement or, in the case of any third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case DBFM Co 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 DBFM Co (other than those transferred to the Authority pursuant to this Agreement) less liabilities of DBFM Co 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 DBFM Co arising out of:

- (a) agreements or arrangements entered into by DBFM Co to the extent that such agreements or arrangements were not entered into in connection with DBFM Co's obligations in relation to the Project; or
 - (b) agreements or arrangements entered into by DBFM Co 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, DBFM Co 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 (without double counting in relation to the calculation of the Revised Senior Debt Termination Amount) the amounts referred to in paragraphs 1.2.6 to 1.2.8 above; provided always that (a) the amount referred to in paragraph 1.2.2 shall only be paid to the extent that DBFM Co 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 DBFM Co to terminate such Sub-Contract.
- 1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and DBFM Co 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 DBFM Co 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 DBFM Co as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Section 1 (Compensation on Termination for Authority Default and Voluntary Termination), then the Authority Default Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 1.7 The Authority Default Termination Sum shall be payable in accordance with Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*).

2 NOT USED

SECTION 2

COMPENSATION FOR DBFM CO DEFAULT

1 If the Authority terminates this Agreement pursuant to Clause 40 (*DBFM Co Events of Default*), the Authority shall pay to DBFM Co such sum as is calculated according to this Section 2 (*Compensation for DBFM Co 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 DBFM Co 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) DBFM Co or the Senior Funders have not procured the transfer of DBFM Co'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 DBFM Co 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 DBFM Co 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 DBFM Co:

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 DBFM Co may, at its own cost, appoint a person to monitor the Tender Process for the purpose of monitoring and reporting to DBFM Co 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 DBFM Co in the event that DBFM Co 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 DBFM Co 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 DBFM Co 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 Insurance Proceeds Account on the date that the New Agreement is entered into.
- 3.10 As soon as practicable after tenders have been received, or where no tenders have been received by the date set by the Authority for submission of tenders, the Authority shall (acting reasonably) review and assess the Compliant Tenders (if any) and shall notify DBFM Co of:
- 3.10.1 the number of Compliant Tenders received by the Authority (if any);
- 3.10.2 the highest Compliant Tender price;
- 3.10.3 the Tender Costs; and
- 3.10.4 its calculation of the Adjusted Highest Compliant Tender Price.
- 3.11 If DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 Insurance Proceeds Account) or which will be received pursuant to policies maintained in accordance with Clause 53 (*Insurance*); and

(ii) amounts payable by the Authority in respect of Capital Expenditure under this Agreement which have not been paid,

in each case such costs to be forecast at a level that will deliver the Services to the standards required by this Agreement.

- 4.4 If the parties cannot agree on the Adjusted Estimated Fair Value of the Agreement on or before the date falling twenty (20) Business Days after the date on which the Authority elected or was required pursuant to paragraph 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 DBFM Co or the Authority terminates this Agreement pursuant to Clause 31.1 (*Force Majeure*) or Clause 53.14.2 the Authority shall pay to DBFM Co 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 DBFM Co by way of subscription for shares in the capital of DBFM Co less dividends and other distributions paid to the shareholders of DBFM Co 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 DBFM Co to receive insurance proceeds (save where such insurance proceeds are held in the Insurance Proceeds Account and are to be applied in accordance with Clause 53.19 of this Agreement in reinstatement, restoration or replacement, or in the case of third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case DBFM Co 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 DBFM Co (other than those transferred to the Authority pursuant to this Agreement) less liabilities of DBFM Co 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 DBFM Co arising out of:

(a) agreements or arrangements entered into by DBFM Co to the extent that such agreements or arrangements were not entered into in connection with DBFM Co's obligations in relation to the Project; and

- (b) agreements or arrangements entered into by DBFM Co 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 1.2.6 above are not realised and applied pursuant to that paragraph DBFM Co 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 (without double counting in relation to the calculation of the Revised Senior Debt Termination Amount) the amounts referred to at paragraphs 1.2.5 to 1.2.7 above; provided always that (a) the amount referred to in paragraph 1.2.2 shall only be paid to the extent that DBFM Co 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 DBFM Co to terminate such Sub-Contract.
- 1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and DBFM Co 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 DBFM Co 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 DBFM Co 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

NOT USED



SECTION 5

GENERAL

1. PAYMENT AND INTEREST

Following termination for Authority Default or Force Majeure

1.1 Subject to paragraphs 1.2 and 1.6 below, the Authority shall pay to DBFM Co the Termination Sum, together with interest on any Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount element of the Termination Sum at the No Default Interest Rate, on or before the date falling 60 days after the Notice Date provided that, if the Authority fails to pay the Termination Sum in full by such date, interest shall accrue at the Default Interest Rate on any unpaid amount from (but not including) such date until the date such amount is paid.

1.2 The Authority may, other than where payment is to be made pursuant to Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of this Schedule Part 17 (*Compensation on Termination*), elect to pay the Adjusted Estimated Fair Value of the Agreement or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum:

1.2.1 in instalments as follows:

(a) where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) is greater than or equal to the Outstanding Principal:

(i) in respect of that element of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) representing the Outstanding Principal, on the dates (the "**Instalment Dates**") and in the amounts that DBFM Co would have been required to pay principal to the Senior Funders under the terms of the Credit Agreement had the Termination Date not occurred; and

(ii) in respect of the sum (if any) remaining after deducting the Outstanding Principal from the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant), in equal instalments on the Instalment Dates;

(b) where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) is less than the Outstanding Principal, on the Instalment Dates pro rata to the amounts that DBFM Co would have been required to pay to the Senior Funders on each Instalment Date under the terms of the Credit Agreement had the Termination Date not occurred; or

1.2.2 as the parties may otherwise agree.

- 1.3 From the Notice Date until the date of payment, interest shall accrue on any unpaid element of the Termination Sum at the No Default Interest Rate and be payable on the next occurring Instalment Date.
- 1.4 If the Authority has elected to pay in accordance with paragraph 1.2 above, it may (on 28 days' prior written notice to DBFM Co) elect to pay the outstanding part of the Adjusted Estimated Fair Value of the Agreement or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in full on any Instalment Date. If the Authority:
- 1.4.1 fails to make a payment DBFM Co in accordance with paragraphs 1.1 or 1.2 or 1.3 above; or
- 1.4.2 breaches Clause 57.4,
- DBFM Co may issue a notice to the Authority declaring any unpaid and outstanding element of (as applicable) the Adjusted Estimated Fair Value of the Agreement or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum and any accrued but unpaid interest to be immediately due and payable.
- 1.5 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 DBFM Co to the Authority on the Compensation Date.

Following Retendering

- 1.6 Subject to paragraphs 1.7 and 1.9, following a retendering exercise under Section 2 (*Compensation for DBFM Co Default*) of this Schedule Part 17 the Authority shall pay to DBFM Co an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling twenty (20) Business Days after the later of:
- 1.6.1 the date of the New Agreement; and
- 1.6.2 if DBFM Co 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 DBFM Co 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 DBFM Co to dispute resolution (pursuant to paragraph 1.6.2 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 1.6.1 above (the "**Undisputed Payment Date**") and the Authority shall pay interest to DBFM Co 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 1.6.2 above at the No Default Interest Rate.
- 1.7 If the Authority has:
- 1.7.1 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 DBFM Co of this decision and (if the Adjusted Highest Compliant Tender Price is a positive number) pay to DBFM Co an amount equal to the Adjusted Highest Compliant Tender Price within 20 Business Days of such notification; or
- 1.7.2 received no bids from bidders under the Tender Process shall pay to DBFM Co an amount equal to the Adjusted Highest Compliant Tender

Price (if the Adjusted Highest Compliant Tender Price is a positive number) within 20 Business Days of notification in accordance with paragraph 3.10 of Section 2 (*Compensation for DBFM Co Default*) of this Schedule Part 17 (*Compensation on Termination*).

- 1.8 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 1.6 or paragraph 1.7 above, the Authority shall pay to DBFM Co 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 1.6 or paragraph 1.7 above until such amount is paid.
- 1.9 If the Adjusted Highest Compliant Tender Price is zero or a negative number then, on entering into the New Agreement with the New DBFM Co, the Authority shall have no obligation to make any payment to DBFM Co and (if a negative number) an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by DBFM Co to the Authority on the date of the New Agreement or (where paragraph 1.7.1 or 1.7.2 applies) within 20 Business Days of notification from the Authority pursuant to that paragraph.

2. FULL AND FINAL SETTLEMENT

- 2.1 Any and all sums irrevocably paid by the Authority to DBFM Co 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 DBFM Co 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 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 DBFM Co 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 Agent 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 Agent 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 DBFM Co.

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 DBFM Co 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 DBFM Co 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 DBFM Co on the date that the Estimated Fair Value of the Agreement is calculated; and
- (f) any insurance proceeds and other amounts owing to DBFM Co (and which DBFM Co is entitled to retain), to the extent not included in (e);

to the extent that:

- i. (e) and (f) have not been directly taken into account in calculating the Estimated Fair Value of the Agreement; and
- ii. the Authority has received such

amounts in accordance with this Agreement or such amounts are standing to the credit of the Insurance Proceeds Account;

"Adjusted Highest Compliant Tender Price"

means the price offered by the Compliant Tenderer (if any) with the highest tender price, and if no Compliant Tenders are received zero, adjusted as follows:

- (a) where in respect of any month or part of a month from the Termination Date to the Compensation Date the 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 DBFM Co 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 DBFM Co 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 DBFM Co on the date that the highest priced Compliant Tender is received; and
- (f) any insurance proceeds and other amounts owing to DBFM Co (and which DBFM Co is entitled to retain), to the extent not included in (e);

to the extent that:

- i. (e) and (f) have not been directly taken into account in that Compliant Tender; and
- ii. the Authority has received such amounts in accordance with this Agreement;

"APB Distribution"

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

"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 DBFM Co 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, payable by DBFM Co 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 only, as a result of termination of this Agreement, subject to DBFM Co and the Senior Funders mitigating all such costs to the extent reasonably possible;

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

- i. 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 DBFM Co 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 DBFM Co

as a result of enforcing any other rights they may have; and

- iv. all credit balances on any bank accounts (but excluding the Insurance Proceeds Account) held by or on behalf of DBFM Co on the Termination Date;

"Compensation Date"

means either:

- (a) if paragraph 3 (*Retendering Procedure*) of Section 2 (*Compensation for DBFM Co 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 DBFM Co; or
- (b) if paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation for DBFM Co Default*) of this Schedule Part 17 (*Compensation on Termination*) applies, the date that the Adjusted Estimated Fair Value of the Agreement has been agreed or determined;

"Compliant Tender"

means a tender that meets all of the Qualification Criteria;

"Compliant Tenderer"

means a Suitable Substitute Contractor who submits a Compliant Tender;

"Contingent Funding Liabilities"

means any contingent liabilities of the Shareholders in respect of financial obligations owed to DBFM Co, Holdco 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 the Actual Completion Date, then the Longstop Date shall be extended by a period to allow a New DBFM Co (had one been appointed) to achieve the Actual Completion Date prior to the Longstop Date;
- (b) any accrued Deductions and/or Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled; and
- (c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date;

"Discount Rate"

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

where:

"real base case project IRR" is the real pre-tax 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 Financial Model at Financial Close, 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;

"Estimated Fair Value of the Agreement"

means the amount determined in accordance with paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation for DBFM Co 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 or the Force Majeure Termination Sum (as appropriate), the date on which the Authority receives an invoice from DBFM Co for the relevant termination sum;

"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 DBFM Co 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 the Actual Completion Date, then the Longstop Date shall be extended by a period to allow a

New DBFM Co to achieve the Actual Completion Date prior to the Longstop Date;

- (b) any accrued Deductions and/or Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled;
- (c) the term of such agreement shall be equal to the term from the Termination Date until the Expiry Date; and
- (d) any other amendments which do not adversely affect the DBFM Co;

"New DBFM Co"

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

"No Default Interest Rate"

has the meaning given to the term "Margin" in the Credit Agreement;

"Notice Date"

means the later of the Termination Date and (if paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation for DBFM Co 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;

"Outstanding Principal"

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

"Post Termination Service Amount"

means for the purposes of paragraph 3 (*Retendering Process*) of Section 2 (*Compensation for DBFM Co 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;
- (d) the tenderer is experienced in providing the Services or similar services;
- (e) the technical solution proposed by the tenderers is capable of delivery and the tenderer is technically capable of delivery of the Services; and
- (f) any other tender criteria agreed by the Authority and the DBFM Co;

"Rectification Costs"

means, for the purposes of any Termination Date that occurs after the Actual Completion Date, an amount equal to the reasonable and proper costs incurred by the Authority in a particular month or part of a month in ensuring that the Services are available;

"Redundancy Payments"

means redundancy payments and other termination payments which are required under Law to be made to employees of DBFM Co reasonably and properly incurred by DBFM Co arising as a direct result of terminating this Agreement (provided that DBFM Co 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 DBFM Co arising out of:

- (a) contracts of employment or other agreements or arrangements entered into by DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co and the Project is taken into account;

"Revised Senior Debt Termination Amount"

means, subject to Clause 4.3:

- (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 DBFM Co 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, payable by DBFM Co 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 only, as a result of termination of this Agreement subject to DBFM Co and the Senior Funders mitigating all such costs to the extent reasonably possible;

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

- i. all credit balances on any bank accounts (but excluding the Insurance Proceeds Account) held by or on behalf of DBFM Co 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 DBFM Co 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 DBFM Co as a result of enforcing any other rights they may have; and
- v. all APB Distributions;

"Senior Debt"

means the financing provided by the Senior Funders under the Senior Funding Agreements;

"Senior Funding Agreements"

has the meaning given in Schedule Part 1 (*Definitions and Interpretation*);

"Sub-Contractor Losses"

means:

- (a) the amount reasonably and properly payable by DBFM Co 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 DBFM Co fails to use all reasonable endeavours to mitigate such amount; and
- (b) the amount reasonably and properly payable by DBFM Co to the Service Provider as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that DBFM Co fails to use all reasonable endeavours to mitigate such amount;

provided that in both cases no account should be taken of any liabilities and obligation of DBFM Co to the Sub-Contractors arising out of:

- i. agreements or arrangements entered into by DBFM Co and/or the Sub-Contractors to the extent that such agreements or arrangements were not entered into in connection with those parties obligations in relation to

the Project; and/or

- ii. agreements or arrangements entered into by DBFM Co and/or the Sub-Contractors to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms;

"Suitable Substitute Contractor"

has the meaning given in the Funders' Direct Agreement;

"Subordinated Debt"

means all of the debt incurred by DBFM Co to the Subordinated Funders;

"Tender Costs"

means the reasonable and proper costs of the Authority incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Agreement;

"Tender Process"

means the process by which the Authority requests tenders from any parties interested in entering into a New Agreement, evaluates the responses from those interested parties and enters into a New Agreement with a new service provider, in accordance with paragraph 3 (*Retendering Process*) of Section 2 (*Compensation for DBFM Co Default*) of this Schedule Part 17 (*Compensation on Termination*);

"Tender Process Monitor"

means the person appointed under paragraph 3.6 of Section 2 (*Compensation for DBFM Co Default*) of this Schedule Part 17 (*Compensation on Termination*);

"Termination Sum"

means any compensation payable by the Authority to DBFM Co pursuant to this Schedule Part 17 (*Compensation on Termination*) (excluding the Adjusted Highest Compliant Tender Price).

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:

“**Handback Works**” 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;

“**Handback Programme**” means the programme for carrying out the Handback Works over the remainder of the Project Term describing the total works to be carried out and the method of carrying out such works during the overall period in which the Handback Works are to be executed;

“**Handback Amount**” means the estimated cost of carrying out the Handback Works.

2 On the Expiry Date, each element of the Facilities shall be in a condition which is:

2.1 consistent with due performance by DBFM Co 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 5.1 of the Authority’s Construction Requirements,

together referred to as (the “**Handback Requirements**”).

3 Not less than twenty four (24) months prior to the Expiry Date, DBFM Co 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, DBFM Co shall forthwith provide to the Authority’s Representative in accordance with Schedule Part 8 (*Review Procedure*):

4.1 DBFM Co’s proposal as to the Handback Works;

4.2 DBFM Co’s proposal as to the Handback Programme; and

4.3 DBFM Co’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 DBFM Co, raise comments in accordance with paragraph 3 of Schedule Part 8 (*Review Procedure*) on DBFM Co'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), DBFM Co shall procure that the Handback Works are carried out in accordance with the Handback Programme so as to meet the Handback Requirements. DBFM Co 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:

7.1 in the period prior to the Senior Debt Discharge Date (as at the date of this Agreement), twelve percent (12%); and

7.2 thereafter twelve percent (12%),

in each case 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 DBFM Co may elect by notice in writing to the Authority within ten (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 DBFM Co 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,

DBFM Co 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 DBFM Co carries out any material part of the Handback Works in accordance with paragraph 6, DBFM Co may make a claim for payment for the work carried out. Any such claim shall be accompanied by a certificate by DBFM Co 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 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 DBFM Co, 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 DBFM Co's costs which have not been paid, DBFM Co shall bear the balance of such costs itself.

12 Not later than sixty (60) Business Days before the Expiry Date, DBFM Co 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 2 above.

13 On, or within ten (10) Business Days after, the Expiry Date, the Authority's Representative shall either:

13.1 issue to DBFM Co a Handback Certificate and return the Handback Bond or pay any balance standing to the credit of the Retention Fund (as appropriate), to DBFM Co; or

13.2 notify DBFM Co 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 DBFM Co may, within ten (10) 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's notice. The notice from DBFM Co shall give details of the grounds of such objection and shall set out DBFM Co's proposals in respect of such matters.

16 If no agreement is reached between DBFM Co and the Authority's Representative as to any matter referred to in DBFM Co's notice given in accordance with paragraph 15 within fifteen (15) Business Days of receipt of that notice by the Authority's Representative, then either DBFM Co 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, DBFM Co 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 fifteen (15) Business Days after the estimated cost has been agreed or determined and, upon such payment being received by the Authority, the Authority's Representative shall issue the Handback Certificate and return (where applicable) the Handback Bond to DBFM Co.

SCHEDULE PART 19

RECORD PROVISIONS

SECTION 1

GENERAL REQUIREMENTS

- 1 DBFM Co 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. DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co.
- 5 Where DBFM Co 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 DBFM Co shall notify the Authority and if, within forty (40) Business Days of such notice, the Authority elects to receive certain of those records, then DBFM Co 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 DBFM Co.
- 6 Subject to paragraph 5, for a period of not more than six (6) years following the termination for whatever reason of this Agreement, DBFM Co 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), DBFM Co shall deliver up all those records (or where those records are required by statute to remain with DBFM Co or a Contracting Associate of DBFM Co, copies thereof) to the Authority in the manner and at the location as the Authority shall reasonably specify. The Authority shall make available to DBFM Co all the records DBFM Co 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 DBFM Co where the termination arises as a result of a DBFM Co Event of Default; and

6.2 by the Authority where the termination arises for any other cause.

7 Without prejudice to the foregoing, DBFM Co 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 DBFM Co which falls during the Project Term, a copy, certified as a true copy by an officer of DBFM Co, of its unaudited interim accounts and, if appropriate, of consolidated unaudited interim accounts of DBFM Co, its Subsidiaries and Holding Company (if any) which would (if DBFM Co 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 DBFM Co but not later than one hundred and thirty (130) Business Days after the end of each accounting reference period of DBFM Co part or all of which falls in a Contract Year, a copy of DBFM Co's audited accounts and if appropriate, of the consolidated audited accounts of DBFM Co 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 DBFM Co 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, DBFM Co shall (and shall ensure that the sub-contractors will) comply with all reasonable requests of the Authority to provide information relating to DBFM Co's costs of operating and maintaining the Project.

11 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co 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 DBFM Co'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 DBFM Co and/or Holdco.
- 18 Documents relating to the rescheduling of the indebtedness of DBFM Co or refinancing of the Project.
- 19 Tax invoices and records related to Value Added Tax.
- 20 Financial records, including audited and unaudited accounts of Holdco and DBFM Co 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 DBFM Co pursuant to this Agreement or any Project Document.
- 24 Records of all persons employed by DBFM Co 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

1.1 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.

1.2 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 DBFM Co, the Authority, the relevant Sub-Contractor and any of the major competitors of DBFM Co or the relevant Sub-Contractor;

4.2.2 the Construction Panel shall be comprised of three (3) adjudicators as identified in paragraph 7 (*Panel Members*);

4.2.3 the Operational Panel shall be comprised of three (3) adjudicators who shall be selected to the panel jointly by DBFM Co and the Authority.

Such selections shall take place on or before the 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 DBFM Co and the Authority as soon as practicable;

4.2.5 if DBFM Co and the Authority are unable to agree on the identity of any replacement adjudicator, the Chairman (or Vice Chairman) for the time being of the Chartered Institute of Arbitrators Scottish Branch shall appoint such adjudicator(s) within seven (7) days of any application for such appointment by either party;

4.2.6 in the event that the first panel member is unable or unwilling to confirm acceptance of his appointment as Adjudicator or where he fails to respond within two (2) days of the date of the Notice of Adjudication, then the Referring Party shall invite the person next in line to act as Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within four (4) days of the date of the Notice of Adjudication or if the parties disagree as to the relevant panel of adjudicators to be used, then the Referring Party may apply to the Chairman (or Vice Chairman) for the time being of the Chartered Institute of Arbitrators Scottish Branch who shall within seven (7) days of the date of the Notice of Adjudication, nominate an Adjudicator (who shall also within the same period, confirm acceptance of his appointment as Adjudicator) to determine the Dispute described in the Notice of Adjudication;

4.2.7 no member of either panel shall be entitled to accept an appointment to act as Adjudicator unless he is willing also to be appointed as the adjudicator to adjudicate any dispute which:

(a) may arise between DBFM Co and the Contractor and raises issues which, in the opinion of DBFM Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed; and/or

(b) may arise between DBFM Co and the Service Provider and raises issues which, in the opinion of DBFM Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed; and/or

(c) may arise between DBFM Co and the Independent Tester and raises issues which, in the opinion of DBFM Co, 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.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 DBFM Co, 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 DBFM Co and the Contractor;
 - 4.11.2 DBFM Co and the Service Provider; and/or,
 - 4.11.3 DBFM Co 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 DBFM Co 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 DBFM Co and the Authority and both of them shall acknowledge the appointment of the Related Adjudicator as the adjudicator of the Dispute, with DBFM Co or the Authority (as the case may be) using its best endeavours to procure that the third party who is a party to the Related Agreement shall with effect from the time of such order comply with the requirements of the Related Agreement (including if applicable any requirement or direction of the Related Adjudicator appointed under such Related Agreement) as to the future conduct of the determination of the Dispute and the Related Adjudication; and
- 4.12.3 notwithstanding paragraph 4.6, DBFM Co and the Authority shall be jointly responsible with the third party who is a party to the Related Agreement for the Related Adjudicator's fees and expenses including those of any specialist consultant appointed under the adjudication procedure in the Related Agreement, in respect of the period in which the Dispute is consolidated with the Related Adjudication pursuant to an order of the Related Adjudicator ("**Consolidated Adjudication Costs**"). DBFM Co and the Authority agree that the Related Adjudicator shall have the discretion to make directions to require DBFM Co, the Authority and the third party who is a party to the Related Agreement to pay or make contribution to the Consolidated Adjudication Costs in different proportions. If no such directions are made, DBFM Co, the Authority and the third party who is a party to the Related Agreement shall bear the Consolidated Adjudication Costs in equal shares, and if DBFM Co, the Authority or the third party has paid more than such equal share, that party or third party shall be entitled to a contribution from the other party, parties or third party, as the case may be.
- 4.13 Notwithstanding anything to the contrary a Dispute under this Agreement may only be consolidated with a Related Adjudication, if the Related Adjudicator receives particulars of the Dispute within ten (10) days of the referral of the Related Adjudication to the Related Adjudicator under the Related Agreement.
- 4.14 Where DBFM Co 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 save where the Sheriff Courts have exclusive competence in which case it shall be referred to Edinburgh Sheriff Court.

6 **SUBMISSIONS IN RELATION TO ADJUDICATION**

6.1 If any Dispute raises issues which relate to:

6.1.1 any dispute between DBFM Co and the Contractor arising under the Construction Contract or otherwise affects the relationship or rights of DBFM Co and/or the Contractor under the Construction Contract (the "**Construction Contract Dispute**"); or

6.1.2 any dispute between DBFM Co and the Service Provider arising under the Service Contract or otherwise affects the relationship or rights of DBFM Co and/or the Service Provider under the Service Contract (the "**Service Contract Dispute**"); or

6.1.3 any dispute between DBFM Co and the Independent Tester arising under the Independent Tester Contract or otherwise affects the relationship or rights of DBFM Co and/or the Independent Tester under the Independent Tester Contract (the "**Independent Tester Contract Dispute**"),

then DBFM Co 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 DBFM Co to the Adjudicator; and

6.2.2 concern only those matters which relate to the Dispute between the Authority and DBFM Co 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 DBFM Co.

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 DBFM Co 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 DBFM Co 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 DBFM Co 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: (i) Janey Milligan, Construction Dispute Resolution, Pavilion 1, Parkway Court, 291 Springwell Parkway, Glasgow G69 6GA; (ii) John Hunter, Hunter Consultants, Commercial Centre, Stirling Enterprise, Stirling, FK7 7BS; and (iii) Brian Eggleston, 80 Green Park Manor Road Bournemouth BH1 3HR.

Operational Panel: (i) Janey Milligan, Construction Dispute Resolution, Pavilion, Parkway Court, 291 Springwell Parkway, Glasgow G69 6GA; (ii) John Hunter, Hunter Consultants, Commercial Centre, Stirling Enterprise, Stirling, FK7 7BS; and (iii) Brian Eggleston, 80 Green Park Manor Road Bournemouth BH1 3HR.

8 **NO LOSS**

Where the Authority would otherwise be expressly liable to make payment to DBFM Co of sums which include amounts payable in turn by DBFM Co to any Sub-Contractor, the Authority shall not be entitled to withhold, reduce or avoid any such payment to DBFM Co in reliance only on the fact that the amount which is due from DBFM Co 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 DBFM Co 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

DBFM CO INFORMATION

SECTION 1

DBFM CO INFORMATION


Name : WCHS DBFM Co Limited

Date of Incorporation : 17 May 2016

Registered number : SC535587

Registered office : Atholl House, 51 Melville Street, Edinburgh, EH3 7HL

Directors :

Name	Address
Kevin James Bradley	
John Alexander Hope	
Brian Love	
Philip McVey	
Colin Campbell	
Rory Christie	
Garry Sheret	
Alexander Monteith McCrorie	

Paul McGirk	
Richard Park	

Secretary : Galliford Try Secretarial Services Limited

Subsidiary undertakings at the date of this Agreement : None

Authorised and issued share capital at the date of this Agreement :

Name address of registered holder	Number and class held	Amount paid up
WCHS DBFM HoldCo Limited	100 shares of £1 each	£100

[REDACED]

SECTION 2

HOLDCO INFORMATION

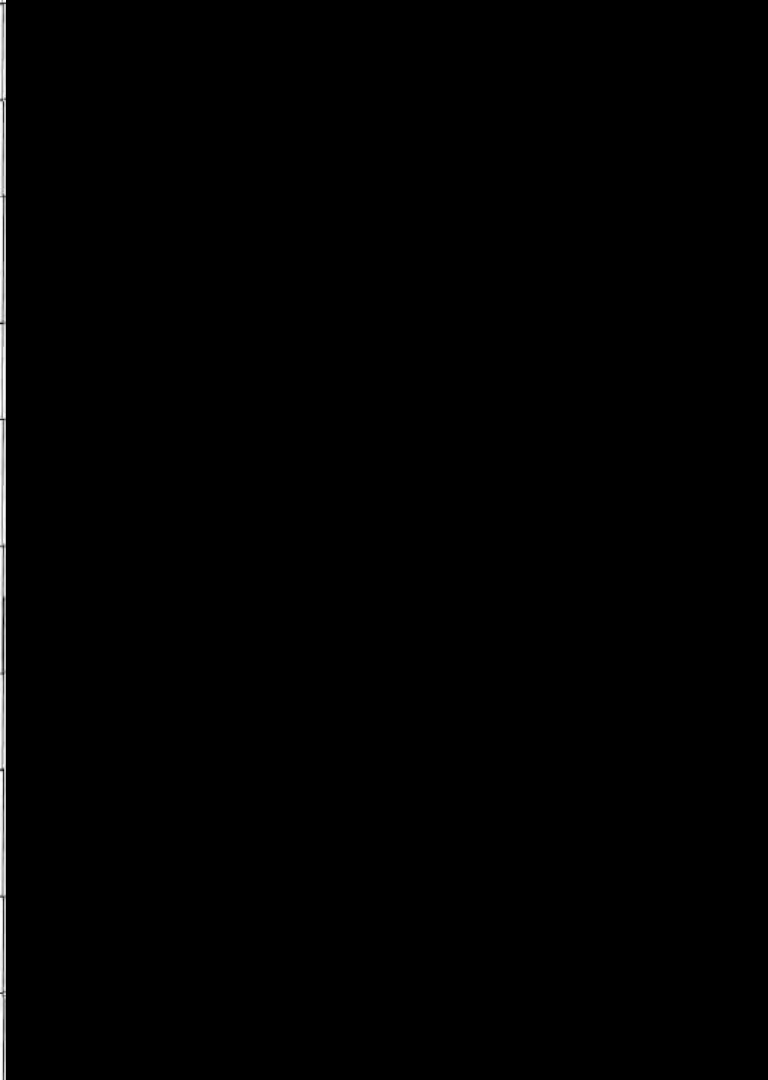
Name : WCHS DBFM Holdco Limited

Date of Incorporation : 17 May 2016

Registered number : SC535579

Registered office : Atholl House, 51 Melville Street, Edinburgh, EH3 7HL

Directors :

Name	Address
Alexander Monteith McCrorie	
Paul McGirk	
Kevin James Bradley	
John Alexander Hope	
Brian Love	
Philip McVey	
Colin Campbell	
Rory Christie	
Garry Sheret	
Richard Park	

Secretary : Galliford Try Secretarial Services Limited

Subsidiary undertakings at the date of this Agreement : WCHS DBFM Co Limited

Authorised and issued share capital at the date of this Agreement :

Name address of registered holder	Number and class held	Amount paid up
Scottish Futures Trust Investments Limited	10 "A" Shares of £1 each	£10
Hub Community Foundation	20 "B" Shares of £1 each	£20
West Lothian Council	10 "B" Shares of £1 each	£10
Space Scotland Limited	60 "C" Shares of £1 each	£60

[REDACTED]

SCHEDULE PART 22

CERTIFICATES

Commencement Certificate

Issued by: **[AUTHORITY]**

Address: []

DBFM Co: **[DBFM CO]**

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: []

DBFM Co: [DBFM CO]

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 Practical Completion**

Issued by: Independent Tester – []

Address: []

DBFM Co: [DBFM CO]

Address: []

Authority: [AUTHORITY]

Address: []

Contractor: [CONTRACTOR]

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 Completion Date 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: []

DBFM Co: [DBFM CO]

Address: []

Authority: [AUTHORITY]

Address: []

Contractor: [CONTRACTOR]

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. The provisions of this Schedule Part 23 (*Refinancing*) shall operate without prejudice to the provisions of Clauses 4.2 to 4.4 and both the Authority and DBFM Co shall at all times act in good faith with respect to any Refinancing.
2. The Authority shall be entitled to receive a 30% share of any Refinancing Gain arising from a Qualifying Refinancing.

DBFM Co Details

3. DBFM Co 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

4. The Authority shall have the right to elect to receive its share of any Refinancing Gain as:
 - 4.1 a single payment being the proportion (corresponding to the proportion of the Refinancing Gain to which the Authority is entitled pursuant to paragraph 2 above) of the amount which, but for the provisions of this Schedule Part 23 (*Refinancing*), would otherwise be capable of being released as a Distribution made on or about the date of the Refinancing;
 - 4.2 a reduction in the Annual Service Payments over the remaining term of this Agreement; or
 - 4.3 a combination of the above.

Method of Calculation

5. The Authority and DBFM Co will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Authority's share of the Refinancing Gain (taking into account how the Authority has elected to receive its share of the Refinancing Gain under paragraph 4 (*Receipt of Gain*) above). If the parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Authority's share, the dispute shall be determined in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

Costs

6. The Refinancing Gain shall be calculated after taking into account any breakage costs necessary to facilitate the Qualifying Refinancing together with the reasonable and proper professional costs that each party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Authority will be paid to the Authority by DBFM Co within twenty eight (28) days of any Qualifying Refinancing.
7. Without prejudice to the other provisions of this Schedule Part 23 (*Refinancing*), DBFM Co shall:

- 7.1 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
- 7.2 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).

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:

whether in cash or in kind, any:

1. dividend or other distribution in respect of share capital;
2. reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
3. payments under the Subordinated Funding Agreements (whether of principal, interest, breakage costs or otherwise);
4. 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;
5. the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms; or
6. 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:
 - 1. breach of representations and warranties or undertakings;
 - 2. movement of monies between the Project Accounts in accordance with the terms of the Senior Funding Agreements as at Financial Close;
 - 3. late or non-provision of information, consents or licences;
 - 4. amendments to Sub-Contracts;
 - 5. approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Funding Agreements);
 - 6. restrictions imposed by Senior Funders on the dates at which the Senior Debt can be advanced to DBFM Co under the Senior Funding Agreements and/or amounts released from Utilisation Account during the Availability Period, each as defined in the Senior Funding Agreements and which are given as a result of any failure by DBFM Co to ensure that the construction work is performed in accordance with the agreed construction programme and which is notified in writing by DBFM Co or the Senior Funders to the Authority prior to being given;
 - 7. changes to milestones for drawdown and/or amounts released from the Utilisation Account during the Availability Period set out in the Senior Funding Agreements and which are given as a result of any failure by DBFM Co to ensure that construction work is performed in accordance with the agreed construction programme and which is notified in writing by DBFM Co or the Senior Funders to the Authority prior to being given;
 - 8. failure by DBFM Co to obtain any consent by statutory bodies required by the Senior Funding Agreements; or
 - 9. 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 DBFM Co or Holdco by the shareholders or securitisation of the existing rights and/or interests attaching to shares in DBFM Co or Holdco provided that this paragraph (e) shall, in respect of shares in Holdco, only apply for so long as Holdco holds 100% of the issued share capital of DBFM Co;
- (f) any sale or transfer of the Subordinated Funders' existing rights and/or interests under the Subordinated Funding Agreements or securitisation of the Subordinated Funders' existing rights and/or interests under the Subordinated Funding Agreements; or
- (g) any Qualifying Bank Transaction;

“Insurance Undertaking”

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

“Net Present Value”

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

“Notifiable Financings”

means any Refinancing described in paragraphs (a) or (c) of the definition of Refinancing and any other arrangement which has or would have a similar effect or which has or would have the effect of limiting DBFM Co's or any Associated Company's ability to carry out any such refinancing or other arrangements that would have a similar effect;

“Pre-Refinancing Equity IRR”

means the nominal post-tax (i.e. post-tax with respect to DBFM Co, 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:

- i. 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;
- ii. 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:

- (a) any other Senior Funder;
 - (b) any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2013/36/EU relating to the taking up and pursuit of business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EEA member state;
 - (c) a local authority or public authority;
 - (d) 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);
 - (e) 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);
 - (f) an EEA or Swiss Insurance Undertaking;
 - (g) a Regulated Collective Investment Scheme;
 - (h) any Qualifying Institution; or
 - (i) any other institution in respect of which the prior written consent of the Authority has been given; and/or
- iii. 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 DBFM Co or Holdco, whether by way of security or otherwise, in favour of:
- (a) any other Senior Funder;
 - (b) any institution specified in paragraphs ii(b) to ii(g) above;
 - (c) any Qualifying Institution; or
 - (d) 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 Conduct 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 DBFM Co whether by way of security or otherwise; or
- (d) any other arrangement put in place by DBFM Co or another person which has an effect which is similar to any of (a)-(c) above or which has the effect of limiting DBFM Co’s or any Associated Company’s ability to carry out any of (a)-(c) above;


“Refinancing Gain” means an amount equal to the greater of zero and $[(A - B) - C]$, where:

A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing;

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

C = any adjustment required to raise the Pre-Refinancing

Equity IRR to the Threshold Equity IRR;

“Regulated Collective Investment Scheme”	has the meaning given in the rules from time to time of the Financial Services Authority;
“Relevant Person”	means a Shareholder and any of its Associated Companies;
“Shareholder”	means any person from time to time holding share capital in DBFM Co or Holdco.
“Subordinated Funder”	means a person providing finance under a Subordinated Funding Agreement;
“Subordinated Funding Agreements”	has the meaning given to the term “Sponsor Documents” in the Credit Agreement as at the date of this Agreement or as amended with prior written agreement with the Authority;
“Threshold Equity IRR”	

SCHEDULE PART 24

NOT USED

SCHEDULE PART 25

INSURANCE PROCEEDS ACCOUNT AGREEMENT

The Insurance Proceeds Account Agreement is in the Agreed Form

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 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"> • the Actual Completion Date; and • the date on which the amendments to Financial Model are agreed in accordance with this Agreement
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
DBFM Co 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 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"> • the Actual Completion Date; and • the date of the Financial Model containing the relevant information
Ancillary Documents	Project Term

Funding Agreements	Project Term
Information about DBFM Co'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 DBFM Co's competitors	Trade secrets – Project Term All other cases – 5 years from the date on which the information is produced to the Authority
Breakdown of prices within the overall contract price (to the extent not disclosed within the Financial Model)	Project Term
Information on DBFM Co's costing mechanisms including information obtained from DBFM Co relating to project risks and pricing of the same and cost information relating to third party contractors and the Sub-Contractors	Project Term
Financial term sheets and related funding information including any funder pricing	2 years from the date on which the information is produced to the Authority
Information relating to the appointment of DBFM Co as the preferred bidder to the Project (including the preferred bidder letter and correspondence and minutes relating to the same)	Until the date falling 2 years after the Actual Completion Date
Information contained within or relating to DBFM Co's bid for the Project except as otherwise listed in this Schedule Part 26 (<i>Commercially Sensitive Information</i>) or otherwise provided for in the Agreement	Until the date falling 2 years after the Actual Completion Date

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 DBFM Co 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 DBFM Co in respect of the Senior Debt; and
- 1.2.2 the Authority shall pay DBFM Co 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 DBFM Co, 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 1.2.2; 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 DBFM Co pursuant to paragraph 1.2.2.

APPENDIX A
AUTHORITY POLICIES

The Authority Policies are in the Agreed Form on disc.

