

**CONFORMED COPY**

**PROJECT AGREEMENT**

**between**

**HIGHLAND COUNCIL**

**and**

**ALPHA SCHOOLS (HIGHLAND) LIMITED**

---

**EDUCATION CULTURE AND SPORT SERVICE  
PUBLIC PRIVATE PARTNERSHIP 2**

---

**macROBERTS**

## CONTENTS

PART 1 .....	4
PRELIMINARY .....	4
1. DEFINITIONS AND INTERPRETATION .....	4
2. EXCLUSION OF LEGISLATION/THIRD PARTY RIGHTS/VARIATIONS .....	40
3. COMMENCEMENT AND DURATION .....	40
4. CONDITIONS PRECEDENT .....	40
5. WARRANTIES .....	41
6. BACKGROUND INFORMATION .....	42
7. PROJECT DOCUMENTS .....	43
PART 2 .....	44
LAND ISSUES .....	44
8. NATURE OF LAND INTERESTS .....	44
PART 3 .....	46
TRANSITIONAL ARRANGEMENTS .....	46
9. NOT USED .....	46
10. THE WORKS .....	46
11. CONSTRUCTION PROGRAMME .....	47
13. SITE MEETINGS .....	49
14. COLLATERAL WARRANTIES .....	49
15. DESIGN DEVELOPMENT .....	49
16. CHANGES TO THE CONTRACTOR'S PROPOSALS .....	51
17. EXTENSIONS OF TIME .....	51
18. CDM REGULATIONS .....	54
19. THE SITES .....	54
20. MONITORING AND INSPECTION .....	56
21. NOTIFICATION OF SERVICE AVAILABILITY .....	57
22. DELAY AND SUPERVENING UNAVAILABILITY .....	59
PART 4 .....	62
THE SERVICES .....	62
23. PRINCIPAL OBLIGATIONS .....	62
24. CONDITION OF THE PROJECT FACILITIES .....	64
25. HAZARDOUS SUBSTANCES .....	67
26. EMERGENCIES .....	67
27. PERFORMANCE MONITORING .....	68
28. MARKET TESTING AND BENCHMARKING .....	68
29. USE OF PROJECT FACILITIES .....	72
30. TUPE .....	75
31. EMPLOYEES .....	80
32. OPERATING MANUAL .....	84
PART 5 .....	85
PAYMENT .....	85
33. PAYMENT PROVISIONS .....	85
PART 6 .....	89
TERMINATION .....	89
34. DIRECT AGREEMENT .....	89
35. TERMINATION OF THIS AGREEMENT .....	91
36. PERSISTENT BREACH .....	92
37. WARNING NOTICES .....	92
38. INCREASES IN MONITORING .....	93
39. FORCE MAJEURE .....	94
40. CONSEQUENCES OF TERMINATION .....	95
41. SURVEYS ON EXPIRY AND RETENTION FUND .....	95
42. TRANSITION TO ANOTHER CONTRACTOR .....	97
PART 7 .....	99
COMPENSATION ON TERMINATION .....	99
43. DEFINITIONS .....	99
44. FORCE MAJEURE COMPENSATION .....	104
45. COMPENSATION ON TERMINATION FOR CONTRACTOR DEFAULT .....	105
46. COMPENSATION ON TERMINATION FOR AUTHORITY DEFAULT/VOLUNTARY TERMINATION BY THE AUTHORITY .....	109

47.	COMPENSATION ON TERMINATION FOR CORRUPT GIFTS AND FRAUD AND BREACH OF REFINANCING .....	110
47A	PAYMENT.....	110
48.	ASSETS.....	114
49.	ACCOUNTS OF THE CONTRACTOR .....	115
50.	GROSS UP .....	115
51.	SET-OFF ON TERMINATION .....	115
52.	INSURANCE PROCEEDS .....	115
	PART 8 .....	116
	GENERAL.....	116
53.	LIAISON WITH SCHOOLS.....	116
54.	RELIEF EVENTS.....	116
55.	QUALIFYING CHANGE IN LAW .....	118
56.	VARIATIONS .....	119
57	CONTRACTOR CHANGES IN OPERATIONAL SERVICES.....	125
57A	IMPLEMENTATION OF CHANGES.....	127
58.	AUTHORITY STEP-IN.....	127
59.	INFORMATION AND CONFIDENTIALITY .....	128
60.	INDEMNITIES AND RESPONSIBILITY .....	130
61.	INSURANCE.....	132
62.	REINSTATEMENT.....	134
63.	UNINSURABLE RISKS .....	136
64.	DISPUTE RESOLUTION.....	137
65.	ORDERING OF GOODS AND SERVICES .....	137
66.	INTELLECTUAL PROPERTY.....	137
67.	ASSIGNATION AND SUB-CONTRACTING.....	138
68.	AUDIT ACCESS .....	139
69.	CORPORATE STRUCTURES .....	139
70.	NO AGENCY .....	141
71.	ENTIRE AGREEMENT .....	141
72.	NOTICES.....	141
73.	SEVERABILITY .....	143
74.	WAIVER.....	143
75.	PUBLIC RELATIONS AND PUBLICITY .....	143
76.	ADVERTISEMENTS.....	143
77.	CONTRACTOR'S RECORDS .....	143
78.	DATA PROTECTION.....	144
79.	CORRUPT GIFTS AND PAYMENTS OF COMMISSION .....	145
80.	PARTIES NOT TO PREVENT.....	146
81.	CO-OPERATION .....	147
82.	EXCLUSIVE REMEDIES.....	147
83.	MALICIOUS DAMAGE .....	147
84.	LOCAL GOVERNMENT (CONTRACTS) ACT 1997.....	150
85	REFINANCING PROVISIONS.....	151
86.	TERMINATION BY THE AUTHORITY FOR BREACH OF THE REFINANCING PROVISIONS.....	152
87.	BEST VALUE.....	152
88.	GOVERNING LAW AND JURISDICTION .....	153

## PROJECT AGREEMENT

between

- (1) **THE HIGHLAND COUNCIL** a local authority constituted and incorporated under the Local Government etc Scotland Act 1994 acting in its capacity as both education authority under the Education (Scotland) Act 1980 and as authority responsible for recreational and social activities in terms of the Local Government & Planning (Scotland) Act 1982 and having its principal offices at Glenurquhart Road, Inverness, IV3 5NX (the “**Authority**”); and
- (2) **ALPHA SCHOOLS (HIGHLAND) LIMITED** (company registered number 05509942) whose registered office is at Anglian House, Ambury Road, Huntingdon, Cambridgeshire, PE29 3NZ (the “**Contractor**”)

### WHEREAS

- A. By an advertisement dated January 2003 in the Supplement to the Official Journal of the European Union, the Authority sought proposals for the design, construction, financing and operation of certain educational facilities in the Highlands and associated services under the Private Finance Initiative (“PFI”) of Her Majesty’s Government.
- B. Following a tender process in accordance with the Public Services Contracts Regulations (SI 1993 No.3228), the Authority has selected the Contractor to carry out the Project and following negotiations the Authority and the Contractor have agreed to enter into this Agreement on the terms and conditions herein contained.
- C. The parties intend that this Agreement be a certified contract for the purposes of the Local Government (Contracts) Act 1997.
- D. The relevant discharge terms as referred to in Section 6 of Local Government (Contracts) Act 1997 are set out in Schedule Part 13 (*Relevant Discharge Terms*).
- E. The Authority wishes to procure the Operational Services, which requires the Contractor to procure the Works.

**IT IS AGREED** as follows:

### **PART 1 PRELIMINARY**

#### **1. DEFINITIONS AND INTERPRETATION**

##### **1.1 Definitions**

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

**Abandon** means, in the period prior to the issue of the final Certificate of Service Availability, to not carry out any Works at the Project Facilities for 30 consecutive Business Days or during 90 Business Days (whether consecutive or not) in any Year and/or, in the period after the issue of the first Certificate of Service Availability, to not provide substantially all of the Operational Services for 60 consecutive Business Days except when relieved of the obligation to do so by the express provisions of this Agreement;

**Academic Timetable** means the timetable for each New Project Facility setting out the proposed term dates for an Academic Year, as notified to the Contractor in accordance with Clause 29.3;

**Academic Year** means the period from the first day of the Authority's school year until the last day of the Authority's school year (excluding holiday periods) (as published from time to time in accordance with Clause 29.3), such period not to include more than 195 School Days;

**Acceptance Certificate** means a certificate issued by the Technical Adviser in the form as set out in Schedule Part 20 Section D confirming its agreement with the issue of a Certificate of Service Availability or Certificate of External Works Availability or Certificate of Grass Playing Fields Availability (as the case may be);

**Access Employee** means any employee or worker employed or engaged in the provision of the Services, including the Relevant Employees except where this Agreement provides otherwise, whose normal duties might reasonably be expected to include work in the Project Facilities or any other educational establishment within the meaning of the Protection of Children (Scotland) Act 2003 or whose normal duties might otherwise reasonably be expected to involve unsupervised contact with children under arrangements made by the Council or the Contractor or the FM Contractor (it being agreed that employees of the Building Contractor or its sub-contractors engaged in Snagging Works or the rectification of defects or on Works at the Sites which are separated by a physical barrier from the Existing Project Facility or when arriving at or leaving the Sites during the Works Period and employees not working during Core Times shall not be considered as having unsupervised contact);

**Acquired Rights Directive** means EC Directive 01/23;

**Actual Consumption** has the meaning given to it in Paragraph 8.1.1 of Part 6 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Additional Permitted Borrowing** means on any date, the amount equal to any amount of principal outstanding under the Senior Funding Agreements 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 12(d)(iii) of the Direct Agreement as it applies to such Additional Permitted Borrowing,

and provided further that any such excess amount of principal which is invested as part of any Qualifying Variation 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 (a);

**Additional Rights** means the rights set out in Section B of Schedule Part 16;

**Additional Rights Plans** means the plans set out in Appendix A to Schedule Part 16 (*Property Agreements and Title Provisions*)

**Adjudication** has the meaning given to it in Paragraph 3.1 of Schedule Part 18 (*Dispute Resolution Procedure*);

**Adjudicator** has the meaning given to it in Paragraph 3.2 of Schedule Part 18 (*Dispute Resolution Procedure*);

**Adjusted Actual Consumption** has the meaning given to it in Paragraph 8.1.3 of Part 6 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Adjusted Estimated Fair Value** has the meaning given to it in Clause 43 (*Definitions*);

**Adjusted Highest Compliant Tender Price** has the meaning given to it in Clause 43 (*Definitions*);

**Affected Party** has the meaning given to it in the definition of Force Majeure Event;

**Affiliate** means:

- (i) 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 736 of the Companies Act 1985;
- (ii) in relation to Northern Infrastructure Investments LLP (or any successor thereto), any unit trust, investment fund, partnership, other fund or entity of which Northern Infrastructure Investments LLP (or its successor) is either the general partner, trustee or principal manager (directly or indirectly); and
- (iii) partners or limited partners in Northern Infrastructure Investments LLP (or its successor) or any partnership referred to in paragraph (ii) of this definition, but only to the extent that such partners become holders of shares as a result of a transfer in specie to them which is a distribution on winding up out of the assets of the partnership (or limited liability partnership) in question;

**Agreed Form** means in relation to any document, the form of the document initialled by or on behalf of the parties for the purpose of identification and/or entered into on or about the Execution Date or the Effective Date;

**Agreement** means this agreement (including its Schedule Parts) and (without prejudice to the provisions of Clauses 10.1.3 and 23.2.2) the Authority’s Requirements and the Contractor’s Proposals;

**Ambac** has the meaning given in the Master Definitions Schedule;

**Ambac Bond Guarantee** has the meaning given to “Bond Guarantee” in the Master Definitions Schedule;

**Ambac Fee Letter** has the meaning given in the Master Definitions Schedule;

**Ancillary Documents** means the Building Contract, the FM Agreement and the Project Documents listed in Section A of Schedule Part 6 (*Project Documents*) as the same may be amended or replaced from time to time;

**Ancillary Rights** means the Additional Rights and

- (a) a non exclusive right to enter and remain on each of the Project Facilities, with effect from the Service Availability Date (other than in respect of the External Works including the Grass Playing Fields) and/or the External Works Availability Date (in respect of the areas forming the External Works and/or the Grass Playing Fields), as appropriate,
- (b) rights to connect into all utilities and services located in the Project Facilities and to use, maintain, repair and renew all such utilities and services,
- (c) during the Works Period only the right to occupy the areas shown coloured blue on the Phasing Drawings on an exclusive basis during the period shown on the relevant Phasing Drawing, and

- (d) during the Works Period only the right to occupy the areas shown coloured red on the Phasing Drawings on a non-exclusive basis during the period shown on the relevant Phasing Drawing.

in each case to the extent required only for the purpose of implementing the Works, performing the Services and fulfilling the Contractor's rights and obligations under this Agreement but, save as provided in Section B of Schedule Part 16, only insofar as such right is capable of being granted by the Authority as at the date to which the searches referred to in Section A of Schedule Part 16 are brought down;

**Annual Reconciliation Statement** has the meaning given to it in Paragraph 5.1 of Part 6 of Section A of Schedule Part 7 (*Payment Mechanism*);

**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;

**Applicable Standards** means any generally recognised industry or service standard or code of practice (including British and European Standards and Codes of Practice) which relates to services of a type similar to the Services or to goods, equipment or materials required in the provision of the Services or to works of a similar nature as the Works but specifically excluding the standards and codes which it is stated in the Authority's Requirements shall not apply to the Works and/or the Services;

**Approved Purposes** has the meaning given to it in Clause 66.1 (*Contractor to Make Available Project Data*);

**Approved RDD Item** means:

- a) an item of Reviewable Design Data which has been returned or deemed to have been returned marked 'Level A - no comment' or 'Level B - proceed subject to amendment as noted' under the Review Procedure; or
- b) the items of Reviewable Design Data listed in Appendix B of Schedule Part 9 (*Approved RDD Items*);

**Archaeological Finds** means the discovery on or under a site of human remains or of any fossils or antiquities of particular archaeological interest;

**Area** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Assets** means all assets and rights to enable the Authority or a successor contractor to own, operate and maintain the New Project Facilities in accordance with this Agreement including:

- (a) any land or buildings;
- (b) any furniture and equipment;
- (c) any books and records (including operating and maintenance manuals, health and safety manuals and other know how);
- (d) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred);
- (e) any revenues and any other contractual rights; and
- (f) any intellectual property rights,

but excluding any assets and rights in respect of which the Authority is full legal and beneficial owner;

**Assigned Employees** has the meaning given to it in Clause 30.2.3 (*Contractor Responsibilities*);

**Associated Company** 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 the Contractor shall include HoldCo and each of the Shareholders;

**Authority Change** means a change in the Authority's Requirements or other matters set out in Clause 56.1.1, which the Contractor is obliged to implement pursuant to Clause 56 (*Authority Changes*);

**Authority Default** means one of the following events:

- (a) an expropriation, sequestration or requisition of a material part of the Assets and/or any of the shares of the Contractor or HoldCo by the Authority or any Relevant Authority;
- (b) a failure by the Authority to make payment of any amount (excluding amounts to which Clause 33.4 applies) of money exceeding £1,500,000 (Indexed) in relation to a single payment, or of amounts exceeding £1,500,000 in aggregate (Indexed) that is due and payable by the Authority under this Agreement within 10 Business Days of service of a second formal written demand by the Contractor, provided that (i) a first formal written demand was served by the Contractor on the Authority not earlier than 5 Business Days following the final date for payment, and (ii) a second formal written demand was served by the Contractor on the Authority not earlier than 10 Business Days following the date of service of the first formal written demand ;
- (c) a breach by the Authority of its obligations under this Agreement which substantially frustrates or renders it impossible for the Contractor to perform its obligations under this Agreement for a continuous period in excess of three months;
- (d) the Authority is sequestrated under the Bankruptcy (Scotland) Act 1985 or otherwise becomes insolvent or is wound up and its obligations are not otherwise transferred to another party such as is referred to in Clause 67.1 (*Restrictions on Agreement Transfer*);
- (e) breach of Clause 67.1 (*Restrictions on Agreement Transfer*) by the Authority;
- (f) for the purposes of the Local Government (Contracts) Act 1997, a determination or order is made on an application for judicial review or an audit review that this Agreement and/or the Direct Agreement shall have no effect;
- (g) a persistent failure by the Authority to make payment of any amount of money exceeding £150,000 (Indexed), which shall be deemed to have occurred if the Authority delays (by more than 10 Business Days) on three or more occasions in any 12 month period payment to the Contractor of any sum due (abut only where the Contractor has served written notice on the Authority after each such occasion warning the Authority of potential persistent late payment);

**Authority Default Termination Sum** has the meaning given to it in Clause 46 (*Compensation on Termination for Authority Default/Voluntary Termination by the Authority*);

**Authority Equipment** means all fixed and moveable plant and equipment, items and goods at the New Project Facilities other than Contractor Plant and Equipment;

**Authority Employee** means an employee of the Authority acting in the course of his employment;

**Authority Notice of Change** has the meaning given to it in Clause 56.1.3 (*Authority Changes*);

**Authority Obligations** means the obligations of the Authority specified in Schedule Part 22 (*Authority's Obligations*);

**Authority Observer Stakeholder Representative** means such representative as the Authority may notify in advance to the Contractor from time to time shall undertake the role of Authority Observer Stakeholder Representative in terms of Clause 69.4 (*Sharing of Information*);

**Authority Property** has the meaning given to it in Clause 60.4 (*Contractor's Indemnity*);

**Authority Related Party** means:

- (a) an officer, agent, Councillor or employee of the Authority acting in the course of his office or employment or any contractor or sub-contractor of the Authority or any other person engaged in the provision of Educational Services;
- (b) in relation to any New Project Facility, any School Board Member of that New Project Facility acting as such;
- (c) in relation to any New Project Facility, during a School Day any pupil of that New Project Facility who is or ought to have been under the supervision of a teacher, or any person visiting that New Project Facility at the invitation (whether express or implied) of the Authority; and
- (d) in relation to Community Use or Community Education Services, any person visiting the New Project Facilities for that purpose;

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

**Authority Unavailability Notice** has the meaning given to it in Paragraph 10.3.1 of Part 5 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Authority Year** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Authority's Conditions Precedent** means the Conditions Precedent set out in Section A of Schedule Part 1 (*Conditions Precedent*);

**Authority's Representative** means the representative appointed by the Authority pursuant to Clause 12.4 (*Authority's Representative*);

**Authority's Requirements** means the requirements of the Authority in respect of the Project set out in the document so entitled and in the Agreed Form as amended in accordance with Clauses 55 to 57A;

**Availability Deductions** or **AD** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Availability Failure** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Availability Standards** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Base Case** means the Financial Model;

**Base Cost** has the meaning given to it in Clause 28.1.2 (*Benchmarking*);

**Base Date** means 6<sup>th</sup> April 2006;

**Base Senior Debt Termination Amount** means:

- (a) all amounts outstanding at the Termination Date, including interest and Default

Interest accrued as at that date, from the Contractor to the Senior Lenders under the Senior Funding Agreements and in respect of Permitted Borrowing; and

- (b) other than amounts falling within paragraph (a), all amounts (or if the prepayment referred to below has not occurred by the Termination Date, that which would have become payable should such prepayment occur on the Termination Date) including costs of early termination of interest rate hedging arrangements and other Breakage Costs, payable by the Contractor to the Senior Lenders as a result of a prepayment under the Senior Funding Agreements and in respect of Permitted Borrowings and any amounts which are payable in respect of the Bonds and in respect of Permitted Borrowings calculated in accordance with the definition of "Default Amount" at Condition 9(e) of the Bonds, if the Bonds are redeemed early subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible (unless the amount, the method or the formula for determining the amount of such costs are fixed in advance under the terms of the relevant Senior Funding Agreements);

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) all credit balances on any bank accounts (but excluding the Joint Insurance Account and the Distributions Account and, if the Authority selects the Instalment Option, the Debt Service Reserve Account) held by or on behalf of the Contractor on the Termination Date which are freely available for repayment of Senior Debt;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Contractor as a result of prepayment of amounts outstanding under the Senior Funding Agreements and in respect of Permitted Borrowings;
- (iv) any Additional Permitted Borrowing and any interest and Default Interest on such Additional Permitted Borrowing; and
- (v) all other amounts (except insurance proceeds in respect of third party liabilities) received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have;

**Benchmarking Exercise** has the meaning given to it in Clause 28.1.1 (*Benchmarking*);

**Benchmarked Price** means a price demonstrated to the reasonable satisfaction of the Authority to be arrived at on the basis of an objective and like for like comparison by comparing the quality and price of the Works or Services in question, and the quality and prices of equivalent works or services by reputable organisations possessing the appropriate expertise;

**Blended Equity IRR** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Bond Trustee** has the meaning given in the Master Definitions Schedule;

**Bonds** has the meaning given in the Master Definitions Schedule;

**Breakage Costs** has the meaning given in Clause 43 (Definitions);

**Building** means any building (including any existing as at the Effective Date), service media and/or relative infrastructure at or on one of the Sites;

**Building Contract** means the building contract between the Contractor and the Building Contractor relating to the Works which is in the Agreed Form;

**Building Contract Dispute** has the meaning given to it in Paragraph 48A.1 of Schedule Part 18 (*Dispute Resolution Procedure*);

**Building Contractor** means Morrison Construction Services Limited, a company incorporated in Scotland under the Companies Acts (Registered Number SC055775) and having its Registered Office at 51 Melville Street, Edinburgh, EH3 7HL, or such other building contractor as the Contractor may, subject to Clause 67.3 (*Assignment and Sub Contracting - Exception*), appoint to carry out the Works;

**Building Sub-Contractor** means a principal sub-contractor appointed by the Building Contractor to undertake (i) the building of the whole of any single New Project Facility or (ii) works to a value in excess of £10,000,000 in connection with the Works;

**Business Day** means a day (other than a Saturday or Sunday) on which banks are open for domestic business in Edinburgh;

**Capital Expenditure** means any expenditure which falls to be treated as capital expenditure in accordance with generally accepted accounting principles in the United Kingdom from time to time;

**Capital Sum** has the meaning given to it in Clause 43 (*Definitions*);

**CDM Regulations** has the meaning given to it in Clause 18.2 (*Contractor as Client*);

**Catering Service Provider** means any organisation, department of the Authority or other party responsible for the provision of catering services at a New Project Facility from time to time;

**CDT Equipment** means the Portree CDT Equipment, the Dingwall CDT Equipment, the Millburn CDT Equipment and the Kinlochleven CDT Equipment all as defined in Schedule Part 22;

**Certificate of Service Availability** means a certificate stating the satisfaction in relation to a New Project Facility (excluding the External Works and/or the Grass Playing Fields as appropriate) of the Service Availability Requirements in the form as set out in Schedule Part 20 Section A (*Certificate of Service Availability*);

**Certificate of External Works Availability** means a certificate stating the satisfaction in relation to a New Project Facility (excluding the Grass Playing Fields) of any External Works Availability Requirements for that New Project Facility in the form as set out in Schedule Part 20 Section B (*Certificate of External Works Availability*);

**Certificate of Grass Playing Fields Availability** means a certificate stating the satisfaction in relation to a New Project Facility of any Grass Playing Fields Availability Requirements for that New Project Facility in the form as set out in Schedule Part 20 Section C (*Certificate of Grass Playing Fields Availability*);

**Certification Period** means the period within which the Certification Requirements must be satisfied for a contract to be a certified contract for the purposes of the Local Government (Contracts) Act 1997;

**Certification Requirements** means the requirements which must be satisfied for a contract to be a certified contract for the purposes of the Local Government (Contracts) Act 1997;

**Change of Control** means (other than in respect of transfers to Affiliates of any Shareholder) the change in the direct or indirect legal or beneficial ownership of more than 50% of the issued share capital or (if it is convertible into shares), of the loan capital of the Contractor and/or the HoldCo;

**Change in Law** means the coming into effect after the Execution Date of:

- (a) Legislation other than any Legislation which on the date of this Agreement has been published

- (i) in a draft Bill as part of a Government Departmental Consultation Paper;
  - (ii) in a Bill;
  - (iii) in a draft statutory instrument; or
  - (iv) as a proposal in the Official Journal of the European Union;
- (b) any Guidance; or
- (c) any applicable judgement of a relevant court of law which changes a binding precedent;

**Change Procedure** means the procedure set out in Clauses 55 (*Qualifying Change in Law*) to 57A (*Implementation of Changes*) inclusive;

**Cleaning** means the cleaning services provided by the Contractor identified in Section B.5.8 of the Operational Services Specification.

**Collateral Deed** has the meaning given in the Master Definitions Schedule;

**Collateral Warranty** means the collateral warranties entitled Construction Direct Agreement, Services Direct Agreement and any other collateral warranty between the Authority and either (as the case may be) the Building Contractor, FM Contractor, a Building Sub-Contractor, or a member of the Professional Team in the Agreed Form;

**Commercially Sensitive Information** means any information which relates to pricing or other methodologies of the relevant party or which is agreed by the parties at the time of this Agreement or otherwise as being commercially sensitive;

**Community Education Services** means the provision of education services to adults within or outside School Hours, or to children outside School Hours, the provision of library services, the provision of access to the Authority's archives, and the provision of facilities for the purpose of cultural or sporting activities to the extent such services and activities are provided or undertaken within Core Times;

**Community Use** means use of a New Project Facility outside Core Times by the Authority, an Authority Related Party or any other person at the invitation of the Authority, including any persons who pay the Authority for the use of a New Project Facility;

**Compensation Date** has the meaning given to it in Clause 43 (*Definitions*);

**Competitive Tender** means a binding quote or tender price obtained following a tender process with a minimum of 3 reputable organisations possessing the appropriate expertise undertaken in good faith by or on behalf of the Contractor (subject to open book scrutiny at the reasonable request of the Authority), or, with the written agreement of the Authority (not to be unreasonably withheld or delayed), such lesser numbers as may put forward a tender;

**Compliant Tender** has the meaning given to it in Clause 43 (*Definitions*);

**Compliant Tenderer** has the meaning given to it in Clause 43 (*Definitions*);

**Conditions** has the meaning given to it in the Master Definitions Schedule;

**Conditions Precedent** means the conditions set out in Schedule Part 1;

**Consolidated Adjudication Costs** has the meaning given to it in Paragraph 46.3 of Schedule Part 18 (*Dispute Resolution Procedure*);

**Construction Programme** means (subject to Clause 17 (*Extensions of Time*)) the outline programme in relation to each Project Facility comprising part of the Works which, as at the Execution Date is in the Agreed Form, as amended from time to time in accordance with this Agreement;

**Contingent Funding Liabilities** means any contingent liabilities of the Shareholders in respect of financial obligations owed to the Contractor and/or Senior Lenders 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 deferred equity or Loan Note Commitments (as defined in the Equity Subscription Agreement) but excluding any guarantees or letters of credit issued in support of sub-contractors' obligations under the relevant sub-contracts;

**Contract Period** means the period from the Effective Date to the Expiry Date, or if earlier, the Termination Date;

**Contract Year** means each period of 12 calendar months during the Contract Period starting on 1 April, save for the first Contract Year which shall be the period commencing on the first Service Availability Date and ending on the next 31 March and the last Contract Year which shall be the period commencing on the 1 April preceding the earlier of the Termination Date and Expiry Date and ending on such earlier date;

**Contractor Commissioning** means any installation, commissioning, testing or running in of plant, machinery or facilities required to bring the New Project Facilities into compliance with the Facilities Requirements;

**Contractor Event of Default** means any of the events set out in Clause 35.1 (*Contractor Event of Default*);

**Contractor Notice of Change** has the meaning given to it in Clause 57.1 (*Contractor Notice of Change*);

**Contractor Plant and Equipment** means the fixed and moveable plant and equipment provided, maintained, repaired and insured by the Contractor at the New Project Facilities in terms of the Authority's Requirements and the Contractor's Proposals;

**Contractor's Conditions Precedent** means the Conditions Precedent set out in Section B of Schedule Part 1 (*Conditions Precedent*);

**Contractor's Proposals** means the proposals for the design, construction, financing and operation of the New Project Facilities, the demolition of certain Existing Project Facilities and provision of services set out in the document so entitled and in the Agreed Form as amended from time to time in accordance with this Agreement;

**Contractor Related Party** means:

- (a) an officer, servant or agent of the Contractor, or any Affiliate of the Contractor and any officer, servant or agent of such a person;
- (b) any sub-contractor of the Contractor of any tier and any of their officers, servants or agents; and
- (c) any person on or at any of the Project Facilities at the express or implied invitation of the Contractor or a sub-contractor of any tier of the Contractor (other than an Authority Related Party);

**Contractor's Representative** means the person to be appointed by the Contractor pursuant to Clause 12.1 (*Contractor's Representative*);

**Contractor's Share** means the percentage figure corresponding to the amount of Cumulative Capital Expenditure at the relevant time, as shown in the second column of the table set out in Schedule Part 10 (*Change in Law Contractor's Share*);

**Contractor Termination Notice** has the meaning given to it in Clause 35.3.2 (*Authority Default Termination*);

**Contractor Unavailability Notice** has the meaning given to it in Paragraph 10.3.2 of Part 5 of

Section A of Schedule Part 7 (*Payment Mechanism*);

**Core Times** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**COSHH Register** means a register of any substances within the Project Facilities which are governed by the Control of Substances Hazardous to Health (COSHH) Regulations 1999;

**Costs** has the meaning given to it in Clause 29.10 (*Income*);

**Costs of Adjudication** has the meaning given to it in Paragraph 24 of Schedule Part 18 (*Dispute Resolution Procedure*);

**Credit** has the meaning given to it in the EIB Loan Agreement;

**Cumulative Capital Expenditure** means the aggregate of

- (a) all Capital Expenditure which has been incurred as a result of each General Change of Law which has come into effect during the Operational Services Period; and
- (b) the amount of Capital Expenditure which is agreed, or determined to be required, as a result of a General Change in Law under Clause 55 (*Qualifying Change in Law*);

**Cut-Off Date** means 5.00pm on the date which is 60 days following the Execution Date;

**Data Room** means the room at The Highland Council PPP Offices, Drummond School, Drummond Road, Inverness which was set up by the Authority and which contained documents and other information related to the Project for inspection by the Contractor;

**Date of Possession** means, in respect of each Phasing Drawing, the dates set out in Schedule Part 23;

**Day** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Deadline Date** means:

- (1) in respect of Portree High School, the date falling 24 months after the Target Service Availability Date for that New Project Facility;
- (2) in respect of the remaining New Project Facilities, the date falling 18 months after the Target Service Availability Date for the relevant New Project Facility;

**Debt Service Reserve Account** has the meaning given to "Senior Debt Service Reserve Account" in the Master Definitions Schedule;

**Deduction** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Deduction Factor or DF** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Deduction Look-up Table** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Deduction Period or DP** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Deemed New Contract** has the meaning given to it in Clause 43 (*Definitions*);

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

**Design Data** means all material calculations, designs, design information, specifications, plans, programmes (other than computer programs), drawings, graphs, sketches, models, engineering and other forms of material data in whatever medium prepared or to be prepared by or on behalf of the Contractor for the Works, the implementation of a change under the Change Procedure or the operation or maintenance of the New Project Facilities including the Reviewable Design Data;

**Dingwall Academy** means the New Project Facility numbered "1" in Section B of Schedule Part 4 (*New Project Facilities*);

**Dingwall Permission** means the detailed planning permission number 05/00067/REMRC issued by The Highland Council on 29 June 2005 in respect of Dingwall Academy;

**Direct Agreement** means the agreement on or about the same date as this Agreement between the Authority, the Contractor and the Security Trustee;

**Disclosed Data** means information relating to the Project disclosed to the Contractor including;

- (a) the Information Memorandum issued by the Authority dated January 2003;
- (b) the ITN dated February 2004 and associated amendments and clarifications issued by or on behalf of the Authority to the Contractor;
- (c) all information in the Data Room at the Execution Date under exception of the information contained in Schedule Part 12 (*Employment Cost Data*); and
- (d) all Title Deeds exhibited to the Contractor in respect of the Project Facilities.

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

- (a) the Project and not to similar projects procured under the PFI;
- (b) the Contractor and not to other persons; or
- (c) PFI Contractors and not to other persons;

**Dispute** has the meaning given to it in Paragraph 1 of Schedule Part 18 (*Dispute Resolution Procedure*);

**Dispute Notice** has the meaning given to it in Clause 29.11 (*Income Sharing*);

**Dispute Resolution Procedure** means the procedure for the resolution of disputes set out in Clause 64;

**Disputed Amount** has the meaning given to it in Clause 33.4 (*Dispute Amounts*);

**Distribution** means:

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

extent (in each case) it was put in place after the Effective Date and was neither in the ordinary course of business nor on reasonable commercial terms; or

- (v) the receipt of any other benefit which is not received on reasonable commercial terms and in the ordinary course of business; or
- (b) the early release of any Contingent Funding Liabilities the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain;

**Distributions Account** has the meaning given in the Master Definition Schedule;

**Drummond School** means the Existing Project Facility known as Drummond School;

**DPA** means the Data Protection Act 1998 and any secondary legislation implemented thereunder;

**Educational Functionality** means the following matters:-

- (a) points of access to and between the buildings and egress from the buildings forming the New Project Facilities;
- (b) the relationship between the buildings forming the New Project Facilities;
- (c) the adjacencies between rooms and where relevant between departments within New Project Facilities; and
- (d) the quantity, description and areas of those rooms and spaces shown on the Educational Functionality Information (details of plans/drawings to be inserted into that definition),

but only insofar as the above relate to or affect the provision of Educational Services;

**Educational Functionality Information** means the information listed in Section 14 of Section A of the Contractor's Proposals;

**Educational Services** means the making available of school accommodation, the provision of teaching and pastoral support for children, the provision of careers advice, liaison with parents and guardians of pupils and related management and administration;

**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

**Effective Date** means the date on which the last Condition Precedent to be satisfied is satisfied or waived in accordance with Clause 4 (*Conditions Precedent*);

**Efficiency Factor** or **y** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**EIB Loan Agreement** has the meaning given to it in the Master Definitions Schedule;

**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;

**Employer** means the FM Contractor or any other provider of any of the Services which constitutes or will constitute one of the Services;

**Equity IRR** means the projected post-tax blended rate of return to the Relevant Persons over

the full term of the Agreement, having regard to Distributions made and projected to be made;

**Equity Subscription Agreement** means the Funding Agreement with that name dated on or around the Effective Date and entered into by the Contractor, HoldCo, the Issuer, the Shareholders, the Bond Trustee, the Security Trustee, Ambac and European Investment Bank as amended or varied from time to time in accordance with the provisions of this Agreement;

**Estimate** has the meaning given to it in Clause 56.1.4.1 (*Authority Changes*);

**Estimated Change in Project Costs** means, subject to Paragraph 1.1 of Section B of Schedule Part 7 (Payment Mechanism), the aggregate of any estimated increased design and construction, operating (including lifecycle), financing and insurance costs less the aggregate of any reduced design and construction, operating (including lifecycle), financing and insurance costs, which result directly from a Works Compensation Event, a Services Compensation Event, a Qualifying Change in Law or an Authority Change (as the case may be), subject, in the case of a Qualifying Change in Law or an Authority Change, to the following provisos:

- (a) in the case of works to be undertaken at a Project Facility,
  - (i) prior to the Service Availability Date or relevant External Works Availability Date (where the works relate to the External Works other than the Grass Playing Fields) or the relevant Grass Playing Fields Availability Date (where the works relate to the Grass Playing Fields) for that Project Facility; or
  - (ii) at any time after Service Availability Date for that Project Facility where the estimated construction cost of the works is less than £25,000 (Indexed),  
  
will comprise a Benchmarked Price and otherwise shall comprise a Competitive Tender;
- (b) in the case of services, where the estimated increase in the operating costs is more than £10,000, and it is practicable to do so, will comprise a Competitive Tender, and otherwise will comprise a Benchmarked Price; and
- (c) to avoid doubt, any estimated costs or savings in maintaining and replacing assets at any time prior to the Expiry Date which result from any works shall be deemed to be a cost or saving (as applicable) in operating costs resulting directly from a Works Compensation Event or a Services Compensation Event or a Qualifying Change in Law or an Authority Change, as the case may be;

**Estimated Fair Value** has the meaning given to it in Clause 43 (*Definitions*);

**Execution Date** means the last date of execution of this Agreement by the parties;

**Existing Project Facility** means each facility listed in Section A of Schedule Part 4 (*Project Facilities*) and the Site relative to such facility;

**Exempt Refinancing** means:

- (a) any Refinancing that was fully taken into account in the calculation of the Unitary Charge;
- (b) a change in taxation or change in accounting treatment;
- (c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:
  - (i) breach of representations and warranties or undertakings;
  - (ii) movement of monies between the Project Accounts in accordance with the terms of the Senior Funding Agreements as at Financial Close;

- (iii) late or non-provision of information, consents or licences;
  - (iv) amendments to Sub-Contracts;
  - (v) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Funding Agreements)
  - (vi) restrictions imposed by the Senior Lenders on the dates at which the Senior Debt can be advanced to the Contractor under the Senior Funding Agreements and/or amounts released from the Escrow Account during the period prior to the Final Service Availability Date, each as defined in the Master Definitions Schedule and which are given as a result of any failure by the Contractor to ensure that the construction work is performed in accordance with the agreed construction programme and which are notified in writing by the Contractor or the Senior Lenders to the Authority prior to being given;
  - (vii) changes to milestones for drawdown and/or amounts released from the Escrow Account during the period prior to the Final Service Availability Date, each as defined in the Master Definitions Schedule, set out in the Senior Funding Agreements and which are given as a result of any failure by the Contractor to ensure that construction work is performed in accordance with the agreed construction programme and which are notified in writing by the Contractor or the Senior Lenders to the Authority prior to being given;
  - (viii) failure by the Contractor to obtain any consent by statutory bodies required by the Senior Funding Agreements; or
  - (ix) voting by the Senior Lenders and the voting arrangements between the Senior Lenders in respect of the levels of approval required by them under the Senior Funding Agreements;
- (d) any amendment, variation or supplement of any agreement (other than any Subordinated Funding Agreement) approved by the Authority as part of any Qualifying Variation under this Agreement;
  - (e) any sale of shares in the Contractor, the Issuer or HoldCo by the shareholders or securitisation of the existing rights and/or interests attaching to shares in the Contractor, the Issuer or HoldCo;
  - (e) any sale or transfer of the Subordinated Lenders' existing rights and/or interests under the Subordinated Funding Agreements or securitisation of the Subordinated Lenders' existing rights and/or interests under the Subordinated Funding Agreements; or
  - (f) any Qualifying Bank Transaction;

**Expiry Date** means the date falling 30 years after (but including) the Target Service Availability Date for the first New Project Facility;

**External Works** has the meaning given to that term in Section A of Schedule Part 5 (*Service Availability Requirements*);

**External Works Availability** means the satisfaction of the External Works Availability Requirements in relation to any External Works;

**External Works Availability Date** means, in relation to External Works (other than the Grass Playing Fields) at a New Project Facility, the date of issue of an Acceptance Certificate in respect of such External Works (other than the Grass Playing Fields) or the date determined as the date on which External Works Availability occurred in relation to such External Works (other than the Grass Playing Fields) under the Dispute Resolution Procedure;

**External Works Availability Requirements** means the requirements set out in Section B of Schedule Part 5 (*External Works Availability Requirements*);

**Facilities Requirements** means the document so entitled forming part of the Authority's Requirements as amended in accordance with the Change Procedure;

**Failure** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Fair Value** has the meaning given to it in Clause 43 (*Definitions*);

**Final Survey** has the meaning given to it in Clause 41.2 (*Final Survey*);

**Financial Close** means the Effective Date;

**Financial Model** means the financial model in the Agreed Form as more particularly described in the Financial Supplement (as updated from time to time in accordance with the terms of this Agreement) for the purpose of calculating the Unitary Charge;

**Financial Supplement** means the agreement with that title between the Authority and the Contractor dated on or before the Effective Date;

**Flexible Use** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Flexible Use Deductions or FD** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Flexible Use Hours** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Flexible Use Hours Cap** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**FM Agreement** means the agreement under which the FM Contractor is to provide the Services to the Contractor which, as at the Effective Date, is in the Agreed Form;

**FM Contract Dispute** has the meaning given to it in Paragraph 48A.2 of Schedule Part 18 (*Dispute Resolution Procedure*);

**FM Contractor** means Morrison Facilities Services Limited (company registered number SC120550) or such other facilities management contractor as the Contractor may, subject to Clause 67.3 (*Assignment and Sub-Contracting – Exception*) appoint to provide the Services, or part of them;

**Force Majeure Event** means the occurrence after the date of this Agreement of:

- (a) war, civil war, armed conflict or terrorism; or
- (b) nuclear, chemical or biological contamination unless the source or cause of the contamination is as a result of the acts or omissions of the Contractor or a Contractor Related Party; or
- (c) pressure waves caused by devices travelling at supersonic speeds,

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

**Funding Agreements** means all or any of the agreements or instruments entered into or to be entered into by the Contractor or any of its Associated Companies relating to the financing of the Project (including the Initial Funding Agreements and any agreements or instruments to be entered into by the Contractor or any of its Associated Companies relating to the rescheduling of their indebtedness or any Refinancing);

**General Change in Law** means a Change in Law which is not a Discriminatory Change in

Law or a Specific Change in Law;

**Good Industry Practice** means that degree of skill, care, prudence and foresight and operating practice or generally recognised industry or service standard which:

- (a) would reasonably and ordinarily be expected from time to time of a skilled and experienced operator (engaged in the same type of undertaking as that of the Contractor) or FM Contractor or Building Contractor or any sub-contractor under the same or similar circumstances; or
- (b) (where there is no equivalent type of undertaking) would be expected from a prudent and experienced person in order to implement the specific task set out in this Agreement;

**Grass Playing Fields** has the meaning set out in Section A of Schedule Part 5 (*Service Availability Requirements*);

**Grass Playing Fields Availability** means the satisfaction of the Grass Playing Fields Availability Requirements in relation to any Grass Playing Fields;

**Grass Playing Fields Availability Date** means, in relation to the Grass Playing Fields at a New Project Facility, the date of issue of an Acceptance Certificate in respect of such Grass Playing Fields or the date determined as the date on which the Grass Playing Fields Availability occurred in relation to such Grass Playing Fields under the Dispute Resolution Procedure;

**Grass Playing Fields Availability Requirements** means the requirements set out in Section C of Schedule Part 5 (*External Works Availability Requirements*);

**Gross Income** has the meaning given to it in Clause 29.10 (*Income*);

**Gross Service Units or GSU** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Gross Service Units Affected or GSUA** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Growing Month** means each and all of April, May, June, July, August, and/or September;

**Guaranteed Investment Contract** has the meaning given to it in the Master Definitions Schedule;

**Guidance** means any applicable guidance, code of practice, or directions with which the Contractor is bound to comply;

**Handback Requirements** means that, as at the Expiry Date:

- (a) each New Project Facility is structurally sound and that it is safe to be used as a school;
- (b) each New Project Facility is in a good and substantial condition;
- (c) each New Project Facility is in good decorative order;
- (d) each building element (as defined in Appendix III of the Standard Form of Cost Analysis published by the Building Cost Information Service of The Royal Institution of Chartered Surveyors, December 1969, September 1999 Reprint) of the New Project Facilities can reasonably be expected to have a minimum useful residual life span equal to or greater than five years, on the assumption that Routine Maintenance (but no other maintenance) is carried out on each such building element;
- (e) each item of Contractor Plant and Equipment for which the manufacturer has given a guarantee, warranty, or other written guidance as to its useful working life, is in good

order and repair, is operating efficiently, and can reasonably be expected to have a service life, and to be capable of being used or operated safely by the Authority, for a minimum period of five years after the Expiry Date without cost other than the cost of Routine Maintenance and consumables, on the assumption that such Contractor Plant and Equipment is maintained in accordance with the relevant manufacturer's written instructions; and

- (f) each item of Contractor Plant and Equipment not falling within paragraph (e) above, is in good order and repair, is operating efficiently and can reasonably be expected to have a service life, and to be capable of being used or operated safely by the Authority, for a minimum period of five years after the Expiry Date, without cost other than the cost of Routine Maintenance and consumables, on the assumption that the Authority carries out Routine Maintenance on such Contractor Plant and Equipment during that period of five years;
- (g) where maintenance or service contracts exist or are required by the Authority in terms of the Authority's Requirements in relation to any item of Contractor Plant and Equipment, the Contractor has, or has procured, that the benefit of such maintenance or service contracts is transferred to the Authority at no cost to the Authority;

**Helpdesk** means the helpdesk facilities established by the Contractor pursuant to the Operational Services Specification and as defined in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Highest Compliant Tender Price** has the meaning given to it in Clause 43 (*Definitions*);

**Holding Company** has the meaning given to it in Section 736 of the Companies Act 1985, as amended by Section 144 of the Companies Act 1989;

**HoldCo means** Alpha Schools (Highland) Holdings Limited (registered number 05508168) having its registered office at Anglian House, Ambury Road, Huntingdon, Cambridgeshire, PE29 3NZ ;

**Income Notice** has the meaning given to it in Clause 29.11 (*Income Sharing*);

**Indemnifying Party** has the meaning given to it in Clause 60.7 (*Notification of Claims*);

**Indemnified Party** has the meaning given to it in Clause 60.7 (*Notification of Claims*);

**Indexed** has the meaning given to it in Clause 1.5 (*Indexation*);

**Indexation Adjustment or IA** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Initial Funding Agreements** means the Funding Agreements put in place on or around execution of this Agreement and/or on or around the Effective Date as detailed in Section B of Schedule Part 6, as the same may be amended from time to time in accordance with Clause 7.2 (*Changes to Funding Agreements*);

**Instalment Option** has the meaning given in Clause 43 (*Definitions*);

**Insurance Undertaking** has the meaning given in the rules from time to time of the Financial Services Authority

**Intellectual Property Rights** means any and all patents, trade marks, service marks, copyright, moral rights, rights in a design, know how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attached thereto;

**Irrecoverable VAT** has the meaning given to it in Clause 33.10.5 (*VAT*);

**Issuer** means Alpha Schools (Highland) Project plc a company incorporated in England and Wales with registered number 05516176 having its registered office at Anglian House, Ambury Road, Huntingdon, Cambridgeshire, PE29 3NZ;

**Joint Insurance Account** means an account in the joint names of the Authority and the Contractor to which shall be credited all insurance proceeds from any Physical Damage Insurance Policies;

**Judicial Review** means judicial review under Chapter 58 of the Rules of the Court of Session or any statutory challenge or appeal against the Authority or the Scottish Executive which proceeds on principles similar to judicial review, which concerns the legality of any grant of planning permission.

**Key Dates** means the dates specified in the table in Section B of Schedule Part 4 (*New Project Facilities*);

**Kitchen Facilities** means the cooking facilities and food preparation area(s) in each New Project Facility (excluding to avoid doubt any areas used for dining or consuming food and any cooking facilities and food preparation area(s) forming part of any teaching space in a New Project Facility);

**Latent Defects** means any defect in any of the Buildings, or any part of them, or anything installed in the Buildings attributable to:

- (a) defective design;
- (b) defective workmanship or defective materials, plant or machinery used in such construction having regard to Good Industry Practice and to appropriate British standards and codes of practice current at the date of construction of the Building;
- (c) defective installation of anything in or on the Buildings including but not limited to plant, but not extending to damage of loose equipment;
- (d) defective preparation of the Site on which the Building is constructed; or
- (e) defects brought about by adverse ground conditions or by reason of subsidence, water table change or any other change to ground conditions;

**Legislation** means in relation to the United Kingdom:

- (a) any Act of Parliament including the Scottish Parliament;
- (b) any subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978;
- (c) any exercise of the Royal Prerogative; and
- (d) any enforceable community right within the meaning of section 2 of the European Communities Act 1972;

**Lenders** means the Senior Lenders and the Subordinated Lenders;

**Liaison Committee** means the liaison committee established pursuant to Clause 53.1 (*Liaison with Schools*);

**Liaison Procedure** means the procedure set out in Schedule Part 11 (*Liaison Procedure*);

**Liquid Market** has the meaning given to it in Clause 43 (*Definitions*);

**Local Government Scheme** has the meaning given to it in Clause 30.2.2.1 (*Contractor Responsibilities*);

**Logged Failure Time** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Logged Rectification Time** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Losses** has the meaning given to it in Clause 43 (*Definitions*);

**Maintenance Programme** means the programme for carrying out maintenance (including lifecycle replacement and maintenance) and repair works to the New Project Facilities during each Contract Year to be prepared and submitted to the Authority pursuant to Clause 24.4.1 (*Maintenance Programme*);

**Major Maintenance Reserve Account** has the meaning given to it in the Master Definitions Schedule;

**Majority Creditor** has the meaning given in the Master Definitions Schedule;

**Malicious Damage Cap** means, in respect of all New Project Facilities in the Contract Year:

- (a) commencing 1 April 2006, nil;
- (b) commencing 1 April 2007, the sum of £12,327 Indexed;
- (c) commencing 1 April 2008, the sum of £66,817 Indexed; and
- (d) commencing 1 April 2009 and in each Contract Year thereafter, the sum of £80,000 Indexed;

**Malicious Damage Net Costs** means, at any time during a Contract Year the aggregate (without double-counting) of the reasonable and properly incurred costs of the Contractor in carrying out or procuring the carrying out of repairs, replacements or additional cleaning pursuant to Clause 83.2 (*Contractor's Obligations*) in respect of malicious damage which has occurred to date during that Contract Year (including sums which the Contractor is obliged to pay but may not yet have paid) under deduction of all proceeds which are available under the insurance policies referred to in Clause 61.1 (*Requirement to Maintain*) in respect of malicious damage which has occurred to date during that Contract Year;

**Malicious Damage Rectification Programme** has the meaning given to it in Clause 83.9.2.1;

**Market Cost** has the meaning given to it in Clause 28.1.2 (*Benchmarking*);

**Market Testing** means market testing in accordance with Clauses 28.2 to 28.4 (*Market Testing*);

**Market Testing Proposal** has the meaning given to it in Clause 28.4.2 (*Market Testing Procedure*);

**Market Testing Review Date** has the meaning given to it in Clause 28.2 (*Market Testing Review Dates*);

**Market Value Availability Deduction Amount** has the meaning given to it in Clause 43 (*Definitions*);

**Master Definitions Schedule** means the document of that name in the Agreed Form;

**Maximum Unitary Charge** has the meaning given to it in Clause 43 (*Definitions*);

**Minimum Availability Deduction** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Minimum Performance Deduction** has the meaning given to it in Part 1 of Section A of

Schedule Part 7 (*Payment Mechanism*);

**Month** has the meaning given to it in Clause 43 (*Definitions*);

**Monthly Invoice** has the meaning given to it in Clause 33.2 (*Monthly Invoice*);

**Monthly Net Charge or MNC** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Monthly Unitary Charge or MUC** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Multiplier** or **M** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**NCC** means National Computer Centre Limited;

**NPI Factor** has the meaning given to it in Paragraph 4.5 of Part 6 of Section A of Schedule Part 7 (*Payment Mechanism*);

**NPI Review Date** has the meaning given to it in Paragraph 6 of Part 6 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Necessary Consents** means all approvals, permissions, consents, licences, certificates and authorisations (whether statutory or otherwise) which are required for the purposes of carrying out the Project, whether required in order to comply with Legislation or as a result of the rights of any third party;

**Net Income** has the meaning given to it in Clause 29.10 (*Income*);

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

**New Contract** has the meaning given to it in Clause 43 (*Definitions*);

**New Contractor** has the meaning given to it in Clause 42.1 (*Duty to Co-operate*) and 43 (*Definitions*);

**New Project Facility** means each facility listed in Section B of Schedule Part 4 (*New Project Facilities*) and the Site relative to such facility;

**New Supplier** any successor to the Contractor (including for the avoidance of doubt the Authority) in the provision of services which are equivalent or identifiably similar to the Operational Services upon the cessation of provision of the Operational Services by the Contractor; or upon the partial cessation of the provision of the Operational Services by the Contractor, any successor to the Contractor in the provision of services which are equivalent or identifiably similar to that part or those parts of the Operational Services which are to cease to be provided by the Contractor;

**Nominator** has the meaning given to it in Paragraph 7 of Schedule Part 18 (*Dispute Resolution Procedure*);

**Non School Day** means a day other than a School Day, Christmas Day or New Year's Day;

**Operating Manual** has the meaning given to it in Clause 32.1 (*Maintenance of Manual*);

**Operational and Maintenance Proposals** means the document so entitled forming part of the Contractor's Proposals relating to the operation and maintenance of the New Project Facilities in accordance with the Operational Services Specification;

**Operational Services** means the services required to satisfy the Operational Services Specification;

**Operational Services Period** means the period from and including the Service Availability Date for the New Project Facility until and including the earlier of the Termination Date and the Expiry Date;

**Operational Services Specification** means the specification set out in the document so entitled forming part of the Authority's Requirements as amended in accordance with the Change Procedure;

**Original Senior Commitment** means:

- (a) the gross Bond proceeds excluding the proceeds of the Variation Bonds to be raised under the Senior Funding Agreements; and
- (b) the amount committed under the Senior Funding Agreements other than the gross Bond proceeds and the proceeds of the Variation Bonds, being the Credit from EIB,

in each case as at Financial Close (as adjusted to take into account any Qualifying Variation);

**Pass-Through Costs** means rates levied in respect of New Project Facilities;

**Payment Period** means, a calendar month during the Contract Period, save for:

- (a) the first Payment Period which shall be the period commencing on the first Service Availability Date and ending on the last day of the same calendar month; and
- (b) the last Payment Period which shall be the period commencing on the first day of the last Payment Period and ending on the Expiry Date or the Termination Date, if earlier;

**Performance and Payment Report** has the meaning given to it in Clause 33.6 (*Monthly Reconciliations*);

**Performance Deduction or PD** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Performance Failure** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Performance Standards** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

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

- (a) advance to the Contractor under the Senior Funding Agreements;
- (b) Additional Permitted Borrowing;
- (c) not used; and
- (d) interest and, in respect of the Initial Funding Agreements only (prior to any subsequent amendment), other amounts accrued or payable under the terms of the Senior Funding Agreements;

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

**Persistent Breach** means a breach of this Agreement which recurs in four or more Payment Periods within six months after the date falling one month after the date on which a Persistent Breach Final Notice in respect of such breach referred to in Clause 36.2 is served on the Contractor;

**Persistent Breach Final Notice** has the meaning given to it in Clause 36.2 (*Persistent Breach Final Notice*);

**Persistent Breach Warning Notice** has the meaning given to it in Clause 36.1 (*Persistent Breach Warning Notice*);

**Personal Data** means personal data within the meaning of Section 1(1) of the DPA which is supplied to the Contractor by the Authority or obtained by the Contractor in the course of performing the Services or vice versa;

**Phasing Drawings** means the drawings set out in Appendix A to Schedule Part 23 (*Dates of Possession*);

**Physical Damage Insurance Policies** means the Construction "All Risks" and Property "All Risks" insurances referred to in Schedule Part 15 (*Insurances*);

**PFI** means the UK Government's Private Finance Initiative or any similar or replacement initiative;

**PFI Contractor** means a person that has contracted with the Government, a local authority or other public or statutory body to provide services under the PFI;

**Portree High School** means the New Project Facility numbered "2" in Section B of Schedule Part 4 (*New Project Facilities*);

**Portree Permission** means the detailed planning permission number 05/00048/REMSL issued by the The Highland Council on 30 June 2005 in respect of Portree High School;

**Post Termination Service Amount** has the meaning given to it in Clause 43 (*Definitions*);

**Pre-Refinancing Equity IRR** means the nominal post tax Equity IRR calculated immediately prior to a Refinancing;

**Prescribed Rate** means 2 per cent. per annum above the base rate from time to time of City Bank NA, London Branch;

**Procurement Rules** means the Legislation in force from time to time in respect of the procurement of goods, works, and/or services by or on behalf of public sector bodies;

**Professional Team** means:

(a) the professional team employed by the Building Contractor in connection with the Works being, at the Execution Date:

Keppie Design Limited	Architect
A F Cruden Associates	Structural Engineer
Wallace Whittle Limited	M&E Engineer; and

(b) the professional team employed by the Contractor in connection with the Works being, at the Execution Date:

Armours & Partners	Planning Supervisor
McLeod & Aitken	Planning Supervisor,

or such other parties as may be appointed from time to time in the carrying out of these roles;

**Prohibited Act** means:

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

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

- (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Authority; or
- (b) entering into this Agreement or any other contract with the Authority in connection with which commission has been paid or has been agreed to be paid by the Contractor or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Authority; or
- (c) committing any offence:
  - (i) under the Prevention of Corruption Acts 1889-1916; or
  - (ii) under Legislation creating offences in respect of fraudulent acts; or
  - (iii) at common law in respect of fraudulent acts in relation to this Agreement or any other contract with the Authority; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Authority;

**Prohibited Materials** means those goods, products or materials that are not in accordance with guidance in the publication “Good Practice in Selection of Construction Materials” (1997: Ove Arup & Partners) and any goods, products or materials not in conformity with relevant British or European Union Standards or codes of practice which at the time of use are widely known to building contractors or members of the relevant design profession within the European Union to be deleterious to health or safety and/or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used;

**Project** means the provision of serviced accommodation to the Authority at the New Project Facilities by the Contractor as contemplated by this Agreement including the carrying out of the Works and the provision of the Operational Services;

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

**Project Data** means:

- (a) all Design Data;
- (b) all drawings, reports, documents, plans, formulae, calculations and other data relating to the carrying out of the Works or the provision of the Services;
- (c) any other materials, documents or data acquired brought into existence or used in relation to the Works, the Services or this Agreement;

**Project Documents** means the agreements listed in Section A of Schedule Part 6 (*Project Documents*);

**Project Facilities** means the Existing Project Facilities and the New Project Facilities;

**Project IRR** as defined in Clause 43 (*Definitions*);

**Property Agreements** means the property agreements listed in Schedule Part 16 (*Property Agreements and Title Provisions*);

**Qualifying Bank Transaction** means:

- (a) the syndication, re-insurance or other transfer or grant of rights by a Senior Lender in the ordinary course of its business, of any of its rights or interests in the Senior Funding Agreements;
- (b) the grant by a Senior Lender of any rights of participation or the disposition by a

Senior Lender of any of its rights or interests (other than as specified in paragraph (a) above), in respect of the Senior Funding Agreements in favour of (i) any other Senior Lender (ii) any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EEA member state (iii) a local authority or public authority (iv) a trustee of a charitable trust which has (or has had at any time during the previous two years) assets of at least £10 million (or its equivalent in any other currency at the relevant time) (v) a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two years) at least 50 members and assets under management of at least £10 million (or its equivalent in any other currency at the relevant time) (vi) an EEA or Swiss Insurance Undertaking (vii) a Regulated Collective Investment Scheme (viii) any Qualifying Institution or (ix) any other institution in respect of which the prior written consent of the Authority has been given;

- (c) the grant by a Senior Lender of any other form of benefit or interest in either the Senior Funding Agreements or the revenues or assets of the Contractor and/or HoldCo and/or the Issuer, whether by way of security or otherwise, in favour of (i) any other Senior Lender (ii) any institution specified in paragraphs (b)(ii) to (vii) above (iii) any Qualifying Institution or (iv) any other institution in respect of which the prior written consent of the Authority has been given;

**Qualifying Change in Law** means:

- (a) a Discriminatory Change in Law;
- (b) a Specific Change in Law; and/or
- (c) a General Change in Law which comes into effect during the Operational Services Period and which involves Capital Expenditure,

which was not foreseeable at the Execution Date;

**Qualifying Institution** means:

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

**Qualifying Refinancing** means any Refinancing that will give rise to a Refinancing Gain

greater than zero that is not an Exempt Refinancing;

**Qualifying Variation** means either:

- (a) a change in the Works and/or Services in respect of which an Authority Notice of Change has been served and the Authority has confirmed the Estimate and, where the Contractor is not funding all or part of the required Capital Expenditure, the Authority has agreed to meet all or the remaining part (as appropriate) of such Capital Expenditure; or
- (b) a Qualifying Change in Law;  
  
and in respect of which any documents or amendments to the Project Documents which are required to give effect to such change in the Works and/or Services have become unconditional in all respects;

**Receiving Scheme** has the meaning given to it in Clause 30.2.2.3 (*Contractor Responsibilities*);

**Recipient** has the meaning given to it in Clause 33.10.2 (*VAT*);

**Rectification Costs** has the meaning given to it in Clause 43 (*Definitions*);

**Rectification Period** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Rectification Programme** means the rectification programme prepared by the Contractor and referred to in Clauses 35.2.3.4 (*Termination by the Authority*) and agreed or determined pursuant to Clause 35.2.4;

**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 Funding Agreements (other than the Subordinated Funding Agreements) or the contracts, the revenues or assets of Contractor, whether by way of security or otherwise; or
- (d) any other arrangement put in place by the Contractor or another person which has an effect which is similar to any of (a) to (c) above or which has the effect of limiting the Contractor's ability to carry out any of (a) to (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 and using the Base Case as updated (including as to performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the following term of the Agreement following the Refinancing:

B = Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Base Case as updated (including as to 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 the 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;

**Reimbursement and Indemnity Agreement** has the meaning given in the Master Definitions Schedule;

**Reinstatement Plan** has the meaning given to it in Clause 62.3.1 (*Reinstatement Obligations*);

**Reinstatement Works** has the meaning given to it in Clause 62.3.1 (*Reinstatement Obligations*);

**Related Adjudicator** has the meaning given to it in Paragraph 46 of Schedule Part 18 (*Dispute Resolution Procedure*);

**Related Agreements** has the meaning given to it in Paragraph 34 of Schedule Part 18 (*Dispute Resolution Procedure*);

**Related Dispute** has the meaning given to it in Paragraph 34 of Schedule Part 18 (*Dispute Resolution Procedure*);

**Related Procedure** has the meaning given to it in Paragraph 34 of Schedule Part 18;

**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 Executive or the Scottish Parliament;

**Relevant Employee** means any Authority Employee listed in Schedule Part 12 (*Employment Cost Data*) the subject of a Relevant Transfer pursuant to Clause 30.1 (*TUPE*);

**Relevant Incident** has the meaning given to it in Clause 62.3 (*Reinstatement Obligations*);

**Relevant Judicial Review** means Judicial Review which has not arisen on the grounds of failure by the Contractor or any Contractor Related Party to comply with statutory procedure or on the grounds of commission of any unlawful act or acts by the Contractor or any Contractor Related Party;

**Relevant Person** means a Shareholder and any of its Affiliates;

**Relevant Proceeds** has the meaning given to it in Clause 62.3.2.3 (*Reinstatement Obligations*);

**Relevant Transfer** means a relevant transfer for the purposes of TUPE, or a transfer which the Authority advises the Contractor is to be treated as if it were a relevant transfer for the purposes of TUPE;

**Relief Amount** has the meaning given to it in Clause 23.3 (*Services Compensation Event*);

**Relief Event** means any of the following:

- (a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks apparatus or pipes, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, riot and civil commotion;
- (b) failure by any statutory undertaker, utility company, local authority (other than the Authority) or other like body to carry out works or provide services;
- (c) any accidental loss or damage to the Sites or the Works or any roads servicing them;

- (d) any failure or shortage of power, fuel or transport;
- (e) any blockade or embargo which does not constitute a Force Majeure Event; or
- (f) any:
  - (i) official or unofficial strike;
  - (ii) lock out;
  - (iii) go slow; or
  - (iv) other dispute (“industrial action”);

generally affecting the construction, building maintenance or facilities management industries in the United Kingdom or a significant sector of any of them, but not including industrial action specific to the Sites or industrial action which affects only the employees of the Contractor or its sub-contractors of any tier;

- (g) Archaeological Finds
- (h) an application for Relevant Judicial Review in relation to the Dingwall Permission and/or the Portree Permission made within the period of three months from the Effective Date including, without prejudice to the foregoing generality, the issue of a decision revoking, quashing or withdrawing a planning permission following such an application for Judicial Review,

unless any of the events listed in paragraphs (a) to (h) inclusive arises directly or indirectly as a result of any wilful default or wilful act of the Contractor or any of its sub-contractors;

**Repeated Failure** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Repeated Failure Deduction** or **RFD** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Reporting Failure** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Reporting Failure Deduction** or **RD** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Required Action** has the meaning given to it in Clause 58.3 (*Action by Authority*);

**Required Deductions** has the meaning given to it in Clause 33.6.5 (*Monthly Reconciliations*);

**Required Standard** has the meaning given to it in Clause 41.5 (*Results of Survey*);

**Reserved Rights** means (1) rights of pedestrian and (save in respect of (c) below) vehicular access and egress over the Site of (a) Millburn Academy by the Authority or Authority Related Parties to the area shown edged in blue on the Millburn Academy Site Plan (b) Portree High School to the area shown edged in blue on the Portree High School Site Plan (c) Drummond Special School for the purpose of access to and egress from adjoining land currently owned by Authority (such access to be pedestrian only during the Works Period) and (d) Kinlochleven Campus by the Authority or Authority Related Parties to the land adjoining the River Leven for the purposes of carrying out works on or to the same as authorised by the Authority along such reasonable route designated by the Contractor from time to time and (2) the rights of the owner, tenants and occupiers of the area of ground shown outlined in blue on the Site Plan of Portree High School, currently known as Elgin Hostel, to park six cars in the car parking spaces existing from time to time in the area surrounding Elgin Hostel and (3) the existing public right of way exercisable over the Site of Portree High School;

**Restricted Share Transfer** means a transfer of shares in the Contractor or HoldCo to any

person engaged, or with substantial interests, in gambling, gaming, the production or sale of alcoholic drinks, the production or sale of products containing or derived from tobacco, or the manufacture or sale of arms and weapons;

**Retention Fund Account** has the meaning given to it in Clause 41.1 (*Retention Fund*);

**Re-transfer Date** means the date on which any cessation or partial cessation referred to in Clause 30.6 (*TUPE upon Cessation*) takes effect so as to transfer the contracts of employment of the Re-transferring Employees by virtue of TUPE;

**Re-transferring Employees** means those employees of the Contractor, the FM Contractor or any other provider of any of the Services which constitutes or will constitute one of the Services who are assigned to the provision of those part(s) of the Services which are to cease to be provided immediately prior to the cessation or partial cessation of the provision of the Services;

**Review Procedure** means the procedure set out in Schedule Part 9 (*Review Procedure*);

**Reviewable Design Data** means the plans, drawings, documents and information relating to the Works listed in Appendix A to the Review Procedure;

**Revised Senior Debt Termination Amount** means, subject to Clause 7.2 (*Changes to Funding Agreements*)

- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the Contractor to the Senior Lenders under the Senior Funding Agreements including in respect of Permitted Borrowing other than any such amounts that are in respect of Additional Permitted Borrowings;
- (b) all amounts of Additional Permitted Borrowings including interest but excluding Default Interest outstanding at the Termination Date, including such Additional Permitted Borrowings accrued at that date; and
- (c) other than amounts falling within paragraph (a), all amounts (or if the prepayment referred to below has not occurred by the Termination Date, that which would have become payable should such prepayment occur on the Termination Date) including costs of early termination of interest rate hedging arrangements and other Breakage Costs, payable by the Contractor to the Senior Lenders as a result of a prepayment under the Senior Funding Agreements including in respect of Permitted Borrowing and any amounts which are payable in respect of the Bonds and in respect of Permitted Borrowings calculated in accordance with the definition of "Default Amount" at Condition 9(e) of the Bonds, if the Bonds are redeemed early subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible unless the amount, the method or the formula for determining the amount of such costs are fixed in advance under the terms of the relevant Senior Funding Agreements),

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

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account and the Distributions Account and, if the Authority selects the Instalment Option, the Debt Service Reserve Account) held by or on behalf of the Contractor on the Termination Date which are freely available for the repayment of Senior Debt;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Contractor as a result of prepayment of amounts outstanding under the

Senior Funding Agreements including in respect of Permitted Borrowing;

- (iv) all other amounts (except insurance proceeds in respect of third party liabilities) received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have; and
- (v) all APB Distributions;

**Routine Maintenance** means reactive and planned maintenance and repair activities (including checks and services carried out in line with manufacturers' specifications and Good Industry Practice and Applicable Standards) but excluding substantial or complete replacement of any element or the majority of its constituent parts;

**RPIX** means the index published in Table 5 (excluding mortgage interest payments) of Business Monitor (MM23) published by the Office of National Statistics or if that index ceases to be published or the basis upon which such index is calculated is substantially changed or rebased, such substitute or alternative index measuring inflation in the United Kingdom most likely to achieve an equivalent result as the parties may agree or, in the absence of agreement, as shall be determined pursuant to the Dispute Resolution Procedure;

**Rules** has the meaning given to it in Paragraph 1 of Schedule Part 18 (*Dispute Resolution Procedure*);

**School Day** has the meaning given to it in Part 1 of Section A of Part 7 of the Schedule;

**School Hours** means 0830 to 1630 on each School Day;

**School Representative** means the person specified in Clause 12.6.1;

**Security Trustee** has the meaning given in the Master Definitions Schedule;

**Senior Debt** means the financing provided by the Senior Lenders under the Senior Funding Agreements;

**Senior Debt Interest Rate** has the meaning given to it in Clause 43 (*Definitions*);

**Senior Funding Agreements** means the agreements listed in Part 1 of Section B of Schedule Part 6 (*Transaction Documents*) in the Agreed Form or as amended in accordance with Clause 7.2 (*Changes to Funding Agreements*);

**Senior Lenders** has the meaning given to "Senior Creditors" in the Senior Funding Agreements;

**Service Availability** means in relation to a New Project Facility, satisfaction of the Service Availability Requirements;

**Service Availability Date** means the date of issue of an Acceptance Certificate in respect of the relevant New Project Facility (other than the External Works and the Grass Playing Fields) or the date determined under the Dispute Resolution Procedure as the date on which Service Availability occurred;

**Service Availability Requirements** means the requirements set out in Section A of Schedule Part 5 (*Service Availability Requirements*);

**Service Response Priority Level 1, 2, 3, 4 or 5** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Service Unit Base Rate or SUBR** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Service Unit Rate or SUR** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Service Units Affected or SUA** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Service Units or SU** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Service Units per School or SUS** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Services** means the Operational Services;

**Services Compensation Event** means:

- (a) a breach by the Authority of any of its obligations (a) under Clause 58 (Authority Step-in) of this Agreement or (b) which prevents the Contractor performing its obligations (other than in respect of the Works);
- (b) opening up pursuant to Clause 20.3 (*Opening Up for Inspection*) which subsequently shows that the works, materials or goods concerned complied with this Agreement or the carrying out of a survey pursuant to Clause 24.2 (*Surveys*) which subsequently fails to show that the Contractor has been in breach of Clause 23.2 (*Standard of Performance*) or Clause 24.1 (*Maintenance*);
- (c) the carrying out of works or services at any Project Facility by the Authority or an Authority Related Party;
- (d) the exercise by any person at any time after the Execution Date of a right to work or search for coal or other minerals, which may be situated on or beneath any Site;
- (e) The existence at the Kinlochleven Site after the first Date of Possession relative to Kinlochleven of (i) any contamination identified in the investigative works to be carried out by or on behalf of British Alcan Aluminium plc in terms of the Minute of Agreement between the Highland Council and British Alcan Aluminium plc dated 22 September 2005 and/or any contamination which should be so identified by British Alcan Aluminium plc in carrying out such investigative works prior to the 5<sup>th</sup> March 2007 in accordance with such Minute of Agreement of and/or (ii) Japanese knotweed;
- (f) The exercise of the Reserved Rights in breach of the conditions contained in Clause 19.4 hereof;
- (g) The occurrence of any Title Compensation Event;

**Services Specification** means the Operational Services Specification;

**Shareholders** means those persons who from time to time hold share capital in the Contractor or HoldCo, as permitted in terms of this Agreement being, as at the Execution Date, those persons detailed in Schedule Part 14 (*Details of Companies*);

**Site** means the area edged red on the relevant Site Plan for each Project Facility (under exception of any area edged blue thereon) together with the buildings and other erections in and upon the same and the service ducts and media for all utilities and services serving such buildings and erections;

**Site Plans** means the plans of each Project Facility in Appendix A to Schedule Part 4 (*Project Facilities*);

**Small Works** means any change to the Services (which for the avoidance of doubt, may involve the undertaking of physical works to any New Project Facility) requested by the Authority pursuant to Clause 56.1.17 having an individual cost not exceeding £1,000 (Indexed) or as otherwise agreed from time to time, except for any request which will (if implemented) increase the likelihood of the Services not meeting the Authority's Requirements or materially and adversely affect the Contractors ability to perform its obligations under this Agreement;

**Small Works Rates** has the meaning given to it in Clause 56.1.17 (*Authority Changes*);

**Snagging List** means the list, to be prepared by the Contractor and agreed by the Technical Adviser, of minor defects, deficiencies or omissions of a snagging nature which do not prevent the Technical Adviser from issuing an Acceptance Certificate;

**Snagging Works** means:

- (a) the Section A Snagging Works (as defined in Paragraph 2 of Section A of Schedule Part 5 (*Service Availability Requirements*));
- (b) the Section B Snagging Works (as defined in Paragraph 2 of Section B of Schedule Part 5 (*External Works Availability Requirements*)); and/ or
- (c) the Section C Snagging Works (as defined in paragraph 2 of Section C of Schedule Part 5 (*Grass Playing Fields Availability Requirements*));

**Specific Change in Law** means any Change in Law which specifically refers to:

- (a) the provision of works or services the same as or similar to the Works or Services; or
- (b) the holding of shares in companies (or the holding companies of such companies) whose main business is providing works or services the same as or similar to the Works or Services;

**Steering Group** means the consultation groups constituted by the Authority (including staff representatives, school board members and local users) in relation to each of the Project Facilities, for the purpose of liaison as referred to in Clause 53.5;

**Step-In Date** has the meaning given to it in Paragraph 1 of Schedule Part 19 (*Direct Agreement*);

**Step-In Period** has the meaning given to it in Paragraph 1 of Schedule Part 19 (*Direct Agreement*);

**Step-Out Date** has the meaning given to it in Paragraph 1 of Schedule Part 19 (*Direct Agreement*);

**Sub-Contractor** means a counterparty of the Contractor to the Building Contract or the FM Agreement;

**Sub-Contractor Breakage Costs** has the meaning given to it in Clause 43 (*Definitions*);

**Sub-Contracts** means the contracts entered into by the Contractor and the contracts entered into by Sub-Contractors;

**Submitted Item** has the meaning given to it in Paragraph 1.2 of Schedule, Part 9 (*Review Procedure*);

**Subordinated Debt** means all amounts outstanding on the Termination Date under the Subordinated Funding Agreements (excluding interest accrued but unpaid);

**Subordinated Funding Agreements** means the agreements listed in Part 2 of Section B of Schedule Part 6 (*Transaction Documents*) in the Agreed Form, as amended or replaced from time to time in accordance with this Agreement;

**Subordinated Lender** means a person providing finance under a Subordinated Funding Agreement;

**Successful Tenderer** has the meaning given to it in Clause 28.5 (*Adjustments to Unitary Charge*);

**Suitable Substitute Contractor** has the meaning given to it in Clause 43 (*Definitions*);

**Supplier** has the meaning given to it in Clause 33.10.2 (*VAT*);

**Target External Works Availability Date** means, in relation to each New Project Facility, the date shown as the Target External Works Availability Date in Schedule Part 4 (*Project Facilities*) or such later date as may be allowed in accordance with the terms of this Agreement;

**Target Grass Playing Fields Availability Date** means, in relation to each New Project Facility, the date shown as the Target Grass Playing Fields Availability Date in Schedule Part 4 (*New Project Facilities*) or such later date as may be allowed in accordance with the terms of this Agreement;

**Target Service Availability Date** means, in relation to each New Project Facility, the date shown as the Target Service Availability Date in Schedule Part 4 (*Project Facilities*) or such later date as may be allowed in accordance with the terms of this Agreement;

**Tax** means any kind of tax, duty, levy or other charge (other than VAT) whether or not similar to any in force at the Execution Date and whether imposed by a local, governmental, or other Relevant Authority in the United Kingdom or elsewhere;

**Technical Adviser** means the person appointed jointly by the Contractor and the Senior Lenders, or such other person or technical adviser as the last mentioned parties may appoint to act as technical adviser/independent certifier to the Project in accordance with the Technical Adviser's Deed of Appointment;

**Technical Adviser's Deed of Appointment** means the deed of appointment of the Technical Adviser which, as at the Effective Date, is in Agreed Form;

**Tender Costs** has the meaning given to it in Clause 43 (*Definitions*);

**Tender Documents** has the meaning given to it in Clause 28.4.1.2 (*Market Testing Procedure*);

**Tender Process** has the meaning given to it in Clause 43 (*Definitions*);

**Tender Process Monitor** has the meaning given to it in Clause 43 (*Definitions*);

**Termination Date** has the meaning given to it in Clause 43 (*Definitions*);

**Termination Date Discount Rate** has the meaning given to it in Clause 43 (*Definitions*);

**Termination Notice** has the meaning given to it in Clause 35.2.3 (*Termination by the Authority*);

**Threshold Equity IRR** means the nominal post tax Equity IRR as set out in the Financial Model as at the Effective Date;

**Third Party Use** means use of the New Project Facilities by any person other than by the Authority or an Authority Related Party;

**Title Compensation Events** means notwithstanding any other provisions of this Agreement

- (a) any third party exercising or asserting any right of ownership over the Inches Site (or any part or parts thereof or any part of that section of the Inches distributor road shown hatched in red on the plan set out at Appendix B to Schedule Part 16 );
- (b) the exercise by any third party of any right which is (a) not disclosed in the Title Deeds or (b) is not otherwise ascertainable from an inspection of the Sites other than (i) the Reserved Rights and/or (ii) those rights which relate to public water, sewerage, drainage, electricity, gas service media or telephone communication cables or service media existing as at the Execution Date;

- (c) the exercise by the party entitled thereto of the right to widen the road on the west side of the Cullicudden site shown blue on the Site Plan relative thereto;
- (d) the exercise by the party entitled thereto of the right to substitute the route of either the access road leading to or a servicing connected with the Cawdor Site;
- (e) the exercise by the former agricultural tenant of part of the Cawdor Site of any right of access over that part hereof shown shaded blue on the Site Plan relative to the Cawdor Site;
- (f) the exercise of the right to buy the Cawdor Site which becomes exercisable by virtue of (a) the construction of the new school not having materially commenced within 5 years of the date of entry of the Authority's acquisition of the Cawdor Site or (b) the Authority using the Cawdor Site or obtaining consent to use it for any purpose other than educational and community purposes;
- (g) any third party exercising or asserting any right of ownership over that part shown shaded blue on the Site Plan relative to the Portree Site.

**Title Deeds** means those title deeds and documents which form part of the Disclosed Data (including non-proprietary titles and documents) and any other deeds and documents referred to in those title deeds and all title deeds and documents in respect of any Site which would be discoverable from a search of the General Register of Sasines or the computerised Presentment Book or the Land Register of Scotland as appropriate, all down to the date to which the searches referred to in Section A of Schedule Part 16 are brought down .

**TM<sup>2</sup>** has the meaning given to it in Paragraph 4.5 of Part 6 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Total Agreed Consumption** has the meaning given to it in Paragraph 4.5 of Part 6 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Total Days or TD** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**TUPE** means the Transfer of Undertakings (Protection of Employment) Regulations 1981;

**Unavailable/Unavailability** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Unavailable but Used** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Uninsurable** means, in relation to a risk, either that:

- (a) insurance is not available to the Contractor in respect of the Project in the worldwide insurance market with reputable insurers of good standing in respect of that risk; or
- (b) the insurance premium payable for insuring that risk is at such a level or the terms and conditions offered in respect of such risk are such that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors operating in the United Kingdom;
- (c) only in relation to malicious damage or arson risks, the insurance premium payable for insuring such risk is at such a level or the terms and conditions offered in respect of such risk are such that a prudent operator of a school in the locality of the Project would not insure against such risk in the commercial insurance market;

**Unit Rate** has the meaning given to it in Paragraph 4.5 of Part 6 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Unitary Charge Adjustment** means an alteration of the Unitary Charge which, in terms of this

Agreement, is directed to be made pursuant to Section B of Schedule Part 7 (*Unitary Charge Adjustment*);

**Unitary Charge or UC** means, for each Contract Year, the amount calculated in accordance with Part 3 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Urgent** means any occurrence or state of affairs which, if allowed to continue, is likely to present a serious threat of danger to life, or will or is likely to, present a serious threat of personal injury or damage to the New Project Facilities or any part thereof;

**Utilities** has the meaning given to it in Paragraph 1 of Part 6 of Section A of Schedule Part 7 (*Payment Mechanism*);

**VAT** means any value added taxes;

**Warning Notice** means a notice served by the Authority Representative on the Contractor under Clause 37 (*Warning Notices*), specifying that it is a Warning Notice and setting out the circumstances that have given rise to the issue thereof and where it is agreed or in the case of dispute determined such notice was validly given;

**Whole School Unavailability** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Whole Schools Unavailability Threshold or WSUT** has the meaning given to it in Part 1 of Section A of Schedule Part 7 (*Payment Mechanism*);

**Works** means all the works described in the Authority's Requirements and Section A of the Contractor's Proposals including the design, construction, fitting out, equipping, testing and commissioning of the whole works to be undertaken at each Project Facility to achieve Service Availability, External Works Availability and Grass Playing Fields Availability and any works necessary for obtaining access to the Sites to be undertaken in accordance with this Agreement;

**Works Area** means those parts of the Sites which are from time to time occupied by the Contractor, the Building Contractor or any of their sub-contractors for the purpose of carrying out the Works;

**Works Compensation Event** means, during the Works Period:

- (a) a breach by the Authority of any of its obligations under this Agreement; or
- (b) opening up pursuant to Clause 20.3 (*Opening up for Inspection*) which subsequently shows that the work, materials or goods concerned complied with this Agreement;
- (c) the carrying out of works or services at any Project Facility by the Authority or an Authority Related Party;
- (d) the exercise by any person at any time after the Execution Date of a right to work or search for coal or other minerals, which may be situated on or beneath any Site.
- (e) The existence at the Kinlochleven Site after the first Date of Possession relative to Kinlochleven of (i) any contamination identified in the investigative works to be carried out by or on behalf of British Alcan Aluminium plc in terms of the Minute of Agreement between the Highland Council and British Alcan Aluminium plc dated 22 September 2005 and/or any contamination which should be so identified by British Alcan Aluminium plc in carrying out such investigative works prior to the 5<sup>th</sup> March 2007 in accordance with such Minute of Agreement of and/or (ii) Japanese knotweed;
- (f) The exercise of the Reserved Rights in breach of the conditions contained in Clause 19.4 hereof;

- (g) The occurrence of any Title Compensation Event;

**Works Period** means in relation to each Project Facility, the period from the Effective Date to the date of the final Acceptance Certificate issued pursuant to Clause 21.6 for that Project Facility; and

**Year** means the 12 month period from and including a day to (but not including) the day bearing the same number in the same month of the following year (or, in the case only of a period commencing on 29 February, ending on the next following 28 February).

## 1.2 Interpretation

In this Agreement except where the context otherwise requires:

- 1.2.1 each gender includes all genders;
- 1.2.2 the singular includes the plural and vice versa;
- 1.2.3 a reference to any Part, Clause, Sub-clause, Paragraph, Schedule Parts, Part or Annex is except where expressly stated to the contrary, a reference to such Part, Clause, Sub-clause, Paragraph, Schedule Parts, Part or Annex of and to this Agreement;
- 1.2.4 any reference to this Agreement or to any other document shall include any permitted variation, amendment or supplement to such document;
- 1.2.5 subject to the provision of this Agreement in respect of any Change in Law any reference to any enactment, order, regulation or other similar instrument, statute or statutory provisions shall be construed as a reference to the enactment, order, regulation or other similar instrument, statute or statutory provisions as amended, replaced, consolidated or re-enacted;
- 1.2.6 any reference to a person includes firms, partnerships and corporations and (subject to Clause 67.1 and Clause 67.2 (*Assignment*)) their successors and permitted assignees or transferees;
- 1.2.7 the Part, Clause, Sub-clause, Schedule Part, Part, Annex and (where provided) Paragraph, headings and captions in the body of this Agreement do not form part of this Agreement and shall not be taken into account in its construction or interpretation;
- 1.2.8 words preceding “**include**”, “**includes**”, “**including**” and “**included**” shall be construed without limitation by the words which follow those words;
- 1.2.9 if there is any discrepancy between the Clause reference and words in parentheses and italics appearing after a Clause reference, the Clause reference shall prevail; and
- 1.2.10 an obligation on the Contractor to procure or prohibit acts shall include an obligation on the Contractor to procure that sub-contractors of any tier are similarly bound.

## 1.3 Schedule Parts

The Schedule Parts to this Agreement form part of this Agreement.

## 1.4 Consents

The right of a party under this Agreement to give or withhold its approval, consent, agreement, confirmation or analogous endorsement shall in each case (unless otherwise stated) be subject to an obligation not to unreasonably withhold or delay the giving or withholding of any such endorsement.

## 1.5 Indexation

In this Agreement, references to amounts expressed to be “Indexed” are references to such

amounts, adjusted only with effect from 1 April in each year, by multiplying such amount by

$$\frac{RPIX_1}{RPIX_2} \text{ where:}$$

$RPIX_1$  is the value of RPIX most recently published prior to the relevant 1 April and

$RPIX_2$  is the value of RPIX on the Base Date

save where such amounts are changed pursuant to Clauses 17 (*Extension of Time*), 28 (*Market Testing and Benchmarking*), 55 (*Change in Law*), 56 (*Variations*) or 57 (*Contractor Changes in Interim Services or Operational Services*). Any such changed amounts shall be adjusted on the following 1 April on the basis that the reference to the Base Date in the definition of  $RPIX_2$  shall be deemed to be replaced by a reference to the date upon which the relevant change came into effect pursuant to one of the Clauses listed above.

## **1.6 Conflict with other Project Documents**

Subject to the Direct Agreement in the event of a conflict between this Agreement and any of the Project Documents, the provisions of this Agreement will prevail.

## **2. EXCLUSION OF LEGISLATION/THIRD PARTY RIGHTS/VARIATIONS**

### **2.1 Housing Grants, Construction and Regeneration Act**

This Agreement is entered into under the PFI and, in accordance with the Construction Contracts (Scotland) Exclusion Order 1998 (S.I. 1998/686), is intended to be, and shall be, excluded from Part II of the Housing Grants, Construction and Regeneration Act 1996.

### **2.2 Third Party Rights**

Save to the extent expressly provided in this Agreement and, to avoid doubt, without prejudice to the terms of the Direct Agreement, 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 the Contractor 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.

### **2.3 Variations**

This Agreement may not be varied or amended unless in a document expressed to be supplemental to this Agreement and signed by a duly authorised director of the Contractor and by a duly authorised signatory of the Authority.

## **3. COMMENCEMENT AND DURATION**

Subject to Clause 4.1 (*Conditions Precedent*), this Agreement and the rights and obligations of the parties shall take effect on the Effective Date and (subject to the provisions for early termination set out in Clauses 4.2, 35 (*Termination*), 39 (*Force Majeure*), 63 (*Uninsurable Risks*), 79 (*Corrupt Gifts and Payment of Commission*) and 86 (*Termination by the Authority for Breach of the Refinancing Provisions*)) shall continue until the Expiry Date.

## **4. CONDITIONS PRECEDENT**

### **4.1 Conditionality**

This Agreement (other than the provisions of Clauses 1, 2, 3, 4, 40.2, 59, 67, 70, 71, 72, 74, 75, 80.1, 80.2.3, 80.3, 80.4, 82, 84 and 88) is conditional on the satisfaction of the Conditions Precedent.

### **4.2 Termination**

If the Conditions Precedent have not been satisfied or waived by the Cut-Off Date, in relation

to the Contractor's Conditions Precedent by the Authority and in relation to Authority's Conditions Precedent by the Contractor, this Agreement shall terminate on the Cut-Off Date and, subject to Clause 40.2 (*Accrued Rights - Consequences of Termination*), be without further effect.

#### **4.3 Authority's obligation to satisfy**

The Authority shall use its reasonable endeavours to ensure that the Authority's Conditions Precedent are satisfied by the Cut-Off Date.

#### **4.4 Contractor's obligation to satisfy**

The Contractor shall use its reasonable endeavours to ensure that the Contractor's Conditions Precedent are satisfied by the Cut-Off Date.

#### **4.5 Satisfaction of Conditions Precedent**

A Condition Precedent shall be deemed to be satisfied on the date on which notice of satisfaction or waiver:

4.5.1 in the case of an Authority's Condition Precedent, is received by the Contractor from the Authority; and

4.5.2 in the case of a Contractor's Condition Precedent, is received by the Authority from the Contractor.

### **5. WARRANTIES**

#### **5.1 Contractor Warranty**

The Contractor warrants, represents and undertakes to the Authority that as at the Execution Date:

5.1.1 it is properly constituted and incorporated under the laws of England and Wales and has all necessary authority, power and capacity to enter into this Agreement, to execute, deliver and perform its obligations under each of the Project Documents and Initial Funding Agreements to which it is a party and to exercise its rights under them;

5.1.2 the information relating to the Contractor and its Affiliates set out in Schedule Part 14 (*Details of Companies*) is true and accurate;

5.1.3 there are no material facts or circumstances in relation to the financial position or operational constitution of the Contractor which have not been fully and fairly disclosed to the Authority and which if disclosed might reasonably have been expected to affect the decision of the Authority to enter into this Agreement;

5.1.4 neither the performance nor the functionality of any computer automatically controlled or imbedded system used by the Contractor in support of the performance of this Agreement is affected by any date change;

5.1.5 it has not traded since incorporation or incurred any liabilities other than in terms of the Agreement, Project Documents, the Ancillary Documents and the Initial Funding Agreements;

5.1.6 the Initial Funding Agreements set out the full basis on which the Contractor will obtain Senior Debt and Subordinated Debt;

5.1.7 the Project Documents referred to in this Agreement are the only agreements which would materially affect interpretation or application of any of the Project Documents;

5.1.8 the Contractor is solvent and that no litigation or other proceedings are pending, threatened or have been entered into against it or any of its assets;

5.1.9 no security interests exist over the Assets other than as created by the Funding Agreements;

and the Authority relies upon such warranties, representations and undertakings.

## **5.2 Status of Warranties**

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

## **6. BACKGROUND INFORMATION**

### **6.1 No warranty by Authority**

The Authority does not give any warranty or undertaking as to the relevance, completeness, accuracy or fitness for any purpose of any of the Disclosed Data.

### **6.2 No liability to Contractor**

Neither the Authority nor any of its agents or servants shall be liable to the Contractor in contract, delict (including negligence or breach of statutory duty), statute or otherwise as a result of:

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

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

### **6.3 Contractor's warranty**

The Contractor warrants and represents to the Authority that it has conducted its own analysis and review of the Disclosed Data and that it has satisfied itself as to the accuracy, completeness and fitness for purpose of any Disclosed Data on which it places reliance.

### **6.4 Fraudulent Statements**

Nothing in this Clause 6 shall exclude any liability which the Authority or any of its agents or servants would otherwise have to the Contractor in respect of any statements made fraudulently prior to the Execution Date.

### **6.5 [Not Used]**

### **6.6 Contractor's Due Diligence**

The Contractor (subject to Clause 8 (*Nature of Land Interests*) and the Authority complying with its obligations under Clause 22B and the Schedule Part 16 (*Property Agreements and Title Provisions*) shall be deemed to have:

6.6.1 satisfied itself as to the assets to which it will acquire rights and the nature and extent of the risks assumed by it under this Agreement; and

6.6.2 gathered all information necessary to perform its obligations under this Agreement and other obligations assumed, including:

6.6.2.1 information as to the nature, location and condition of the sites (including hydrological, geological, geo-technical and sub-surface conditions);

6.6.2.2 subject to the provisions of this Agreement relative to Relief Events, information relating to Archaeological Finds, areas of archaeological, scientific, historic or natural interest, local conditions and facilities and the quality of existing structures; and

6.6.2.3 information relating to environmental contamination or asbestos at the Sites.

## **6.7 No Relief**

Subject to Clause 6.4 (*Fraudulent Statements*), the Contractor will not in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against the Authority on grounds that any information, whether obtained from the Authority or otherwise (including information made available by the Authority) is incorrect or insufficient and shall make its own enquiries as to the accuracy of that information.

## **7. PROJECT DOCUMENTS**

### **7.1 Ancillary Documents**

The Contractor shall perform its obligations under, and observe all of the provisions of, the Ancillary Documents to which it is a party and shall not:

- 7.1.1 save for the termination of an Ancillary Document in accordance with its terms, terminate or agree to the termination of all or part of any Ancillary Document;
- 7.1.2 make or agree to any material variation of any Ancillary Document;
- 7.1.3 in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights such others may have in a material respect), under any Ancillary Document; or
- 7.1.4 enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Ancillary Document,

unless the proposed course of action (and any relevant documentation) has been submitted to the Authority's Representative for review under the Review Procedure and there has been no objection in accordance with Paragraph 1.2 of the Review Procedure within 15 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.

### **7.2 Changes to Funding Agreements**

- 7.2.1 The Contractor shall not terminate, amend, waive or exercise its rights under the Funding Agreements if the effect of such would be to materially and adversely affect the ability of the Contractor to perform its obligations under this Agreement.
- 7.2.2 No amendment, waiver or exercise of a right under any Funding Agreement shall have the effect of increasing the Authority's liabilities on early termination of this Agreement unless:
  - 7.2.2.1 the Contractor has obtained the prior written consent of the Authority which may or may not be granted in the Authority's absolute discretion; or
  - 7.2.2.2 it is a Permitted Borrowing.

### **7.3 Delivery**

Without prejudice to the provisions of this Clause 7, if at any time an amendment is made to any Project Document, or the Contractor enters into a new or replacement Project Document (or any agreement which affects the interpretation or application of any Project Document), the Contractor shall deliver to the Authority a copy of each such amendment or new or replacement agreement together with a conformed copy of the relevant Project Document within 10 Business Days of the date of its execution or creation, certified as a true copy by an officer of the Contractor, together with a conformed copy of the relevant Project Document.

**PART 2  
LAND ISSUES**

**8. NATURE OF LAND INTERESTS**

**8.1 Ancillary Rights**

Subject to Clause 19.4 from the Effective Date until the Termination Date or the Expiry Date, whichever is the earlier, the Authority will afford the Ancillary Rights to the Contractor and Contractor Related Parties. The Additional Rights shall be exercised subject to the conditions set out in Section B of Schedule Part 16.

**8.2 No Property Interest Created**

The Ancillary Rights afforded to the Contractor and Contractor Related Parties shall not confer nor be deemed to confer upon the Contractor or Contractor Related Parties a right of ownership, a lease, a licence or any other interest in any of the Project Facilities other than a right of access, egress and occupancy of each Project Facility for purposes specified in this Agreement.

**8.3** During the Operational Services Period, the Contractor will maintain and repair in good and substantial condition and, if necessary, replace or renew all drains, sewers, pipes, wires, cables, or other conducting media, pumps, valves, manholes, meters and connections and other service media and apparatus which may be used in the provision of any services to the Sites and which are not maintained at public expense or by the relevant statutory undertaker, so as to ensure that the same are kept in a good and substantial condition throughout the Operational Services Period.

**8.4** [Not Used]

**8.5** [Not Used]

**8.6** [Not Used]

**8.7** [Not Used]

**8.8** [Not Used]

**8.9** [Not Used]

**8.10 Compliance with the Title Deeds**

The Contractor shall procure that:

8.10.1 the carrying out of the Works and the provision of the Services at each Project Facility by or on behalf of the Contractor (whether before, during or after the completion of the Works) shall be carried out in a manner which does not breach any provisions of the Title Deeds for that Project Facility;

8.10.2 there shall be no action, or omission to act by or on behalf of the Contractor or the Contractor Related Parties, which shall give rise to a right for any person to obtain title to the Project Facilities or any part of them (save in accordance with the terms of this Agreement); and

8.10.3 all walls, structures of walls, fences and other boundary features, sewers, drains, pipes, watercourses, wires and other service media of the Sites (other than, during the Works Period, any Existing Project Facility except to the extent that exclusive occupation thereof is given to the Contractor under sub-paragraph (c) of the definition of Ancillary Rights) for which the Authority is responsible in terms of any title conditions contained in the Title Deeds at common law or in terms of Legislation, are repaired, maintained, reconstructed and/or rebuilt as required by such title conditions, common law and/or Legislation.

### **8.11 Satisfaction on Title Deeds**

The Contractor confirms that it has inspected the Title Deeds for the Sites or has had adequate opportunity to inspect the Title Deeds and (subject to Clause 8.1 and the Authority's compliance with its obligations under Clause 22B and Schedule Part 16 (*Property Agreements and Title Provisions*)) is satisfied with regard to:

8.11.1 the content, validity and completeness thereof;

8.11.2 the marketability of the Authority's title to the Sites;

8.11.3 the extent of the Sites; and

8.11.4 the nature of any conditions affecting them to the extent detailed in the Title Deeds;

and the Contractor hereby waives any claim in respect of any matter which would or ought to be disclosed by an inspection of the Title Deeds or otherwise in respect of the marketability of the Sites.

### **8.12 Access during Operations**

Subject to the provisions of this Agreement, with effect from the Service Availability Date for a New Project Facility, the Authority shall permit the Contractor and Contractor Related Parties reasonable access to and egress from that New Project Facility for the purpose of carrying out its obligations under the Agreement provided that the Contractor (subject to Clause 24.4) shall only be entitled to have access to an Area which is being used by the Authority for Educational Services or Community Educational Use with the prior consent of the relevant School Representative.

**PART 3  
TRANSITIONAL ARRANGEMENTS**

**9. NOT USED**

**10. THE WORKS**

**10.1 Obligation to Carry Out**

The Contractor shall or shall procure that the Building Contractor shall (subject to the Authority's obligations set out in Clause 22B and Schedule Part 22) secure the Necessary Consents and carry out the Works so that:

10.1.1 as set out in the Construction Programme (subject only to the terms of this Agreement) each New Project Facility shall achieve Service Availability on the Target Service Availability Date for that New Project Facility, the External Works at each New Project Facility shall achieve External Works Availability by the relevant Target External Works Availability Date and the Grass Playing Fields at each New Project Facility shall achieve Grass Playing Fields Availability by the relevant Target Grass Playing Fields Availability Date or, in the case of delay beyond the Target Service Availability Date, Target External Works Availability Date or Target Grass Playing Fields Availability Date (as the case may be), as soon as reasonably practicable thereafter;

10.1.2 the Works are carried out so as fully to comply with and meet all the requirements of;

10.1.2.1 the Legislation;

10.1.2.2 the Necessary Consents

10.1.2.3 this Agreement

10.1.2.4 the Facilities Requirements

10.1.2.5 the Contractor's Proposals

10.1.2.6 the Applicable Standards, and

10.1.2.7 Good Industry Practice.

10.1.3 subject to Clause 10.2, in the event of a conflict between the requirements of Clauses 10.1.2.1 to 10.1.2.7 the requirements shall have precedence in the numerical order in Clause 10.1.2, provided always that where the Contractor's Proposals provide a greater benefit to the Authority (of which the Authority shall be sole judge) there shall be deemed to be no conflict (unless and to the extent the Contractor's Proposals are inconsistent with Legislation and/or the Necessary Consents).

10.1.4 new materials only will be included in any parts of the Works which comprise new build (unless the Authority agrees otherwise in writing with specific reference to this Clause). All goods used or included in the Works will be of satisfactory quality and no Prohibited Materials will be used or included in the Works;

10.1.5 all persons employed in connection with the performance of the Works will be careful, skilled and experienced in their several professions, trades and callings taking into account their roles and responsibilities; and

10.1.6 all aspects of the Works will be supervised by sufficient numbers of persons having adequate knowledge of such matters for the satisfactory and safe performance of the Works in accordance with this Agreement and having regard to the activities which are carried on at the Sites.

## **10.2 Inconsistency between Facilities Requirements and Contractor's Proposals**

10.2.1 If the Authority or the Contractor finds there is any inconsistency or contradiction between the Facilities Requirements and the Contractor's Proposals it shall give notice to the other specifying the inconsistency or contradiction; and

10.2.2 The Contractor shall notify the Authority in writing of its proposed amendment with specific reference to this Clause 10.2 to remove the inconsistency or contradiction and, subject always to compliance with Legislation and/or the Necessary Consents, the Authority shall (in its sole discretion) within 10 Business Days of receipt of such written information decide between the inconsistent or contradictory items, or otherwise may accept the Contractor's proposed amendment. The Contractor shall be obliged to comply with the decision or acceptance by the Authority without cost to the Authority.

Where the Authority fails to so decide within said 10 Business Day period, the Contractor will be deemed entitled to proceed with its proposed amendment.

## **11. CONSTRUCTION PROGRAMME**

### **11.1 Contractor to follow Construction Programme**

Insofar as the carrying out of the Works affects or may affect the provision of Educational Services or the Community Education Services at any Project Facility, the Contractor shall procure that the Works are carried out generally in accordance with the Construction Programme and so as to minimise, so far as reasonably practicable, any disruption to the provision of Educational Services and the Community Education Services. The Authority's Representative may notify the Contractor if in his opinion at any time the actual progress of the Works does not conform in any material respect with the Construction Programme and may require (acting reasonably and if the Contractor agrees or it is determined pursuant to the Dispute Resolution Procedure that such progress does not so conform) the Contractor either:

11.1.1 to submit to the Authority's Representative a report identifying the reasons for the delay; and

11.1.2 to produce and submit to the Authority's Representative in accordance with the Review Procedure a revised Construction Programme showing the manner in which the Works will be carried out and (if possible) the periods necessary to ensure completion of the Works at the relevant Project Facility by the relevant Target Service Availability Date, Target External Works Availability Date or Target Grass Playing Fields Availability Date, as the case may be; or

11.1.3 to produce and submit to the Authority's Representative in accordance with the Review Procedure a revised Construction Programme showing the steps which the Contractor intends to take to eliminate or reduce any delay in reaching the relevant Target Service Availability Date, Target External Works Availability Date or Target Grass Playing Fields Availability Date, as the case may be.

### **11.2 Variations to the Construction Programme**

11.2.1 Subject to Clause 16.1, the Contractor may amend or revise the Construction Programme from time to time save in respect of its obligations under Clause 10.1.1. The Contractor shall consult with the Authority and have due regard to the Authority's comments in relation to any material amendments to the Construction Programme.

11.2.2 Any revised Construction Programme shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail to enable the Authority's Representative to monitor progress including all commissioning activities and likely future progress of the Works.

11.2.3 The Contractor shall promptly submit to the Authority's Representative a copy of any revised Construction Programme.

### **11.3 No relief for Contractor**

No such report or review as is referred to in Clause 11.1 by the Authority's Representative of the Construction Programme nor any comment thereon nor any amendment or review thereof shall relieve the Contractor of any of its obligations under this Agreement, except as regards any extension of time to which the Contractor is entitled under Clause 17.7 (*Giving of Relief*).

### **11.4 Development Constraints**

The Contractor shall, subject to the Authority's Requirements and insofar as reasonably practicable having regard to the requirements of the Education Services and School Representative, ensure that the carrying out of the Works at any Project Facility prior to the Service Availability Date is undertaken in such a way and in such locations as will not prevent the Authority from providing the Educational Services and the Community Education Services and without prejudice to such generality in accordance with the requirements of Section C3 and 4 of the Authority's Requirements (*Decant and Disruption Provisions*).

## **12. REPRESENTATIVES**

### **12.1 Contractor's Representative**

The Contractor shall employ a representative the identity of whom will be subject to the prior approval of the Authority (acting reasonably) to act as the Contractor's Representative in connection with the carrying out of the Works, the provision of the Operational Services and generally in connection with this Agreement.

### **12.2 Authority of Contractor's Representative**

The Contractor's Representative shall have full authority to act on behalf of the Contractor for all purposes of this Agreement. Subject to the following, the Authority shall be entitled to treat any act of the Contractor's Representative in connection with this Agreement as being expressly authorised by the Contractor (save where the Contractor has notified the Authority that the Contractor's Representative has no such authority or that such authority has been revoked) and the Authority will not be required to determine whether any express authority has in fact been given. The Contractor's Representative shall have no authority to terminate this Agreement.

### **12.3 No Termination of Appointment**

Except in the case of death, serious illness or gross misconduct, the Contractor shall not terminate the appointment of the Contractor's Representative without the prior approval of the Authority (acting reasonably). The Contractor shall appoint a replacement (a) immediately upon the Contractor's Representative ceasing to act in the case of resignation, death, serious illness or gross misconduct and (b) prior to termination of the appointment in all other cases, in each case subject to the prior approval of the Authority.

### **12.4 Authority's Representative**

The Authority shall appoint a representative to be the Authority's Representative and as such to liaise with the Contractor's Representative, and shall keep the Contractor informed of the identity from time to time of the Authority's Representative. The Authority's Representative may from time to time, by written notice to the Contractor, delegate any of his powers, duties or responsibilities under this Agreement to up to two deputies provided that the proposed deputy or deputies are technically competent to carry out the delegated duties (of which the Authority shall be the sole judge).

### **12.5 Authority of the Authority's Representative**

The Authority's Representative shall have full authority to act on behalf of the Authority for all purposes of this Agreement. The Contractor shall be entitled to treat any act of the Authority's Representative in connection with this Agreement as being expressly authorised by the Authority (save where the Authority has notified the Contractor that the Authority's Representative has no such authority or that such authority has been revoked) and the

Contractor will not be required to determine whether any express authority has in fact been given.

## **12.6 School Representative**

12.6.1 At each Project Facility, the head teacher of the school or such other member of staff of the school as the head teacher of the school may notify in advance to the Contractor from time to time, shall undertake the role of a School Representative, which School Representative shall provide a day to day contact with the Contractor for the routine operation of this Agreement in relation to the relevant Project Facility.

12.6.2 Unless pursuant to a specific delegation under Clause 12.6.3 or otherwise specifically provided for in terms of this Agreement, the School Representative shall have no power or authority to bind the Authority or vary the terms of this Agreement in any way and the Contractor acknowledges that it shall not act on the instructions of or as a consequence of or otherwise rely upon any act or omission of a School Representative for the purposes of this Agreement unless under a specific delegation issued pursuant to Clause 12.6.3 or otherwise specifically provided for in this Agreement.

12.6.3 The Authority's Representative may from time to time by notice to the Contractor delegate any of his powers, duties or responsibilities under this Agreement to a School Representative, subject to such terms and conditions, and for such duration as may be specified by the Authority's Representative.

## **12.7 Substitutes**

Either party may from time to time designate a substitute by notice to the other in advance of the substitute temporarily undertaking the duties of the Contractor's Representative or Authority's Representative, as the case may be.

## **13. SITE MEETINGS**

The Contractor shall procure that representatives of the Authority are afforded an opportunity to attend site meetings relating to the Works at least monthly and that agendas for such site meetings (including the matters detailed in Schedule Part 17 (*Site Meeting Agenda Items*)) are sent to the Authority in advance of the meetings and (whether or not such representatives have attended) that a copy of the minutes of site meetings is promptly supplied to the Authority.

## **14. COLLATERAL WARRANTIES**

14.1 The Contractor shall not engage any new Building Contractor or new member of the Professional Team and shall ensure that no new member of the Professional Team is engaged in connection with the Works without the relevant new Building Contractor or new member of the Professional Team having delivered to the Authority a duly executed agreement substantially in the form of the Collateral Warranty and certified true copies of the appointments and contracts.

14.2 The Contractor shall also procure that an agreement substantially in the form of the Collateral Warranty duly executed by any relevant Building Sub-Contractor or a new member of the Professional Team is delivered to the Authority forthwith upon the relevant sub-contract being entered into accompanied by a certified true copy of the relevant sub-contract.

## **15. DESIGN DEVELOPMENT**

### **15.1 Obligation to finalise design**

The Contractor shall develop and finalise the design and specification of the Works and the Authority may review the Reviewable Design Data in accordance with the Review Procedure and the provisions of this Clause 15.

## **15.2 Submit Reviewable Design Data**

The Contractor shall submit the Reviewable Design Data and the design of any variations developed in accordance with the Review Procedure to the Authority's Representative for review under the Review Procedure and in such a manner that every revision is highlighted and described.

## **15.3 No construction prior to review**

The Contractor, save as aftermentioned, shall not commence or permit the commencement of the construction of the part or parts of the Works to which any Reviewable Design Data relate until it has submitted the relevant Reviewable Design Data for review and is entitled to proceed in accordance with the Review Procedure. If the Contractor commences or permits the construction of the part or parts of the Works to which any Reviewable Design Data relates prior to completion of the review thereof under the Review Procedure it shall do so entirely at its own risk. Any Approved RDD Item falling within the definition of sub-paragraph (b) thereof shall be deemed to have been submitted for review and approved under the Review Procedure for the purposes of Clauses 15.3 and 15.4 (*Approved RDD*).

## **15.4 Approved RDD**

Subject to Clause 15.3 with effect from the date on which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with the Review Procedure, the Contractor may proceed with the construction of the relevant part or part of the Works (subject to the need to submit any associated Reviewable Design Data to review) in accordance with that Approved RDD Item.

## **15.5 Review of Design Data**

The Contractor shall allow the Authority's Representative at any time a reasonable opportunity to view any items of Design Data, which shall be made available to the Authority's Representative as soon as practicable following receipt of any written request from the Authority's Representative.

## **15.6 Design Database**

The Contractor shall procure that there is made available for inspection by the Authority's Representative or any person authorised by the Authority's Representative paper copies of the drawings comprised within the Design Data (including Reviewable Design Data). The Authority shall ensure that any such data is used only in connection with its rights to monitor the Works in accordance with this Agreement.

## **15.7 Rectification of Contractor's Proposals**

Subject to Clause 15.9 (*Educational Functionality*) and Clause 21.5 (*Issue of an Acceptance Certificate*), if it should be found pursuant to a claim notified prior to the second anniversary of the relevant Service Availability Date that the Contractor's Proposals do not fulfil the Facilities Requirements, the Contractor shall at its own expense amend the Contractor's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:

15.7.1 the Contractor's Proposals shall satisfy the Facilities Requirements; and

15.7.2 following the amendment or rectification the structural, fabric, mechanical and electrical performance of the New Project Facilities will be of an equivalent standard of performance to that set out in the Contractor's Proposals prior to their amendment or rectification (for the purpose of comparison disregarding the fault which required the amendment or rectification to be made).

## **15.8 Responsibility for Design**

All liability attaching to the design of the Works (whether pursuant to statute, the provisions of this Agreement or otherwise) shall remain with the Contractor and shall not in any way be

affected by:

15.8.1 any element of the design set out in the Authority's Requirements;

15.8.2 any design carried out at the request of the Authority by or on behalf of the Contractor;  
and

15.8.3 the agreement to or approval by the Authority of any design proposal made by the Contractor whether before, on or after the Effective Date and whether under the Review Procedure or otherwise.

## **15.9 Educational Functionality**

The Authority confirms that, as at the date of this Agreement, it has reviewed the Educational Functionality Information and that, subject to any qualifications and/or comments notified by the Authority to the Contractor in writing and set out in the Educational Functionality Information such proposals satisfy the Facilities Requirements in respect of Educational Functionality.

## **16. CHANGES TO THE CONTRACTOR'S PROPOSALS**

### **16.1 Proposal to Vary Contractor's Proposals**

Subject to Clause 16.2 the Contractor shall be entitled to propose variations (such proposal to make specific reference on its face to Clause 16.1 of this Agreement) to the Contractor's Proposals or to the Key Dates in the Construction Programme by submitting the relevant variation to the Authority for review under the Review Procedure.

### **16.2 Limitation**

The Contractor will not be entitled to propose a variation to the Contractor's Proposals or to the Key Dates in the Construction Programme (other than where necessitated by a Specific Change in Law, a Discriminatory Change in Law or as a direct consequence of a variation to the Contractor's Proposals or to the Key Dates in the Construction Programme which is implemented at the request of the Authority) which would delay the Target Service Availability Date, Target External Works Availability Date or Target Grass Playing Fields Availability Date of the New Project Facility in question or would lead to an increase in the Unitary Charge.

### **16.3 Implementing a Variation to the Contractor's Proposals or to the Key Dates in the Construction Programme**

The Contractor shall not implement any variation to the Contractor's Proposals or to the Key Dates in the Construction Programme until the Authority consents or is deemed to have consented to the variation in accordance with the Review Procedure. Once consented to, a proposed variation will form part of the Contractor's Proposals or to the Key Dates in Construction Programme as the case may be.

### **16.4 Construction Programme**

Subject to the Contractor giving to the Authority written notice thereof not less than 5 Business Days before any amendment takes effect, the Contractor will be entitled to amend the Construction Programme other than in relation to the Key Dates in accordance with Clause 11.

## **17. EXTENSIONS OF TIME**

### **17.1 Notice**

If at any time the Contractor becomes aware that there will be or is likely to be a delay in carrying out the Works or achieving a Target Service Availability Date and/or a Target External Works Availability Date and/or Target Grass Playing Fields Availability Date, the Contractor shall as soon as reasonably practicable and in any event within 20 Business Days give notice to the Authority to that effect specifying:

17.1.1 the reason for the delay or likely delay; and

17.1.2 an estimate of the likely effect of the delay on carrying out the Works or achieving the relevant Target Service Availability Date and/or a Target External Works Availability Date and/or Target Grass Playing Fields Availability Date (taking into account any measures that the Contractor proposes to adopt to mitigate the consequences of the delay in accordance with Clause 17.3).

## **17.2 Supply of Information**

Following service of a notice by the Contractor pursuant to Clause 17.1 the Contractor shall promptly supply to the Authority any further information relating to the delay which:

17.2.1 is received by the Contractor; or

17.2.2 is reasonably requested by the Authority.

## **17.3 Duty to Mitigate**

The Contractor shall take all reasonable steps to mitigate the consequences of any delay to the Construction Programme.

## **17.4 Time for Completion of the Works**

If any anticipated failure to carry out the Works timeously or meet a Target Service Availability Date and/or a Target External Works Availability Date and/or Target Grass Playing Fields Availability Date is directly attributable to:

17.4.1 a Works Compensation Event, then the provisions of Clause 17.5 shall apply; or

17.4.2 a Relief Event, then the provisions of Clause 54 (*Relief Events*) shall apply; or

17.4.3 a Force Majeure Event, then the provisions of Clause 39 (*Force Majeure*) shall apply.

## **17.5 Delays due to a Works Compensation Event**

17.5.1 If, as a direct result of the occurrence of a Works Compensation Event:

17.5.1.1 the Works are or are likely to be delayed or the issue of an Acceptance Certificate may not occur on the relevant Target Service Availability Date and/or a Target External Works Availability Date and/or Target Grass Playing Fields Availability Date; and/or

17.5.1.2 the Contractor is unable or is likely to be unable to comply with its obligations under this Agreement; and/or

17.5.1.3 the Contractor incurs or is likely to incur costs or loses or is likely to lose revenue,

then, subject to Clause 17.6, the Contractor will be entitled to apply for relief in accordance with this Clause 17 from its obligations under this Agreement and/or claim compensation under this Agreement.

## **17.6 Procedure for relief**

To obtain relief and/or claim compensation under this Clause 17 the Contractor must:

17.6.1 as soon as practicable, and in any event within 20 Business Days after it becomes aware that the Works Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement or the Contractor to incur costs or lose revenue, give to the Authority a notice of its claim for an extension of time to the Target Service Availability Date, Target External Works Availability Date and/or Target Grass Playing Fields Availability Date and/or the Deadline Dates, payment of

compensation under Part 3 of this Agreement and/or relief from its obligations under this Agreement.

17.6.2 subject to Clause 17.8 within 10 Business Days of receipt by the Authority of the notice referred to in Clause 17.6.1 (or such longer period as the Authority may agree in writing (acting reasonably), having regard to the nature of the Works Compensation Event), give full details of the Works Compensation Event and the extension of time and any Estimated Change in Project Costs claimed (including evidence, on an open book basis, of the calculation of any Estimated Change in Project Costs); and

17.6.3 demonstrate to the reasonable satisfaction of the Authority that:

17.6.3.1 the Works Compensation Event was the direct cause of the Estimated Change in Project Costs and/or any delay in the Construction Programme or the achievement of the relevant Target Service Availability Date and/or Target External Works Availability Date and/or Target Grass Playing Fields Availability Date and/or breach of an obligation and there were no other events responsible for delays to the Construction Programme or achievement of the relevant Target Service Availability Date and/or Target External Works Availability Date and/or Target Grass Playing Fields Availability Date which have been included in the calculation of the Estimated Change in Project Costs and/or the delay in the Construction Programme or achievement of the Target Service Availability Date and/or Target External Works Availability Date and/or Target Grass Playing Fields Availability Date; and

17.6.3.2 the Estimated Change in Project Costs, time lost and relief from the obligations under this Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice.

## **17.7 Giving of relief**

Subject to Clause 17.8, following compliance by the Contractor with the requirements of Clause 17.6, then:

17.7.1 the relevant part of the Construction Programme, Target Service Availability Dates, Target External Works Availability Dates Target Grass Playing Fields Availability Dates and/or Deadline Dates shall be postponed by such time as shall be reasonable for such a Works Compensation Event, taking into account the likely effect of delay;

17.7.2 in the case of Capital Expenditure and/or financing costs in respect of the events listed in the definition of Works Compensation Event, which cannot be compensated by an adjustment to the Unitary Charge in accordance with Part B of Schedule Part 7 (*Payment Mechanism*) so that the Contractor is in a no worse position that it would have been in had the Works Compensation Event not occurred, the Authority shall pay such Capital Expenditure and/or financing costs reasonably incurred within 30 days of its receipt of a written demand by the Contractor supported by all relevant information;

17.7.3 in the case of a payment of compensation for the Estimated Change in Project Costs that does not fall within Clause 17.7.2, the Authority shall compensate the Contractor in accordance with Part B of Schedule Part 7 (*Payment Mechanism*) by an adjustment to the Unitary Charge, excluding double counting arising from the Indexation Adjustment; and

17.7.4 the Authority shall give the Contractor such relief from its obligations under this Agreement as is reasonable for such a Works Compensation Event.

## **17.8 Late provision of information**

In the event that information is provided after the period allowed in Clause 17.6, the Contractor will not be entitled to any extension of time, compensation, or relief from its obligations under

this Agreement to the extent that the Authority is prejudiced by such delay.

#### **17.9 Failure to agree**

If the parties cannot agree the extent of any compensation, delay incurred, relief from the Contractor's obligations under this Agreement, or the Authority disagrees that a Works Compensation Event has occurred (or as to its consequences), or that the Contractor is entitled to any relief under this Clause, the parties shall resolve the matter in accordance with the Dispute Resolution Procedure.

### **18. CDM REGULATIONS**

#### **18.1 Responsibility for design**

As between the Contractor and the Authority, the Contractor shall be entirely responsible for the safety of any design which forms part of the Works and for the adequacy, stability and safety of all site operations and methods of construction.

#### **18.2 Contractor as Client**

The Contractor shall act as the only client in respect of the Project. Within 10 Business Days of the Effective Date the Contractor shall make and serve on the Health and Safety Executive, a declaration in accordance with Paragraph (4) of Regulation 4 of the Construction (Design and Management) Regulations 1994 (**CDM Regulations**). The Contractor shall as soon as possible provide to the Authority a copy of the notice which it receives pursuant to Paragraph (5) of Regulation 4 of the CDM Regulations. The Contractor shall ensure that the Building Contractor and FM Contractor are aware of such declaration and shall not prior to the completion of the Works seek to withdraw, terminate or in any manner derogate from such declaration.

#### **18.3 Duties under CDM Regulations**

The Contractor shall observe, perform and discharge and/or shall procure the observance, performance and discharge of all the obligations, requirements and duties arising under the CDM Regulations in connection with the Project.

#### **18.4 Health and Safety File**

The Contractor shall issue to the Authority's Representative within 20 Business Days of the preparation thereof a copy of each and every health and safety plan and health and safety file (as such terms are used in the CDM Regulations) to be prepared by it pursuant to the CDM Regulations and of every amendment or update made to such file during the period of this Agreement.

#### **18.5 Indemnity**

The Contractor shall indemnify the Authority and keep the Authority indemnified in full from and against all direct, indirect or consequential liability, losses, damages, injury, claims, costs and expenses (including management and legal expenses) awarded against or incurred or paid by the Authority as a result of or in connection with the breach by the Contractor of its obligations under this Clause 18.

### **19. THE SITES**

#### **19.1 Access**

If at any time the Contractor requires access to or any interest in any land which does not form part of the Sites or any additional rights beyond those which the Contractor has in relation to any part of the Sites, the responsibility and cost of securing or acquiring such access or interest shall be entirely the responsibility of the Contractor.

## **19.2 Use of Sites**

The Contractor is deemed:

19.2.1 to have satisfied itself in relation to:

19.2.1.1 means of access to and through the Sites, the possibility of interference by any person with such access and the times and methods of working necessary to prevent any nuisance whether public or private to any third party;

19.2.1.2 the boundaries of the Sites;

19.2.1.3 the rights exercisable over or in relation to the Sites (to the extent as disclosed in or reasonably ascertainable from a due and diligent inspection of the Title Deeds or the Sites);

19.2.1.4 the information disclosed in the Data Room in respect of the Sites;

19.2.1.5 the extent and nature of work and materials necessary for conducting and completing the Works;

19.2.2 in general to have obtained for itself all necessary information as to risks, contingencies and all other circumstances which may influence, delay or affect the Works; and

19.2.3 to accept entire responsibility (including any financial or other consequences which result whether directly or indirectly) for the ascertainment of and dealing with the matters detailed in Clauses 19.2.1 and 19.2.2.

## **19.3 No Warranty**

The Contractor shall take the Sites in their state and condition in all respects as at the date of this Agreement. Nothing in this Agreement or otherwise shall constitute or imply a warranty by or on the part of the Authority as to the fitness and suitability of the Sites or any part thereof for the Works or for any other purpose.

## **19.4 Third Party Rights and Reserved Rights**

19.4.1 The Contractor shall observe and comply with any third party rights (including public rights) which may exist from time to time in respect of land comprising and adjoining the Sites and the Contractor shall ensure that the Works are carried out in such a way as not to interfere with access to and use and occupation of public or private roads or footpaths by any person who is entitled to any such access, use or occupation.

19.4.2 The Contractor shall not obstruct the exercise of the Reserved Rights provided that, (1) in respect of those areas shown coloured blue on the relevant Phasing Drawing and that during the period shown on the relevant Phasing Drawing (being areas in respect of which the Contractor is entitled to exclusive occupation of the relevant Site for the said period) the Reserved Rights in respect thereof shall - only be exercisable by the party or parties entitled thereto on their giving at least 48 hours verbal or written notification to the Contractor of their intention to exercise these rights save in the case of emergency provided that the Contractor shall ensure that access to the property currently known as Elgin Hostel is available over a route through the Site of Portree High School at all times and pedestrian access to the land adjoining Drummond Special Schools is available at all times (2) in all cases except in respect of the exercise of the public right of way (other than by the Authority or any Authority Related Party) presently exercisable over the Site of Portree High School the exercise of the Reserved Rights shall be subject to the Authority (or such owner tenant or occupier or other party exercising such Reserved Rights as appropriate):-

19.4.2.1 complying with the Contractor's reasonable requirements regarding Site management and any applicable Legislation including health and safety requirements and site rules;

19.4.2.2 not interfering with, delaying or otherwise adversely affecting the carrying out of the Works or the Services;

19.4.2.3 not damaging the Works the Project Facilities or any materials thereon in the exercise of the Reserved Rights.

Notwithstanding the foregoing, nothing in this Clause shall place responsibility on the Authority for the actions of any parties exercising the Reserved Rights in respect of either the Site of Portree High School or the Site of Drummond Special School to the extent that such parties are not authorised (whether specifically or impliedly) by the Authority to exercise them.

## **19.5 Safety, Security and Cleaning**

The Contractor shall procure that at all times prior to the issue of an Acceptance Certificate in respect of a New Project Facility that the Works Area in question is maintained in an orderly, safe and secure state and without prejudice to such generality in accordance with the requirements of Section 2, Section C.3 of the Authority's Requirements provided that no act or omission on the part of the Authority shall result in the Contractor being in breach of the provisions of this Clause.

## **19.6 Latent Defects**

In respect of the Sites, the Contractor accepts entire responsibility (including any financial or other consequences which result whether directly or indirectly) for the ascertainment of and rectification of Latent Defects so as to meet the requirements of Clauses 23.2 (*Standard of Performance*) and 24.1 (*Maintenance*).

## **19.7 Compliance with Authority Notices**

The Contractor shall comply with and/or procure compliance with any notice issued by the Authority from time to time requiring the removal from any of the Sites of any person employed or engaged thereon in the carrying out of the Works who in the reasonable opinion of the Authority is prejudicial to the delivery by the Authority of Educational Services. Where the Contractor wishes to dispute any such notice, the relevant individual shall not attend any Site pending the outcome of the dispute.

## **20. MONITORING AND INSPECTION**

### **20.1 Right of Inspection**

The Contractor shall procure that any representative or adviser of the Authority shall have subject to compliance with health and safety rules, at all reasonable times prior to the relevant Service Availability Date or, in the case of External Works, External Works Availability Date:

- (a) the right to enter any of the Sites in order to inspect and view the state and progress of the Works and to ascertain whether they are being executed in accordance with this Agreement, and
- (b) the right to enter upon any property used by the Contractor as training or workshop facilities and places where work is being prepared or materials being obtained for the Project,

but, in each case, not so as to delay or impede the progress of the Works.

### **20.2 Supply of Information**

The Contractor shall promptly (and in any event within 5 Business Days of request) supply to the Authority and any representative or adviser of the Authority visiting any of the Sites pursuant to Clause 20.1 such information in respect of the Works as may reasonably be required.

### **20.3 Opening up for Inspection**

Prior to the relevant Service Availability Date or, in the case of External Works, the External Works Availability Date, the Authority may issue instructions requiring the Contractor to open up for inspection any work covered up or to arrange for or to carry out any test of any materials or goods (whether or not already incorporated in the Works) or of any executed work.

#### **20.4 Removal of Materials**

If any work, materials or goods are found pursuant to Clause 20.3 not to be in accordance with this Agreement the Authority without prejudice to its rights otherwise, may issue instructions with regard to the removal from the Site of all or any of such work, materials or goods; and/or after consultation with the Contractor issue such instructions requiring a change which shall be treated as a change in terms of Clause 16 (*Changes to Contractor's Proposals*).

### **21. NOTIFICATION OF SERVICE AVAILABILITY**

#### **21.1 Inspection of a Project Facility**

The Contractor shall give the Authority and the Technical Adviser not less than 5 Business Days' notice of the date when it proposes to inspect a New Project Facility with a view to issuing a Certificate of Service Availability, a Certificate of External Works Availability or a Certificate of Grass Playing Fields Availability (as the case may be) in respect of that New Project Facility and representatives from the Authority and the Technical Adviser shall make a joint inspection with the Contractor.

#### **21.2 Dates on which Service Availability may occur**

Notwithstanding the Service Availability Requirements may have been met in relation to a New Project Facility, a Service Availability Date may only fall on a date on or after the Target Service Availability Date for such New Project Facility unless the Authority otherwise agrees (in its absolute discretion).

#### **21.3 Authority Representations**

The Contractor shall have due and proper regard to any representations made by the Authority or the Technical Adviser regarding the condition of the New Project Facility in respect of which a Certificate of Service Availability, a Certificate of External Works Availability or a Certificate of Grass Playing Fields Availability is proposed to be issued by the Contractor and any defects or items to be included on a Snagging List.

#### **21.4 Issue of Statement**

Immediately following the issue of any Certificate of Service Availability, Certificate of External Works Availability or Certificate of Grass Playing Fields Availability, the Contractor shall send a true and complete certified copy of such certificate and the Snagging List (if relevant) to the Authority and the Technical Adviser.

#### **21.5 Issue of an Acceptance Certificate**

21.5.1 Following receipt of the certified copy of the Certificate of Service Availability and/or Certificate of External Works Availability and/or Certificate of Grass Playing Fields Availability pursuant to Clause 21.4 and provided that the Technical Adviser acting reasonably is satisfied that:

21.5.1.1 in relation to the relevant New Project Facility, the Service Availability Requirements, External Works Availability Requirements or Grass Playing Fields Availability Requirements (as the case may be) have been met; and

21.5.1.2 all outstanding Works detailed in the Snagging List are capable of being carried out within 20 Business Days (or such longer period as the Technical Adviser may agree in writing, having regard to the lead time in respect of the relevant items) of the date of the Acceptance Certificate save that the 20 Business Day period shall not apply to any landscaping grassed areas or playing fields which have not been turfed at that stage or in respect of which

the turf has not been laid for 6 full Growing Months due to the growing season,

then the Technical Adviser shall within 5 Business Days issue an Acceptance Certificate in respect of the relevant New Project Facility or the relevant External Works or Grass Playing Fields (as the case may be). If the Technical Adviser declines to issue an Acceptance Certificate, and unless the parties agree within a further 5 Business Days to repeat the procedure set out in Clause 21.5.1 and so advise the Technical Adviser, the matter shall be determined under the Dispute Resolution Procedure.

21.5.2 The issue of an Acceptance Certificate and any identification of any outstanding Works detailed in the Snagging List shall not relieve the Contractor of liability for Deductions in terms of Schedule Part 7 (*Payment Mechanism*) or otherwise diminish the obligations of the Contractor under this Agreement in accordance with the terms of this Agreement. Subject to the operation of the provisions of Schedule Part 7 (*Payment Mechanism*) and without affording any relief to the Contractor from meeting the requirements of the Operational Services Specification or from liability for Deductions in terms of Schedule Part 7 (*Payment Mechanism*), the Authority shall not be entitled to, and shall be deemed to have waived any right to claim that there has been a breach by the Contractor of its obligations under Clause 15.7 (*Rectification of Contractor's Proposals*) which should have been apparent from any detailed visual inspection of the Works following the issue of the relevant Acceptance Certificate but not otherwise, unless the claim intimating the same is made prior to the second anniversary of the relevant Service Availability Date, External Works Availability Date or Grass Playing Fields Availability Date, as the case may be.

## **21.6 Issue of Final Acceptance Certificate**

As soon as practicable following the issue by the Technical Adviser of the final Acceptance Certificate in respect of the final New Project Facility to be completed in accordance with the Construction Programme, the Technical Adviser shall (provided that the Contractor has complied with its obligations to remedy any works listed in any Snagging List) issue a final Acceptance Certificate to the Contractor.

## **21.7 Technical Adviser**

The Technical Adviser's Deed of Appointment including the collateral warranty in favour of the Authority relative thereto shall specify that the Technical Adviser owes a duty of care to the Authority and the Contractor and the Senior Lenders and a duty to act in good faith in relation to the discharge of his duties under this Agreement and the Technical Adviser's Deed of Appointment and that the Technical Adviser is to have due and equal regard to any representations made by any party in respect of the matters to be determined thereunder.

## **21.8 Completion of Works detailed in the Snagging List**

21.8.1 Unless otherwise agreed pursuant to Clause 21.8.7 and Clause 21.8.8 below, the Contractor shall carry out all outstanding Works detailed in the Snagging List annexed to the relevant Certificate of Service Availability, Certificate of External Works Availability or Certificate of Grass Playing Fields Availability (as the case may be) to the reasonable satisfaction of the Technical Adviser (acting in accordance with the Technical Adviser's Deed of Appointment) within 20 Business Days of the date of the issue of the Acceptance Certificate.

21.8.2 Subject to Clause 21.8.7 and Clause 21.8.8, if 20 Business Days after the date of issue of any Acceptance Certificate, the Contractor has not completed the relevant Snagging Works, the Authority shall be entitled to give to the Contractor notice in writing requiring the Contractor to complete the Snagging Works within 20 Business Days of the date of such notice. If the Contractor fails to complete the Snagging Works to the Technical Adviser's reasonable satisfaction within such time period the provisions of Clauses 21.8.3 to 21.8.6 shall apply.

- 21.8.3 Where the Contractor has failed to comply with its obligations in terms of Clause 21.8.2, the Authority shall be entitled to undertake in whole or in part the Snagging Works on the Authority giving to the Contractor notice in writing of the Authority's intention to exercise its rights under this Clause 21.8.3.
- 21.8.4 Upon receipt of a notice under Clause 21.8.3, the Contractor shall provide the Authority (and any person the Authority has engaged for the purposes of Clause 21.8) with access to the relevant New Project Facility and shall co-operate with them to enable the Snagging Works to be carried out as soon as reasonably practical.
- 21.8.5 The Authority (and any person the Authority has engaged for the purposes of Clause 21.8) shall undertake the outstanding Snagging Works in whole or in part, in a manner which is not contrary to any current manufacturer's warranty the terms of which have been notified to the Authority, Legislation, Good Industry Practice or the Authority's Requirements.
- 21.8.6 The Contractor shall reimburse the Authority on demand the cost incurred by the Authority in carrying out the Snagging Works or having the Snagging Works carried out.
- 21.8.7 If the Contractor is unable to procure delivery of the materials required to carry out any outstanding Works detailed in the Snagging List within the 20 Business Day period referred to in Clause 21.8.1 above, the Technical Adviser may extend the period of 20 Business Days in relation to such works, to such period as the Technical Adviser considers appropriate, acting reasonably, having regard to the lead time in respect of the relevant items. In the event that the Technical Adviser extends such period the periods specified in Clause 21.8.2 shall be similarly extended in relation to those works.
- 21.8.8 If the outstanding work detailed on the Snagging List is landscaping grassed areas or playing fields which have not been turfed at that stage or in respect of which the turf has not been laid for 6 full Growing Months due to the growing season then the Contractor shall be obliged to lay the turf in the next appropriate growing season (where it has not already been laid) and to achieve the Service Availability Requirements or External Works Availability Requirements (as the case may be) in respect of the relevant areas of turf when the relevant area of turf has been laid for 6 full Growing Months

## **22. DELAY AND SUPERVENING UNAVAILABILITY**

### **22.1 Unavailability**

If any part of an Existing Project Facility cannot, in the reasonable opinion of the Authority (having regard to its statutory obligations as education authority), continue to be used for the provision of Educational Services or Community Education Services prior to the Service Availability Date for the New Project Facility that is to replace that Existing Project Facility through a failure by the Contractor in the carrying out of the Works otherwise than in accordance with Clause 10 (*The Works*) and Clause 11 (*Construction Programme*), then, at the option of the Authority, the Contractor shall either:

- 22.1.1 reimburse to the Authority the costs reasonably and properly incurred by the Authority in the provision of alternative accommodation and associated arrangements;
- 22.1.2 provide at the Contractor's expense equivalent alternative accommodation in a location, where possible, within the town boundaries of where the Project Facility is situated; or
- 22.1.3 for a Project Facility for which no alternative accommodation can reasonably be procured within the same local area, provide in co-operation with the Authority alternative accommodation at another site which is within the control of the Authority.

- 22.2 For the purposes of Clause 22.1.2, alternative accommodation shall be “equivalent” where it complies with the requirements of Legislation and is, in the reasonable opinion of the Authority adequate for provision of Educational Services.
- 22.3 The failure of the Contractor to achieve Service Availability in relation to a New Project Facility on or before the Target Service Availability Date for that New Project Facility shall not constitute grounds for it being deemed that the relevant Existing Project Facility or any part thereof cannot reasonably continue to be used for the provision of Educational Services or Community Education Services.
- 22.4.1 If the Grass Playing Fields Availability Date at a New Project Facility is not achieved by the Target Grass Playing Fields Availability Date, the Authority shall be entitled to instruct the Contractor (at no cost to the Authority) to turf the affected Grass Playing Fields in accordance with Good Industry Practice and the Contractor shall complete the turfing of the affected Grass Playing Field(s) within 60 days of such instruction (or such other reasonable period as the parties may agree).
- 22.4.2 In the event that the Contractor fails to turf the affected Grass Playing Field(s) within the time period specified in Clause 22.4.1 above, the Authority shall be entitled to turf the affected Grass Playing Fields at the Contractor’s cost, such costs to be deducted by the Authority from the Monthly Unitary Charge until paid in full by the Contractor.

## **22A JUDICIAL REVIEW**

- 22A.1 Where any application for Judicial Review is made, the Authority shall notify the Contractor as soon as it becomes aware of such application and:-
- 22A.1.1 for the avoidance of doubt, the Authority shall be entitled to defend, compromise or take any other step in relation to such application as it shall think fit;
- 22A.1.2 the Contractor shall at the written request of the Authority:
- (a) provide to the Authority all such relevant evidence and information as is available to the Contractor; and
- (b) co-operate in the provision of witnesses,
- which is or are necessary and (in the case of (a) above) may be lawfully disclosed to the Authority and employed by it for the effective defence of the Judicial Review proceedings. The Authority shall reimburse the Contractor's proper and reasonable costs of compliance with this Clause 22A.1.2; and
- 22A.1.3 the Contractor may be required by order of the court to suspend the Works in whole or part for such period or periods as may from time to time be notified to the Contractor. In the absence of such a requirement, the Contractor shall be entitled to continue with the Works as if no application for Judicial Review had been made.
- 22A.2 Subject to Clause 22A.3 if an application for Relevant Judicial Review made within the period of three months from the Effective Date results in the revocation, quashing or withdrawal of the Dingwall Permission and/or the Portree Permission:
- 22A.2.1 the Authority shall elect within 20 Business Days to either:
- (a) serve an Authority Notice of Change on the Contractor under Clause 56.1:
- (i) varying the Authority's Requirements by the removal of the affected Project Facility from the Project; or
- (ii) instructing the Contractor to proceed with a new planning application in respect of the Project Facility(ies) affected by the Judicial Review; or

- (b) exercise its rights of appeal against the decision revoking, quashing or withdrawing the relevant planning permission,

and if the Contractor is not notified of any such election within the said period of 20 Business Days, the Authority shall be deemed to have elected in accordance with Clause 22A.2.1(a)(i); and

22A.2.2 save to the extent that to do so would be a breach of Legislation, Guidance or any Necessary Consent, or an order of the court ordering suspension of the Works, the Contractor will be entitled to continue the Works at the affected Project Facility(ies) pending agreement of any Authority Notice of Change issued or deemed to have been issued pursuant to Clause 22A.2.1(a) in accordance with Clause 56 or the resolution of any appeal (as the case may be).

For the avoidance of doubt the Authority shall issue an instruction to proceed with the agreed or determined Estimate issued in relation to any Authority Notice of Change served or deemed to be served under Clause 22A.2.1(a) pursuant to Clause 56.1.4A.2 and any such Authority Notice of Change shall not be capable of withdrawal notwithstanding Clause 56.1.9.2 and 56.1.10 (but subject always to Clause 56.1.16A).

22A.3 If the Contractor is required by order of the court following an application for Relevant Judicial Review made within the period of three months from the Effective Date in relation to the Portree Permission and/or the Dingwall Permission to suspend the Works in relation to either Portree High School or Dingwall Academy for a period in excess of ten (10) months at either New Project Facility, any such period of suspension at such New Project Facility in excess of ten (10) months shall be deemed to be a Works Compensation Event and a Services Compensation Event. For the avoidance of doubt, all costs, losses and/or expenses relating to the suspension of Works during such 10 month period shall be borne by the Contractor and shall not be recoverable from the Authority in any circumstances.

22A.4 In the event that the Authority elects to exercise its rights pursuant to:

22A.4.1 Clause 22A.2.1(a)(ii) and a new detailed planning permission in respect of the affected Project Facility has not been obtained by the expiry of the period of ten (10) months after the date of notification to the Contractor of the Authority's election (subject always to the Contractor having complied with its obligations under Clause 56.1 in respect of the relevant Authority Notice of Change); and/or

22A.4.2 Clause 22A.2.1(b) and no final decision in relation to such appeal has been given in favour of the Authority so that the planning permission that was the subject of the Relevant Judicial Review remains in full force and effect by the date falling ten (10) months after the date of notification to the Contractor of the Authority's election,

any period of delay between the date falling ten (10) months after the date of such notification referred to in Clauses 22A.4.1 or 22A.4.2 above (as the case may be) and the date of grant of a new detailed planning permission in respect of the affected Project Facility or final decision (as the case may be) shall be deemed to be a Works Compensation Event and a Services Compensation Event but only in so far as the acts or omissions of the Contractor or any Contractor Related Party have not contributed to any such delay. For the avoidance of doubt, all costs, losses and/or expenses incurred by the Contractor prior to such ten (10) month period shall be borne by the Contractor and shall not be recoverable from the Authority in any circumstances

## **22B AUTHORITY OBLIGATIONS**

The Authority shall duly perform and/or observe the Authority Obligations by the dates or throughout the periods specified in Column B of the table forming Schedule Part 22 (*Authority Obligations*).

**PART 4  
THE SERVICES**

**23. PRINCIPAL OBLIGATIONS**

**23.1 Provision of Services**

The Contractor shall provide to the Authority or procure the provision to the Authority of the Operational Services at each New Project Facility on the terms of this Agreement with effect from the Service Availability Date for that New Project Facility or, in respect of External Works, the relevant External Works Availability Date or, in respect of Grass Playing Fields, the relevant Grass Playing Fields Availability Date.

**23.1A Provision of Catering Services**

The Authority and the Contractor shall comply with their respective obligations in Schedule Part 21 (*Catering Arrangements*).

**23.2 Standard of Performance**

23.2.1 The Contractor shall at all times ensure that the Services are performed by appropriately qualified and trained personnel and in accordance with:

- 23.2.1.1 Legislation;
- 23.2.1.2 Necessary Consents;
- 23.2.1.3 the Operational Services Specification;
- 23.2.1.4 the Applicable Standards;
- 23.2.1.5 Good Industry Practice; and
- 23.2.1.6 the Operational and Maintenance Proposals.

23.2.2 In the event of a conflict between the requirements of Clauses 23.2.1.1 to 23.2.1.6 the requirements shall have precedence in the numerical order in Clause 23.2.1, provided always that, where the Operational and Maintenance Proposals provide a greater benefit to the Authority (of which the Authority shall be the sole judge) there shall be deemed to be no conflict (unless and to the extent the Operational and Maintenance Proposals are inconsistent with Legislation and/or the Necessary Consents).

23.2.3 The Contractor shall at all times perform its obligations under this Agreement in accordance with Legislation.

**23.2A Inconsistency between Operational Services Specification and Operation and Maintenance Proposals**

23.2A1 If the Authority or the Contractor finds there is any inconsistency or contradiction between the Operational Services Specification and the Operation and Maintenance Proposals it shall give notice to the other specifying the inconsistency or contradiction; and

23.2A2 The Contractor shall notify the Authority in writing of its proposed amendment with specific reference to this Clause 23.2A to remove the inconsistency or contradiction and, subject always to compliance with Legislation and/or the Necessary Consents, the Authority shall (in its sole discretion) within 10 Business Days of receipt of such written information decide between the inconsistent or contradictory items, or otherwise may accept the Contractor's proposed amendment. The Contractor shall be obliged to comply with the decision or acceptance by the Authority without cost to the Authority.

Where the Authority fails to so decide within said 10 Business Days period, the Contractor will be deemed entitled to proceed with its proposed amendment.

### **23.3 Services Compensation Event**

If, as a direct result of the occurrence of a Services Compensation Event, the Contractor is unable or will be unable to comply with its obligations under this Agreement and/or the Contractor incurs or may incur costs or loses or may lose revenue in excess of £150 (Indexed) per event or £5,000 (Indexed) in aggregate in any Contract Year (**Relief Amount**) then, subject to Clause 23.6, the Contractor shall be entitled to claim compensation under this Part 4 of the Agreement and or relief from its obligations under this Agreement.

### **23.4 Procedure for relief**

To claim compensation and/or relief under Clause 23.3 the Contractor must:

23.4.1 as soon as practicable, and in any event within 20 Business Days after it becomes aware that the Services Compensation Event has caused or is likely to cause the Contractor to breach an obligation under this Agreement and/or the Contractor to incur the Relief Amount, give to the Authority a notice of its claim for relief and/or payment of compensation;

23.4.2 within 10 Business Days of receipt by the Authority of the notice referred to in Clause 23.4.1 (or such other period as the Authority may agree in writing (acting reasonably), having regard to the nature of the Services Compensation Event), give full details of the Services Compensation Event and any Estimated Change in Project Costs claimed (including evidence, on an open book basis, of the calculation of the Relief Amount and of any Estimated Change in Project Costs); and

23.4.3 demonstrate to the reasonable satisfaction of the Authority that:

23.4.3.1 the Services Compensation Event was the direct cause of the Estimated Change in Project Costs and/or breach of an obligation; and

23.4.3.2 the Estimated Change in Project Costs claimed could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice.

### **23.5 Giving of relief**

Subject to Clause 23.6, following compliance by the Contractor of the requirements of Clause 23.4, then in the case of the Relief Amount being incurred by the Contractor, the Authority shall compensate the Contractor for the actual Estimated Change in Project Costs as adjusted to reflect the actual Relief Amount reasonably incurred. The Authority shall compensate the Contractor either:

(a) by an adjustment to the Unitary Charge calculated in accordance with Section B of Schedule Part 7 (*Unitary Charge Adjustment*) excluding double counting arising from the Indexation Adjustment; or

(b) by payment of the Relief Amount reasonably incurred within 30 days of receipt of a written demand by the Contractor supported by all relevant information.

The Authority shall give the Contractor such relief from its obligations under this Agreement as is reasonable for such a Services Compensation Event.

### **23.6 Late provision of information**

In the event that information is provided after the period allowed in Clause 23.4, then the Contractor will not be entitled to any compensation or relief from its obligations under this Agreement to the extent the Authority is prejudiced by such delay.

### **23.7 Failure to agree**

If the parties cannot agree the extent of any compensation under this Part 4 of the Agreement

or relief from the Contractor's obligations or the Authority disagrees that a Services Compensation Event has occurred (or as to its consequences), the parties shall resolve the matter in accordance with the Dispute Resolution Procedure.

### **23.8 Parties to Mitigate**

Each party shall take all reasonable steps to mitigate any losses which arise under this Agreement.

## **24. CONDITION OF THE NEW PROJECT FACILITIES**

### **24.1 Maintenance**

The Contractor shall ensure that the maintenance and operating procedures set out in the Contractor's Proposals are and remain sufficient to ensure that:

- 24.1.1 the New Project Facilities are available in accordance with the provisions of this Agreement;
- 24.1.2 the physical assets can be maintained to achieve their full designed working life;
- 24.1.3 the New Project Facilities are kept in safe, good and substantial condition, and in good decorative order in accordance with the Authority's Requirements;
- 24.1.4 the Contractor can deliver the Services in accordance with this Agreement and the Authority's Requirements; and
- 24.1.5 the New Project Facilities are handed back to the Authority on the Expiry Date in accordance with the Handback Requirements.

### **24.2 Surveys**

- 24.2.1 If the Authority reasonably believes that the Contractor is in breach of its obligations under Clauses 23.2 or 24.1 then it may carry out or procure the carrying out of a survey of the New Project Facilities believed to be non-compliant to assess whether the New Project Facilities have been and are being maintained by the Contractor in accordance with its obligations under Clauses 23.2 and/or 24.1. This right may not be exercised in relation to any individual New Project Facility more often than once every two years.
- 24.2.2 The Authority shall notify the Contractor in writing a minimum of 5 Business Days in advance of the date it wishes to carry out the survey. The Authority shall consider in good faith any reasonable requests by the Contractor for the survey to be carried out on a different date if such request is made at least 2 Business Days prior to the notified date and the Contractor is able to demonstrate that carrying out the survey on the notified date would materially prejudice the Contractor's ability to provide the Services.
- 24.2.3 When carrying out any survey, the Authority shall cause the minimum disruption reasonably practicable to the provision of the Services by the Contractor. The cost of the survey, except where Clause 24.2.4 applies, shall be borne by the Authority. The Contractor shall give the Authority (free of charge) any reasonable assistance required by the Authority from time to time during the carrying out of any survey.
- 24.2.4 If a survey shows that the Contractor has not complied or is not complying with its obligations under Clauses 23.2 and/or 24.1, the Authority shall:
  - 24.2.4.1 notify the Contractor of the standard that the condition of the relevant New Project Facility should be in to comply with its obligations under Clauses 23.2 and/or 24.1;
  - 24.2.4.2 specify a reasonable period within which the Contractor must carry out such rectification and/or maintenance work (taking into account future maintenance

scheduled in accordance with Clause 24.4); and

24.2.4.3 be entitled to be reimbursed by the Contractor for the cost of the survey and any administrative costs incurred by the Authority in relation to the survey where the relevant maintenance work had not prior to the carrying out of such survey already been scheduled in the Maintenance Programme to take place.

24.2.5 The Contractor shall at its own cost carry out such rectification or maintenance work as necessary to ensure that it complies with its obligations under Clauses 23.2 and/or 24.1 within the period specified by the Authority.

### **24.3 Operational and Maintenance Proposals**

#### **24.3.1 Procedures for Proposals**

If the Contractor proposes to vary or amend the Operational and Maintenance Proposals, such proposal, together with an explanation of the reasons for the proposed change, shall be submitted to the Authority's Representative in accordance with the Review Procedure. If there is no objection to such proposal in accordance with the Review Procedure then the Operational and Maintenance Proposals shall be varied or amended in accordance with such proposal.

#### **24.3.2 No Variation**

The making or implementation of a variation or amendment to the Operational and Maintenance Proposals pursuant to this Clause 24.3 shall not constitute a variation in terms of Clause 56 (*Variations*).

### **24.4 Maintenance Programme**

24.4.1 The Contractor shall prepare and submit to the Authority's Representative for approval under the Review Procedure:

24.4.1.1 not later than three months prior to any Target Service Availability Date a Maintenance Programme for that New Project Facility for the remaining part of the Contract Year in which a Service Availability Date occurs; and

24.4.1.2 not later than two months prior to the beginning of each Contract Year thereafter a Maintenance Programme for each New Project Facility for that Contract Year.

24.4.2 Each Maintenance Programme produced pursuant to Clause 24.4.1 shall:

24.4.2.1 specify in reasonable detail all maintenance (including lifecycle replacement and maintenance) or repair works to be carried out in respect of the relevant New Project Facility in the relevant Contract Year and shall specify the proposed start date and end date for each material element of such works; and

24.4.2.2 provide that any such works which may cause any disruption or inconvenience to the normal operation of a New Project Facility shall be scheduled to take place either outwith those times that the relevant Area is required in accordance with the Academic Timetable for that New Project Facility or at a time to minimise (so far as reasonably practicable) disruption at that New Project Facility which, if within a School Day, the Authority can at its sole discretion determine.

24.4.3 In the event that the Authority does not comment upon or object to such Maintenance Programme under the Review Procedure it shall be the Maintenance Programme for the New Project Facility for the relevant Contract Year. The approval or deemed approval as the case may be by the Authority of a Maintenance Programme shall not relieve the Contractor of any of its obligations under this Agreement.

- 24.4.4 In the event that the Authority comments upon or objects to a Maintenance Programme in terms of the Review Procedure, the revised Maintenance Programme shall be the relevant Maintenance Programme for the relevant Contract Year.
- 24.4.5 Without prejudice to Clause 41.6, the Contractor shall only effect maintenance (including lifecycle replacement and maintenance) or repair works at a New Project Facility in any Contract Year as provided for in the Maintenance Programme therefor for that Contract Year, approved by the Authority or determined by Dispute Resolution Procedure under this Clause 24.4, unless:
- 24.4.5.1 in the case of Urgent need, then in accordance with Clause 24.4.6; or
- 24.4.5.2 in accordance with Clause 24.4.7.
- 24.4.6 If an Urgent need arises for unprogrammed maintenance or repair works (otherwise than in accordance with a Maintenance Programme or Clause 24.4.7) the Contractor shall (save where and to the extent that the Authority has exercised its rights under Clause 58 to step-in) effect such maintenance or repair works, provided that the Contractor shall, as soon as reasonably practicable (which the parties hereby acknowledge may be after the commencement of such works) advise the Authority's Representative and School Representative of such maintenance works where the same affect any New Project Facility (or any part thereof) and need to be carried out at a time when the New Project Facility or the relevant part thereof is required for its intended use and shall take all reasonable steps to minimise the duration of such maintenance or repair works and minimise disruption (if any) to the provision of the Operational Services and the use of the New Project Facility.
- 24.4.7 If the need arises for unprogrammed maintenance or repair works (otherwise than in accordance with a Maintenance Programme or Clause 24.4.6) and the Contractor proposes that such works are carried out during such times as the New Project Facility (or the relevant part thereof) is required for its intended use, the Contractor shall advise the Authority's Representative and School Representative of such need and request approval of the proposed commencement date and estimated duration of and resultant disruption or inconvenience resulting from the requisite maintenance or repair works. In the event that the Authority's Representative has not objected within 5 Business Days of such notification, the Authority's approval shall be deemed to have been given. The provisions of this Clause 24.4.7 are without prejudice to the Contractor's right to carry out unprogrammed maintenance or repair works where such maintenance or repair is being carried out following a call to the Helpdesk and the call to the Helpdesk relates to a failure to meet the Operational Services Specification which can be rectified by such maintenance or repair works.

## **24.5 Rights of Inspection**

- 24.5.1 The Authority or a representative of the Authority may enter upon any property used by the Contractor to perform the Services, to inspect the operation and maintenance of the Project and to monitor compliance by the Contractor with its obligations in respect of the Services.
- 24.5.2 If the Authority is or becomes aware of a breach by the Contractor of its obligations under Clause 24.1 (Maintenance) then the Authority may (or may instruct a representative to) carry out such inspection of the New Project Facility as the Authority acting reasonably, considers necessary. The following provisions of this Clause 24.5.2 shall apply to such inspection.
- 24.5.2.1 The Authority shall notify the Contractor in writing a minimum of 10 Business Days in advance of the date it wishes to carry out such inspection and of the scope, scale and expected duration of such inspection. The Authority shall consider in good faith any reasonable requests by the Contractor for the survey to be carried out on a different date if such request is made at least 3 Business Days prior to the notified date and the Contractor is able to demonstrate that carrying out the inspection on the notified date would materially

prejudice the Contractor's ability to provide the Services.

24.5.2.2 The cost of any inspection under Clause 24.5.2 shall be borne by the Authority, unless the inspection shows that the Contractor has not complied or is not complying with its obligations under Clause 24.1, in which case the Authority shall be entitled to recover such costs of inspection from the Contractor as a debt.

24.5.3 The Authority and its representative shall at all times comply with any applicable health and safety requirements when exercising its rights under this Clause and, so far as practicable, shall not impede the delivery of the Operational Services.

24.5.4 [Not Used].

24.5.5 The Contractor shall procure that satisfactory facilities are made available to the Authority and any representative of the Authority and that reasonable assistance is given for the purposes of Clauses 24.5.1 and 24.5.2 above, subject to the Contractor's and Sub-Contractors' operational requirements not being adversely affected and to reimbursement of any reasonable costs or expenses of the Contractor.

24.5.6 If the Authority or its representative causes material damage to any physical asset in exercising any right under this Clause, then unless the inspection shows that the Contractor has not complied or is not complying with its obligations under Clause 24.1, the Authority shall be liable to the Contractor for the reasonable costs directly caused by such damage.

## **25. HAZARDOUS SUBSTANCES**

### **25.1 Storage**

The Contractor shall ensure that any hazardous materials or equipment used or intended to be used in the provision of the Services are kept under control and in safe keeping in accordance with all relevant Legislation, and Good Industry Practice and shall ensure that all such materials or equipment are properly and clearly labelled on their containers, and shall promptly inform the Authority of all such materials or equipment being used or stored at the Sites and shall comply with any reasonable requirement of the Authority in respect thereof.

### **25.2 COSHH Register**

The Contractor shall maintain a COSHH Register in relation to each Project Facility and shall ensure that a copy of each register is held at the relevant Project Facility and at the Contractor's registered office and that a copy thereof is given to the Authority, including copies of any changes when made. The Authority shall promptly notify the Contractor of any items in use or being stored at the relevant New Project Facility (other than items used or intended for use by the Contractor in provision of the Services) which require to be included in a COSHH register.

## **26. EMERGENCIES**

### **26.1 Authority may instruct**

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

### **26.2 Cost of Services**

The cost of any additional or alternative services provided by the Contractor under Clause 26.1 shall be borne by the Authority and paid in accordance with Clause 33 (*Payment Provisions*). 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 the Contractor's

compliance with this Clause 26.

## 27. PERFORMANCE MONITORING

### 27.1 Contractor Monitoring

The Contractor shall monitor its performance in the delivery of the Services in accordance with the procedure set out in Part 5 of Section A of Schedule Part 7 (*Payment Mechanism*).

### 27.2 Authority Monitoring

The Authority may elect, at its own cost, to undertake its own performance monitoring at any time during the Contract Period for any purpose including in order to ensure that the Services are being provided in accordance with this Agreement. The Contractor shall use all reasonable endeavours to assist the Authority in such an exercise but without being required to disrupt the proper delivery of the Services in accordance with this Agreement. The Authority may notify the Contractor of the outcome of the performance monitoring exercise, and the Contractor shall have due regard to the Authority's comments in relation to the future provision of the Services.

## 28. MARKET TESTING AND BENCHMARKING

### 28.1 Benchmarking

28.1.1 The Contractor shall undertake a benchmarking exercise (the **Benchmarking Exercise**) at its own cost six months before any Market Testing Review Date (as defined in Clause 28.2) in relation to those Operational Services which may be subject to Market Testing under Clause 28.2.

28.1.2 Each Benchmarking Exercise will be undertaken to ascertain the relative quality and competitiveness of each Operational Service element. The Benchmarking Exercise will be undertaken in good faith by the Contractor and on the basis of an objective and like for like comparison by comparing

- (i) the standards and prices of the relevant Operational Services element as detailed in the relevant sub contract and the costs of the provision thereof by the FM Contractor (or of the relevant sub-contractor of the FM Contractor if a sub-contractor is delivering the Operational Services in question) as identified in the Financial Model (as such element may have been adjusted as a result of being Indexed or as a result of previous adjustments made pursuant to Clause 17 (*Extension of Time*), Clause 23, Clause 28, or the Change Procedure (**Base Cost**); with
- (ii) the standards and prices of equivalent services and the costs of providing them provided by reputable organisations possessing an appropriate degree of skill, resources, reputation and financial standing relative to the provision of the aforesaid Operational Services (**Market Cost**).

28.1.3 The Contractor shall make the results of any Benchmarking Exercise available to the Authority by the date occurring three months before the relevant Market Testing Review Date. The results shall indicate the extent to which (if at all) the Market Cost differs (in percentage terms) from the Base Cost.

28.1.4 If the Market Cost is 5% or less, upwards or downwards than the Base Cost, there will be no adjustment to the Unitary Charge. Where the difference between Market Cost and the Base Cost is greater than 5%, the Unitary Charge will only be adjusted by such amount that is in excess of 5% either as an increase or decrease as appropriate in accordance with Clause 28.1.5 or Clause 28.1.6.

28.1.5 Where the Market Cost is more than 5% but less than 15% higher than the Base Cost

the Service Unit Rate shall be increased with effect from the Market Testing Review Date by:

$$\frac{A}{TD \times SU}$$

Where

$$A = P_M - P_A$$

$$P_M = \text{Market Cost of the relevant Operational Service}$$

$$P_B = \text{Base Cost of the relevant Operational Service}$$

$$P_A = \frac{105}{100} P_B \text{ and}$$

TD and SU are as defined in Schedule Part 7 (*Payment Mechanism*).

28.1.6 Where the Market Cost is more than 5% but less than 15% lower than the Base Cost the Service Unit Rate shall be decreased with effect from the Market Testing Review Date by:

$$\frac{B}{TD \times SU}$$

Where

$$B = P_N - P_M$$

$$P_M = \text{Market Cost of the relevant Operational Service}$$

$$P_B = \text{Base Cost of the relevant Operational Service}$$

$$P_N = P_B \left( \frac{95}{100} \right) \text{ and}$$

TD and SU are as defined in Schedule Part 7 (*Payment Mechanism*).

## 28.2 Market Testing Review Dates

Subject to Clause 28.3 the following Operational Service shall be subject to Market Testing by the Contractor on the dates specified in the table below (such dates being referred to in this Clause as the “**Market Testing Review Date**”):

Operational Services	Market Testing Review Date
Cleaning	5 years after final Service Availability Date  and every 5 years thereafter up to the Expiry Date

## 28.3 Conditions for Market Testing

The Contractor will not be required to undertake Market Testing on any Market Testing Review Date unless any Benchmarking Exercise carried out pursuant to Clause 28.1 indicates that there is a cost difference between the Base Cost of relevant Operational Services and the Market Cost of more than 15% upwards or downwards or the Authority acting reasonably

having regard to the results of and/or the conduct of the Benchmarking Exercise requires the Contractor to do so.

#### **28.4 Market Testing Procedure**

Where in terms of Clause 28.3 of this Agreement Market Testing is required, the following procedure shall apply:

28.4.1 At least 10 weeks before each Market Testing Review Date the parties shall endeavour to agree:

28.4.1.1 the number and identity of prospective tenderers that will be invited to prepare and submit tenders for the Operational Services in question provided that any prospective tenderer shall possess an appropriate degree of skill, resources, reputation and financial standing relative to the provision of the Operational Services in question; and

28.4.1.2 the form and contents of the tender documents (which shall include the Operational Services Specification to be delivered to prospective tenderers) **(Tender Documents)**

Any dispute as to the selection of a prospective tenderer or as to the Tender Documents shall be determined in accordance with the Dispute Resolution Procedure.

28.4.2 No later than 6 weeks before each Market Testing Review Date the Contractor shall prepare and deliver to the Authority a draft market testing proposal **(Market Testing Proposal)** describing in detail the Contractor's proposed tenderers and the Tender Documents for each of the Operational Services in question, and the Market Testing Proposal shall incorporate all of the matters agreed by the parties and shall reflect the payment structure and other relevant provisions contained in this Agreement and shall include sufficient information relating to the transfer of any employees to enable prospective tenderers to assess the obligations to be assumed.

28.4.3 If the parties are unable to agree any of the matters set out in the Market Testing Proposal or if the Authority reasonably considers that the Contractor has made a material error or omission in the Market Testing Proposal the Authority may (subject to Clause 28.4.4) amend the provisions of the Market Testing Proposal to accord with the requirements of Procurement Rules, Guidance and Legislation at its sole discretion.

28.4.4 The Contractor may upon receiving any amendments made by the Authority in accordance with Clause 28.4.3 refer the matter to the Dispute Resolution Procedure.

28.4.5 The Contractor shall manage the Market Testing tendering process in accordance with the Market Testing Proposal agreed or determined in accordance with this Clause 28.4.

28.4.6 The Contractor shall bear all of its own costs, fees and expenses associated with the Market Testing.

28.4.7 The Contractor shall provide to the Authority as soon as reasonably practicable a copy of the Tender Documents and each response to the Tender Documents.

28.4.8 Subject to Clause 28.4.9 following the expiry of the tender period the Contractor shall determine following consultation with the Authority which tender to select, if any.

28.4.9 The Contractor shall select the most economically advantageous tender received in respect of the provision of the Operational Service, provided that nothing in this Clause 28.4.9 shall oblige the Contractor to accept the lowest tender.

28.4.10 Any dispute under Clause 28.4.9 shall be determined in accordance with the Dispute Resolution Procedure.

- 28.4.11 The Contractor shall procure that all tenderers selected in accordance with Clause 28.4.9 are appointed as sub-contractors to the FM Contractor.
- 28.4.12 The Authority shall have the right to object to the selection of a tenderer and such tenderer shall not be selected where the tenderer has committed a Prohibited Act.
- 28.4.13 Each Market Testing exercise shall be conducted on the basis that prospective tenderers shall submit tenders on the basis that they are required to make available (by virtue of TUPE or otherwise) employment to all employees of the then current service provider who are wholly or mainly assigned to performance of the relevant Operational Service on like terms and conditions of employment and will indemnify the employer of such employees in the terms set out in Clause 30.

## 28.5 Adjustments to Unitary Charge

Where the tender price of a sub-contractor appointed pursuant to Clause 28.4 (**Successful Tenderer**) is lower or higher than the relevant element identified as the Base Cost of providing the Operational Services in question then the cost difference between the Successful Tenderer's tender price and the Base Cost shall be reflected by an adjustment to the Unitary Charge with effect from the relevant Market Testing Review Date in accordance with the following:

- 28.5.1 Where the Successful Tenderer's tender price is lower than the Base Cost by more than 5%, the Service Unit Rate shall be decreased as follows:

$$\frac{P_N - P_S}{TD \times SU}$$

Where

$P_N$  has meaning given to it in Clause 28.1.6

$P_S$  = Successful Tenderer's tender price and

$TD$  and  $SU$  are as defined in Schedule Part 7 (*Payment Mechanism*).

- 28.5.2 Where the Successful Tenderer's tender price is higher than the Base Cost by more than 5%, the Service Unit Rate shall be increased by:

$$\frac{P_S - P_A}{TD \times SU}$$

Where

$P_S$  = Successful Tenderer's tender price

$P_A$  has meaning given to it in Clause 28.1.5 and

$TD$  and  $SU$  are as defined in Schedule Part 7 (*Payment Mechanism*).

## 28.6 Reconciliation

Until the adjustment of the Unitary Charge in terms of this Clause 28 is agreed or determined, the Authority shall continue to pay the existing Unitary Charge with a reconciliation being effected between the parties in the Payment Period following the agreement or determination of the Unitary Charge Adjustment as aforesaid.

## 28.7 Financial Model

The Financial Model shall be adjusted in terms of this Clause 28 as at the date when such

adjustment takes effect and the Contractor shall deliver an updated copy of the Financial Model to the Authority in accordance with the requirements set out in Section B of Schedule Part 7 (*Unitary Charge Adjustment*).

## **29. USE OF NEW PROJECT FACILITIES**

### **29.1 Priority**

29.1.1 The New Project Facilities shall be made available for use in the following order of priority:

29.1.1.1 the provision by the Authority of Educational Services during the School Day (including for the avoidance of doubt and subject to Clause 29.2, during Flexible Use Hours);

29.1.1.2 the provision by the Authority of Community Education Services during Core Times;

29.1.1.3 Community Use;

29.1.1.4 Third Party Use.

29.1.2 Subject to Clauses 29.3 and 29.7, the Authority shall be entitled to use the New Project Facilities during the Core Times to the extent defined therein, and during Flexible Use Hours pursuant to Clause 29.2.

29.1.3 The Contractor shall otherwise be entitled to use the New Project Facilities for Third Party Use in accordance with this Clause 29.

### **29.2 Flexible Use Hours**

29.2.1 If Flexible Use of an Area of any New Project Facility is required by the Authority, the Authority shall notify the Contractor (copied to the FM Contractor at such address as is given to the Authority from time to time) not less than 2 Business Days prior to the date of the proposed Flexible Use, of the type of Area and use required and the number of hours during which Flexible Use will be required, which will be the corresponding Flexible Use Hours. If 2 Business Days' notice is given to the Contractor by the Authority, the Contractor shall make the relevant Area available to the Authority for the required number of hours. If the Authority gives the Contractor less than 2 Business Days prior notice, the Contractor shall use all reasonable endeavours to make the relevant Area of the New Project Facility available for the Flexible Use requested. If the Contractor is not able to make the relevant Area of the New Project Facility available in circumstances where 2 Business Days is not given, the Contractor shall not be deemed to be in breach of this Agreement and no Flexible Use Deduction shall apply.

29.2.2 The cost of providing the Flexible Use Hours is included in the Unitary Charge.

29.2.3 If in any Contract Year the total Flexible Use Hours exceeds the Flexible Use Hours Cap, the Authority will pay to the Contractor the sum of £29 per hour (Indexed) for such number of hours beyond the said Flexible Use Hours Cap.

29.2.4 If Flexible Use is booked pursuant to Clause 29.2.1 and the Authority cancels the relevant booking, provided the Contractor is given 24 hours prior notice of such cancellation, the Flexible Use Hours which would otherwise have been required in relation to such Flexible Use shall not count towards the Flexible Use Hours Cap.

29.2.5 If a Flexible Use Deduction is made pursuant to Paragraph 6 of Part 4 of Section A of Part 7 of the Schedule (*Payment Mechanism*), and no other Areas are utilised for Flexible Use at the relevant New Project Facility, the Flexible Use Hours which would otherwise have been required in relation to such Flexible Use shall not count towards the Flexible Use Hours Cap.

### **29.3 Notification of terms**

- 29.3.1 The terms for Academic Year 2005/6 are those published on the Authority's website at the Execution Date.
- 29.3.2 No later than 31<sup>st</sup> December in each year the Authority shall notify the Contractor of the dates for terms (including any half-term holidays) for the Academic Year commencing in the following year. The Contractor agrees that the publication of these dates on the Authority's website will satisfy the Authority's obligation to notify the Contractor pursuant to this Clause 29.3.2.
- 29.3.3 Without prejudice to Clause 29.2, in the event that the Authority wishes either:
- 29.3.3.1 terms to have an aggregate yearly duration in excess of the number of School Days detailed in the Academic Year, or
  - 29.3.3.2 to make a change to Core Times; or
  - 29.3.3.3 to make any material changes to the term durations or a material change to the periods of time between the end dates and start dates of terms which would have a material adverse effect on the Contractor's ability to carry out and complete its planned preventative or lifecycle maintenance (or materially increase the cost to the Contractor of doing so),
- it shall propose a change to the Authority's Requirements in accordance with Clause 56 (*Variations*).
- 29.3.4 Notwithstanding Clause 29.3.3, the Authority shall be entitled without proposing a change to the Authority's Requirements in accordance with Clause 56 (*Variations*) to make *de minimis* changes to the Core Times, provided the total number of hours falling within Core Times remains the same unless the Contractor can demonstrate to the Authority that such change will not have a *de minimis* impact on the cost of and/or the delivery of the Services.

### **29.4 Third Party Use**

The Contractor may enter into arrangements for Third Party Use for a period not exceeding 1 year provided that:

- 29.4.1 it is in accordance with Legislation;
- 29.4.2 the Third Party Use cannot reasonably be expected to impair the ability of the Authority to provide Educational Services or Community Education Services or to hinder Community Use; and
- 29.4.3 prior to such Third Party Use the Contractor has submitted the proposed Third Party Use to the Authority under the Review Procedure and the Authority has either approved or not objected to the relevant Third Party Use within the time stipulated by the Review Procedure.

### **29.5 Use Forbidden**

- 29.5.1 If the Authority reasonably believes that any Third Party Use is not compatible with the use of the New Project Facilities as determined by the Authority in accordance with Paragraph 3.1.8 of the Review Procedure it may forbid such use of the New Project Facilities on any occasion without any liability to pay compensation or damages to the Contractor or any other person.
- 29.5.2 If there has been a change of circumstances or further information has become available to the Contractor, which (in either case) would cause the Contractor to reasonably believe that such Third Party Use would impair the ability of the Authority to provide Educational Services or Community Education Services or would impair Community Use since such Third Party Use was submitted to the Authority under the

Review Procedure pursuant to Clause 29.4 the Contractor shall be obliged to resubmit the Third Party Use to the Authority for review under the Review Procedure.

#### **29.6 Fees for Third Party Use**

The Contractor shall, in respect of the use of the New Project Facilities, be entitled to charge for, and be paid by, each third party user a fee determined by the Contractor for the Third Party Use made of the New Project Facilities.

#### **29.7 Community Use**

Without prejudice to Clause 29.2.1, the Authority shall use its best endeavours to notify the Contractor of any planned periods of Community Use and the Area required for such use for each New Project Facility not less than one month before the commencement of each term. The Authority may notify the Contractor of any additional Community Use and the Area required for such use not less than one month before the commencement of such Community Use.

#### **29.8 Payment for Community Use**

Payment from third parties for Community Use will be collected by the Authority.

#### **29.9 Use of Authority Equipment**

The Contractor will not be entitled to use Authority Equipment in connection with Third Party Use unless and until the Contractor and the Authority have agreed the terms and conditions upon which such use will be authorised by the Authority. Such terms shall include the period of such use, requirements to ensure the proper use of Authority Equipment and the insurance thereof, the costs to be met by the Contractor including in connection with the maintenance, repair and replacement of such Authority Equipment and the Contractor's liability for any damage caused to Authority Equipment and/or the persons using the same during Third Party Use. The Authority, in the event of any previous misuse of any item of Authority Equipment, shall be entitled to prohibit the Contractor from using the same.

#### **29.10 Income**

All income received whether directly or indirectly and whether by payment, set off or other accommodation by the Contractor in connection with Third Party Use (**Gross Income**) after deducting the aggregate of the direct and indirect costs incurred by the Contractor, so far as they are additional to the costs which the Contractor would have incurred in connection with the provision of the Operational Services, in constructing, altering, servicing, supplying and/or making available any part of the New Project Facilities to such third party and are not costs which are included in the Financial Model (**Costs**) is referred to in Clause 29.11 as the "**Net Income**".

#### **29.11 Income Sharing**

With effect from the final Service Availability Date the Net Income shall be divided between the Authority and the Contractor equally.

The Contractor shall notify the Authority in respect of the six months ending on each 30 September and 31 March, within one month of the end of each such period, of the Gross Income and the amount and nature of all Costs which the Contractor considers are eligible to be deducted from the Gross Income in accordance with this Clause 29.11 (**Income Notice**).

The Contractor shall deliver to the Authority with the Income Notice a detailed breakdown of the Gross Income and all Costs, together with supporting evidence thereof and shall permit the Authority access in an open book basis to all accounts and other records necessary to satisfy the Authority as to the accuracy of the Income Notice.

The Authority shall be entitled to dispute the amount of the Gross Income and the Costs by written notice to the Contractor within 20 Business Days (**Dispute Notice**). If the Authority does not serve a Dispute Notice, the Income Notice shall be conclusive evidence of the Gross

Income and the Costs. If the Authority does serve a Dispute Notice, the matter shall, in default of agreement, be resolved by reference to the Dispute Resolution Procedure.

The Authority's part of the Net Income shall be taken account in the Monthly Unitary Charge payable for the Payment Period following the final determination of the amount of Net Income in accordance with this Clause 29.11 and such Monthly Unitary Charge shall be reduced accordingly.

If the date of such final determination is after the end of the Contract Period, the Authority's part of such Net Income shall be paid by the Contractor to the Authority.

#### **29.12 Minimisation of Costs**

In connection with Third Party Use, the Contractor shall use all reasonable endeavours in accordance with Good Industry Practice to minimise the Costs.

### **30. TUPE**

#### **30.1 Relevant Transfers**

The Authority and the Contractor agree that where the identity of a provider (including the Authority) of any service which constitutes or which will constitute one of the Operational Services is changed in anticipation of or consequent upon:

30.1.1 the Contractor or its sub-contractors of any tier providing the Operational Services as set out in this Agreement;

30.1.2 the Change Procedure;

30.1.3 Market Testing;

30.1.4 termination of the relevant subcontract as a result of the sub-contractor being in default thereunder; or

30.1.5 the termination of this Agreement;

then the change in the identity of such provider may constitute a Relevant Transfer. On the occasion of each Relevant Transfer the Contractor shall procure, insofar as reasonably practicable, that the Relevant Employees transfer directly to the new provider of the relevant service and that the new provider of the relevant service will comply with all of its obligations under TUPE in respect of any Relevant Employees.

#### **30.2 Contractor Responsibilities**

In respect of each Relevant Transfer to the Contractor or any of its Sub-Contractors, the Contractor shall or shall procure that the Employer to whom any of the Relevant Employees transfer under a Relevant Transfer shall:

30.2.1 become responsible for the payment of all salaries and provision of other benefits and deductions of any Relevant Employees with effect from the date of any Relevant Transfer;

30.2.2 Subject to the provisions of Schedule Part 8:

30.2.2.1 apply (at its own cost) to enter into an admission agreement with the administering authority of the Highland Council Pension Fund (**Local Government Scheme**) constituted under the Local Government Pension Scheme in terms of the Local Government Pension Scheme (Scotland) Regulations 1998 (as amended) (**Regulations**) and use all reasonable endeavours to obtain admitted body status in terms of the Regulations with effect from the first Relevant Transfer to it, and

30.2.2.2 procure that each Relevant Employee who is a member of the Local

Government Scheme at the date of the Relevant Transfer will be entitled, during the whole period that the Relevant Employee is involved in the provision of the Services, to remain a member of the Local Government Scheme on substantially the same terms as those offered to him whilst employed by the Authority and that his service under the Local Government Scheme is treated as continuous, or in the case of a Relevant Employee who is not a member of the Local Government Scheme at the date of the Relevant Transfer but was entitled to become such a member procure that such Relevant Employees are entitled to become members of the Local Government Scheme on substantially the same terms as those offered to those Relevant Employees who were members of the Local Government Scheme at the date of the Relevant Transfer;

30.2.2.3if, for any reason any of the Relevant Employees are unable to continue as members of the Local Government Scheme or to join and continue as members of the Local Government Scheme after the Relevant Transfer, procure that every such Relevant Employee is offered membership of an HM Revenue & Custom approved occupational pension scheme (**Receiving Scheme**) which has been certified by the Government Actuary's Department as providing benefits which are broadly comparable to those provided by the Local Government Scheme;

30.2.2.4in the event that Clause 30.2.2.3 applies, offer each Relevant Employee the opportunity to transfer the benefits accrued in respect of him under the Local Government Scheme to the Receiving Scheme and procure that the whole of the amount transferred to the Receiving Scheme shall be applied in providing the Relevant Employees with past service credits on a day for day basis and where there is a subsequent TUPE transfer back to the Authority the opportunity to transfer the benefits accrued in respect of time under the Receiving Scheme to the Local Government Scheme and procure that the whole of the amount transferred back to the Local Government Scheme shall be applied in providing the Relevant Employees with past service credits on a day for day basis. Where there is such a transfer back the Contractor shall ensure that the bulk transfer value to be paid from the transferring Receiving Scheme is sufficient to fund a day for day service credit in the Local Government Scheme.

30.2.3 subject to Clause 30.2.6, ensure that all individuals (including Relevant Employees) from time to time employed or engaged in the provision of the Services ("**Assigned Employees**") are engaged on terms and conditions of employment which are no less favourable overall than those applying to the Relevant Employees who provide the same or similar role to those Assigned Employees who are not Relevant Employees;

30.2.4 subject to Clause 30.2.3, ensure that the terms and conditions offered to any new employees who are being employed or engaged in the provision of the Services are offered after full consultation with the representatives of any recognised trade union of the Assigned Employees or, in the event that there is no recognised trade union for the Assigned Employees, with other elected representatives of such Assigned Employees;

30.2.5 subject to Clause 30.2.3, ensure that any changes to the terms and conditions of the Assigned Employees are achieved after full consultation with the representatives of any recognised trade union of such Assigned Employees or, in the event that there is no recognised trade union for such Assigned Employees, with other elected representatives of such Assigned Employees;

30.2.6 subject to Schedule Part 8, ensure that the Assigned Employees are offered one of the following pension arrangements:

- (a) membership of the Local Government Scheme or the Receiving Scheme of which the Relevant Employees are members, or if this is not possible, either:
  - (i) membership of a good quality employer pension scheme, either being

a contracted out, final salary based defined benefit scheme or a defined contribution scheme (in the latter case the employer must match employee contributions up to at least 6% of the employee's gross salary); or

- (ii) a stakeholder scheme, under which the employer will match employee contributions up to at least 6% of the employee's gross salary;

30.2.7 use all reasonable endeavours to promote and conduct fair employment practices and best practice in relation to health and safety and equal opportunities and maintain a constructive approach to employee relations, including to the question of trade union recognition;

30.2.8 support any government sponsored review of any guidelines, recommendations or requirements in relation to public private partnerships in Scotland and that the Contractor shall provide (and shall procure that any Employer shall provide) the Authority with all such advice, information or other support as it shall require to enable it to assist any such reviews;

30.2.9 provide in writing to the Authority within 10 Business Days of a reasonable written request from the Authority, subject to its obligations relating to Data Protection and confidentiality, all such information or documentation as the Authority may require acting reasonably to enable it to review and monitor the extent to which the Contractor (or any Employer) complies with the conditions set out in the document "Public Private Partnerships in Scotland – Protocol and Guidance Concerning Employment Issues" (or any such similar protocol, requirements or guidance issued and with which the Authority, Contractor or any Employer may be required to comply) and in this Clause 30.2 throughout the period of this Agreement. Such information may include (but shall not be limited to) information relating to:

- (a) the management arrangements for the Assigned Employees;
- (b) the pay, terms and conditions of the Assigned Employees, including details of the pension arrangements for Assigned Employees;
- (c) the variety of workforce training and development opportunities available to the Assigned Employees;
- (d) the framework for and conduct of employee relations relating to the Assigned Employees, including the employer's approach to trade union recognition and facilities;
- (e) the health and safety, equal opportunities or other employment related procedures relating to the Assigned Employees;

30.2.10 provide to the Authority as soon as reasonably practicable any further information or documentation in its possession or under its control (or which it can reasonably obtain) which updates any information or documentation provided in accordance with Clause 30.2.9 above;

30.2.11 warrant that the information provided to the Authority in accordance with Clauses 30.2.9 and 30.2.10 above will be full, complete and accurate but such warranty shall exclude information in respect of Relevant Employees which at the date of any Relevant Transfer from the Authority was inaccurate;

30.2.12 indemnify the Authority and keep the Authority indemnified in full against all costs, claims, liabilities or expenses (including legal expenses) suffered or incurred by the Authority which relate to or arise out of any breach by the Contractor (or any Employer) of any of the provisions of Clauses 30.2.1 to 30.2.11 above;

30.2.13 indemnify the Authority and keep the Authority indemnified in full from and against any costs, claims, liabilities and expenses (including legal expenses) suffered or incurred by the Authority in connection with the employment of or the termination of

employment of any Relevant Employee in each case by the Contractor or Employer which relate to or arise out of any act or omission by the Contractor or the Employer or any other event or occurrence in each case on or after the Service Availability Date up to but not including the Re-transfer Date (including, without prejudice to the foregoing generality, in relation to negligence claims by any Relevant Employee or third party, unfair dismissal, redundancy, unlawful discrimination, breach of contract, unlawful deduction of wages and equal pay).

### 30.3 Provision of Details and Indemnity

The Contractor shall or shall procure that any of its sub-contractors of any tier to whom any of the Relevant Employees transfer under a Relevant Transfer, subject to its or their legal obligations relating to data protection and confidentiality, within 10 Business Days of a written request by the Authority provide to the Authority details of any measures which the Contractor or the sub-contractor envisages it or they will take in relation to any employees who are or who will be the subject of a Relevant Transfer and shall indemnify the Authority against all injury, claims, costs and expenses (including legal expenses) and/or damages resulting from any failure by the Contractor or the relevant sub-contractor to comply with this obligation.

### 30.4 Pre Transfer Liabilities

30.4.1 The Authority shall indemnify and keep the Contractor (and/or the Employer to whom any of the Relevant Employees transfer under a Relevant Transfer from the Authority) indemnified against all loss, damages, injury, claims, cost liabilities and expenses (including legal expense) which relate to or arise out of any act or omission (including without prejudice to the foregoing generality, in relation to negligence claims by any Relevant Employee, unfair dismissal, redundancy, unlawful discrimination, breach of employment contract, unlawful deduction of wages and equal pay) by the Authority or any other event or occurrence where the cause of action arose prior to the Service Availability Date and the claim relates to any period prior to the Service Availability Date

30.4.2 The parties agree that in the case of equal pay the indemnity set out in 30.4.1 shall also apply to claims which relate to the period of one year after the Service Availability Date and which relate to or arise out of alleged inequalities in the terms and conditions of employment of the Relevant Employees which are inherited by the Contractor or any Employer by virtue of TUPE or the provisions of this agreement (save that for the avoidance of doubt the Contractors shall not be entitled to be indemnified in respect of any sums which it has or will recover in accordance with clause 30.4A below).

#### 30.4A Costs of Employment

30.4A.1 As at the Execution Date, Part 12 of the Schedule (*Employment Cost Data*) ("**the Employees List**") represents the Authority's estimate, acting reasonably and in good faith, of those persons (including persons who will be appointed to positions marked as vacancies) who will be Relevant Employees at the relevant New Project Facility by the Service Availability Date and the Authority confirms that the information detailed in the Employees' List is complete and accurate in all respects.

30.4A.2 Not later than 3 weeks before the Service Availability Date for each New Project Facility, the Authority will prepare and deliver to the Contractor a proposed list of all Relevant Employees or other individuals who will transfer to the Contractor or any Sub-Contractor or other Employer and the Authority's estimate, acting reasonably and in good faith, of those persons (including persons who will be appointed to positions marked as vacancies) who will transfer to the Contractor or any Sub-Contractor or other Employer on the Services Availability Date (the "**Authority School Employees List**").

30.4A.3 Not later than 3 weeks after the Services Availability Date for each New Project Facility, the Contractor will prepare and deliver to the Authority a list showing all Relevant Employees or other individuals who have transferred or claim at such time to have transferred to the Contractor or any Sub-Contractor or other Employer ("**the Contractor School Employee List**"). The parties shall agree any changes required to be made to the Contractor School Employee List and the list having been so agreed it shall be the "**Final Employees List**". If

there is any dispute between the Authority and the Contractor arising out of differences between the Authority School Employee List and the Contractor School Employees List the same shall be determined under the Dispute Resolution Procedure.

30.4A.4 The Contractor shall notify the Authority of the annual costs of employment of the Assigned Employees at each New Project Facility within 30 days of the parties' agreement (or of determination under the Dispute Resolution Procedure) of the Final Employees List for that New Project Facility. If the annual cost of employment of the Assigned Employees at each New Project Facility (assessed in respect of the year following the relevant Service Availability Date) is more or less than the annual aggregate costs of employment of such employees calculated with reference to the information specified in Part 12 of the Schedule as at the Execution Date for that New Project Facility as a result only of:

- (a) any difference in the grading of any Relevant Employee or the length of continuous service of any Relevant Employee by comparison of Part 12 of the Schedule as at the Execution Date and the Final Employees List; and/or
- (b) any changes to the terms and conditions of any of the Relevant Employees between the Execution Date and the Service Availability Date; and/or
- (c) such information as specified in Part 12 of the Schedule being erroneous or incomplete and/or
- (d) any difference in the number of Relevant Employees by comparison of Part 12 of the Schedule as at the Execution Date and the Final Employees List;

the Financial Model and Unitary Charge shall be adjusted (without double counting for indexation) by operation of Section B of Schedule Part 7 (*Payment Mechanism*) to reflect the additional costs or savings to the Contractor as demonstrated to the Authority's reasonable satisfaction.

### **30.5 Transfer of Additional Employees**

If the contract of employment of any individual who is not a Relevant Employee shall have effect as if originally made between the individual concerned and the Contractor or the Employer as a result of the provisions of TUPE and/or any judicial decision interpreting the same, then such a person shall, for the purposes of Clauses 30.4, 30.7A and 30.8, be deemed to be a Relevant Employee.

### **30.6 TUPE Upon Cessation**

The parties acknowledge that, by virtue of the cessation or partial cessation of the provision of the Services by the Contractor or the Employer (whether or not on the Expiry Date or earlier termination of this Agreement), the contract of employment of each Re-transferring Employee shall have effect after such cessation as if originally entered into between a New Supplier and the individual concerned pursuant to TUPE (and the Authority shall, save where in the reasonable opinion of the Authority it is clear that there will not be a relevant transfer for the purposes of TUPE, use all reasonable endeavours to ensure that TUPE shall apply upon such cessation or partial cessation of the provision of the Services) but the parties agree that the provisions of Clauses 30.7A and 30.8 shall apply irrespective of whether or not TUPE does apply as anticipated in this Clause 30.6.

### **30.7 Contractor Indemnity – Cessation**

The Contractor shall indemnify and shall keep indemnified on demand the Authority and/or, on demand by the Authority, any New Supplier, from and against any costs, claims, liabilities and expenses (including legal expenses) which relate to or arise out of any act or omission (including, without prejudice to the foregoing generality, in relation to negligence claims by any of the Re-transferring Employees or any third party, unfair dismissal, redundancy, unlawful discrimination, breach of employment contract, claims in relation to pension entitlement, unlawful deduction of wages and equal pay) by it, or the Employer or any other event or occurrence on or after the Service Availability Date and before the Re-transfer Date for which the Authority and/or any New Supplier is or becomes liable by reason of the operation of

TUPE and/or any judicial decision interpreting the same provided that the indemnity in this Clause excludes any costs or liability arising from any failure by the Authority or any New Supplier appointed by the Authority to provide any necessary information to the Contractor or Employer as the case may be in relation to informing and consulting the Re-transferring Employees prior to the Re-transfer Date.

**30.7A** The Authority shall indemnify and shall keep indemnified on demand the Contractor and each Employer from and against any costs, claims, liabilities and expenses (including legal expenses) which relate to or arise out of (a) any failure by the Authority or any New Supplier appointed by the Authority to provide any necessary information to the Contractor or Employer as the case may be in relation to informing and consulting the Re-transferring Employees prior to the Re-transfer Date or (b) any act or omission (including, without prejudice to the foregoing generality, in relation to negligence claims by such Re-transferring Employee or any third party, unfair dismissal, redundancy, unlawful discrimination, breach of contract, claims in relation to pension entitlement, unlawful deduction of wages and equal pay) by it or any New Supplier appointed by the Authority relating to the employment of such Re-transferring Employee or (c) any other event or occurrence relating to the employment of the Re-transferring Employees after the Re-transfer Date applicable to such Re-transferring Employee.

### **30.8 Indemnification of Sub-Contractors**

The Authority acknowledges and agrees that the Contractor shall grant an indemnity in favour of the Employer to whom any of the Relevant Employees transfer under a relevant transfer from the Authority to the same extent that the Authority is undertaking to indemnify the Contractor in terms of Clauses 30.4 and 30.7A and meet costs reasonably and properly incurred in terms of Clause 31.13 and agrees that in the event of a claim in terms of Clauses 30.4, 30.7A and/or 31.13 for loss reasonably and properly incurred by the Contractor that loss shall include the amount, if any, which the Contractor has acting diligently and prudently paid or is required to pay to the Employer.

## **31. EMPLOYEES**

### **31.1 Contractors Obligations regarding Personnel**

The Contractor shall procure that all persons engaged in the provision of the Services:

- 31.1.1 are properly trained and adequately supervised;
- 31.1.2 have all appropriate and necessary qualifications and registrations;
- 31.1.3 have all skills required for the performance of the Services for which they are engaged;
- 31.1.4 wear appropriate uniforms and bear an identification badge which identifies the Contractor and/or the Employer and the wearer's name; and
- 31.1.5 are provided with and wear appropriate protective equipment, clothing and footwear.

### **31.2 Conduct of Staff**

The Contractor shall, and shall procure that all persons engaged for the provision of the Services, shall whilst within any Site and/or any New Project Facility:

- 31.2.1 comply with the rules, regulations and requirements insofar as they relate to services equivalent to the Services and relate to the conduct of Authority staff as the Authority acting reasonably and having regard to the interests of the parties from time to time may specify to the Contractor in writing provided that any material change to such rules, regulations and requirements from those notified to the Contractor in writing on or prior to the Execution Date shall be deemed to be an Authority Change;
- 31.2.2 not consume or have in their possession any alcohol or illegal substances;

31.2.3 not be under the influence of alcohol or any illegal substances;

31.2.4 only smoke in those areas of any Site and/or any New Project Facility where smoking is specifically authorised.

### **31.3 Confidentiality**

Subject to Clause 59.2, the Contractor shall, and shall procure that all persons engaged for the provision of the Services, shall:

31.3.1 regard as confidential and shall not disclose to any person, any information which is acquired as a consequence of the carrying out of the Services;

31.3.2 not read, copy or remove any file, correspondence, literature or photography from a New Project Facility unless in accordance with the proper performance of the Operational Services.

### **31.4 Employee Checks**

The Contractor shall, and shall procure that the Employer when employing or engaging any Access Employee (other than a Relevant Employee) act with the diligence and care expected of a prudent employer, and not employ or engage any such person in the provision of the Services unless the Contractor or the Employer, as the case may be:

31.4.1 has obtained references in respect of any such person containing no information indicating that such person is a threat to the health and safety of children; and

31.4.2 has carried out the check referred to under Clause 31.5 below to establish that no such person has any criminal conviction (excepting minor road traffic offences) or record of dishonesty or violence and such check has established that no such person has any criminal conviction or record of dishonesty or violence (with the exception of minor road traffic offences) and shall submit copies of such checks to the Authority within 5 days of receipt of such check from the relevant authority.

and in addition to its obligations under this Clause 31 the Contractor agrees that it shall and shall procure that its sub-contractors of any tier comply with the Protection of Children (Scotland) Act 2003 as amended from time to time.

### **31.5 Employees Records**

The Contractor shall, and shall procure that every Access Employee (other than a Relevant Employee) has consented to the Contractor and/or the Employer obtaining an enhanced disclosure under Part V of the Police Act 1997.

### **31.6 Contractor's Acknowledgement of Public Interest**

The Contractor acknowledges that the requirements on a prospective employee, in terms of Clause 31.5, are requirements justified as being in the public interest.

### **31.7 Registration under the Police Act 1997**

The Authority and the Contractor shall and the Contractor shall procure that the Employer shall apply to be registered under section 120 of the Police Act 1997.

### **31.8 Contractor's Notification of Offences etc**

The Contractor shall, and shall procure that the Employer shall, keep the Authority advised at all times if the Contractor and/or the Employer becomes aware that any Access Employee engaged or to be engaged in the provision of the Services

31.8.1 has been or is convicted of an offence (other than minor road traffic offences); or

31.8.2 is engaged in any behaviour

either of which may give rise to concern as to their suitability to be engaged or continue to be engaged in the provision of the Services.

### **31.9 Authority Notice**

31.9.1 The Authority may in circumstances where information is received under the terms of Clause 31.8, in its absolute discretion, instruct the Contractor by way of a written notice not to employ or continue to employ (or procure that the Employer does not employ or continue to employ) that person in connection with the provision of the Services and to remove or procure the removal of that person from the Sites and/or the New Project Facilities. The decision of the Authority to issue such a notice shall be final and conclusive.

31.9.2 If the Contractor receives a notice from the Authority in accordance with Clause 31.9.1 it shall not employ or continue to employ (or shall procure that the Employer shall not employ or continue to employ) the person in connection with the Services and where the person is already employed the Contractor shall remove or procure that such person or persons are removed from the Sites and/or the New Project Facilities immediately.

### **31.10 Authority Right to Request Removal**

If the Contractor does not comply with its obligations under Clause 31.1.2, 31.1.3, 31.1.4, 31.1.5, 31.2, 31.3, 31.4 or 31.5 the Authority shall be entitled to request the removal of the person or persons concerned from the New Project Facilities and the Contractor shall remove or procure that such person or persons are removed immediately pending the Contractor taking all steps necessary to remedy such non compliance or breaches of its obligations. The Contractor shall, and shall procure that as soon as is reasonably possible the matter is thoroughly investigated.

### **31.11 Removal from Project Facilities**

The Contractor shall comply with and/or procure compliance with any request by the Authority to remove from any Site or Project Facility any person employed thereon by the Contractor or the Employer or any sub-contractors of any tier, if in the reasonable opinion of the Authority such person:

31.11.1 commits an act of gross misconduct (whether in the course of his duties or not); and/or

31.11.2 is not acceptable or is undesirable on the grounds of security or other grounds;

and such person shall not be employed again upon the Project without the written consent of the Authority.

### **31.12 Admission to the Sites**

The Contractor shall at least 20 Business Days before the date on which the Contractor first provides itself or through others any of the Services provide the Authority with a written list of the names and addresses of all employees (other than Relevant Employees) or other persons whom it expects may require admission to each Site or New Project Facility in connection with the provision of the Services specifying the capacities in which those employees or other persons are concerned with the Services and giving such other particulars as the Authority may reasonably require. The Contractor shall update this information as soon as reasonably practicable as and when any such individuals are replaced or complemented by others, before their involvement in the delivery of the Services. Where an unreasonable volume of amendments to the list is made by the Contractor the Authority reserves the right to make an appropriate administrative charge.

### **31.13 Refusal of Admission**

Where the Authority:

- (a) in refusing admission to and/or requiring the removal of a person from any Site and/or Project Facility pursuant to Clauses 31.10 and/or 31.11, or
- (b) in serving a notice on the Contractor pursuant to Clause 31.9

did not act reasonably, then the Authority shall meet the costs reasonably and properly incurred by the Contractor in terminating the employment or engagement of any such person employed or engaged by the Contractor or the Employer or a sub-contractor where the Contractor (or that person's employer) cannot, using all reasonable endeavours, relocate that person to a different place of employment subject always to the Contractor or the Employer or sub-contractor using reasonable endeavours to mitigate such costs.

### **31.14 Decision to Refuse Admission**

The decision of the Authority as to whether any person is to be refused admission to and/or is removed from any Site and/or Project Facility pursuant to Clauses 31.10 or 31.11 shall be final and conclusive, but the Authority will give written details of the reasons for its decision to the Contractor and the Contractor will, in processing such information, comply with the requirements of the Data Protection Act 1998 as amended.

### **31.15 Contractor Breach**

31.15.1 If the Contractor fails to comply with its obligations under Clauses 31.4, 31.5 or 31.8.1 and an employee to whom such breach relates is involved in any incident the result of which is that such employee is successfully prosecuted for an offence which would cause the Authority concern, acting reasonably, as regards any Access Employee then (unless the Contractor has remedied the breach prior to the occurrence of the incident but only where that breach relates to the submission of copies of checks within a time period of 5 days as specified in Clause 31.4.2) the Authority may give notice to the Contractor requiring the Contractor to terminate the FM Agreement and within 12 weeks of receipt of such notice the Contractor shall terminate the FM Agreement and procure the performance of the Services by another person who is not an Affiliate of the FM Contractor whose appointment has been terminated.

31.15.2 If the Contractor fails to comply with its obligations under Clauses 31.9, 31.10 or 31.11 then on the occurrence of such failure by the Contractor, the Authority may serve a notice on the Contractor requiring rectification of such failure. If the Contractor fails to remedy such breach within 2 Business Days of receipt of such notice, the Contractor shall be in breach of this Clause 31.15.2 and the Authority may serve a further notice on the Contractor requiring rectification of such breach. The Contractor shall remedy such breach within 2 Business Days receipt of the Authority's notice relating thereto, failing which the Authority may serve a further notice or notices on the Contractor until the breach is remedied. Each notice served under this Clause shall be as a separate breach for the purposes of Clause 31.15.3.

31.15.3 If the Contractor fails to comply with its obligations under Clauses 31.9, 31.10 or 31.11 or breaches Clause 31.15.2 or any of them on 3 or more occasions in any rolling period of 10 years then the Authority may give notice to the Contractor requiring the Contractor to terminate the FM Agreement and within 12 weeks of receipt of such notice the Contractor shall terminate the FM Agreement and procure the performance of the Services by another person who is not an Affiliate of the FM Contractor.

31.15.4 If the Authority discovers that the Contractor has failed to comply with its obligations under Clauses 31.4, 31.5, 31.8.1 or 31.12 and such failure recurs more than 3 times in any rolling period of 10 years from the date of the first such discovery then the Authority may give notice to the Contractor requiring the Contractor to terminate the FM Agreement and within 12 weeks of receipt of such notice the Contractor shall terminate the FM Agreement and procure the performance of the Services by another person who is not an Affiliate of the FM Contractor.

31.15.5 If the Contractor discovers that it has failed to comply with its obligations under Clauses 31.4, 31.5, 31.8.1 or 31.12, the Contractor shall notify the Authority of such failure and remedy the same within 10 Business Days of it becoming aware of such

failure, failing which it will be deemed to have been discovered by the Authority and Clause 31.15.4 shall then apply.

31.15.6 If the FM Agreement is terminated pursuant to Clauses 31.15.3 or 31.15.4 then any failures by the Contractor to fulfil its obligations under Clauses 31.4, 31.5, 31.8.1, 31.9, 31.10, 31.11 or 31.12 or to remedy any breach of Clause 31.15.2 prior to such termination of the FM Agreement shall be disregarded for the purposes of this Clause 31.15.

## **32. OPERATING MANUAL**

### **32.1 Maintenance of Manual**

The Contractor shall provide to the Authority, not later than one month prior to each Target Service Availability Date, an operating and maintenance manual setting out the procedures for providing the Services at the relevant New Project Facility which if complied with will deliver the Services in accordance with the terms of this Agreement (**Operating Manual**). The Contractor shall maintain and update the Operating Manual throughout the Services Period.

### **32.2 Access to Manual**

The Contractor shall at the request of the Authority provide the Authority with access to the Operating Manual in order to demonstrate that the Contractor has complied with its obligation to maintain and update the Operating Manual under Clause 32.1.

### **32.3 Copy on Termination**

On termination of this Agreement (howsoever arising including expiry) the Contractor shall within 5 Business Days of such Termination provide a copy of the Operating Manual to the Authority.

## PART 5 PAYMENT

### 33. PAYMENT PROVISIONS

#### 33.1 Payment of Unitary Charge

The Authority shall pay the Contractor an amount in respect of each Payment Period, calculated in accordance with Clause 33.2.

#### 33.2 Monthly Invoice

On or about the fifteenth day of each Payment Period the Contractor shall submit to the Authority an invoice (**the Monthly Invoice**) aggregating the following:

- 33.2.1 the Monthly Unitary Charge for that Payment Period;
- 33.2.2 as a negative figure, any Required Deductions which fall to be made for the previous Payment Period;
- 33.2.3 any amount owed to the Contractor in respect of Pass-Through Costs;
- 33.2.4 as a negative figure, any reimbursement of step-in costs incurred by the Authority;
- 33.2.5 any amount owed to the Contractor by the Authority in accordance with Clause 55 (*Qualifying Changes in Law*) or Clause 56 (*Variations*);
- 33.2.6 any undisputed amounts owed by either party to the other in accordance with Clause 60 (*Indemnities and Responsibility*) (and where owed by the Contractor, appearing as a negative figure);
- 33.2.7 any amounts owed to the Contractor by the Authority in accordance with Clause 26 (*Emergencies*);
- 33.2.8 any amounts owed by either party to the other under Part 6 of Section A of Schedule Part 7 (*Utilities*) (and where owed by the Contractor, appearing as a negative figure);
- 33.2.9 as a negative figure, any amounts owed by the Contractor under Clause 29 (*Use of New Project Facilities*);
- 33.2.10 any amounts owed by the Contractor under Clause 21.8.6 (*Completion of Works Detailed in the Snagging List*), 22 (*Delay and Supervening Unavailability*), 38.3 (*Increases and Monitoring*) or 41.5.3 (*Cost of Surveys*);
- 33.2.11 any interest due in accordance with Clause 33.5 (*Determination of Dispute*); and
- 33.2.12 any other amounts agreed or determined to be due and payable under this Agreement by one party to the other (and where owed by the Contractor, appearing as a negative figure); and
- 33.2.13 any VAT chargeable.

#### 33.3 Payment of Invoices

33.3.1 Subject to Clause 33.4 and to the submission of the Performance and Payment Report in accordance with Clause 33.6, the Authority shall pay the amount of the Monthly Invoice submitted under Clause 33.2 within 30 days of its submission and delivery of a valid VAT invoice in respect thereof.

33.3.2 Where a Monthly Invoice shows a net amount owed by the Contractor to the Authority, the Contractor shall pay that amount to the Authority within 30 days of the Monthly Invoice or, at the option of the Authority, carry forward that amount to the next Monthly Invoice in reduction of amounts which would otherwise have been owed by the

Authority to the Contractor.

### 33.4 Disputed Amounts

If the Authority disputes, in good faith, any amount set out in a Monthly Invoice, the Authority shall be entitled to withhold payment of the amount so disputed (**the Disputed Amount**). The Parties shall liaise to agree the Disputed Amount. Where the Disputed Amount is not agreed within 10 Business Days either Party may refer the matter to the Dispute Resolution Procedure.

### 33.5 Determination of Dispute

If the determination of any dispute referred to in Clause 33.4 shows that:

33.5.1 the Authority has withheld any amount which the Contractor was entitled to be paid; or

33.5.2 the Contractor has claimed under Clause 33.2 any amount which it was not entitled to be paid,

the Authority shall pay to the Contractor any amount which the Contractor is entitled to be paid or, if the Contractor has been paid an amount which it was not entitled to be paid, the Contractor shall repay such amount to the Authority with interest in each case on that amount at the Prescribed Rate calculated on a daily basis and compounded quarterly from the date on which payment should have been made (in the case of failure to pay by the Authority) or from the date on which over payment was made (in the case of excess claims by the Contractor) until all relevant monies have been paid in full and whether before or after judgement.

### 33.6 Monthly Reconciliations

The Contractor shall provide to the Authority, with each Monthly Invoice rendered pursuant to Clause 33.2, a performance and payment report accompanied by work papers clearly setting out the derivation and calculation of all of the entries on the Monthly Invoice including the Required Deductions (**the Performance and Payment Report**) in respect of the previous Payment Period as follows:

The Performance and Payment Report shall set out in respect of the previous Payment Period:

33.6.1 the details of each and the aggregate amount of any Availability Deductions for the relevant Payment Period, calculated in accordance with Section A of Schedule Part 7(*Payment Mechanism*);

33.6.2 the details of each and the aggregate amount of any Performance Deductions for the relevant Payment Period, calculated in accordance with Section A of Schedule Part 7(*Payment Mechanism*);

33.6.3 any Reporting Failure Deductions or Repeated Failure Deductions for the relevant Payment Period, calculated in accordance with Section A of Schedule Part 7(*Payment Mechanism*);

33.6.4 any adjustments to reflect previous over-payments and/or under-payments (each adjustment stated separately);

33.6.5 the total amount to be deducted from the Monthly Unitary Charge, being the aggregate of the matters set out in Clauses 33.6.1 to 33.6.4 (**the Required Deductions**); and

33.6.6 other information required in terms of Section A of Schedule Part 7(*Payment Mechanism*), Part 5 Paragraph 7.

If the Contractor fails to issue any Performance and Payment Report with the Monthly Invoice as required pursuant to Clause 33.6, or issues a Performance and Payment Report which does not comply with the requirements of this Clause 33.6, the Authority shall be entitled to withhold payment of the whole of the relevant Monthly Invoice by the same number of days as equates to the delay in the issue of a compliant Performance and Payment Report.

### **33.7 Late Payments**

Save where otherwise specifically provided, where any payment or sum of money due from the Contractor to the Authority or from the Authority to the Contractor under any provision of this Agreement is not paid on the due date it shall bear interest thereon at the Prescribed Rate from the due date (whether before or after any judgement) until actual payment and it is agreed between the parties that the Prescribed Rate and the provisions of this Agreement relating to the payment of compensation on termination of this Agreement following the occurrence of an Authority Default provide the Contractor with a substantial remedy pursuant to Sections 8 and 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

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

Subject to Clause 33.2.12 (*Monthly Invoice*), the Contractor will not be entitled to retain or set off any amount due to the Authority by it, but the Authority may (subject to Clause 51 (*Set-off on Termination*)) retain or set off any amount owed to it by the Contractor under this Agreement which has fallen due and payable against any amount due to the Contractor under this Agreement.

### **33.9 Set-Off and Disputed Amounts**

If the payment or deduction of any amount referred to in Clause 33.8 is disputed then any undisputed element of that amount shall be paid and the disputed element shall be dealt with in accordance with the Dispute Resolution Procedure.

### **33.10 VAT**

33.10.1 All amounts due under this Agreement are exclusive of VAT.

33.10.2 If any supply made or referred to in this Agreement is or becomes chargeable to VAT then the person receiving the supply (the **Recipient**) shall in addition pay the person making the supply (the **Supplier**) the amount of that VAT against receipt by the Recipient from the Supplier of a proper VAT invoice in respect of that supply.

33.10.3 Where under this Agreement any amount is calculated by reference to any sum which has or may be incurred by any person, the amount shall include any VAT in respect of that amount only to the extent that such VAT is not recoverable as input tax by that person (or a member of the same VAT group), whether by set-off or repayment.

33.10.4 The Contractor shall provide the Authority with any information reasonably requested by the Authority from time to time in relation to the amount of VAT chargeable in accordance with this Agreement and payable by the Authority to the Contractor.

33.10.5 The Authority shall pay to the Contractor from time to time as the same is incurred by the Contractor sums equal to any Irrecoverable VAT but only to the extent that it arises as a result of a Change of Law. Any such payment shall be made within 28 days of the delivery by the Contractor to the Authority of written details of the amount involved accompanied by details as to the grounds for and computation of the amount claimed. For the purposes of this Clause 33.10.5, **Irrecoverable VAT** means input VAT incurred by the Contractor on any supply which is made to it which is used or to be used exclusively in performing the Works or the Services or any of the obligations or provisions under the Agreement (together with input VAT incurred as part of its overhead in relation to such activities) to the extent that the Contractor is not entitled to repayment or credit from HM Custom & Excise in respect of such input VAT.

33.10.6 If following a change in taxation or accounting treatment there is a VAT Benefit which results in savings in Capital Expenditure and/or operating costs of the Services, the

Contractor shall pay an amount equal to any such VAT Benefit to the Authority either:

- (i) in the case of savings in Capital Expenditure, within 60 Business Days of such savings being identified; or
- (ii) in the case of savings in operating costs of the Services by way of a Unitary Change Adjustment.

For the purposes of this Clause 33.10.6 “**VAT Benefit**” means any increase in input VAT recoverable by the Contractor on any supply which is made to it which is used or to be used exclusively in performing the Works or the Services or any of the obligations or provisions under the Agreement (together with input VAT incurred as part of its overhead in relation to such activities).

**PART 6  
TERMINATION**

**34. DIRECT AGREEMENT**

The provisions set out in this Part 6 of this Agreement are subject to the Direct Agreement.

**35. TERMINATION OF THIS AGREEMENT**

**35.1 Contractor Event of Default Termination**

The Authority shall be entitled to terminate this Agreement by notice in writing to the Contractor in accordance with Clause 35.2.3 (subject to Clauses 35.2.5 and 35.4) if:

35.1.1 [Not Used]

35.1.2 the Contractor has not substantially commenced the physical Works generally in accordance with the Construction Programme by 2 months from the Effective Date;

35.1.3 the Contractor commits a breach of any of its obligations under this Agreement which is:

(a) a material breach; or

(b) a breach in relation to the Operational Services:

(i) in respect of which the Authority does not have a remedy under Schedule Part 7 (Payment Mechanism);

(ii) which cannot be taken into account in determining whether a Persistent Breach has occurred; and

(iii) which, should it continue or recur, will not fall under any of the other categories of default in Clause 35.1 (*Contractor Event of Default Termination*)

and which in the case of either Clause 35.1.3(a) or Clause 35.1.3(b) materially and adversely affects the carrying out of the Works (other than the carrying out of the Works in accordance with the Construction Programme) or the performance of the Services;

35.1.4 there is the occurrence of a Persistent Breach;

35.1.5 the Contractor:

35.1.5.1 ceases to carry on the whole of its business or disposes of all of its assets (other than in the terms of this Agreement); or

35.1.5.2 becomes the subject of a voluntary arrangement under section 1 of the Insolvency Act 1986; or

35.1.5.3 is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 save that for the purposes of this Agreement the minimum amount referred to in section 123(1) shall be £500,000 (Indexed) and "three months" shall be substituted for "3 weeks"; or

35.1.5.4 has a receiver, administrator or administrative receiver appointed over all or any material part of its undertakings, assets or income; or

35.1.5.5 has a winding up or administration order made against it (other than an interim or provisional order) and the same is not discharged within 10

Business Days; or

35.1.5.6 has passed a resolution for its winding-up; or

35.1.5.7 is the subject of any process or event similar or analogous to the events in Clauses 35.1.5.1 to 35.1.5.6 in any jurisdiction outside Scotland;

35.1.6 the Contractor commits a breach of (a) Clause 67.2 (*Assignment and Sub-Contracting*) or (b) Clause 69.3 (*Corporate Structures*);

35.1.7 the Contractor Abandons the Project;

35.1.8 the Service Availability Date for any New Project Facility has not occurred before the relevant Deadline Date;

35.1.9 in any three Payment Periods in any six consecutive Payment Periods the Authority has been entitled to reduce the amount of the Monthly Unitary Charge for each of those three Payment Periods by more than 20 per cent through Deductions;

35.1.10 the Contractor receives 4 or more valid notices from the Authority requiring the Contractor to terminate the FM Agreement pursuant to Clauses 31.15.1, 31.15.3 or 31.15.4 (*Contractor Breach*) or any of them;

35.1.11 the Contractor receives a total number of five or more Warning Notices in any period of 12 consecutive months ending on or before the first Service Availability Date, six or more Warning Notices in any period of 12 consecutive months commencing on or after the first Service Availability Date or five or more Warning Notices in any period of 12 consecutive months commencing after the last External Works Availability Date; and/or

35.1.12 a breach by the Contractor of its obligation to take out and maintain required insurances in accordance with Clause 61 (*Insurance*) other than where excused by Clause 63 (*Uninsurable Risks*).

## **35.2 Termination by the Authority**

35.2.1 The Authority may terminate this Agreement at any time on or before the Expiry Date in accordance with Clause 35.2.2 or 35.2.3.

35.2.2 The Authority may terminate this Agreement at any time by 6 months prior notice in writing to the Contractor to such effect.

35.2.3 On the occurrence of a Contractor Event of Default, the Authority may terminate this Agreement by notice in writing (**Termination Notice**) to the Contractor stating:

35.2.3.1 the Contractor Event of Default in respect of which the notice is given, giving reasonable details;

35.2.3.2 that the Authority is terminating this Agreement under this Clause; and

35.2.3.3 that this Agreement will terminate on the date falling 40 Business Days after the date of receipt of the notice unless:

(a) the Contractor, in the case of a Contractor Event of Default under Clause 35.1.3 only, puts forward a Rectification Programme in terms reasonably acceptable to the Authority or in the event of a dispute, as determined in accordance with the Dispute Resolution Procedure) within 10 Business Days of receipt of the Termination Notice or rectifies the Contractor Event of Default within 40 Business Days of receipt of the Termination Notice; or

(b) in the case of any Contractor Event of Default listed in Clauses 35.1.6, 35.1.7 or 35.1.12, the Contractor rectifies the Contractor

Event Default within 40 Business Days of receipt of the Termination Notice; or

- (c) the provisions of the Direct Agreement or Clause 35.2.5 apply to prevent termination.

35.2.4 On receipt of the Termination Notice issued by the Authority in accordance with Clause 35.2, the Contractor may, within 10 Business Days of receipt of the Termination Notice in respect of Contractor Event of Default under Clause 35.1.3 only, issue a Rectification Programme to the Authority (in terms reasonably acceptable to the Authority or in the event of a dispute, as determined in accordance with the Dispute Resolution Procedure). In the event that the Contractor Event of Default is continuing at the date of issue of the Rectification Programme, the Contractor shall detail within the Rectification Programme the steps that it has already taken in order to remedy the Contractor Event of Default in question or the circumstances giving rise to it and the further steps (if any) and procedures that the Contractor intends to take or implement in order to prevent such a Contractor Event of Default from recurring.

35.2.5 If the Contractor either rectifies any Contractor Event of Default or the circumstances giving rise to it within 40 Business Days after receipt of the Termination Notice or implements the Rectification Programme in accordance with its terms, the Termination Notice will be deemed to be revoked and this Agreement will continue PROVIDED THAT where the Termination Notice served related to a Contractor Event of Default set out in Clauses 35.1.4, 35.1.9, 35.1.10 or 35.1.11 and the Contractor has terminated the FM Agreement or the Building Contract, as the case may be and entered into a new agreement with another sub-contractor, all Warning Notices, all Deductions (for the purposes of Clauses 35.1.9 and 37.1) and all notices counting towards 35.1.10 or under Clause 36 (*Persistent Breach*) issued prior to the date of such new agreement will be deemed to be cancelled provided always that this proviso to Clause 35.2.5 shall have no effect in relation to a Contractor Event of Default under Clauses 35.1.4, 35.1.9, 35.1.10 or 35.1.11 (as the case may be) with effect from service of the fourth Termination Notice in respect of a Contractor Event of Default under the relevant Clause.

35.2.6 Unless the terms of Clause 35.2.3.3 apply or the Termination Notice is deemed to be revoked in accordance with Clause 35.2.5, this Agreement will terminate on the date falling 40 Business Days after the date of receipt of the Termination Notice and the provisions of Clause 40 shall have effect.

### **35.3 Authority Default Termination**

If:

35.3.1 an Authority Default has occurred and is outstanding; and

35.3.2 the Contractor has served a written notice of its intention to terminate this Agreement (the **Contractor Termination Notice**) on the Authority within 40 Business Days of becoming aware of the Authority Default; and

35.3.3 the Contractor Termination Notice specifies the Authority Default in respect of which the Contractor Termination Notice is given,

this Agreement will terminate (i) on the day falling 40 Business Days after the date the Authority receives the Contractor Termination Notice, unless, in the case of paragraphs (a), (c), (d), (e) or (f) of the definition of Authority Default, the Authority rectifies the Authority Default within 40 Business Days of receipt of the Termination Notice and (ii) in the case of paragraph (b) of the definition of Authority Default, on the day falling 5 Business Days after receipt of the Contractor Termination Notice unless the Authority rectifies the Authority Default within 5 Business Days of receipt of the Contractor Termination Notice.

### **35.4 No Event of Default**

No Contractor Event of Default shall be deemed to have occurred and the Authority shall have

no right to terminate this Agreement to the extent that the acts or omissions of the Contractor are directly attributable to a Relief Event, a Works Compensation Event, a Services Compensation Event, a Force Majeure Event or an Emergency save to the extent resulting from the acts or omissions of the Contractor.

## **36. PERSISTENT BREACH**

### **36.1 Persistent Breach Warning Notice**

If the same breach (other than a failure to meet the Availability Standards or the Performance Standards) of the Contractor's obligations has occurred in more than three of any six consecutive Payment Periods after the last Service Availability Date to occur then the Authority may serve a notice in writing on the Contractor (a **Persistent Breach Warning Notice**):

36.1.1 specifying that the notice is a formal Persistent Breach Warning Notice;

36.1.2 giving reasonable details of the breach; and

36.1.3 stating that the breach is a breach which, if it recurs frequently, may result in a termination of this Agreement.

### **36.2 Persistent Breach Final Notice**

If, following service of a Persistent Breach Warning Notice under Clause 36.1, the breach specified recurs in three or more Payment Periods within the six month period after the date falling 1 month after the date of service of the Persistent Breach Warning Notice, then the Authority may serve another notice in writing (a **Persistent Breach Final Notice**) on the Contractor:

36.2.1 specifying that it is a Persistent Breach Final Notice;

36.2.2 stating that the breach specified has been the subject of a Persistent Breach Warning Notice served within the 10 month period prior to the date of service of the Persistent Breach Final Notice; and

36.2.3 stating that if the breach recurs in four or more Payment Periods within the six month period after the date falling one month after the date of service of the Persistent Breach Final Notice, it will be deemed to be a Persistent Breach and this Agreement may be terminated.

### **36.3 Limitation on Service of Persistent Breach Warning Notice**

A Persistent Breach Warning Notice may not be served in respect of any breach of which a Persistent Breach Warning Notice has already been served until a period of twelve months has elapsed since the date of service of either (a) the previous Persistent Breach Warning Notice or (b) a Persistent Breach Final Notice, in each case relevant to such breach.

## **37 WARNING NOTICES**

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

If (a) at any time during the Works Period in the case of the matter detailed in Clause 37.1.7 or (b) at any time during the Operational Services Period (other than by reason of a Force Majeure Event, a Relief Event, a Works Compensation Event, a Services Compensation Event or an Emergency in the case of the matters detailed in Clauses 37.1.2 to 37.1.7):

37.1.1 [Not Used];

37.1.2 the total Deductions taken together, for any Payment Period amount to more than 12 per cent of the Monthly Unitary Charge for that Payment Period; or

37.1.3 in any three Payment Periods in any six consecutive Payment Periods the Authority

has been entitled to reduce the amount of the Monthly Unitary Charge for each such Payment Period by more than 8 per cent through Deductions; or

37.1.4 the total Performance Deductions together with associated Repeated Failure Deductions and Reporting Failure Deductions for any Payment Period amount to more than 5 per cent of the Monthly Unitary Charge for that Payment Period; or

37.1.5 [Not Used];

37.1.6 the total Deductions in respect of any New Project Facility for any Payment Period exceeds 27 per cent of the proportion of the Monthly Unitary Charge which is attributable to the Service Units per School of such New Project Facility for that Payment Period; or

37.1.7 there is any conviction of the Contractor or sub-contractors of any tier for a breach of health and safety in relation to the Project.

the Authority's Representative may serve a Warning Notice on the Contractor provided always that to give the Contractor time to take appropriate rectification measures the Authority's Representative shall not be entitled to serve either (a) more than one Warning Notice in any month or (b) a Warning Notice in respect of the same event/breach in any 2 consecutive months provided that the Contractor demonstrates to the Authority that it has taken all reasonable steps to remedy:

37.1.8 the breach; and/or

37.1.9 the deficiencies in the delivery of the Operational Services which caused the Deductions,

which resulted in the service of a Warning Notice.

## **37.2 Warning Notices Disputes**

If the Contractor disputes that the Authority was or is entitled to serve a Warning Notice, the Contractor may refer that dispute to an Adjudicator appointed 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 by an Adjudicator appointed under the Dispute Resolution Procedure that a Warning Notice was served without justification that Warning Notice shall be recalled or shall be cancelled and deemed not to have been served.

## **38 INCREASES IN MONITORING**

### **38.1 Reporting Failure**

In the event that the Contractor or the Authority discovers that there has been a Reporting Failure, the Authority may increase its monitoring to a level considered necessary and reasonable in the circumstances and may require the Contractor at its cost to increase its monitoring of the Services until such time as the Contractor shall have issued to the Authority accurate Performance and Payment Reports for the Monthly Unitary Charge for six (6) consecutive Payment Periods. The Authority's Representative shall notify the Contractor of the additional measures necessary to be taken by the Authority in monitoring the Services and likewise the Contractor shall notify the Authority of the additional measures to be taken by the Contractor in monitoring the Services.

### **38.2 More than One Warning Notice**

In the event that more than one Warning Notice is served (under Clauses 37.1.2 to 37.1.7 in respect of the same New Project Facility) in any period of 6 consecutive Payment Periods, the Authority may increase its monitoring to a level considered necessary and reasonable in the circumstances of the Services until such time as the Contractor shall have demonstrated to the satisfaction of the Authority (acting reasonably) that it is performing and will continue to perform its obligations under this Agreement. The Authority Representative shall notify the Contractor of the additional measures to be taken by the Authority Representative in

monitoring the Services as a result of the circumstances which gave rise to a Warning Notice being sent.

### **38.3 Costs of Increased Monitoring**

The Contractor shall pay to the Authority in accordance with Clause 33 (*Payment Provisions*) all costs reasonably and properly incurred by the Authority as a result of such increased level of monitoring undertaken by the Authority pursuant to Clauses 38.1 and 38.2.

## **39. FORCE MAJEURE**

### **39.1 Obligations**

No party shall be entitled to bring a claim for a breach of obligations under this Agreement by the other party or incur any liability to the other party for any losses or damages incurred by that other party to the extent that a Force Majeure Event occurs and the relevant party is prevented from carrying out obligations by that Force Majeure Event.

### **39.2 Ability to Make Deductions**

Nothing in Clause 39.1 shall affect any entitlement to make Availability Deductions or any Performance Deductions in the period during which the Force Majeure Event is subsisting.

### **39.3 Notify**

On the occurrence of a Force Majeure Event, the Affected Party shall notify the other party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.

### **39.4 Consultation**

As soon as practicable following such notification, the parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this Agreement.

### **39.5 Unable to Agree**

If no such terms are agreed on or before the date falling 120 days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this Agreement for a period of more than 150 days after the date of the commencement of the Force Majeure Event, then, subject to Clause 39.7, either party may terminate this Agreement by giving 30 days' written notice to the other party.

### **39.6 Not all Project Facilities affected**

Where a Force Majeure Event prevents the Contractor from providing the Services at some but not all of the New Project Facilities, (without prejudice to the Authority's other rights under this Agreement) the Authority may after 150 days following the date of the commencement of the Force Majeure Event propose a change in accordance with Clause 56 (Variations) to the Authority's Requirements for this Agreement under which the affected New Project Facility or Facilities as the case may be cease to be subject to this Agreement in accordance with Clause 56 (Variations).

### **39.7 Consequences of Termination**

If this Agreement is terminated under Clause 39.5 or Clause 39.8, compensation shall be payable by the Authority in accordance with Clause 44 (*Force Majeure Compensation*).

### **39.8 Notice to Continue**

If the Contractor during the subsistence of a Force Majeure Event but not otherwise gives

notice to the Authority under Clause 39.5 that it wishes to terminate this Agreement, then the Authority has the option either to accept such notice or to respond in writing on or before the date falling 10 days after the date of its receipt stating that it requires this Agreement to continue. If the Authority gives the Contractor such notice, then:

39.8.1 the Authority shall pay to the Contractor the Unitary Charge from the day after the date this Agreement would have terminated under Clause 39.5 as if the Operational Services were being fully provided in the Areas of the New Project Facilities affected by the Force Majeure Event; and

39.8.2 this Agreement will not terminate until expiry of written notice (of at least 30 days) from the Authority to the Contractor that it wishes this Agreement to terminate.

### **39.9 Mitigation**

Notwithstanding Clause 39.8.1 the parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Contractor shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

### **39.10 Event Ceases**

Subject to Clause 39.6, the Affected Party shall notify the other party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement. Following such notification this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

## **40. CONSEQUENCES OF TERMINATION**

### **40.1 Compensation Provisions**

If this Agreement is terminated pursuant to:

40.1.1 Clause 35.2.3 (*Termination by the Authority*), the provisions of Clause 45 shall apply;

40.1.2 Clause 35.2.2 (*Authority Voluntary Termination*), the provisions of Clause 46 shall apply;

40.1.3 Clause 35.3 (*Authority Default Termination*), the provisions of Clause 46 shall apply;

40.1.4 Clauses 39.5 or 39.8 (*Force Majeure*), the provisions of Clause 44 shall apply; or

40.1.5 Clause 79.2 (Corrupt Gifts) or Clause 86 (Termination by the Authority for Breach of the Refinancing Provisions) the provisions of Clause 47 shall apply.

### **40.2 Accrued Rights**

The termination of this Agreement howsoever arising is without prejudice to the rights, duties and liabilities of either party accrued prior to the events giving rise to termination. The Clauses of this Agreement which expressly or impliedly have effect after termination will continue to be enforceable notwithstanding termination.

## **41. SURVEYS ON EXPIRY AND RETENTION FUND**

### **41.1 Retention Fund**

If the Contractor has been notified under Clause 41.5.1 that rectification and/or maintenance work is required, in the 12 months prior to the Expiry Date the Authority shall deduct the estimated cost (as such estimate may be updated from time to time) of that work as quantified by the Final Survey in equal amounts from each Monthly Unitary Charge(s) payable after such date and pay such amounts into an interest bearing account in the name of the Authority (the

**Retention Fund Account**) until this Agreement has expired or terminated or the Contractor has procured the carrying out of rectification and/or maintenance work so as to achieve the Required Standard. The Authority shall make withdrawals from the Retention Fund Account only in accordance with this Clause 41.

#### **41.2 Final Survey**

Without prejudice to Clause 24.2 (*Surveys*) or any other provision of this Agreement, in the 18 months prior to the Expiry Date, the Authority shall be entitled to carry out or procure the carrying out of surveys (each a **Final Survey**) of the New Project Facilities to assess whether they have been and are being maintained by the Contractor in accordance with its obligations under Clause 24.1 (*Maintenance*) and whether, as at the date of a Final Survey, they meet the Handback Requirements.

#### **41.3 Notification of Survey**

The Authority shall notify the Contractor in writing a minimum of 10 Business Days in advance of the date(s) it wishes to carry out or procure the carrying out of a Final Survey. The Authority shall consider in good faith any reasonable request by the Contractor for a Final Survey to be carried out on a different date if such request is made at least 5 Business Days prior to the notified date and the Contractor (acting reasonably) is able to demonstrate that carrying out a Final Survey on the notified date would materially prejudice the Contractor's ability to provide the Services in accordance with its obligations under this Agreement.

#### **41.4 Minimise Disruption**

Where the Authority carries out a Final Survey, the Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the Services by the Contractor. Where the Authority procures the carrying out of a Final Survey, the Authority shall use its reasonable endeavours to ensure that the person carrying out the survey minimises any disruption caused to the provision of the Services by the Contractor. The Contractor shall afford the Authority or any person carrying out the survey (free of charge) any reasonable assistance required by the Authority during the carrying out of a Final Survey. Subject to Clause 41.5.3, the cost of each Final Survey shall be borne by the Authority.

#### **41.5 Results of Survey**

If a Final Survey shows that the Contractor has not complied with or is not complying with its obligations under Clause 24.1 (*Maintenance of Project Facilities*), the Authority shall:

- 41.5.1 notify the Contractor of the rectification and/or maintenance work which is required to bring the condition of the New Project Facilities to the standard they would have been in if the Contractor had complied or was complying with its obligations under Clause 24.1 and/or to bring them up to the standards required by the Handback Requirements (**Required Standard**);
- 41.5.2 specify a reasonable period which may where appropriate impose restrictions on the periods of time within which the Contractor must carry out such work; and
- 41.5.3 recover the cost of a Final Survey from the Contractor by means of a withdrawal from the Retention Fund Account or deduction from the next payment of the Monthly Unitary Charge.

#### **41.6 Maintenance Work**

Subject to Clause 24.4.5, the Contractor shall carry out such rectification and/or maintenance work as is necessary in order to reach the Required Standard within the period specified and any costs it incurs in carrying out such rectification and/or maintenance work shall be at its own expense subject to Clause 41.7. The Contractor may propose, in accordance with the Review Procedure, an updated Maintenance Programme for a Contract Year to take account of maintenance which the Contractor requires to perform to meet its obligations under this Clause 41.6.

#### **41.7 Costs**

If and to the extent that the Contractor carries out the rectification and/or maintenance to the Required Standard within the specified period as notified pursuant to Clause 41.5.2, the Contractor may make a claim for payment for work carried out. Any such claim shall be accompanied by a certificate by the Contractor setting out the works performed and the value of such works. The Authority shall be entitled to require all reasonable further evidence in respect of the valuation of the works. The Authority shall make payment of the amount of a valid claim within 15 Business Days of the date of the claim and shall be entitled to withdraw that amount from the Retention Fund. If the amount in the Retention Fund Account is insufficient to cover the Contractor's costs the Authority shall pay the amount of such valid claim from any amounts which subsequently stand to the credit of the Retention Fund Account (if any) as a result of deductions made to the Monthly Unitary Charge pursuant to Clause 41.1. In the event that the amount remaining in the Retention Fund account on the Expiry Date is insufficient to cover the Contractor's costs which have not been paid, the Contractor shall bear the balance of such costs itself.

#### **41.8 Failure to Carry Out Work**

If and to the extent that the Contractor fails to carry out the necessary rectification and/or maintenance work to the Required Standard within the specified period as notified pursuant to Clause 41.5.2, the Authority shall be entitled to carry out itself, or procure, such rectification and/or maintenance work to the Required Standard at the Contractor's expense and shall be entitled to make withdrawals from the Retention Fund Account or, where there are insufficient funds in the Retention Fund Account, make deductions from the Unitary Charge to pay for such work provided that the costs incurred by the Authority shall be reasonable and properly and necessarily incurred. Deductions made to the Unitary Charge pursuant to this Clause 41.8 shall not count towards percentage reductions for the purposes of Clauses 35 (*Termination*) and 37 (*Warning Notices*).

#### **41.9 Balance of Fund**

If:

41.9.1 all the rectification and/or maintenance work identified by the Authority and reflected in the Final Surveys has been carried out to the Required Standard; and

41.9.2 all such work has been paid for by the Contractor or otherwise met in accordance with Clause 41.8; and

41.9.3 no valid notice of termination under this Agreement is outstanding

on the later of the Expiry Date and the expiry of the period notified pursuant to Clause 41.5.2, then the Authority shall pay any credit balance on the Retention Fund Account to the Contractor as soon as practicable. If the rectification and/or maintenance work identified by the Authority and reflected in the Final Survey, has not all been carried out to the Required Standard or paid for by the Contractor, then the provisions of Clause 41.8 shall apply and the Authority shall pay to the Contractor any balance remaining on the Retention Fund Account on completion of all such work pursuant to Clause 41.8.

### **42. TRANSITION TO ANOTHER CONTRACTOR**

#### **42.1 Duty to Co-operate**

During the final 12 months of the Contract Period (where this expires by effluxion of time) or during the period of any notice of termination of this Agreement or termination of any of the Services, and in any case for a period of 12 months thereafter, the Contractor shall co-operate fully with the transfer of responsibility for the Services (or any of the Services) to any new contractor of such services the same or similar to the Services (**New Contractor**), and for the purposes of this Clause 42 the meaning of the term "co-operate" shall include:

42.1.1 liaising with the Authority and/or any New Contractor, and providing reasonable and timely assistance and advice concerning the Services and their transfer to the

Authority or to such New Contractor;

- 42.1.2 allowing any such New Contractor access (at reasonable times and on reasonable notice) to the New Project Facilities, but not so as to interfere with or impede the provision of the Services;
- 42.1.3 (without prejudice to the obligations of the Contractor pursuant to Clause 32 (*Operating Manual*)) providing to the Authority and/or to any New Contractor, all and any information concerning the Sites and the Services which is required for the efficient transfer of responsibility for their performance; and
- 42.1.4 making its sub-contractors like bound by the provision of Clause 42.1 and 42.2 with a third party right of direct enforcement by the Authority.

## **42.2 Transfer of Responsibility**

- 42.2.1 The Contractor shall use all reasonable endeavours so as to facilitate the smooth transfer of responsibility for the Services to a New Contractor or to the Authority, as the case may be, and the Contractor shall take no action at any time during the Contract Period or thereafter which is calculated or intended, directly or indirectly, to prejudice or frustrate or make more difficult such transfer.
- 42.2.2 The Contractor shall take all reasonable steps and shall co-operate fully with the Authority and any New Contractor so that any continuation in the Services is achieved with the minimum of disruption and so as to prevent or mitigate any inconvenience or risk to health and safety of the employees of the Authority and members of the public.

**PART 7  
COMPENSATION ON TERMINATION**

**43. DEFINITIONS**

For the purposes of this Part 7 of this Agreement, the words and expressions below shall have the following meanings:

**Adjusted Estimated Fair Value** means the Estimated Fair Value,

**less** (without any double-counting) an amount equal to the aggregate of:

- (a) the total Post Termination Service Amounts paid by the Authority hereunder (if a positive number);
- (b) the Tender Costs; and
- (c) amounts which the Authority is entitled to set off or deduct under this Agreement,

**plus** an amount equal to the aggregate of:

- (d) all credit balances on any bank accounts held by or on behalf of the Contractor on the date that the Estimated Fair Value is calculated; and
- (e) any insurance proceeds and other amounts owing to the Contractor (and which the Contractor is entitled under this Agreement to retain), to the extent not included in (d) above; and
- (f) interest which has become due by the Authority on any Post Termination Service Amounts which have not been paid timeously in accordance with this Agreement; and
- (g) any Post Termination Service Amounts (if a negative number) which have not been set off in accordance with Clause 45.2.8 prior to the Compensation Date

to the extent that:

- (h) (d), (e), (f) and (g) have not been directly taken into account when calculating the Estimated Fair Value; and
- (i) in relation to (d) and (e), the Authority has received such amounts in accordance with the Agreement or such amounts are standing to the credit of the Joint Insurance Account;

**Adjusted Highest Compliant Tender Price** means the Highest Compliant Tender Price less (without any double-counting) the aggregate of:

- (a) any Post Termination Service Amounts paid to the Contractor to date ; and
- (b) the Tender Costs; and
- (c) amounts that the Authority is entitled to set off or deduct under this Agreement

**plus** an amount equal to the aggregate of:

- (d) all credit balances on any bank accounts held by or on behalf of the Contractor on the date that the highest priced Compliant Tender is received; and
- (e) any insurance proceeds and other amounts owing to the Contractor (and which the Contractor is entitled under this Agreement to retain) to the extent not included in (d) above; and
- (f) interest which has become due by the Authority on any Post Termination Service Amounts which have not been paid timeously in accordance with this Agreement; and

- (g) any Post Termination Service Amounts (if a negative number) which have not been set off in accordance with Clause 45.2.8 prior to the Compensation Date;

to the extent that:

- (h) (d) (e) (f) and (g), have not been directly taken into account in that Compliant Tender; and
- (i) in relation to (d) and (e), the Authority has received such amounts in accordance with the Agreement;

**Breakage Costs** means all amounts (excluding interest, principal and other amounts payable under the Bonds pursuant to the Conditions) payable by the Contractor to the Senior Lenders as a result of a prepayment or a failure to make payment in respect of Permitted Borrowings on the due date for payment (except to the extent that such payments arose prior to the Termination Date and are not attributable to any breach by the Authority of this Agreement) under the Senior Funding Agreements, including costs of early termination of the Guaranteed Investment Contract and any other interest hedging arrangements and any other breakage or termination costs calculated in accordance with the terms of the Senior Funding Agreements, subject to the Contractor and the Senior Lenders mitigating any such costs to the extent reasonably possible (unless the amount, the method or the formula for determining the amount of such costs are fixed in advance under the terms of the relevant Senior Funding Agreements);

**Capital Sum** means the capital sum offered by each Compliant Tenderer under the Tender Process or the capital sum which the New Contractor is to pay to the Authority, in each case in consideration for the Authority entering into the New Contract, as the context permits or requires;

**Compensation Date** means either:

- (a) if Clause 45.2 (*Retendering*) applies, the earlier of:
  - (i) the date that the New Contract is entered into; and
  - (ii) the date on which the Authority pays the Adjusted Highest Compliant Tender Price to the Contractor; or
- (b) if Clause 45.3 (*No Retendering*) applies, the date on which the Adjusted Estimated Fair Value of the Agreement has been agreed or determined;

**Compliant Tender** means any tender submitted by a Compliant Tenderer which meets the Qualification Criteria;

**Compliant Tenderer** means a tenderer who is a Suitable Substitute Contractor;

**Condition Satisfaction Period** shall have the meaning given in clause 47A.2.1;

**Deemed New Contract** 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 during the Works Period, then the relevant Target Service Availability Dates and/or Target External Works Availability Dates and/or Target Grass Playing Fields Availability Dates shall be extended by a period to allow a New Contractor (had one been appointed) to achieve completion of the Works at the Project Facilities in question;
- (b) any accrued Warning Notices or Deductions or Persistent Breach Warning Notices or Persistent Breach Final Notices shall be cancelled and/or disregarded; and
- (c) the term of such agreement shall be for such period as is equal to the term from the Termination Date to and including the Expiry Date;

**Election Notice** shall have the meaning given in clause 47A.2.3;

**Estimated Fair Value** means the amount determined in accordance with Clause 45.3 which a third party would pay to the Authority as the market value of the Deemed New Contract;

**Fair Value** means the amount at which an asset or liability could be exchanged in an arm's length transaction between informed and willing parties, other than in a forced or liquidation sale;

**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;

**Instalment Notice** shall have the meaning given in Clause 47A.1.2;

**Instalment Period** means the period commencing on the date of the Instalment Notice and ending on the earlier to occur of (i) the date falling 5 years after the Instalment Notice; and (ii) the earlier of the last Scheduled Payment Date of the Bonds (as scheduled prior to any acceleration under the Conditions) and the last Payment Date (as defined in the EIB Loan Agreement and as scheduled prior to any acceleration thereunder);

**Instalment Option** shall have the meaning given in Clause 47A.1.2;

**Liquid Market** means 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 PFI contracts or similar contracts for the provision of services in Scotland (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 Lenders specifically for the purposes of this Project and to which this Agreement may be novated shall be discounted in assessing whether there are sufficient willing bidders in the market for such purposes;

**Losses** means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses), and charges whether arising under statute, contract (including contractual entitlement for loss of profit for a maximum of a one year period from termination of such contract), or at common law or in connection with judgments, proceedings, internal costs or demands;

**Market Value Availability Deduction Amount** means for any Payment Period or part of a Payment Period an amount equal to:

- (a) the Availability Deductions which were made from the Monthly Unitary Charge under Clause 33 (*Payment Provisions*) in the Monthly Invoice submitted for the Payment Period immediately preceding the Termination Date;

less:

- (b) an amount equal to any Availability Deductions made referred to in paragraph (a) above in the Payment Period immediately preceding the Termination Date to the extent that the Availability Deduction relates to an Area which was Unavailable at the Termination Date which has subsequently become available (as at the date of calculation of any Post Termination Service Amount) whether it has become available as a result of the Authority incurring Rectification Costs or otherwise;

**Maximum Unitary Charge** means one twelfth of the Unitary Charge which would have been payable as at the Termination Date had the Agreement not been terminated, before any deductions under Clause 33 but allowing for indexation under Schedule Part 7 (*Payment Mechanism*);

**Month** means a period starting at midnight on one day in a calendar month and ending at midnight on the day before the numerically corresponding day in the next calendar month save that if there is no numerically corresponding day in the next calendar month, the period shall end at midnight on the last day of that next calendar month;

**New Contract** 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 during the Works Period, then the relevant Target Service Availability Dates and/or Target External Works Availability Dates and/or Target Grass Playing Fields Availability Dates shall be extended by a period to allow a New Contractor to complete the Works at the Project Facilities in question;
- (b) any accrued Warning Notices or Deductions or Persistent Breach Warning Notices or Persistent Breach Final Notices shall be cancelled and/or disregarded;
- (c) the term of such agreement shall be such period as is equal to the term from the Termination Date until the Expiry Date; and
- (d) any other amendments which do not adversely affect the Contractor;

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

**Post Termination Service Amount** means an amount equal to the Maximum Unitary Charge (pro rata for any part of a Month) which would have been payable in that month under the Agreement had the Agreement not been terminated less an amount equal to the aggregate of:

- (a) the Market Value Availability Deduction Amount for the Month (or pro rata for any part thereof) to which the Post Termination Service Amount relates; and
- (b) the Rectification Costs incurred by the Authority during the Month (or part thereof) to which the Post Termination Service Amount relates; and
- (c) (where relevant), the amount by which the Post Termination Service Amount for the previous Month was less than zero;

**Project IRR** means real pre-tax pre-financing project internal rate of return set out in the Financial Model as at the Effective Date;

**Qualification Criteria** means the criteria that the Authority requires parties to meet as part of the Tender Process which (subject to compliance with the procurement regulations) shall be:-

- (a) the New Contract terms;
- (b) parties should have the financial ability to pay the Capital Sum tendered for in the New Contract and the financial ability to deliver the Works and the Services (as appropriate) for the price tendered;
- (c) the parties may only bid on the basis of a single capital payment to be made on the date of the New Contract;
- (d) the parties are experienced in providing the Services or services;
- (e) the technical solutions proposed by the parties are capable of delivery and the parties are technically capable of delivery of the Services;

**Rectification Costs** means 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;

**Relevant Assumption** means the assumptions that the sale of the Contractor is on the basis that there is no default by the Authority, that the sale is on a going concern basis, that no restrictions exist on the transfer of share capital, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of the Contractor and the Project is taken into account;

**Scheduled Payment Date** has the meaning given to it in the Master Definitions Schedule;

**Senior Debt Default Interest Rate** has the meaning given in the Financial Supplement;

**Senior Debt Interest Rate** means in respect of the Bonds the interest rate (not being the default rate) that applies to the Bonds in terms of the Conditions and in respect of the Credit , the rate (not being the default rate) that applies under the EIB Loan Agreement;

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

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

**Suitable Substitute Contractor** means a person approved by the Authority (such approval not to be unreasonably withheld or delayed) as:

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

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

**Tender Process** means the process by which the Authority requests tenders from any parties interested in entering into a New Contract, evaluates the responses from those interested parties and enters into a New Contract with a New Contractor, in accordance with Clause 45.2;

**Tender Process Monitor** means an independent third party appointed pursuant to Clause 45.2.16;

**Termination Date** means the date of termination of this Agreement in accordance with Clauses 35 or 39.5 or 39.8 or 79.2 or 86;

**Termination Date Discount Rate** means a discount rate expressed as  $[(1 + \text{Project IRR} + \text{Gilt B} - \text{Gilt A}) * (1 + i) - 1]$  where:

"*i*" is equal to the Bank of England's prevailing long term inflation target as at the Termination Date;

"**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 on the Effective Date; 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 on Termination Date.

**Trustee Notice** has the meaning given in Clause 47A.2.4;

#### **44. FORCE MAJEURE COMPENSATION**

##### **44.1 Amount**

On termination of the Agreement under Clause 39 (*Force Majeure*) the Authority shall pay to the Contractor the "Force Majeure Termination Sum".

Subject to Clauses 44.3 to 44.5 below the Force Majeure Termination Sum shall be the amount equal to the aggregate of:

44.1.1 the Base Senior Debt Termination Amount;

44.1.2 the Subordinated Debt, less an amount equal to the aggregate of payments of interest made by the Contractor under the Subordinated Funding Agreements;

44.1.3 an amount equal to all amounts paid to the Contractor by way of subscription for shares in the capital of the Contractor less dividends and other distributions paid to the shareholders of the Contractor (save to the extent deducted under 44.1.2 above); and

44.1.4 redundancy payments for employees of the Contractor that have been or will be reasonably incurred by the Contractor as a direct result of termination of the Agreement and any Sub-Contractor Breakage Costs.

##### **44.2 Amounts less than zero**

If the amounts referred to in Clauses 44.1.2 and/or 44.1.3 are less than zero then, for the purposes of the calculation in Clause 44.1, they shall be deemed to be zero.

##### **44.3 Aggregate Amounts**

If the aggregate of the amounts referred to in Clauses 44.1.1, 44.1.2 and 44.1.3 is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in Clause 44.1.4 provided always that:

44.3.1 the amount referred to in Clause 44.1.4 shall only be paid to the extent that the Contractor has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and

44.3.2 if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Sub-Contract in circumstances where there is an event of default under such Sub-Contract which would entitle the Contractor to terminate such Sub-Contract.

##### **44.4 Distributions**

If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Contractor has wilfully, or through gross negligence, failed to comply with its obligations under Clause 12(d)(iv)(a) of the Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination

Sum will never be less than the Revised Senior Debt Termination Amount .

#### **44.5 Overstatement of Balances**

If the Contractor has wilfully or through gross negligence failed to comply with its obligations under Clause 12(d)(iv)(b) of the Direct Agreement and there has been an overstatement of the cash balances by the Contractor as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Clause 44, 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 .

#### **44.6 Payment**

44.6.1 The compensation payable pursuant to Clause 44 shall be paid in accordance with Clause 47A.

44.6.2 The discharge by the Authority of its obligations under Clause 44.6 is in full and final settlement of all Contractor's claims and rights against the Authority for breaches and/or termination of this Agreement whether in contract, delict, restitution, or otherwise.

### **45. COMPENSATION ON TERMINATION FOR CONTRACTOR DEFAULT**

#### **45.1 Retendering Election**

On termination of this Agreement under Clause 35.1 (*Contractor Event of Default Termination*), the Authority shall be entitled to retender the provision of the Works and the Services or the Services in accordance with Clause 45.2 (*Retendering*) and the provisions of Clause 45.2 shall apply if:

45.1.1 the Authority notifies the Contractor on or before the date falling 20 Business Days after the Termination Date; and

45.1.2 there is a Liquid Market; and either

45.1.3 the Senior Lenders have not exercised their rights to step-in under Clause 5 (*Representatives*) of the Direct Agreement; or

45.1.4 the Contractor or the Senior Lenders have not procured the transfer of the Contractor's rights and liabilities under this Agreement to a Suitable Substitute Contractor and have failed to use all reasonable efforts to do so,

but otherwise the Authority shall require a determination in accordance with Clause 45.3 (*No Retendering*) and the provisions of that Clause shall apply.

#### **45.2 Retendering**

If the Authority elects to retender the provision of the Works and the Services or the Services under Clause 45.1 (*Retendering Election*), then the following provisions shall apply:

45.2.1 The objective of the retendering procedure shall be to establish and pay to the Contractor the Adjusted Highest Compliant Tender Price, as a result of the Tender Process.

45.2.2 The Authority shall (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as lawfully practicable having regard to the assistance given by the Contractor in connection with the Tender Process in accordance with this clause.

45.2.3 The Authority shall notify the Contractor of the Qualification Criteria and the other requirements and terms of the Tender Process, including the timing of the Tender

Process, but shall act reasonably in setting such requirements and terms.

- 45.2.4 The Contractor authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under Clause 59 (*Information and Confidentiality*) that is reasonably required as part of the Tender Process.
- 45.2.5 The Contractor may, at its own cost, appoint a person (the "Tender Process Monitor") to monitor the Tender Process for the purpose of monitoring and reporting to the Contractor and the Senior Lenders on the Authority's compliance with the Tender Process and making representations to the Authority. The Tender Process Monitor will not disclose any confidential information to the Contractor or any other person (and shall provide an undertaking to the Authority to such effect as a condition of its appointment) but shall be entitled to advise the Contractor as to whether it considers that the Authority has acted in accordance with the Tender Process, and correctly determined the Adjusted Highest Compliant Tender Price.
- 45.2.6 The Tender Process Monitor shall enter into a confidentially agreement with the Authority in a form acceptable to the Authority and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of the tender documentation and bids and shall be required to make written representations to the Authority regarding compliance with the Tender Process. The Authority shall give the Tender Process Monitor at least 48 hours notice of any meetings that the Tender Process Monitor is entitled to attend. All representations shall be made by the Tender Process Monitor in a timely manner as the Tender Process proceeds. The Authority shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by the Contractor in the event that the Contractor refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 64 (Dispute Resolution).
- 45.2.7 For all or any part of a month, falling within the period from the Termination Date to the Compensation Date, the Authority shall pay to the Contractor
- 45.2.7.1 the Post Termination Service Amount for that month, on or before the date falling 10 Business Days after the end of that month; and
  - 45.2.7.2 the Post Termination Service Amount for the period ending on the Compensation Date, on or before the date falling 20 Business Days after the Compensation Date.
- 45.2.8 If any Post Termination Service Amount is less than zero, it shall be carried forward and shall be set off against any future positive Post Termination Service Amounts. If any such Post Termination Service Amount has not been set off on or before the Compensation Date then it shall be taken into account in the calculation of the Adjusted Highest Compliant Tender Price.
- 45.2.9 The Authority shall require bidders to bid on the basis that they will receive the benefit of any outstanding claims under material damage insurance policies and the amounts (if any) standing to the credit of the Joint Insurance Account on the date that the New Contract is entered into.
- 45.2.10 As soon as practicable after tenders have been received, the Authority shall (acting reasonably) determine the Compliant Tenders and shall notify the Contractor of the Adjusted Highest Compliant Tender Price.

- 45.2.11 If the Contractor refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 64 (*Dispute Resolution*), the Authority shall be entitled to enter into a New Contract and in such event (a) the Authority shall pay to the Contractor the undisputed part of the Adjusted Highest Compliant Tender Price on or before the date falling 20 Business Days after the date specified in Clause 45.2.12 below (if the Authority has not paid such part of the Adjusted Highest Compliant Tender Price at the expiry of the said 20 Business Day period then interest on such part shall be at the Senior Debt Default Interest Rate) and (b) the Authority shall pay to the Contractor the disputed part of the Adjusted Highest Compliant Tender Price no later than the date falling 20 Business Days after the dispute has been determined in accordance with Clause 64 (*Disputes Resolution*) and the Authority shall pay interest to the Contractor at the Senior Debt Interest Rate on any amount of Adjusted Highest Compliant Tender Price which had been withheld from the date that such payment should have been made but for the dispute until the expiry of twenty (20) Business Days after the disputed amount is no longer disputed and thereafter at the Senior Debt Default Interest Rate until the no longer disputed part of the Adjusted Highest Compliant Tender Price is paid in full by the Authority.
- 45.2.12 Subject to Clauses 45.2.11 and 45.2.15, the Authority shall pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling 20 Business Days after the date of the New Contract. To the extent that the Adjusted Highest Compliant Tender Price has not been paid within the twenty (20) Business Day period, interest on the outstanding part of the Adjusted Highest Compliant Tender Price shall accrue at the Senior Debt Default Interest Rate from the expiry of such 20 Business Day period until payment in full.
- 45.2.13 The discharge by the Authority of its payment obligation in Clauses 45.2.11 to 45.2.12 shall be in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Agreement and the Project Documents whether under contract, delict, restitution or otherwise, save for any liability of the Authority which arose prior to the Termination Date that has not already been taken into account in the Adjusted Highest Compliant Tender Price.
- 45.2.14 Subject to Clauses 45.2.15 and 45.2.18 below, if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price to the Contractor on or before the date falling two years after the Termination Date then the following provisions of this Clause shall not apply to that termination and the provisions of Clause 45.3 (*No Retendering Process*) shall apply instead.
- 45.2.15 If the Adjusted Highest Compliant Tender Price is zero or a negative number then the Authority shall have no obligation to make any payment to the Contractor and with effect from the time that the Authority gives notice of that event to the Contractor, the Authority shall be released from all liability to the Contractor for breaches and/or termination of this Agreement and any other Project Document whether under contract, delict, restitution or otherwise, save for any antecedent liability of the Authority which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price.
- 45.2.16 If the Adjusted Highest Compliant Tender Price is less than zero then an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by the Contractor to the Authority on the date of the New Contract.
- 45.2.17 The Authority may elect at any time prior to the receipt of a Compliant Tender to follow the no retendering procedure under Clause 45.3 (*No Retendering Procedure*) by notifying the Contractor that this election has been made.
- 45.2.18 If the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process it shall notify the Contractor as soon as possible of this decision and pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price within 20 Business Days of such notification. To the extent that the Adjusted Highest Compliant Tender Price has not been paid within the twenty (20) Business Day period, interest on the

outstanding part of the Adjusted Highest Compliant Tender Price shall accrue at the Senior Debt Default Interest Rate from the expiry of such 20 Business Day period until payment in full.

### **45.3 No Retendering**

45.3.1 Subject to Clause 45.3.2, the Contractor will not be entitled to receive any Post Termination Service Amount.

45.3.2 If the Authority elects to require an expert determination in accordance with this Clause 45.3 after it has elected to follow the procedure under Clause 45.2, then the Authority shall continue to pay to the Contractor each Post Termination Service Amount until the Compensation Date, in accordance with Clause 45.2.

45.3.3 In agreeing or determining the Estimated Fair Value of the Agreement the parties shall be obliged to follow the principles set out below:

45.3.3.1 all forecast amounts 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 the Agreement;

45.3.3.2 the total of all future payments of the full Unitary Charge (without deductions) forecast to be made shall be calculated and discounted to the Termination Date at the Termination Date Discount Rate;

45.3.3.3 the total of all costs forecast to be incurred by the Authority as a result of termination shall be calculated and discounted at the Termination Date Discount Rate and deducted from the payment calculation pursuant to Clause 45.3.3.2 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 the Services forecast to be incurred by the Authority to the standard required to meet the Authority's Requirements; and
- (c) any rectification costs required to deliver the Services to the standard required (including any costs forecast to be incurred by the Authority to complete construction or development work and additional operating costs required to restore operating service standards to meet the Authority's Requirements),

in each case such costs to be forecast at a level that will deliver the full Unitary Charge referred to in Clause 45.3.3.2.

45.3.4 If the parties cannot agree on the Adjusted Estimated Fair Value of the Agreement on or before the date falling 30 days after the date on which the Authority elected to require an expert determination in accordance with this Clause 45.3, then the Estimated Fair Value of the Agreement shall be determined in accordance with the Dispute Resolution Procedure.

45.3.5 The Authority shall pay to the Contractor an amount equal to the Adjusted Estimated Fair Value of the Agreement either as by way of:

45.3.5.1 a lump sum payment on the date falling 28 days after the date on which the Adjusted Estimated Fair Value of the Agreement has been agreed or determined in accordance with this Clause 45.3; or

45.3.5.2 in instalments in accordance with the provisions of Clause 47A; or

45.3.5.3 as the parties may otherwise agree;

45.4 The discharge by the Authority of its obligation in Clause 45.3.5 is in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Agreement or other Project Documents whether in contract, delict, restitution or otherwise, including in relation to any Post Termination Service Amount which has fallen due pursuant to Clause 45.3.1 but not yet been paid save for any liability which arose prior to the Termination Date (but not from the termination itself) which has not been taken into account in determining the Adjusted Estimated Fair Value of the Agreement.

45.5 To the extent that the Adjusted Estimated Fair Value of the Agreement is less than zero, an amount equal to the sum by which the Adjusted Estimated Fair Value of the Agreement falls below zero shall be due and payable by the Contractor to the Authority on the Compensation Date.

#### **46. COMPENSATION ON TERMINATION FOR AUTHORITY DEFAULT/VOLUNTARY TERMINATION BY THE AUTHORITY**

##### **46.1 Amount Payable**

On termination of this Agreement pursuant to Clauses 35.2.2 (*Termination by the Authority*) or 35.3 (*Authority Default Termination*), the Authority shall pay the Contractor the Authority Default Termination Sum, which shall be an amount equal to the aggregate of:

46.1.1 the Base Senior Debt Termination Amount; and

46.1.2 redundancy payments for employees of the Contractor that have been or will be reasonably incurred by the Contractor as a direct result of termination of this Agreement and any 'Sub-Contractor Breakage Costs; and

46.1.3 all amounts shown in the Base Case as payable by the Contractor from the Termination Date, either in dividends or other distributions on the share capital of the Contractor or as payments of interest or repayments of principal made by the Contractor under the Subordinated Funding Agreements, each amount discounted back at the Base Case Equity IRR from the date on which it is shown to be payable in the Base Case to the Termination Date.

##### **46.1.4 Adjustment of Authority Default Termination**

If the aggregate of the amounts referred to in Clause 46.1.1 and Clause 46.1.3 is less than the Revised Senior Debt Termination Amount, then the Authority Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in Clause 46.1.2 provided always that:

46.1.6.1 the amount referred to in Clause 46.1.2 shall only be paid to the extent that the Contractor has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution and

46.1.6.2 if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Sub-Contract in circumstances where there is an event of default under such Sub-Contract which would entitle the Contractor to terminate such Sub-Contract.

46.1.7 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Contractor has willfully, or through gross negligence, failed to comply with its obligations under Clause 12(d)(iv)(a) of the Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Authority Default Termination Sum, provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

46.1.8 If the Contractor has willfully or through gross negligence failed to comply with its obligations under Clause 12(d)(iv)(b) of the Direct Agreement and there has been an overstatement of the cash balances by the Contractor as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Clause 46, 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.

#### **46.2 Method of Payment**

The compensation payable pursuant to this Clause 46 shall be paid in accordance with clauses 47A.1.1 and 47A.3 or Clause 47A.1.3.

#### **46.3 Amounts Less than Zero**

To the extent that the amount of compensation payable under this Clause 46 is less than zero, an amount equal to the sum by which such compensation falls below zero shall be due and payable by the Contractor to the Authority on the due date of payment of the compensation.

46.4 The discharge by the Authority of its obligations in Clause 46.2 is in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Agreement whether in contract delict or otherwise.

### **47. COMPENSATION ON TERMINATION FOR CORRUPT GIFTS AND FRAUD AND BREACH OF REFINANCING**

#### **47.1 Amount of Compensation**

On termination of this Agreement in accordance with Clauses 79.2 (*Termination for Corrupt Gifts and Fraud*) and 86 (*Termination by the Authority for Breach of the Refinancing Provisions*) the Authority shall subject to Clause 47A, pay the Contractor an amount equal to:

- (a) where Additional Permitted Borrowings have been advanced, the Revised Senior Debt Termination Amount; and otherwise
- (b) the Base Senior Debt Termination Amount.

#### **47.2 Payment**

The compensation payable pursuant to Clause 47.1 shall be paid in accordance with Clause 47A.

#### **47.3 Amounts Less than Zero**

To the extent that the amount of compensation payable under this Clause 47 is less than zero, an amount equal to the sum by which such compensation falls below zero shall be due and payable by the Contractor to the Authority on the due date of payment of the compensation.

47.4 The discharge by the Authority of its obligations in Clause 47.2 is in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Agreement whether in contract delict or otherwise.

### **47A PAYMENT**

47A.1 The compensation payable pursuant to Clauses 44, 45.3 and 47 shall at the Authority's discretion be paid either:

47A.1.1 in a lump sum, and (i) in the case of compensation payable pursuant to Clause 45.3 in accordance with Clause 45.3.5.1; and (ii) in the case of compensation payable

pursuant to Clauses 44 and 47 only in accordance with Clause 47A.3 provided that, the Base Senior Debt Termination Amount or, where Additional Permitted Borrowings have been advanced in accordance with the terms of this Agreement, the Revised Senior Debt Termination Amount shall be calculated provisionally within 20 Business Days of the Termination Date and shall be calculated finally as at the date falling 20 Business Days prior to the date falling six months after the Termination Date; or

47A.1.2 in respect of the amounts of compensation other than compensation payable pursuant to Clauses 44.1.4 (which shall be payable in lump sum in accordance with Clause 47A.1.1 above) in instalments, by serving notice (the "**Instalment Notice**") on the Contractor within (i) in the case of compensation payable pursuant to Clauses 44 and 47, 20 Business Days of the Termination Date; and (ii) in the case of compensation payable pursuant to Clause 45.3, 10 Business Days of the Adjusted Estimated Fair Value being agreed or determined, whereupon (other than in the case of compensation payable pursuant to Clauses 44.1.2 and 44.1.3, where payment shall be made pursuant to Clause 47A.4) the provisions of Clause 47A.2 shall apply (the "**Instalment Option**") save where the Authority is in breach of its obligations under Clause 47A.2 in which case the outstanding amount of the compensation will become due and payable immediately, provided that for the purposes of the Instalment Option, the relevant compensation amount shall not, subject to Clause 47A.2.6, be subject to the deduction of the balance standing to the credit of the Debt Service Reserve Account. All other credit balances on any bank accounts (but excluding the Joint Insurance Account and the Distributions Account) held by or on behalf of the Contractor on the Termination Date, shall be deducted on a pound for pound basis against the first payment of principal and interest due and payable by the Authority under Clause 47A.2 and against each subsequent such payment until those credit balances have been reduced to zero; or

47A.1.3 as the parties may otherwise agree,

**47A.2** In the event that the Authority elects to pay the compensation in instalments pursuant to Clause 47A.1.2 then:

47A.2.1 subject to Clauses 47A.2.6 and 47A.2.8, it shall, in the case of compensation payable pursuant to Clauses 44 and 47 only, unconditionally and irrevocably: (i) make all payments of interest and principal due under the Senior Funding Agreements and (ii) make all other payments due under any Senior Funding Agreement or, in the case of compensation payable pursuant to Clause 45.3, make all payments due under Clause 47A.2.8 during the Condition Satisfaction Period and thereafter, in the case of compensation payable pursuant to Clauses 44 and 47 only, on the due date for payment set out in the relevant Senior Funding Agreement (prior to any acceleration) or in the case of compensation payable pursuant to Clause 45.3 on the due date for payment set out in Clause 47A.2.8, provided that, in each case, for any such payments to be made after the Condition Satisfaction Period the following conditions are satisfied (in each case, to the reasonable satisfaction of the Majority Creditor and the Bond Trustee):

47A.2.1.1 each instalment of principal and interest payable under the Senior Funding Agreements is paid to the Contractor not less than ten (10) Business Days prior to the date on which such amount is due to be paid (prior to any acceleration) by the Contractor under the relevant Senior Funding Agreement or in the case of compensation payable pursuant to Clause 45.3 on the due date for payment set out in Clause 47A.2.8;

47A.2.1.2 all amounts due to Ambac under the Reimbursement and Indemnity Agreement and the Ambac Fee Letter are paid by the Authority to Ambac within fifteen (15) Business Days of demand;

47A.2.1.3 the Authority pays all other necessary amounts, costs, fees, expenses and liabilities (including advisor fees) due under the terms of the Senior Funding Agreements within (15) Business Days of demand;

47A.2.1.4 the Authority pays all necessary costs and expenses of the Contractor,

HoldCo, the Issuer and the Senior Lenders in respect of the ongoing operations of the Contractor to include (without limitation) the Contractor maintaining the arrangements contemplated by this Clause 47A.2.1, maintaining an underlying rating of the Bonds and maintaining the Debt Service Reserve Account at the level required by the Collateral Deed and the Accounts Agreement (as defined in the Master Definitions Schedule) and that within (15) Business Days of such amounts being agreed or determined;

47A.2.1.5 In the case of compensation payable pursuant to Clauses 44 and 47 only, the Authority has paid any Breakage Costs for which it is liable under paragraph (b) of the definition of Base Senior Debt Termination Amount or paragraph (c) of the definition of Revised Senior Debt Termination Amount (whichever is relevant);

47A.2.1.6 the Ambac Bond Guarantee is in full force and effect;

47A.2.1.7 the Authority, the Senior Lenders and the Contractor (acting reasonably) agreeing the terms of a new agreement to give effect to the instalment arrangements, based on the provisions of this Part 7, and such agreement has been executed by all the parties thereto and is in full force and effect and any required amendments to existing documents and/or the execution of any new documents have been completed;

47A.2.1.8 Standard and Poor's Ratings Services and Moody's Investors Service, Inc. confirm that the then current credit rating of the Bonds (without taking into account the Ambac Bond Guarantee) is equal to or better than AA from Standard and Poor's Ratings Services and Aa2 from Moody's Investors Service, Inc.

Subject to Clauses 47A.2.6 and 47A.2.8, if any of the above conditions remain unsatisfied after a period of forty five (45) days has elapsed from the date of the Instalment Notice (the "**Condition Satisfaction Period**") or if at any time thereafter any of the conditions is no longer satisfied (to the reasonable satisfaction of the Majority Creditor and the Bond Trustee) then the Authority's exercise of the Instalment Option shall no longer have effect and compensation shall be payable in accordance with Clause 47A.2.4.

47A.2.2 The Contractor and the Senior Lenders will be required to take such reasonable steps as are necessary to mitigate the costs and expenses incurred pursuant to paragraphs 47A.2.1.3 and 47A.2.1.4 and will be required to provide reasonable supporting evidence in respect of the amounts due under paragraphs 47A.1.2, 47A.2.1.3 and 47A.2.1.4.

47A.2.3 Where the Authority has exercised the Instalment Option in accordance with Clause 47A.2 and has satisfied the relevant conditions, the Authority may (in the case of compensation payable pursuant to Clauses 44 and 47 only) at any time thereafter, by (20) Business Days notice in writing to the Contractor and the Security Trustee (the "**Election Notice**") elect to discontinue the Instalment Option. In such case the Authority shall pay to the Contractor the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) in accordance with Clause 47A.3 provided that the date on which the Security Trustee certifies the amount of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) shall be deemed to be the "Termination Date" for the purposes of Clause 47A.3 and in addition, on the date on which such payment is made, the Authority shall pay to the Contractor any amounts which would otherwise be due under Clause 47A.2.1.4 (up to and including the date on which such payment is made) together with interest accruing on the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be), provided there shall be no double counting from the date of the Election Notice to the due date for payment, at the Senior Debt Rate and thereafter, at the Senior Debt Default Interest Rate until paid in full. The Authority shall be required to pay Breakage Costs pursuant to this Clause 47A.2.3 notwithstanding that the Authority is also required to pay Breakage Costs pursuant to paragraph (b) of the definition of Base

Senior Debt Termination Amount or paragraph (c) of the definition of Revised Senior Debt Termination Amount (as the case may be), provided there shall be no double counting. For the purposes of this Clause 47A.2.3 the "Termination Date" for the purposes of the calculation of the amount of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) shall be the date of the Election Notice.

47A.2.4 Subject to Clause 47A.2.7 and 47A.2.8, where the Authority has exercised the Instalment Option in accordance with Clause 47A.2, if the Authority:

47A.2.4.1 fails to make any payment in accordance with Clause 47A.2.1 during the Condition Satisfaction Period; or

47A.2.4.2 the final paragraph of Clause 47A.2.1 applies;

the Security Trustee shall be permitted at any time thereafter to issue a notice to the Authority (copied to the Contractor) the ("**Trustee Notice**") declaring that the Authority shall immediately pay to the Contractor the amount certified by the Security Trustee as being the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) and in addition, on the date on which such payment is made the Authority shall pay to the Contractor any amounts which would otherwise be due under Clause 47A.2.1.1 (up to and including the date on which such payment is made) together with interest accruing on the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) from the date of the Trustee Notice to the date of payment at the Senior Debt Default Interest Rate. In the case of compensation payable pursuant to Clauses 44 and 47 only, the Authority shall be required to pay Breakage Costs pursuant to this Clause 47A.2.4 notwithstanding that the Authority is also required to pay Breakage Costs pursuant to paragraph (b) of the definition of Base Senior Debt Termination Amount or paragraph (c) of the definition of Revised Senior Debt Termination Amount (as the case may be), provided there shall be no double counting.

For the purposes of this Clause 47A.2.4 the "Termination Date" for the purposes of the calculation of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) and Breakage Costs shall be the date of the Trustee Notice.

47A.2.5 Where the Authority has exercised the Instalment Option in accordance with Clause 47A.2, and is maintaining the level of the Debt Service Reserve Account pursuant to Clause 47A.2.1.4, any interest accruing on the Debt Service Reserve Account shall during such period as it is being so maintained be for the account of the Authority.

47A.2.6 Where the Authority has exercised the Instalment Option in accordance with Clause 47A.2, the Authority may set-off an amount equal to the then current balance standing to the credit of the Debt Service Reserve Account following payment by the Authority of the final amount of interest and principal due under the Senior Funding Agreements. Any balance standing to the credit of the Debt Service Reserve Account after repayment of all amounts due under the Senior Funding Agreements shall be paid by the Contractor to the Authority.

47A.2.7 In the case of compensation payable pursuant to Clauses 44 and 47 only, the Authority may elect not to continue with the Instalment Option at any time following the date of the Instalment Notice prior to the earlier of (i) the end of the Condition Satisfaction Period and (ii) the date on which the agreement referred to in Clause 47A.2.1.7 is in full force and effect. In the event that the Authority exercises such an election compensation will be payable in accordance with Clause 47A.1.1 or Clause 47A.1.3. For the purposes of this Clause 47A.2.7 and the time for payment under Clause 47A.3, the Termination Date for the purposes of the calculation of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) shall be the date of the Authority's election pursuant to this Clause 47A.2.7.

47A.2.8 Where compensation is payable by the Authority under Clause 45.3, and the

Authority has elected to pay such compensation in instalments in accordance with Clauses 45.3.5.2 and 47A.1.2, the Authority shall pay an amount equal to the Adjusted Estimated Fair Value of the Agreement to the Contractor in equal instalments on the date 10 Business Days before each Scheduled Payment Date (as scheduled prior to any acceleration under the Senior Funding Agreements) during the Instalment Period and all amounts due under Clause 47A.2.1, provided that the obligations of the Authority to make payment to the Contractor under each of Clauses 47A.2.1, 47A.2.1.1 to 47A.2.1.4 and 47A.2.3 and 47A.2.4 shall be to pay the proportion of amounts due under such Clauses that the (a) Adjusted Estimated Fair Value of the Agreement bears to (b) the Base Senior Debt Termination Amount, or where Additional Permitted Borrowings have been advanced in accordance with the terms of this Agreement, the Revised Senior Debt Termination Amount (in each case excluding any prepayment, breakage or similar costs,).

**47A.3** In the event that the Authority elects to pay the compensation in a lump sum pursuant to Clause 47A.1 and in respect of compensation payable pursuant to Clauses 44, 46 and 47 then:

47A.3.1 it shall, unconditionally and irrevocably: (i) make all payments of interest and principal due under the Senior Funding Agreements; and (ii) make all other payments due under any Senior Funding Agreement during the period from the Termination Date until payment of the lump sum in full; and

47A.3.2 it shall pay the outstanding amount of the lump sum in full within six months of the Termination Date with interest at the Senior Debt Interest Rate accruing from the Termination Date until the date falling six months after the Termination Date and to the extent such lump sum has not been paid in full by the date falling six months after the Termination Date, interest at the Senior Debt Default Interest Rate accruing from the date falling six months after the Termination Date until paid in full.

47A.4 In respect of amounts of compensation payable pursuant to Clauses 44.1.2 and 44.1.3 where the Authority elects to pay by instalments by issuing an Instalment Notice pursuant to Clause 47A.1.2, the Authority shall be entitled to pay such compensation in equal instalments as follows:

47A.4.1 the first such instalment (together with interest therein calculated pursuant to Clause 47A.4.2 below) shall be due on the first Scheduled Payment Date (as scheduled prior to any acceleration) occurring after the Instalment Notice served pursuant to Clause 47A.1.2 above and the remaining instalments (together with interest therein calculated pursuant to Clause 47A.4.2 below) shall be due, respectively, on the remaining Scheduled Payment Dates (as scheduled prior to any acceleration);

47A.4.2 the Authority shall pay interest on the compensation (or any part of such compensation that remains outstanding) from the Termination Date until the due date for payment at the Senior Debt Interest Rate.

47A.4.3 Where the Authority is in material breach of its obligation to pay by instalments pursuant to this Clause 47A.4 (being one instalment being due and payable for 15 Business Days after service of a formal written notice by the Contractor to such effect, served no earlier than 5 Business Days after the due date therefore), the outstanding amount of the compensation (together with interest, in the case of compensation payable pursuant to Clause 44.1.2 at the Senior Debt Default Interest Rate, and in the case of compensation payable to Clause 44.1.3 at the Senior Debt Interest Rate, without double counting) shall become due and payable within 3 months of such material breach.

## **48. ASSETS**

**48.1** If termination of this Agreement occurs for whatever reason then the Authority may require the Contractor and the Contractor shall on the Termination Date;

48.1.1 transfer its rights, title and interest in and to the Assets to the Authority at no cost to the Authority and

48.1.2 obtain from the Lenders such discharges or deeds of release as are necessary to release the Assets from any securities held by the Lenders.

**48.2** The Authority shall not be obliged to pay any amounts to the Contractor in respect of compensation on termination of this Agreement until such time as the Contractor has discharged its obligations under Clause 48.1.

## **49. ACCOUNTS OF THE CONTRACTOR**

### **49.1 Maintenance of Accounts**

The accounts of the Contractor shall be maintained as foreseen in the Financial Model, in particular, and without limiting the generality of the obligation contained in this Clause, the Contractor shall ensure that it is at all times possible to determine the balances of the Debt Service Reserve Account and the Major Maintenance Reserve Account.

### **49.2 Accounts calculated in accordance with Accounting Standards**

The accounts of the Contractor should be calculated in accordance with current applicable accounting standards and generally accepted accounting principles unless it is clearly demonstrated that to do so would be misleading in terms of the truth, fairness and completeness of the accounts.

## **50. GROSS UP**

If any amount of compensation payable by the Authority under Clauses 44 (*Force Majeure Compensation*), 46 (*Compensation on Termination for Authority Default/Voluntary Termination by the Authority*) or 47 in respect of termination pursuant to Clause 79.2 (*Termination for Corrupt Gifts and Fraud*) or pursuant to Clause 86 (*Termination by the Authority for Breach of the Refinancing Provisions*) (but not under Clause 45 (*Compensation on Termination for Contractor Default*)) is subject to Tax payable to a Relevant Authority in the United Kingdom, then the Authority shall pay to the Contractor such additional amount as will put the Contractor in the same after Tax position as it would have been in had the payment not been subject to Tax, taking account of any relief, allowances deduction, setting off or credit in respect of Tax (whether available by choice or not) which may be available to the Contractor to reduce the Tax to which the payment is subject.

## **51. SET-OFF ON TERMINATION**

Except where expressly stated otherwise, the Authority is not entitled to set-off any amount against any payment of termination compensation under Clauses 44 (*Force Majeure Compensation*), 46 (*Compensation on Termination for Authority Default/Voluntary Termination by the Authority*) (whether the Agreement has been terminated under Clause 35.2.2 (*Termination by the Authority*) or Clause 35.3 (*Authority Default Termination*) or 47 (*Compensation on Termination for Corrupt Gifts and Fraud and Breach of Refinancing*), save to the extent that after such an amount has been set-off, the termination payment made would be in an amount greater than or equal to the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount as the case may be at that time.

## **52. INSURANCE PROCEEDS**

In the event that insurance proceeds under the Physical Damage Insurance Policies are received after the Termination Date or the Expiry Date, the parties agree that such proceeds shall be paid to the Authority.

## **PART 8 GENERAL**

### **53. LIAISON WITH SCHOOLS**

#### **53.1 Liaison Committee**

The Authority and the Contractor shall establish and maintain the Liaison Committee with effect from the Effective Date throughout the Contract Period. The Liaison Committee shall consist of a minimum of 3 representatives of the Authority and a minimum of 3 representatives of the Contractor. The chairman of the Liaison Committee will be a representative of the Authority.

#### **53.2 Responsibilities**

The Liaison Committee shall:

53.2.1 review issues relating to the day to day conduct and carrying out of the Works or Services;

53.2.2 undertake a review of the operational interfaces between the Authority and the Contractor;

53.2.3 discuss actual and anticipated changes in the Authority's Requirements, the Works, or the Services;

53.2.4 undertake a regular review of the overall delivery of the Services; and

53.2.5 be a forum for discussing disputes between the parties.

#### **53.3 Liaison Procedure**

The parties shall give effect to the Liaison Procedure.

#### **53.4 Disputes**

The parties shall use reasonable endeavours to resolve any dispute by means of prompt, bona fide discussion through the Liaison Procedure. Such discussion shall not be a precondition of a reference of any dispute to the Dispute Resolution Procedure or legal proceedings in the courts.

#### **53.5 School Liaison**

The Contractor shall procure that representatives of the Contractor meet with representatives of each Project Facility's Steering Group on a regular basis (at least once every six weeks at the relevant Project Facility commencing from the Effective Date) in order to discuss issues regarding the carrying out of the Works and the delivery of the Services at the relevant Project Facility. The Authority may, in its sole discretion, suspend or discontinue the requirement for these meetings, by giving the Contractor 30 days notice of such discontinuance or suspension.

**53.6** The Authority shall use all reasonable endeavours to procure that any comments or observations of any Authority Related Party in connection with the Project are channelled through the Liaison Committee via the New Project Facility's Steering Group (or any successor of such Steering Group).

### **54. RELIEF EVENTS**

#### **54.1 Occurrence**

If and to the extent that a Relief Event:

54.1.1 is the direct cause of a delay to a Service Availability Date in relation to the achievement of the corresponding Target Service Availability Date or an External

Works Availability Date in relation to the corresponding Target External Works Availability Date or a Grass Playing Fields Availability Date in relation to the corresponding Target Grass Playing Fields Availability Date; or

54.1.2 adversely affects the ability of the Contractor to perform any of its obligations under this Agreement

then the Contractor shall be entitled to apply for relief from any rights of the Authority arising under Clause 35.1 (*Contractor Event of Default Termination*).

## **54.2 Relief**

To obtain relief, the Contractor must:

54.2.1 as soon as practicable, and in any event within 10 Business Days after it becomes aware that the Relief Event has caused or is likely to cause delay and/or adversely affect the ability of the Contractor to perform its other obligations give to the Authority a notice of its claim for relief from its obligations under this Agreement, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;

54.2.2 within 5 Business Days of receipt by the Authority of the notice referred to in Clause 54.2.1, give full details of the relief claimed; and

54.2.3 demonstrate to the reasonable satisfaction of the Authority that:

54.2.3.1 the Contractor and its sub-contractors could not have avoided the occurrence or consequences of the relevant Relief Event by steps which they might reasonably be expected to have taken, without incurring material expenditure;

54.2.3.2 the Relief Event directly will cause or has caused the delay to the progress of the Works and/or adversely affect the ability of the Contractor to perform its other obligations under this Agreement;

54.2.3.3 the time lost and/or relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice, without incurring material expenditure; and

54.2.3.4 the Contractor is otherwise using reasonable endeavours to perform its obligations under this Agreement.

## **54.3 Consequences**

Subject to Clause 54.5, following provision by the Contractor of the information required under Clause 54.2, then:

54.3.1 the relevant Target Service Availability Dates and/or Target External Works Availability Dates and/or Target Grass Playing Fields Availability Dates and/or Deadline Date(s) shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and/or

54.3.2 the Authority will not be entitled to exercise its rights of termination under Clause 35 (*Termination of this Agreement*) in such respect.

## **54.4 Deductions**

Nothing in Clause 54.3 shall affect any entitlement to make Deductions during the period in which the Relief Event is subsisting.

## **54.5 Information**

In the event that information required by Clause 54.2 is provided after the dates referred to in that Clause, then the Contractor will not be entitled to any relief during the period for which the

information is delayed.

#### **54.6 Notify**

The Contractor shall notify the Authority as soon as reasonably practicable if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

#### **54.7 Disputes**

If the parties cannot agree the extent of the relief required, or the Authority disagrees that a Relief Event has occurred or that the Contractor is entitled to any relief under this Clause (including postponement of any relevant Target Service Availability Date, Target External Works Availability Date, Target Grass Playing Fields Availability Date and/or Deadline Date) the matter shall be resolved in accordance with the Dispute Resolution Procedure.

### **55. QUALIFYING CHANGE IN LAW**

#### **55.1 Change in Law**

If a Qualifying Change in Law occurs or is shortly to occur, then either party may write to the other to express an opinion on its likely effects, giving details of its opinion of:

55.1.1 any necessary change to the Works or in the Services;

55.1.2 whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law;

55.1.3 whether relief from compliance with obligations is required, including the obligation of the Contractor to achieve the Target Service Availability Date and/or any Target External Works Availability Date and/or any Target Grass Playing Fields Availability Date in relation to a New Project Facility and/or meet the Operational Services Specification during the implementation of any relevant Qualifying Change in Law;

55.1.4 any loss of revenue that will result directly from a Discriminatory Change in Law and/or a Specific Change in Law;

55.1.5 any Estimated Change in Project Costs that directly result from any Qualifying Change in Law; and

55.1.6 any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect during the Operational Services Period;

in each case giving in full detail the procedure for implementing the change in the Works or in the Services. Responsibility for the costs of implementation (and any resulting variation to the Unitary Charge) shall be dealt with in accordance with Clauses 55.2 to 55.5.

#### **55.2 Parties to Discuss**

As soon as practicable after receipt of any notice from either party under Clause 55.1, the parties shall discuss and agree the issues referred to in Clause 55.1 and any ways in which the Contractor can mitigate the effect of a Qualifying Change of Law, including:

55.2.1 providing evidence that the Contractor has used reasonable endeavours (including, where practicable, the use of competitive quotes) to oblige the sub-contractors to minimise any increase in costs and maximise any reduction in costs;

55.2.2 providing evidence that the Contractor has used reasonable endeavours to minimise loss of revenue;

55.2.3 demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is

incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Contractor;

55.2.4 giving evidence as to how the Qualifying Change in Law has affected prices charged by any businesses similar to the Project, including similar businesses in which the shareholders or their Affiliates carry on business; and

55.2.5 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount claimed under Clause 55.1.

### **55.3 Change Agreed**

55.3.1 If the parties agree or it is determined under the Dispute Resolution Procedure that the Contractor is required to incur additional Capital Expenditure due to a Qualifying Change in Law (excluding the Contractor's Share of any Capital Expenditure agreed or determined to be required as a result of a General Change in Law under this Clause 55), then the Contractor shall use its reasonable endeavours to obtain funding for such additional Capital Expenditure on terms reasonably satisfactory to it and the Senior Lenders.

55.3.2 The Contractor's Share shall be solely for the account of the Contractor.

55.3.3 The Authority shall meet any additional operating costs of the Services and loss of revenue of the Contractor agreed pursuant to Clause 55.2 which result directly from a Discriminatory Change in Law and/or a Specific Change in Law by means of a Unitary Charge Adjustment.

55.3.4 The Authority shall be entitled to any savings in Capital Expenditure and/or operating costs of the Services which result directly from a Discriminatory Change in Law and/or a Specific Change in Law and there shall be a Unitary Charge Adjustment to reflect such savings.

### **55.4 Financing**

Subject to Clause 55.3.1, if the Contractor has been asked to and has used reasonable endeavours to obtain funding for additional Capital Expenditure referred to in Clause 55.3.1, but has been unable to do so within 60 days of the date that the agreement or determination referred to in Clause 55.3 occurred, then the Authority shall pay to the Contractor an amount equal to that Capital Expenditure on or before the date falling 30 days after the Capital Expenditure has been incurred.

### **55.5 Unitary Charge Adjustment**

Any compensation payable under this Clause 55 by means of an adjustment to or reduction in the Unitary Charge shall be calculated in accordance with Section B of Schedule Part 7 (*Unitary Charge Adjustment*) excluding double counting arising from the Indexation Adjustment.

## **56. VARIATIONS**

### **56.1 Authority Changes**

56.1.1 The Authority may at any time propose a change:

56.1.1.1 to the Authority's Requirements (which, to avoid doubt, may involve the undertaking of physical works to any Project Facility, the creation of new Assets, or the provision of additional services) or to any provision of this Agreement; or

56.1.1.2 adding or removing one or more Project Facilities from the Project;

56.1.1.3 to School Hours;

56.1.1.4 to Core Times;

56.1.1.5 to the number of School Days; or

56.1.1.6 to the boundaries of any Site

in accordance with this Clause 56 unless such a change is a Small Works change when Clauses 56.1.16 to 56.1.19 will apply.

56.1.2 The Authority may not propose an Authority Change which, if implemented would:

56.1.2.1 infringe any law; or

56.1.2.2 be inconsistent with Good Industry Practice; or

56.1.2.3 cause any Necessary Consent to be revoked or a new consent to implement the relevant change in the Authority's Requirements to be unobtainable; or

56.1.2.4 materially and adversely affect the Contractor's ability to carry out the Works and/or deliver the Services; or

56.1.2.5 materially and adversely affect the health and safety of any person; or

56.1.2.6 materially and adversely change the nature of the Project (including its risk profile).

56.1.2A For the avoidance of doubt, where the Contractor refuses to implement an Authority Change pursuant to Clause 56.1.2 the Authority will be entitled to implement the relevant Authority Change and shall indemnify the Contractor in respect of all losses incurred by the Contractor as a result of the implementation of that Authority Change to the extent that such Authority Change impacts upon the carrying out of the Works or the Services.

56.1.3 If the Authority requires an Authority Change it must serve a notice (**Authority Notice of Change**) of a proposed change on the Contractor.

56.1.4 The Authority Notice of Change shall:

56.1.4.1 set out the change to the Authority's Requirements in sufficient detail to enable the Contractor to calculate and provide the information required in terms of Clause 56.1.4A and the Estimated Change in Project Costs in accordance with Clause 56.1.5 ("**Estimate**"); and

56.1.4.2 in the event that the Authority Change will require Capital Expenditure, state whether the Authority intends to pay to the Contractor the costs involved in implementing the Authority Change or whether the Authority requires the Contractor to use its reasonable efforts to obtain funding in accordance with Clause 56.1.11;

56.1.4.3 require the Contractor to provide to the Authority within 10 Business Days of receipt of the Authority Notice of Change the information required in terms of Clause 56.1.4A.

56.1.4A

56.1.4A.1 The Contractor shall within 10 Business Days of receipt of the Authority Notice of Change (at the cost of the Contractor) inform the Authority in writing of the following:

56.1.4A.1.1 in respect of any Authority Change, whether in the reasonable opinion of the Contractor the Authority Change would:

- (i) so adversely affect the structure, design life or function of the New Project Facilities that the Contractor would incur material additional costs in performing the Services;
- (ii) result in:
  - (a) the Contractor being prevented from meeting the Authority's Requirements; or
  - (b) any Legislation or Necessary Consents or Applicable Standards being breached or would be a departure from Good Industry Practice;
- (iii) during implementation or when implemented would be reasonably likely to jeopardise the safety of any relevant persons;
- (iv) require the consent to be obtained from any third party whose consent cannot be obtained by the Contractor using reasonable endeavours;

56.1.4A.1.2 the Contractor's *bona fide* initial estimate of the cost of or saving in carrying out the Authority Change;

56.1.4A.1.3 in the case of an Authority Change requested prior to any of the Service Availability Dates and/or External Works Availability Dates, and/or Grass Playing Fields Availability Dates the impact (if any) on the Target Service Availability Dates and/or Target External Works Availability Dates and/or Grass Playing Fields Availability Dates; and

56.1.4A.1.4 provide the Contractor's reasonable estimate of the cost and time (which shall not exceed 20 Business Days) of preparing the Estimate.

56.1.4A.2 The Authority shall within 10 Business Days of receipt of the information or notification given pursuant to paragraph 56.1.4A.1 notify the Contractor in writing whether or not the Contractor is instructed to prepare the Estimate.

56.1.5 As soon as practicable and in any event within 20 Business Days after having been instructed pursuant to Clause 56.1.4A.2 to prepare an Estimate in respect of an Authority Notice of Change, the Contractor shall deliver to the Authority the Estimate. The Estimate shall include the opinion of the Contractor on:

56.1.5.1 whether relief from compliance with obligations is required, including the obligations of the Contractor to achieve the Target Service Availability Date and/or any Target External Works Availability Date and/or any Target Grass Playing Fields Availability Date and to meet the Authority's Requirements during the implementation in the Authority Change;

56.1.5.2 any impact on the provision of the Services;

56.1.5.3 any amendment required to this Agreement and/or any Project Document as a result of the Authority Change;

56.1.5.4 any Estimated Change in Project Costs that results from the Authority Change;

56.1.5.5 any loss of revenue that results from the Authority Change;

56.1.5.6 any Capital Expenditure that is required or no longer required as a result of the Authority Change;

56.1.5.7 the proposed method of certification of any construction or operational

aspects of the Works or the Services required by the Authority Change;

56.1.5.8 the programme for implementing the Authority Change; and

56.1.5.9 any Necessary Consents which are required.

56.1.6 As soon as practicable after the Authority receives the Estimate, the parties shall discuss and agree the issues set out in the Estimate, including:

56.1.6.1 providing evidence that the Contractor has used reasonable endeavours (including (where practicable during the Operational Services Period) the use of Competitive Tender) to oblige its sub-contractors to minimise any increase in costs and maximise any reduction in costs;

56.1.6.2 demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, foreseeable Changes in Law at that time have been taken into account by the Contractor; and

56.1.6.3 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain Assets that have been affected by the Authority Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clause 56.1.5.4 and/or 56.1.5.5 and/or 56.1.5.6.

In such discussions the Authority may modify the Authority Notice of Change in which case the Contractor shall as soon as practicable, and in any event not more than 14 days after receipt of such modification, notify the Authority of any consequential changes to the Estimate.

56.1.7 If the Contractor does not intend to use its own resources to implement any Authority Change it shall comply with Good Industry Practice with the objective of ensuring that it obtains best value for money (taking into account all relevant circumstances including, in particular, the requirement that the Contractor should not be worse off as a result of the implementation of the Authority Change) when procuring any work, services, supplies, materials or equipment required in relation to the Authority Change.

56.1.8 If the parties cannot agree on the contents of the Estimate then the dispute will be determined in accordance with the Dispute Resolution Procedure.

56.1.9 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to the Dispute Resolution Procedure, the Authority shall either:

56.1.9.1 confirm in writing the Estimate (as modified); or

56.1.9.2 withdraw the Authority Notice of Change (in which case the Authority shall pay to the Contractor the reasonable cost of preparing the Estimate (which cost is notified to and agreed with the Authority) within 28 days of the Contractor's demand).

56.1.10 If the Authority withdraws a Notice of Change prior to agreement or determination of the contents of the Estimate or does not confirm the Estimate (as modified) within 20 Business Days (or such other period as the Authority notifies to the Contractor within such 20 Business Day period) (acting reasonably) of the contents of the Estimate having been agreed or determined then the Authority Notice of Change shall be deemed to have been withdrawn and the Authority shall reimburse the proper and reasonable costs of the preparation of such Estimate to the Contractor within 28 days of the Contractor's written demand.

56.1.11 In the event that the Estimate (as modified) involves Capital Expenditure then (unless the Authority has elected to fund such costs in accordance with Clause 56.1.4.2) the Contractor shall use its reasonable endeavours to obtain funding for the whole of the

estimated Capital Expenditure (provided that the Shareholders shall not be required to increase their equity contribution to the Contractor), on terms reasonably satisfactory to it and the Senior Lenders. The use of reasonable endeavours by the Contractor to obtain funding shall not oblige the Contractor to increase contributions from existing shareholders of the Contractor or its Holding Company or to finance any Authority Change out of its existing financial resources.

56.1.12 If the Contractor has used its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure but has been unable to obtain an offer of such funding within 40 Business Days after the date on which the Authority confirmed the Estimate then the Contractor will have no obligation to carry out the Authority Change unless the Authority agrees within 20 Business Days of the end of such period to pay the costs for which funding is not available on the basis provided in Clause 56.1.15.

56.1.13 The Authority may, at any time following the date on which the Estimate is confirmed, agree to meet all or, to the extent the Contractor has obtained funding for part of the Capital Expenditure, the remaining part of the estimated Capital Expenditure.

56.1.14 In the event that the Estimate has been confirmed by the Authority, then, to the extent that the Contractor is not otherwise compensated by way of a lump sum paid by the Authority, any adjustment to the Unitary Charge to reflect such Estimate shall be made in accordance with Section B of Schedule Part 7 (*Unitary Charge Adjustment*) excluding double counting arising from the Indexation Adjustment.

56.1.15 Where the Authority agrees to pay the costs for which funding is not available pursuant to Clause 56.1.12:

56.1.15.1 the Authority and Contractor shall agree:

- (a) a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by the Contractor in carrying out the Authority Change to the extent borne by the Authority; and
- (b) where payment for part of the Authority Change reflects the carrying out of, or specific progress towards, an element within the Authority Change, an objective means of providing evidence confirming that the part of the Authority Change corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,

(such payment schedule and evidence to be determined in accordance with Clause 64 (Dispute Resolution Procedure) in the event of the Authority and Contractor failing to agree as to its terms);

56.1.15.2 the Authority shall make a payment to the Contractor within 15 Business Days of receipt by the Authority of invoices presented to the Authority (accurate and complete in all material respects) in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Authority Change has been carried out; and

56.1.15.3 if payment is not made in accordance with Clause 56.1.15.2, the Authority shall pay interest to the Contractor on the amount unpaid from the date 15 Business Days after receipt of the relevant invoice until paid at the Prescribed Rate.

56.1.16 Subject to Clause 56.1.12, in the event that the Estimate has been confirmed by the Authority the relevant Authority Change shall be commenced and implemented by the Contractor in accordance with the programme for implementing the proposed change included in the Estimate (such programme not to be amended without the prior written consent of the Authority). As soon as reasonably practicable after such confirmation the parties shall enter into any documents to amend this Agreement or any relevant

Project Document which are necessary to give effect to such change.

- 56.1.16A In the event that the Contractor has used all reasonable endeavours and acted in accordance with Good Industry Practice and in accordance with the terms of the Estimate to obtain any Necessary Consent (or amended Necessary Consent) required for the implementation of an Authority Change, but such Necessary Consent has not been obtained within the period provided for the obtaining of the Necessary Consents in terms of the relevant Estimate then:
- 56.1.16A.1 the Contractor shall be given an opportunity to revise the relevant Estimate and the terms of this Clause 56.1.16A will apply to such a revised Estimate as if it were the original Estimate, Provided that if such Necessary Consent has not been obtained within a period of 40 weeks after confirmation of the original Estimate by the Authority under Clause 56.1.9, the Contractor shall notify the Authority in writing to this effect and upon receipt of such notice by the Authority from the Contractor, the Contractor shall be relieved of its obligations to implement the Authority Change and the Authority Notice of Change shall be deemed to be withdrawn and the following Clauses of this Clause 56.1.16A shall apply.
  - 56.1.16A.2 Any such withdrawal under Clause 56.1.16A.1 shall not affect the Authority's liability to the Contractor (whether pursuant to Clause 56.1.13 or 56.1.14) for Capital Expenditure reasonably and properly incurred or contracted for in connection with the implementation of the Authority Change in accordance with the Estimate, prior to the date of such withdrawal.
  - 56.1.16A.3 In the event of such a withdrawal under Clause 56.1.16A.1, and to the extent that the progress of any part of the Works has been delayed as a result of the Contractor's implementation of the Authority Change in accordance with the terms of the relevant Estimate:
    - (a) the relevant part of the Construction Programme and the relevant Target Service Availability Date(s), Target External Works Availability Date(s), Target Grass Playing Fields Availability Date(s) and/or Deadline Dates shall be postponed by such time as shall be reasonable, taking into account the likely effect of the delay and any representations from the Contractor, and
    - (b) the provisions of Clauses 17.7.2 and 17.7.3 shall apply as if the circumstances delaying progress for the purposes of this Clause 56.1.16A.3 constituted a Works Compensation Event.
  - 56.1.16A.4 Without prejudice to the foregoing provisions of this Clause 56.1.16A, as soon as the Contractor becomes aware that the Contractor will be unable to obtain a Necessary Consent (or amended Necessary Consent), or of good reason why it will be so unable, the Contractor shall notify the Authority accordingly without delay, and shall copy to the Authority any relevant notices or correspondence received in relation to the Contractor's endeavours to obtain the relevant Necessary Consent (or amended Necessary Consent).
  - 56.1.16A.5 The Contractor shall have regard for any comments or information which the Authority may from time to time provide to the Contractor pursuant to this Clause 56.1.16A.
  - 56.1.16A.6 The operation of this Clause 56.1.16A shall be subject to the Contractor taking all reasonable steps to mitigate the consequences of any delay and/or inability to obtain the relevant Necessary Consent.

56.1.17 28 days prior to the first Target Service Availability Date and 28 days prior to the commencement of each Contract Year for the first 5 Contract Years thereafter and within 20 Business Days of a request from the Authority in any subsequent Contract Year the Contractor shall propose a schedule of rates as are fair and reasonable having regard to the nature of Small Works, the costs applicable thereto and an obligation on the Contractor to mitigate such costs. Such rates shall be agreed with the Authority or in the case of dispute determined by the Adjudicator under the Dispute Resolution Procedure (the **Small Works Rates**), and shall be applied in respect of any request from the Authority for Small Works to be completed during that Contract Year. The value of any Small Works shall be calculated on the basis that:

- (i) the labour element shall be calculated in accordance with the Small Works Rates or, where such rates are not applicable, in accordance with rates which are fair and reasonable; and
- (ii) the materials element shall be charged at the cost of the materials to the Contractor or to the sub-contractor carrying out the work (net of all discounts) plus 7.5%

56.1.18 The Contractor and the Authority shall agree the timing of any Small Works, so as to minimise any inconvenience to the Authority. The Contractor shall take all reasonable steps to minimise the duration of any Small Works and shall ensure that all Small Works are undertaken in accordance with Good Industry Practice.

56.1.19 The Authority may only request Small Works through the Authority's Representative contacting the Helpdesk or such other procedure as is agreed between the parties.

56.1.20 Any dispute between the parties relating to Small Works shall be determined in accordance with Clause 64 (*Dispute Resolution*)

## **57 CONTRACTOR CHANGES IN OPERATIONAL SERVICES**

### **57.1 Contractor Notice of Change**

If the Contractor wishes to introduce a change in any of the Services (which for the avoidance of doubt, may involve the undertaking of physical works to any New Project Facility), it must serve a notice (**Contractor Notice of Change**) on the Authority.

### **57.2 Details in Contractor Notice of Change**

The Contractor Notice of Change must:

- 57.2.1 set out the proposed change in the Services in sufficient detail to enable the Authority to evaluate it in full;
- 57.2.2 specify the Contractor's reasons for proposing the change in the Services
- 57.2.3 request the Authority to consult with the Contractor with a view to deciding whether to agree to the change in the Services and, if so, what consequential changes the Authority requires as a result;
- 57.2.4 indicate any implications of the change in the Services;
- 57.2.5 indicate, in particular, whether a variation to the Unitary Charge is proposed (and, if so, give a detailed cost estimate of such proposed change);
- 57.2.6 indicate if there are any dates by which a decision by the Authority is critical; and
- 57.2.7 set out the programme for implementing the proposed change.

### **57.3 Evaluation of Contractor's Change**

The Authority shall evaluate the Contractor's proposed change in the Services in good faith, taking into account all relevant issues, including whether:

57.3.1 a change in the Unitary Charge will occur;

57.3.2 the change affects the quality of the Services or the likelihood of successful delivery of the Services;

57.3.3 the change will interfere with the relationship of the Authority with third parties;

57.3.4 the financial strength of the Contractor is sufficient to perform the changed Services;

or

57.3.5 the change materially affects the risks or costs to which the Authority is exposed.

#### **57.4 Parties to discuss**

As soon as practicable after receiving the Contractor Notice of Change, the parties shall meet and discuss the matter referred to in it. During their discussions the Authority may propose modifications or accept or reject the Contractor Notice of Change.

#### **57.5 Acceptance of Contractor Notice of Change**

If the Authority accepts the Contractor Notice of Change (with or without modification), the relevant change in Services shall be commenced and implemented by the Contractor in accordance with the programme for implementing the proposed change included in the Contractor Notice of Change (as modified) (such programme not to be amended without the prior written consent of the Authority). Within a period of 7 days, after the date of the Authority's acceptance of the Notice of Change the parties shall consult and agree the remaining details as soon as practicable and shall enter into any documents to amend this Agreement or any relevant Project Document which are necessary to give effect to the change in the Services.

#### **57.6 Rejection of Contractor Notice of Change**

If the Authority rejects the Contractor Notice of Change, it shall not be obliged to give its reasons for such a rejection. The Authority may reject any Contractor Notice Change in its absolute discretion (subject to Clause 57.9).

#### **57.7 No increase in the Unitary Charge**

Unless the Authority's acceptance specifically agrees to an increase in the Unitary Charge, there shall be no increase in the Unitary Charge as a result of a change in the Services proposed by the Contractor.

#### **57.8 Savings to be shared**

If the change in the Services proposed by the Contractor causes or will cause the Contractor's costs or those of a sub-contractor to decrease, there shall be a decrease in the Unitary Charge such that the savings are shared between the parties as agreed in relation to the change in question.

#### **57.9 Change in Law**

The Authority cannot reject a change in the Services which is required in order to conform to a Change in Law. The costs of introducing a change in the Services resulting from a Qualifying Change in Law (including any resulting variation in the Unitary Charge) shall be dealt with in accordance with Clause 55 (*Qualifying Change in Law*) and to the extent not dealt with shall be borne by the Contractor.

## **57A IMPLEMENTATION OF CHANGES**

**57.A.1** The Contractor shall implement any Authority Change, Contractor Change or Qualifying Change in Law in accordance with

57A.1.1 Legislation;

57A.1.2 Necessary Consents;

57A.1.3 the Authority's Requirements as amended in accordance with Clause 55, 56 or 57 as applicable;

57A.1.4 the proposal in respect of the Authority Change, Contractor Change or Qualifying Change in Law, (including any further Contractor proposals) agreed or determined in accordance with Clause 55, 56 or 57 as applicable;

57A.1.5 the Applicable Standards; and

57A.1.6 Good Industry Practice.

**57A.2** In the event of a conflict between the requirements of Clauses 57.A.1.1 to 57A.1.6 the requirements shall have precedence in the numerical order in Clause 57A.1, provided always that where such further Contractor proposals provide greater benefit to the Authority, of which the Authority shall be sole judge, there shall be deemed to be no conflict (unless and to the extent the further Contractor proposals are inconsistent with Legislation and/or the Necessary Consents).

## **58. AUTHORITY STEP-IN**

### **58.1 Reason for Step-In**

If the Authority reasonably believes that it needs to take action in connection with the Services:

58.1.1 because a serious risk exists to the health or safety of persons or property or to the environment; and/or

58.1.2 to discharge a statutory duty (including the duty to make available school places for children),

then the Authority shall be entitled to take action in accordance with Clauses 58.2 to 58.5.

### **58.2 Notify Contractor**

If Clause 58.1 applies and the Authority wishes to take action, the Authority shall notify the Contractor in writing of the following:

58.2.1 the action it wishes to take;

58.2.2 the reason for such action;

58.2.3 the date it wishes to commence such action;

58.2.4 the time period which it believes will be necessary for such action; and

58.2.5 to the extent practicable, the effect on the Contractor and its obligation to provide the Services during the period such action is being taken.

### **58.3 Action by Authority**

Following service of such notice, the Authority shall take such action as notified under Clause 58.2 and any consequential additional action as it reasonably believes is necessary (together, the **Required Action**) and the Contractor shall give all reasonable assistance to the Authority while it is taking the Required Action. To the extent that the Authority performs any of the

obligations of the Contractor hereunder or undertakes tasks that would otherwise be undertaken by the Contractor pursuant to this Agreement, the Authority shall perform such obligations or undertake such tasks to the same standard as would be required of the Contractor hereunder.

#### **58.4 Contractor Not in Breach**

If the Contractor is not in breach of its obligations under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Contractor from providing any part of the Services:

58.4.1 the Contractor shall be relieved from its obligations to provide such part of the Services; and

58.4.2 in respect of the period in which the Authority is taking the Required Action and provided that the Contractor provides the Authority with reasonable assistance (such assistance to be at the expense of the Authority to the extent that additional costs are incurred), the Unitary Charge due from the Authority to the Contractor shall equal the amount the Contractor would receive if it were satisfying all its obligations and providing the Services affected by the Required Action in full over that period.

#### **58.5 Contractor in Breach**

If the Required Action is taken as a result of a breach of the obligations of the Contractor under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Contractor from providing any part of the Services:

58.5.1 the Contractor shall be relieved of its obligations to provide such part of the Services; and

58.5.2 in respect of the period in which the Authority is taking the Required Action, the Unitary Charge due from the Authority to the Contractor shall equal the amount the Contractor would receive if it were satisfying all its obligations and providing the Services affected by the Required Action in full over that period, less an amount equal to all the Authority's properly incurred costs of operation in taking the Required Action.

### **59. INFORMATION AND CONFIDENTIALITY**

#### **59.1 Keep Confidential**

The Parties shall keep confidential all matters relating to this Agreement and the Project Documents and shall use all reasonable endeavours to prevent their employees, agents and sub-contractors from making any disclosure to any person of any matters relating to this Agreement.

#### **59.2 Permitted Disclosure**

Clause 59.1 shall not apply to:

59.2.1 any disclosure of information that is reasonably required by persons engaged in the performance of the obligations of a party to this Agreement;

59.2.2 any matter which a party can demonstrate is already generally available and in the public domain otherwise than as a result of breach of Clause 59.1;

59.2.3 any disclosure to enable a determination to be made under the Dispute Resolution Procedure;

59.2.4 any disclosure which is required by any law (including any order of a court of competent jurisdiction), any Parliamentary obligation or the rules of any stock exchange or governmental or regulatory authority having the force of law;

59.2.5 any disclosure of information which is already lawfully in the possession of the

receiving party, prior to its disclosure by the disclosing party;

59.2.6 any provision of information to the Senior Lenders or the Senior Lenders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Contractor to enable it to carry out its obligations under this Agreement, to that person but only to the extent reasonably necessary to enable a decision to be taken on the proposal;

59.2.7 any disclosure by the Authority, of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to:

59.2.7.1 any proposed New Contractor and/or New Building Contractor and/or FM Contractor and in each case its advisers and lenders;

59.2.7.2 any person in connection with Benchmarking or Market Testing.

59.2.8 any registration or recording of the Necessary Consents and property registration required;

59.2.9 any disclosure of information by the Authority to any other department, office or agency of the Government, or to the governing body of any of the Project Facilities;

59.2.10 any disclosure by the Authority of any document relating to this Agreement to which it is a party and which the Contractor (acting reasonably) has agreed with the Authority contains no Commercially Sensitive Information; and

59.2.11 any disclosure for the purpose of:

59.2.11.1 the examination and certification of the Authority's or the Contractor's accounts; or

59.2.11.2 any examination pursuant to the Local Government (Scotland) Act 1973 as amended by the Local Government in Scotland Act 2003 of the Authority that it has secured best value in the performance of its functions; or

59.2.11.3 responding to a request for information under the Freedom of Information (Scotland) Act 2002; Declaring that no term of the Agreement, whether express or implied, shall preclude the Authority from making public under such Act and any codes applicable from time to time relating to access to public authorities' information, details of all matters relating to the Agreement, the Project Documents to which the Authority is a party and other Project Documents the contents of which the parties agree may be disclosed in response to a request for information under the Freedom of Information (Scotland) Act 2002 unless such details would or would be likely to prejudice substantially the commercial interests of the Contractor, the Authority, Senior Lenders, Building Contractor or FM Provider.

59.2.12 [Not Used]

### **59.3 Obligations Preserved**

Where disclosure is permitted under Clause 59.2 other than Clauses 59.2.2, 59.2.6, 59.2.8, 59.2.10 and 59.2.11, the party disclosing 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.

### **59.4 Audit**

For the purposes of the Local Government (Scotland) Act 1973, the Controller of Audit, the Accounts Commission for Scotland and Audit Scotland may examine such documents as he or

it may reasonably require which are owned, or held by or otherwise in the control of the Contractor and any sub-contractor and may require the Contractor and any sub-contractor to produce such oral or written explanations as he or it considers necessary.

#### **59.5 Exploitation of Information**

The Contractor shall not make use of this Agreement or any information issued or provided by or on behalf of the Authority in connection with this Agreement otherwise than for the purposes of this Agreement, except with the written consent of the Authority.

#### **59.6 Expiry**

On or before the Expiry Date or the Termination Date the Contractor shall ensure that all documents or computer records in its possession, custody or control which contain information relating to any member of staff or pupil at or School Board of any Project Facility including any documents in the possession, custody or control of any sub-contractor are delivered up to the Authority.

#### **59.7 Access to Information**

The Contractor shall co-operate, facilitate, support and assist the Authority to comply with the Freedom of Information (Scotland) Act 2002 and any codes of practice applicable from time to time relating to access to public authorities' information. In the event that the Authority is required to provide information to any person as a result of a request made to it under such Act and/or codes, the Authority shall adhere to the requirements of such Act and/or codes in disclosing information relating to this Agreement, the Project Documents and the Contractor.

#### **59.8 Disclosure by Accounts Commission for Scotland**

The parties acknowledge that the Accounts Commission for Scotland has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Scottish Ministers and/or Parliament.

### **60. INDEMNITIES AND RESPONSIBILITY**

#### **60.1 Authority's Indemnity**

The Authority shall, subject to Clauses 60.2 and 60.3, be responsible for, and shall indemnify the Contractor, its employees, agents and sub contractors on demand from and against all liability for:-

60.1.1 death or personal injury;

60.1.2 loss of or damage to property other than to the Project Facilities; and

60.1.3 third party actions, claims or demands, and costs, charges and expenses (including legal expenses on an indemnity basis),

which may arise out of, or in consequence of the negligence of the Authority.

#### **60.2 Authority not responsible**

The Authority shall not be responsible or be obliged to indemnify the Contractor for:-

60.2.1 any injury, loss, damage, cost and expense caused (or to the extent caused) by the negligence of the Contractor or by the breach by the Contractor of its obligations under this Agreement; or

60.2.2 any claim made under Clause 60.1.2 in respect of loss of or damage to property to the extent in excess of £50 million or such greater sum as this liability is insured against.

#### **60.3 Damage by Authority or Authority Related Parties**

Notwithstanding any other provisions of this Agreement, accidental damage to the New Project Facilities, by the Authority

60.3.1 shall not be a Services Compensation Event; and

60.3.2 the Authority shall have no obligation to indemnify the Contractor or any Contractor Related Party in respect of such damage or meet the cost of repair or remediation of such accidental damage.

#### **60.4 Contractor's Indemnity**

The Contractor shall, subject to Clause 60.5, be responsible for, and shall release and indemnify the Authority, and its employees, agents and contractors (the **Indemnified Parties**) on demand from and against all liability for:

60.4.1 death or personal injury;

60.4.2 loss of or damage to property (including property belonging to the Authority or for which it is responsible (**Authority Property**) excluding the New Project Facilities;

60.4.3 breach of statutory duty; and

60.4.4 third party actions, claims or demands and costs, charges and expenses (including legal expenses on an indemnity basis)

which may arise out of, or in consequence of, the design, construction, operation or maintenance of the New Project Facilities and/or the demolition of any of the Existing Project Facilities or the performance or non-performance by the Contractor of its obligations under this Agreement or the presence on the Authority's property of the Contractor or any Contractor Related Party.

#### **60.5 Contractor not responsible**

The Contractor will not be responsible or be obliged to indemnify the Authority for:

60.5.1 any claim made under Clause 60.4.2 in respect of loss of or damage to Authority Property to the extent in excess of £50,000,000 or such greater sum as the liability is insured against; or

60.5.2 any claim made under Clause 60.4.4 in respect of third party actions or demands to the extent in excess of £50,000,000 or such greater sum as the liability is insured against.

60.5.3 any loss or damage arising from any arrangement that the Authority may have or make for the disposal of land or buildings that are surplus to the requirements of the Authority, by virtue of the Project.

#### **60.6 Responsibility for Related Parties**

60.6.1 Subject to Clauses 12 (*Representatives*), 60.6.2 and 83 (*Malicious Damage*) all of which shall take precedence over this Clause 60.6.1, the Contractor shall be responsible as against the Authority for the acts or omissions of the Contractor Related Parties as if they were the acts or omissions of the Contractor and the Authority shall be responsible as against the Contractor for the acts or omissions of any person listed in paragraph (a) of the definition of the Authority Related Party as if they were the acts or omissions of the Authority.

60.6.2 Where the Contractor is obliged to effect insurance under this Agreement or has otherwise effected insurance, the Contractor will not bring any claim or action against the Authority or any Authority Related Party in terms of this Agreement in respect of any loss or damage in circumstances where the Contractor could recover such loss or damage under said insurances (whether or not such insurance has been effected, or if effected, has been vitiated as a result of any act or omission of the Contractor or any

Contractor Related Party, including but not limited to non-disclosure or under insurance) other than for any loss or damage not covered because of the level of deductibles/excesses under such insurance permitted by this Agreement .

#### **60.7 Notification of Claims**

Where either party (the **Indemnified Party**) wishes to make a claim under this Agreement against the other (the **Indemnifying Party**), the Indemnified Party shall give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim.

#### **60.8 Conduct of Claims**

Subject to the rights of the insurers under the relevant insurance policy, the Indemnifying Party may at its own expense and with the assistance and co-operation of the Indemnified Party have the conduct of the claim including its settlement and the Indemnified Party shall not, unless the Indemnifying Party has failed to resolve the claim within a reasonable period, take any action to settle or prosecute the claim.

#### **60.9 Costs of Claims**

The Indemnifying Party shall, if it wishes to have conduct of any claim, give reasonable security to the Indemnified Party for any cost or liability arising out of the conduct of the claim by the Indemnifying Party.

#### **60.10 Mitigation of Losses**

Each party shall take all reasonable steps to mitigate any losses which are the subject matter of an indemnity under this Agreement.

### **61. INSURANCE**

#### **61.1 Requirement to Maintain**

The Contractor shall take out and maintain in force or procure the taking out and maintenance of the insurances specified in Schedule Part 15 (*Insurances*) and any other insurances as may be required by law (provided that the insurance cover requires to be effective in each case not later than the date on which it is required and from the date on which the relevant risk commences).

#### **61.2 Obligation on Parties**

No party to this Agreement shall take or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that party is an insured, a co-insured or additional insured person or noted on the policy.

#### **61.3 Nature of the Insurances**

Where so specified in Schedule Part 15 (*Insurances*), the insurances referred to in Clause 61.1 shall:

- 61.3.1 subject to Clause 61.4, name the Contractor as co-insured with any other party maintaining the insurance;
- 61.3.2 contain a clause waiving the insurers' subrogation rights against the Authority, its employees and agents;
- 61.3.3 provide for 30 days prior written notice of their cancellation, non-renewal or material amendment to be given to the Authority;
- 61.3.4 provide for payment of any proceeds to be made by insurers in accordance with Clauses 52 (*Insurance Proceeds*) and 62 (*Reinstatement*); and

61.3.5 provide for non-vitiation protection in respect of any claim made by the Authority as co-insured.

#### **61.4 Co-Insured**

Wherever the Authority has an insurable interest as more specifically described in Schedule Part 15 (*Insurances*), the insurances referred to in Clause 61.1 shall name the Authority as a co-insured for its separate interest.

#### **61.5 Evidence of Policies**

The Contractor shall provide to the Authority:

61.5.1 copies on request of all insurance policies relating to the above (together with any other information reasonably requested by the Authority relating to such insurance policies) and the Authority shall be entitled to inspect such original policies as are or should be in the custody of the Contractor during ordinary business hours; and

61.5.2 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 61 and Schedule Part 15 (*Insurances*).

#### **61.6 Renewal Certificates**

Renewal certificates or other evidence of renewal as may be acceptable to the Authority in relation to insurances referred to in Clause 61.1 shall be obtained as and when necessary and copies (certified in a manner acceptable to the Authority) of such renewal certificates or cover notes issued by the insurer evidencing the renewal of such insurances shall be forwarded to the Authority as soon as possible but in any event at least 10 days before the renewal date. If cover notes are submitted to the Authority then copies of the renewal certificates relative to the insurances referred to in such cover notes shall be sent to the Authority within one month of the renewal date or the date of issue of such cover notes, whichever is the earlier.

#### **61.7 Breach**

If the Contractor is in breach of Clause 61.1, the Authority may pay any premiums required to keep such insurances in force or itself procure such insurances and may in either case recover such amounts from the Contractor on written demand.

#### **61.8 Notification of Claim**

The Contractor shall give the Authority notification within 30 days after any claim on any of the insurance policies referred to in this Clause (a) with a value or likely value in excess of £25,000; and (b) at the point where the aggregate value of all claims made under such policies exceeds £50,000 per annum and (if required by the Authority) accompanied by full details of the incident giving rise to the claim.

#### **61.9 Limit of Liability**

Without prejudice to the other provisions of this Agreement, neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Contractor of its liabilities and obligations under this Agreement.

#### **61.10 Premiums**

Subject to Clause 61.13, the insurance premiums referred to in this Clause shall be the responsibility of the Contractor.

#### **61.11 Authority Approval**

The insurance policies referred to in this Clause shall be effected with insurers and on terms and conditions including deductible levels approved by the Authority.

## 61.12 Risk Management

With effect from the date of this Agreement, the Authority and the Contractor shall each designate or appoint an insurance and risk manager and notify details of the same to the other parties. Such persons shall:

- 61.12.1 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;
- 61.12.2 advise and report to that party on such matters; and
- 61.12.3 ensure that any report or survey conducted by any insurer of any relevant procedures in relation to the Project is disclosed to the parties.

## 61.13 Review of Insurance Premia

The provisions of Schedule Part 15A (*Insurance Premium Risk Sharing Schedule*) shall apply to the review of insurance premia.

## 62. REINSTATEMENT

### 62.1 Application of Proceeds

Insurance proceeds received under any of the Physical Damage Insurance Policies shall be applied to repair, reinstate, and replace each part or parts of the New Project Facilities in respect of which the proceeds were received.

### 62.2 Joint Account

All insurance proceeds paid under any Physical Damage Insurance Policy in respect of a single event (or a series of related events) shall be paid into the Joint Insurance Account.

### 62.3 Reinstatement Obligations

Notwithstanding the provisions of this Clause 62, the Contractor will be obliged to repair, make good or reinstate any damage to the New Project Facilities and that in accordance with the Contractor's obligations under this Agreement. Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Insurance Policy in respect of a single event (or a series of related events) (the **Relevant Incident**) in an amount in excess of £100,000 (Indexed):

62.3.1 the Contractor shall deliver as soon as practicable, and in any event within 21 days after the making of the claim, a plan prepared by the Contractor for the carrying out of the works necessary (the **Reinstatement Works**) to repair, reinstate or replace (the **Reinstatement Plan**) the New Project Facility(ies) the subject of the relevant claim or claims in accordance with Clause 62.4. The Reinstatement Plan shall set out:

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

62.3.1.2 the proposed terms and construction programme upon which the Reinstatement Works are to be effected (including the date that the relevant New Project Facility will again become fully operational), the final terms of which shall be subject to the prior written approval of the Authority;

62.3.2 provided that the Authority is satisfied (acting reasonably) that the Reinstatement Plan will enable the Contractor to comply with Clause 62.4 within a reasonable timescale:

62.3.2.1 the Reinstatement Plan will be adopted;

62.3.2.2 the Contractor shall enter into contractual arrangements to effect the

Reinstatement Works with the person identified in the Reinstatement Plan approved by the Authority;

62.3.2.3 prior to the earlier to occur of the Termination Date and the Expiry Date, any amounts standing to the credit of the Joint Insurance Account (the **Relevant Proceeds**) (together with any interest accrued) may be withdrawn by the Contractor from the Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements, referred to in Clause 62.3.2.2, and to meet any other reasonable costs and expenses of the Contractor for the sole purposes of financing the Reinstatement Works. Following the earlier to occur of the Termination Date and the Expiry Date, the Authority may withdraw the amounts standing to the credit of the Joint Insurance Account for the purposes of funding any Reinstatement Works; it being declared that on or after the earlier of the Termination Date and the Expiry Date the Authority only shall be entitled to receive the Relevant Proceeds and/or all sums at the credit of the Joint Insurance Account (including interest);

62.3.2.4 the Authority agrees and undertakes that, subject to compliance by the Contractor with its obligations under this Clause, and provided that the Contractor procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 62.3.2.2 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;

62.3.2.5 the Authority undertakes to use all reasonable endeavours to assist the Contractor in the carrying out of the Reinstatement Plan; and

62.3.2.6 after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with Clause 62.4, the Authority shall permit withdrawal by the Contractor of any Relevant Proceeds then held in the account referred to in Clause 62.2 that have not been paid under Clause 62.3.2.3, together with any interest accrued.

## **62.4 Works Carried Out**

Where insurance proceeds are to be used in accordance with this Agreement to repair, reinstate or replace any part of the New Project Facilities the Contractor shall carry out the work in accordance with the Authority's Requirements so that on completion of the work the New Project Facilities meet the provisions of this Agreement and the provisions of Clause 21 (*Notification of Service Availability*) shall apply *mutatis mutandis* to the Reinstatement Works.

## **62.5 Substantial damage**

The legal principle of *rei interitus* shall not apply to this Agreement.

## **62.6 Alternative Accommodation**

62.6.1 In the event of a New Project Facility or any Area being Unavailable following damage caused by an Insured Risk after the Service Availability Date or, in relation to External Works, the External Works Availability Date, for that New Project Facility, the Contractor shall, at the Contractor's expense, provide timeously so as to permit the continuous provision of Educational Services and Community Education Facilities, (a) equivalent alternative accommodation to the Authority's reasonable satisfaction and (b) ancillary services to enable such equivalent alternative accommodation to be used for the provision of Educational Services.

62.6.2 In the event that the Contractor fails to provide equivalent alternative accommodation timeously pursuant to Clause 62.6.1 of which the Authority shall be the sole judge, the Authority shall be entitled to, at the Contractor's expense, and the Contractor shall permit the Authority to (a) provide equivalent alternative accommodation on the Site(s) and (b) make connections with drains, pipes, cables or other service media within the

Site(s) and (c) provide such ancillary services as may be required to enable such accommodation to be used for the provision of Educational Services.

## **63. UNINSURABLE RISKS**

### **63.1 Obligation**

Nothing in Clause 61 shall oblige the Contractor to take out or maintain insurance in respect of a risk which is or becomes Uninsurable.

### **63.2 Risks Become Uninsurable**

If a risk usually covered by construction all risks, property all risks, public liability, advanced loss of revenue and/or business interruption (but excluding loss of profit) or statutory insurances required to be insured against pursuant to Clause 61 becomes Uninsurable then:

63.2.1 the Contractor shall notify the Authority within 5 days of the Contractor becoming aware that the risk has become Uninsurable; and

63.2.2 if both parties agree, or it is determined in accordance with the Dispute Resolution Procedure, that the risk is Uninsurable and that:

63.2.2.1 the risk being Uninsurable is not caused by the actions or omissions of the Contractor or any Sub-Contractor; and

63.2.2.2 the Contractor has demonstrated to the Authority that the Contractor and a prudent board of directors of a company operating the same or substantially similar PFI businesses in the United Kingdom to that operated by the Contractor would in similar circumstances (in the absence of the type of relief envisaged by this clause) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account *inter alia* (and without limitation) the likelihood of the uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company the parties shall meet to discuss the means by which the risk should be managed (including considering the issue of self-insurance by either party).

### **63.3 Management of Risk**

If the requirements of Clause 63.2 are satisfied, but the parties cannot agree as to how to manage the risk, then :

63.3.1 in respect of third party liability insurance only the Authority shall (at the Authority's option) either pay to the Contractor an amount equal to the amount set out in Clause 44 (*Force Majeure Compensation*) and the Agreement will terminate, or elect to allow the Agreement to continue and Clause 63.3.2 below shall thereafter apply in respect of such risk; and

63.3.2 in respect of construction all risks, property all risks, public liability, advanced loss of revenue and/or business interruption (but excluding loss of profit) or statutory insurances the Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to the Contractor an amount equal to the insurance proceeds that would have been payable had the relevant insurance continued to be available and the Agreement will continue; or an amount equal to the amount set out in Clause 44.1 (*Force Majeure Compensation*) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable to the Contractor whereupon this Agreement will terminate.

63.3.3 If the Authority has exercised its option to pay the amounts detailed in Clause 63.3.1

or 63.3.2 and such payment is in respect of damage to the New Project Facility(ies), the Authority shall pay such amount to the Contractor either:

63.3.3.1 on completion of the Reinstatement Works to the reasonable satisfaction of the Authority; or

63.3.3.2 where the Contractor is required in terms of the contract to undertake the Reinstatement Works (a copy of which shall first have been delivered to the Authority) to make interim payments and there is delivered to the Authority a copy of the interim certificate issued pursuant to such contract, in instalments equal to the amounts as stated as payable in such interim certificate until the amount payable by the Authority to the Contractor is paid in full.

## **64. DISPUTE RESOLUTION**

The provisions of Schedule Part 18 (*Dispute Resolution Procedure*) shall apply to the settlement of all Disputes (as therein defined) which either Party may refer to an Adjudicator through the procedure set out in Schedule Part 18 (*Dispute Resolution Procedure*).

## **65. ORDERING OF GOODS AND SERVICES**

Neither party shall place or cause to be placed any orders with suppliers or otherwise incur liabilities in the name of the other party or any representative of the other party.

## **66. INTELLECTUAL PROPERTY**

### **66.1 Contractor to Make Available Project Data**

The Contractor shall make available to the Authority free of charge (and hereby irrevocably licences the Authority to use) all Project Data that might reasonably be required by the Authority and the Contractor shall ensure that the Contractor obtains all necessary licences, permissions and consents to ensure that the Contractor can make the Project Data available to the Authority on these terms, for the purposes of:

66.1.1 the Authority providing the New Project Facilities for educational and ancillary purposes and its duties under this Agreement and/or any statutory duties which the Authority may have; and

66.1.2 following termination of this Agreement, the design or construction of the New Project Facilities the operation, maintenance or improvement of the New Project Facilities and/or the provision of services the same as, or similar to, the Services,

(together the **Approved Purposes**), and in this Clause “**use**” shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term “**the right to use**” shall be construed accordingly. The licence granted pursuant to this Clause 66.1 shall be free of charge and non-exclusive.

### **66.2 Licence to Use Intellectual Property Rights**

The Contractor

66.2.1 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 all the Intellectual Property Rights which are or become vested in the Contractor; and

66.2.2 shall, where any Intellectual Property Rights used in relation to the Project are or become vested in a third party, use its reasonable endeavours to procure the grant of a like licence to that referred to in Clause 66.2.1 above to the Authority,

in both cases, solely for the Approved Purposes.

### **66.3 Intellectual Property Rights to vest in Contractor**

The Contractor shall use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired in relation to the Project during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in the Contractor and the Contractor shall enter into appropriate agreements with any Contractor Related Party (or other third parties) that may create or bring into existence, or from which it may acquire, any such Intellectual Property Rights. The provisions of this Clause 66.3 shall not apply to moral rights, which are not transferable.

### **66.4 Licence to use Software**

To the extent that any of the Project Data referred to in this Clause are generated by or maintained on a computer or similar system, the Contractor shall:

66.4.1 use all reasonable endeavours to procure for the benefit of the Authority, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Authority or its nominee to access and otherwise use (subject to the payment by the Authority of the relevant fee, if any) such Project Data for the Approved Purposes. As an alternative, the Contractor may provide such Project Data in a format which may be read by software generally available in the market at the relevant time or in hard copy format; and

66.4.2 where the Contractor owns the relevant software and has the source code, enter into the NCC's then current multi-licensee escrow deposit agreement or standard single licensee escrow deposit agreement as appropriate in each case.

### **66.5 Safe Storage Data**

The Contractor shall ensure the back-up and storage in safe custody of the Project Data referred to in Clause 66.4 in accordance with Good Industry Practice. Without prejudice to this obligation, the Contractor shall from time to time on reasonable request submit to the Authority's Representative for approval its proposals for the back-up and storage in safe custody of such Project Data and the Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. The Contractor shall comply, and shall cause all Contractor Related Parties to comply, with all procedures to which the Authority's Representative has given its approval. The Contractor may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Authority's Representative, who shall be entitled to object on the basis set out above.

### **66.6 Infringement of Rights**

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 used in relation to the Project (other than any Disclosed Data) or because the use of any materials, plant, machinery or equipment in connection with the Works or the Project infringes any rights in or to any such Intellectual Property of a third party then, unless such infringement has arisen out of the use of any such Intellectual Property by or on behalf of the Authority otherwise than in accordance with the terms of this Agreement or the relevant licence, the Contractor shall indemnify the Authority at all times from and against all such claims and proceedings and the provisions of Clause 60.8 (*Conduct of Claims*) shall apply.

## **67. ASSIGNATION AND SUB-CONTRACTING**

### **67.1 Restrictions on Transfer of the Agreement by the Authority**

The rights and obligations of the Authority under this Agreement shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) otherwise than in respect of the whole of the Agreement, the Direct Agreement and all other Project Documents to which the Authority is party and then only to a public body (being a single entity) having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Agreement, the

Direct Agreement and such other Project Documents to which the Authority is a party being:

- 67.1.1 a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975;
- 67.1.2 any local authority which has sufficient financial standing or financial resources (to the satisfaction of the Senior Lenders) to perform the obligations of the Authority under this Agreement, the Direct Agreement, the Direct Agreement and such other Project Documents to which the Authority is a party; or
- 67.1.3 any other public body whose obligations under this Agreement, the Direct Agreement and such other Project Documents to which the Authority is a party are unconditionally, irrevocably and effectively guaranteed (in a form reasonably acceptable to the Contractor) by the Authority or a Minister of the Crown having the legal capacity, financial standing and resources (to the satisfaction of the Senior Lenders), power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Agreement, the Direct Agreement and such other Project Documents to which the Authority is a party.

## **67.2 Restriction on the Contractor**

Subject to Clause 67.3 and subject always to the provisions of the Direct Agreement, the Contractor shall not assign, sublet, charge, sell, bargain or otherwise deal in any way with the benefit of this Agreement in whole or in part except with the prior written consent of the Authority (which the Authority may in its absolute discretion refuse). The provisions of this Clause 67.2 shall not apply to any assignation or other dealing by the Contractor by way of security in accordance with the Funding Agreements or by way of enforcement of any such security.

## **67.3 Exception**

Nothing in this Agreement shall prohibit the Contractor from providing or procuring the provision of the Works or the Services from a sub-contractor of sound financial standing and good repute and whose identity and the terms and conditions of contract have been notified through the Review Procedure to the Authority by the Contractor and approved by the Authority prior to the appointment of such sub-contractor, provided that the Contractor shall remain primarily and directly liable for the Contractor's obligations under this Agreement.

The Authority confirms its approval of the Agreed Form Building Contract and FM Agreement.

## **67.4 Contractor's Obligations**

The Contractor shall perform its obligations under and observe all the terms of any sub-contract.

## **67.5 Sub-Contractors**

Nothing in this Agreement shall prohibit or prevent any sub-contractor employed by the Contractor from being employed by the Authority at any establishments of the Authority.

## **68. AUDIT ACCESS**

Notwithstanding the provisions of Clause 77.3 (*Auditor*), the Contractor shall co-operate fully and in a timely manner with any reasonable request from time to time of any auditor (whether internal or external) of the Authority and at the expense of the Contractor to provide documents, or to procure the provision of documents, relating to the Project, and to provide, or to procure the provision of, any oral or written explanation relating to the same.

## **69. CORPORATE STRUCTURES**

### **69.1 Obligation to Inform**

The Contractor shall inform the Authority at least 30 days prior to the date that any Change of

Control of the Contractor and/or HoldCo is due to take effect, of the identities of any proposed parties.

**69.2 [Not Used]**

**69.3 Change of Ownership**

69.3.1 The Contractor shall not register any person as a member of the Contractor, and shall procure that HoldCo shall not register any person as a member of HoldCo, as a result of a Restricted Share Transfer without the prior written consent of the Authority.

69.3.2 For the purposes of Clause 69.1 and Clause 69.3.1:

69.3.2.1 any change in beneficial or legal ownership of any shares that are listed on a stock exchange;

69.3.2.2 any transfer of shares or of any interest in shares by a person to its Affiliate, and

69.3.2.3 any transfer of shares or of any interest in shares by way of security pursuant to the Funding Agreements or by way of enforcement of such security,

shall be disregarded.

**69.4 Sharing of Information/Authority Observer Stakeholder Representative**

69.4.1 The Authority Observer Stakeholder Representative shall (subject to Clause 69.4.2) be invited to attend each board meeting of the Contractor and shall be permitted to attend and participate in but not vote at those meetings. The Authority and the Contractor agree that the Authority Observer Stakeholder Representative shall not be a director of the Contractor and shall not owe any fiduciary duty or duty of confidence (other than pursuant to Clause 59) to the Contractor.

69.4.2 The Contractor shall send to the Authority the following information relating to the Contractor, for the attention of the Authority Observer Stakeholder Representative:

69.4.2.1 in advance of a board meeting, all papers being sent to directors of the Contractor in connection with that board meeting;

69.4.2.2 all papers tabled at a board meeting;

69.4.2.3 the minutes of each board meeting;

69.4.2.4 all management reports (including explanations of material variances against budget);

69.4.2.5 all budgets and forecasts;

69.4.2.6 each set of six monthly management accounts; and

69.4.2.7 each set of statutory accounts

all at the same time as such information is sent to the directors of the Contractor.

69.4.3 All information received by the Authority pursuant to Clause 69.4.2, or obtained by the Authority or the Authority Observer Stakeholder Representative by virtue of attending a board meeting of the Contractor, shall be subject to the provisions of Clause 59 (*Confidentiality*). All information disclosed by the Authority Observer Stakeholder Representative to the Contractor during the course of a board meeting of the Contractor shall be subject to the provisions of Clause 59 (*Confidentiality*). The Contractor agrees that the Authority Stakeholder Representative may disclose any information obtained by virtue of attending a board meeting of the Contractor to an

officer of the Authority.

69.4.4 The Contractor, acting reasonably, shall be entitled to exclude the Authority Observer Stakeholder Representative from attending meetings and to withhold the papers referred to in Clause 69.4.2 in the event of a breach by the Authority or the Authority Observer Stakeholder Representative (as the case may be) of Clause 69.4.3.

## **70. NO AGENCY**

70.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Authority and the Contractor.

70.2 Save as expressly provided otherwise in this Agreement, the Contractor will not be, or be deemed to be, an agent of the Authority and the Contractor shall not hold itself out as having authority or power to bind the Authority in any way.

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

## **71. ENTIRE AGREEMENT**

### **71.1 Agreement Supersedes Prior Communications**

Except where expressly provided in this Agreement, this Agreement and the Direct Agreement constitute 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 and the Direct Agreement.

### **71.2 Acknowledgement of the Parties**

Each of the parties acknowledge that:

71.2.1 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

71.2.2 this Sub-clause shall not apply to any statement, representation or warranty made fraudulently, or to any provisions of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

## **72. NOTICES**

### **72.1 Notice Requirements**

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

If to the Contractor

The Concession Director  
Alpha Schools (Highland) Limited  
Atholl House  
51 Melville Street  
Edinburgh  
EH3 7HL

Fax No: 0131 200 4498

Copied to:

Company Secretary  
Alpha Schools (Highland) Limited  
c/o G.A.G. Shepherd & Co  
Red Tiles  
62 Park Road  
Woking  
Surrey  
GU22 7DB

Fax No: 01483 751557

If to the Authority

Director of Corporate Services  
Highland Council,  
Glenurquhart Road,  
Inverness,  
IV3 5NX

Fax No: 01463 702182

## **72.2 Submission of Information**

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

If to the Contractor's Representative

The Concession Director  
Alpha Schools (Highland) Limited  
Atholl House  
51 Melville Street  
Edinburgh  
EH3 7HL

Fax No: 0131 200 4498

If to the Authority' Representative

Director of Property & Architectural Services,  
Highland Council,  
Glenurquhart Road,  
Inverness,  
IV3 5NX

Fax No: 01463 702222

(copied in each case to the Authority).

## **72.3 Change of Nominated Address**

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

## **72.4 Effective Notices**

Notices given by post shall be effective upon the earlier of (i) actual receipt, and (ii) 2 Business Days after mailing. Notices delivered by hand shall be effective upon delivery if delivered between 9am and 4pm on a Business Day or, if not, at 9am on the next Business Day after delivery. Notices given by facsimile shall be deemed to have been received when there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:

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

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

### **73. SEVERABILITY**

If any term, condition or provision of this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality and enforceability of the other provisions of or any other documents referred to in this Agreement.

### **74. WAIVER**

**74.1** No term or provision of this Agreement shall be considered as waived by any party to this Agreement unless a waiver is given in writing by that party.

**74.2** No waiver under Clause 74.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.

### **75. PUBLIC RELATIONS AND PUBLICITY**

#### **75.1 Restriction**

The Contractor shall not by itself, its employees or agents and shall procure that its sub-contractors shall not communicate with representatives of the press, television, radio or other communications media on any matter concerning this Agreement or the Project without the prior written approval of the Authority.

#### **75.2 Photographs**

No facilities to photograph or film in or upon any property used in relation to the Project shall be given or permitted by the Contractor unless the Authority has given its prior written approval.

#### **75.3 Reputation of the Authority**

The Contractor shall procure that its employees, agents and sub-contractors shall use all reasonable endeavours not to do anything which has the intention of bringing the standing or reputation of the Authority into disrepute or attracting adverse publicity to the Authority.

### **76. ADVERTISEMENTS**

The Contractor shall not exhibit or attach to any part of the Sites or the Project Facilities, any notice or advertisement without the prior written permission of the Authority's Representative, save where otherwise required to comply with Legislation.

### **77. CONTRACTOR'S RECORDS**

#### **77.1 Records of Costs**

The Contractor shall at all times:

77.1.1 maintain a full record of particulars of the costs of performing the Services, including those relating to the design, construction, maintenance, operation and financing of the Project;

77.1.2 upon request by the Authority, provide a written summary of any of the costs referred to in Clause 77.1.1, including details of any funds held by the Contractor specifically to cover such costs, in such form and detail as the Authority may reasonably require to enable the Authority to monitor the performance by the Contractor of its obligations under this Agreement;

77.1.3 provide such facilities as the Authority may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Clause; and

77.1.4 upon request by the Authority, provide to the Authority any information provided on a regular basis by it to the Senior Lenders during the Contract Period.

## **77.2 Books of Account**

Compliance with Clause 77 shall require the Contractor to keep (and where appropriate to procure that its sub-contractors shall keep) books of account in accordance with best accountancy practice with respect to this Agreement showing in detail:

77.2.1 administrative overheads;

77.2.2 payments made to sub-contractors;

77.2.3 capital and revenue expenditure;

77.2.4 such other items as the Authority may reasonably require from time to time to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of this Agreement;

77.2.5 and the Contractor shall have (and procure that its sub-contractors shall have) the books of account evidencing the items listed in Clauses 77.2.1 to 77.2.4 above inclusive available for inspection by the Authority (and any expert) upon reasonable notice, and shall promptly present a written report of these to the Authority as and when requested from time to time.

## **77.3 Auditor**

The Contractor shall permit all records referred to in this Clause 77 to be examined and copied from time to time by the Authority's auditor and their representatives and other representatives of the Authority.

## **77.4 Retention**

The records referred to in this Clause 77 shall be retained for a period of at least five years after the Contractor's obligations under the Agreement have come to an end.

## **77.5 Termination or Expiry**

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 a project the same as or similar to the Project the Contractor shall (and shall ensure that its sub-contractors will) comply with all reasonable requests of the Authority to provide information relating to the Contractor's costs of operating and maintaining the Project.

## **77.6 Confidentiality**

All information referred to in this Clause 77 is subject to the obligations set out in Clause 59 (*Information and Confidentiality*).

## **78. DATA PROTECTION**

### **78.1 General**

78.1.1 In relation to all Personal Data, each party shall at all times comply with the DPA as a data controller if necessary, including maintaining a valid and up to date registration or notification under the DPA covering the data processing to be performed in connection with the Operational Services or this Agreement.

78.1.2 The parties and any sub-contractor shall only undertake processing of Personal Data

reasonably required in connection with the Services or this Agreement and shall not transfer any Personal Data to any country or territory outside the European Economic Area.

## **78.2 No Disclosure**

78.2.1 Neither party shall disclose Personal Data to any third parties other than:

78.2.1.1 to employees and sub-contractors to whom such disclosure is reasonably necessary in order for the Contractor to carry out the Services; or

78.2.1.2 to the extent required under a court order,

provided that disclosure under Clause 78.2.1.1 is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this Clause 78.2.1 and that the relevant party shall give notice in writing to the other party of any disclosure of Personal Data it or a sub-contractor is required to make under Clause 78.2.1.2 immediately it is aware of such a requirement.

78.2.2 Each party shall bring into effect and maintain all technical and organisational measures to prevent unauthorised or unlawful processing of Personal Data and accidental loss or destruction of, or damage to, Personal Data including but not limited to take reasonable steps to ensure the reliability of staff having access to the Personal Data.

78.2.3 Each party may, at reasonable intervals, request a written description of the technical and organisational methods referred to in Clause 78.2.2 employed by the other party and/or the sub-contractors. Within 30 days of such a request, the relevant party shall supply or procure the supply of written particulars of all such measures detailed to a reasonable level such that the requesting party can determine whether or not, in connection with the Personal Data, it is compliant with the DPA.

## **78.3 Indemnity**

Each party shall indemnify and keep indemnified the other against all losses, claims, damages, liabilities, costs and expense (including reasonable legal costs) incurred by it in respect of any breach of this Clause 78 by the other party and/or any act or omission of any sub-contractor.

## **79. CORRUPT GIFTS AND PAYMENTS OF COMMISSION**

### **79.1 Corrupts Gifts and Fraud**

The Contractor warrants that in entering into this Agreement it has not committed any Prohibited Act.

### **79.2 Termination for Corrupt Gifts and Fraud**

79.2.1 If the Contractor or any of its sub-contractors (or anyone employed by or acting on behalf of any of them) or any of its or their agents or shareholders of the Contractor or of HoldCo commits any Prohibited Act, then the Authority shall be entitled to act in accordance with Clause 79.2.

79.2.2 If a Prohibited Act is committed by the Contractor or by an employee not acting independently of the Contractor but acting under the authority of or with the knowledge of a director of the Contractor, then the Authority may terminate this Agreement by giving notice to the Contractor.

79.2.3 If the Prohibited Act is committed by an employee of the Contractor acting independently of the Contractor, then the Authority may give notice to the Contractor of termination and this Agreement will terminate, unless within 30 days of receipt of such notice the Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Operational Services by another person.

- 79.2.4 If the Prohibited Act is committed by a sub-contractor of the Contractor or by an employee of that sub-contractor not acting independently of that sub-contractor then the Authority may give notice to the Contractor of termination and this Agreement will terminate, unless within 30 days of receipt of such notice the Contractor terminates the relevant Project Document and procures the performance of such part of the Operational Services by another person.
- 79.2.5 If the Prohibited Act is committed by an employee of a sub-contractor of the Contractor acting independently of that sub-contractor then the Authority may give notice to the Contractor of termination and this Agreement will terminate, unless within 30 days of receipt of such notice the sub-contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Operational Services by another person.
- 79.2.6 If the Prohibited Act is committed by any other persons not specified in Clause 79 then the Authority may give notice to the Contractor of termination and this Agreement will terminate unless within 30 days of receipt of such notice, the Contractor procures the termination of such person's employment and of the appointment of their employer (where not employed by the Contractor or the sub-contractors) and (if necessary) procures the performance of such part of the Operational Services by another person.
- 79.2.7 Any notice of termination under this Clause 79.2 shall specify:
- 79.2.7.1 the nature of the Prohibited Act;
  - 79.2.7.2 the identity of the party whom the Authority believes has committed the Prohibited Act;
  - 79.2.7.3 the date on which this Agreement will terminate, in accordance with the applicable provision of this Clause; and
  - 79.2.7.4 the Authority's chosen option under Clause 79.2.

### **79.3 Compensation on Termination for Corrupt Gifts and Fraud**

On termination of this Agreement in accordance with Clause 79.2 the Authority shall pay the Contractor compensation in accordance with the provisions of Clause 47 (*Compensation on Termination for Corrupt Gifts and Fraud and Breach of Refinancing*).

## **80. PARTIES NOT TO PREVENT**

- 80.1** Save to the extent that it is entitled to do so in terms of this Agreement, or otherwise obliged to do so in the proper discharge of its statutory functions, the Authority shall not deliberately do or omit to do any act which will prevent the Contractor in carrying out its obligations under this Agreement.
- 80.2** Save to the extent that it is entitled to do so in terms of this Agreement, the Contractor and its sub-contractors shall not do or omit to do any act which will prevent the Authority:
- 80.2.1 using any of the Project Facilities
  - 80.2.2 from providing Educational Services, Community Education Services or other services or
  - 80.2.3 carrying out its obligations under this Agreement
- 80.3** Neither party shall invoke the provisions of this Clause in respect of minor infringements of it by the other party.
- 80.4** The phrase "deliberately do or omit to do any act" shall be construed in this Clause 80 having regard to the interactive nature of the activities of the Authority and the Contractor, but shall exclude any acts or omissions carried out in the ordinary course of the Authority's activities

including acting as statutory authority, or which were within the contemplation of the parties, or which are otherwise permitted in this Agreement save to the extent that the Authority is expressly precluded from acting in such a manner by another provision of this Agreement.

**80.5** Notwithstanding any other provision of this Agreement, to the extent the Authority is liable to the Contractor for any claim arising hereunder, the Authority shall not be entitled to avoid, restrict or reduce its liability to the Contractor on the basis that the Contractor has not suffered all or part of the relevant loss or damage (a **Related Loss**) where such Related Loss is incurred by a Sub-Contractor and/or where the right of the Sub-Contractor to recover such Related Loss from the Contractor is deferred or suspended pending recovery from the Authority.

## **81. CO-OPERATION**

The Contractor shall co-operate fully and in a timely manner with any request from time to time of any auditor (whether internal or external) of the Authority or the Ombudsman to provide documents, or to procure the provision of documents, relating to the Project, and to provide, or to procure the provision of, any oral or written explanation relating to the same.

## **82. EXCLUSIVE REMEDIES**

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

**82.2** Save in relation to Clause 6.5 and as otherwise provided for in this Agreement, the Contractor will not be entitled to any common law rights including (but not limited to) rights to damages or any other rights under contract, delict or otherwise (other than specific implement, interim specific implement, interdict or interim interdict (or their equivalent in any jurisdiction)) in relation to any breach of this Agreement by the Authority or any Authority Related Party.

**82.3** Save as otherwise provided for in terms of this Agreement, the Authority will not be entitled to any common law rights, save in relation to Clauses 5 and 6.3, including (but not limited to) rights to damages or any other rights under contract, delict or otherwise (other than specific implement, interim specific implement, interdict or interim interdict (or their equivalent in any jurisdiction)) in relation to any breach of this Agreement by the Contractor. In respect of any breach of this Agreement relating to the Services or the Facilities Requirements which leads or could lead directly to a failure to meet the Availability Standards or Performance Standards the sole remedy of the Authority in that regard, subject as aforesaid, shall be the operation of the provisions of Clause 37 (*Warning Notices*), Clause 58 (*Authority Step-In*) and Schedule Part 7 (*Payment Mechanism*). The right of the Authority under Clause 35.1.8 (*Contractor Event of Default Termination*) to terminate this Agreement in respect of failure to achieve Service Availability by the relevant Deadline Date shall in such regard subject only to any other provision of Clause 35.1 (*Contractor Event of Default Termination*) be the sole and exclusive remedy of the Authority.

## **83. MALICIOUS DAMAGE**

### **83.1 Remit of Clause**

This Clause 83.1 specifies the respective obligations of the parties to repair (or pay for the repair of) plant, furniture or equipment or the structure or fabric of Areas which are damaged by acts of malicious damage during the Operational Services Period.

### **83.2 Contractor's Obligations**

Subject to Clause 83.3A, 83.9 and 83.10 the Contractor shall, at its own cost (but subject to an obligation to mitigate the costs of such repair and/or replacement works to the extent reasonably practicable, in accordance with the Operational Services Specification (and also having regard to its obligations under Clause 83.7)):

83.2.1 repair all plant, furniture and equipment or the structure or fabric of Areas;

83.2.2 replace all plant, furniture and equipment or the structure or fabric of Areas; and/or

83.2.3 carry out all cleaning required as a result of the malicious damage or repair or replacement,

which have been damaged by acts of malicious damage that have occurred at any time.

83.3 [Not Used]

### **83.3A Maximum Annual Liability**

83.3A.1 In the event that the aggregate Malicious Damage Net Costs in any Contract Year at any time exceed the Malicious Damage Cap, the provisions of this Clause 83.3A shall apply in relation to any further malicious damage occurring in that Contract Year PROVIDED THAT where any malicious damage is caused by the Contractor, a Contractor Related Party or caused by a breach by the Contractor of its obligations under this Agreement, the Contractor shall be responsible at its own cost for all repair and/or replacement works and any cleaning required as a result of such malicious damage in accordance with the provisions of the Operational Services Specification and all such costs and deductions relating thereto shall be borne by the Contractor. Such costs shall not be included in calculating the Malicious Damage Net Costs.

83.3A.2 Where this Clause 83.3A applies:

- (a) notwithstanding clause 83.2 (*Contractor's Obligations*), save where the malicious damage is caused by the Contractor, a Contractor Related Party or by a breach by the Contractor of its obligations the Contractor shall have no obligation to carry out any repair, replacement or cleaning as a result of further malicious damage arising in the Contract Year in question save pursuant to Clause 83.10 or where the malicious damage is caused by the Contractor, a Contractor Related Party or by a breach by the Contractor of its obligations; and
- (b) save where the Contractor is in breach of its obligations under Clause 83.10.1, or where the malicious damage is caused by the Contractor, a Contractor Related Party or by a breach by the Contractor of its obligations no Deductions shall be applied in respect of any failure to meet the Availability Standards or the Performance Standards arising as a result of further malicious damage in that Contract Year.

83.3A.3 The Contractor shall notify the Authority on a monthly basis as to the amounts which have been included as Malicious Damage Net Costs and as soon as reasonably practicable after becoming aware that the Malicious Damage Cap has been or is likely to be exceeded in any Contract Year.

### **83.4 Authority's Entitlement to Claim**

Where the Authority has responsibility for the costs of repair or replacement in accordance with this Clause 83, for the avoidance of doubt, it shall, subject to the requirements of any relevant insurance policy, be entitled to make a claim on any relevant insurance policy maintained pursuant to Clause 61 (*Insurance*). Where Clause 83.3A (*Maximum Annual Liability*) applies, the Authority shall pay the amount of any deductible relating to such claim.

### **83.5 Contractor to Provide Information**

The Contractor shall provide the Authority with such information as the Authority may reasonably request for the purpose of making a claim under Clause 83.4.

### **83.6 Contractor to Comply with Insurers' Instructions**

When effecting repairs to or replacing plant, furniture and equipment or the structure or fabric of Areas in accordance with this Clause 83, the Contractor shall comply with any instructions issued by an insurer who has or will pay out monies in respect of such repairs or replacement. In the event of any conflict between the requirements of this Agreement and the instructions of

such an insurer, the Authority agrees that the instructions of the insurer shall prevail and the Contractor will not be in breach of this Agreement to the extent that it complies with such instructions.

### **83.7 Maintenance of Insurance**

Subject to Clause 63 (*Uninsurable Risks*), insurance for malicious damage will be maintained in terms of Clause 61 (*Insurance*) by the Contractor with a maximum deductible/excess of £5,000 Indexed per relevant insured event, or such other deductible/excess as a prudent operator can from time to time obtain and would ordinarily accept from the commercial insurance market in circumstances where it was responsible for meeting the cost of the deductible/excess.

### **83.8 Policy Guidelines**

The Authority will require head teachers at each of the New Project Facilities to develop (and update from time to time) a set of policy guidelines in relation to pupils having respect for the building in which they are taught, and use all reasonable endeavours to implement such policy guidelines with a view generally to the minimisation of incidents of malicious damage within School Hours provided always there shall be no increased cost to the Authority as a result of compliance with this Clause 83.8.

### **83.9 Rectification Period**

83.9.1 Where Clause 83.3A (*Maximum Annual Liability*) applies, the provisions of this Clause 83.9 shall apply accordingly.

83.9.2 Save to the extent provided in terms of Clause 83.10, the Contractor's sole obligation to carry out repair in respect of malicious damage where Clause 83.3A applies shall be to make safe any damage caused by malicious damage where that is required to avoid risk to health and safety or further material damage to property. The Authority shall reimburse the Contractor's reasonable and proper costs in so doing.

83.9.2.1 Subject to Clause 83.9.3 unless the parties otherwise agree, within 2 Business Days of the malicious damage occurring, the Contractor shall produce a proposal ("**Malicious Damage Rectification Programme**") detailing:

- (a) the timescale for the permanent repair and/or replacement and/or cleaning of the plant, furniture, equipment or fabric affected, such timescale to be reasonable, having regard to the use of the Area affected, to the extent and nature of the damage, the time during which such damage was inflicted and the time during which it may be repaired; and
- (b) the estimated cost for such permanent repair and/or replacement and/or cleaning.

83.9.2.2 If either party believes that the Malicious Damage Rectification Programme proposed is not reasonable, or that the cost is excessive, the matter shall be referred to the Dispute Resolution Procedure.

83.9.3 Where malicious damage is of an extreme or extensive nature (such that an entire Area or wing of a New Project Facility is affected) the 2 Business Days timescale for production of the Malicious Damage Rectification Programme referred to in Clause 83.9.2 shall be extended by such period as is reasonable in the circumstances, and as is agreed by the Authority (acting reasonably) but which shall not exceed 21 days.

83.9.4 Where, during the Rectification Period referred to in Clause 83.10.2, the Contractor identifies (which it shall do as soon as reasonably practicable):

83.9.4.1 more extensive damage or a requirement for more extensive work to be carried out in either case which would impede the progress of the works being carried out in terms of the Malicious Damage Rectification Programme and/or

would extend the period required to complete the work required under Clause 83.2 and such damage and/or requirement for more extensive work to be carried out (as the case may be) could not reasonably have been foreseen by a competent person acting in accordance with Good Industry Practice in the preparation of the Malicious Damage Rectification Programme; and/or

83.9.4.2 more extensive costs than had originally been anticipated or estimated in the Malicious Damage Rectification Programme and such costs could not reasonably have been foreseen by a competent person acting in accordance with Good Industry Practice in the preparation of the Malicious Damage Rectification Programme,

the Contractor shall following such notification be entitled to suspend implementation of the Malicious Damage Rectification Programme and submit an amended rectification programme such programme to be produced as soon as reasonably practicable but not later than 21 days following such notification and;

- (a) the provisions of Clauses 83.9.2.2 and 83.9.3 shall apply; and
- (b) the amended rectification programme as agreed or determined shall be the Malicious Damage Rectification Programme for the purposes of this Clause 83.9 and Clause 83.10 and any previous Rectification Period agreed or determined under Clause 83.9.2 shall be amended accordingly.

## **83.10 Authority to instruct**

83.10.1 Where Clause 83.3A (*Maximum Annual Liability*) applies, the Authority may, within 10 Business Days following agreement or determination of the Malicious Damage Rectification Programme or any amended Malicious Damage Rectification Programme instruct the Contractor in writing (copied to the FM Contractor at such address as may be notified to the Authority from time to time) to carry out the necessary repair, replacement or cleaning and following receipt of such written instruction the Contractor shall proceed to do so in accordance with the Malicious Damage Rectification Programme.

83.10.2 Where the Contractor is instructed to carry out repair, replacement and/or cleaning pursuant to this Clause 83.10:

83.10.2.1 the agreed or determined period for permanent repair and/or replacement and/or cleaning as contained within the Malicious Damage Rectification Programme, shall then be the Rectification Period for the purpose of Schedule Part 7 (*Payment Mechanism*) and the Operational Services Specification; and

83.10.2.2 in the event that the malicious damage is not rectified by the expiry of the Rectification Period (as amended as the case may be) referred to in Clause 83.10.2.1 then, for the purpose of Schedule Part 7, the Logged Failure Time shall be deemed to be 9.00 a.m on the first Business Day immediately following the date on which the proposal is first agreed or determined under the Dispute Resolution Procedure.

83.10.3 The Authority shall reimburse the Contractor in terms of Clause 33.2.12 (*Monthly Invoice*) in respect of the cost of the repair, replacement or cleaning to which an instruction received under Clause 83.10.1 relates.

## **84. LOCAL GOVERNMENT (CONTRACTS) ACT 1997**

### **84.1 Certification Requirements**

The Certification Requirements are intended to be satisfied by the Authority with respect to this Agreement and the Direct Agreement before the end of the Certification Period relating to each agreement.

## **84.2 Contractor's Consent**

The Contractor 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 Direct Agreement.

## **84.3 Failure to Issue a Certificate**

If a certificate is not issued by the Authority pursuant to Clause 84.2 within 6 weeks of the date of this Agreement then the Contractor will be entitled by giving notice in writing to the Authority within seven days of the Authority failing to issue such a certificate to terminate this Agreement, whereupon the Authority shall pay to the Contractor the aggregate costs incurred by the Contractor (including all sums owing to the Lenders under the Funding Agreements) in entering into and terminating this Agreement.

## **84.4 Relevant Discharge Terms**

The relevant discharge terms within the meaning of Section 6 of the Local Government (Contracts) Act 1997 are set out in Schedule Part 13(*Relevant Discharge Terms*).

## **85 REFINANCING PROVISIONS**

### **85.1 Contractor to Obtain Authority's Consent**

The Contractor shall obtain the Authority's prior written consent to any Qualifying Refinancing and both the Authority and the Contractor shall at all times act in good faith with respect to any Refinancing.

### **85.2 Authority's Share**

The Authority shall be entitled to receive a 50 per cent share of any Refinancing Gain arising from a Qualifying Refinancing.

### **85.3 Authority not to Withhold or Delay Consent**

The Authority shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater than 50 per cent share of the Refinancing Gain.

### **85.4 Contractor to Provide Full Details**

The Contractor shall promptly provide the Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain used in connection with that Refinancing whether that Refinancing is a Qualifying Refinancing or not).

### **85.5 Authority's Election for Payment of Share**

The Authority shall have the right to elect to receive its share of any Refinancing Gain as:

85.5.1 a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;

85.5.2 a reduction in the Unitary Charge over the remaining term of the Agreement; or

85.5.3 a combination of any of the above.

### **85.6 Negotiations in Good Faith**

The Authority and the Contractor shall 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 Clause 85.5 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 Clause 64 (*Dispute Resolution*).

**85.7 Professional Costs**

The Refinancing Gain shall be calculated after taking into account the reasonable and proper professional costs that each party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Authority will be paid to the Authority by the Contractor within 28 days of any Qualifying Refinancing.

**86. TERMINATION BY THE AUTHORITY FOR BREACH OF THE REFINANCING PROVISIONS**

**86.1 Wilful Breach by the Contractor**

If the Contractor wilfully breaches Clause 85.1 (*Refinancing*) then the Authority may terminate the Agreement at any time on or before the Expiry Date by complying with its obligations under Clauses 86.2 to 86.3.

**86.2 Notice of Termination**

If the Authority wishes to terminate the Agreement under this Clause 86, it must give notice to the Contractor stating:

86.2.1 that the Authority is terminating the Agreement under this Clause 86;

86.2.2 that the Agreement will terminate on the date falling 30 days after the date of receipt of the notice; and

86.2.3 whether the Authority has chosen to exercise its option under Clause 48 (*Assets*).

**86.3 Date of Termination**

The Agreement will terminate on the date falling 30 days after the date of receipt of the notice referred to in Clause 86.2.2.

**87. BEST VALUE**

**87.1** The Contractor 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.

**87.2** Subject to Clause 87.1, the Contractor 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.

**88. GOVERNING LAW AND JURISDICTION**

This Agreement shall be governed by and construed in all respects in accordance with the laws of Scotland. Subject to Clause 64 (*Dispute Resolution*), the Scottish Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement.

**IN WITNESS WHEREOF** these presents consisting of this and the preceding one hundred and fifty two (152) pages together with the Schedule in 23 Parts annexed as relative hereto are executed as follows:-

**SEALED** with the common seal of **THE HIGHLAND COUNCIL** and signed on its behalf by Oona Mary Sim, authorised signatory at Edinburgh on 29th day of March 2006.

COMMON SEAL

O M Sim

**SUBSCRIBED** for and behalf of the said **ALPHA SCHOOLS (HIGHLAND) LIMITED** at Edinburgh on the 29th day of March 2006 by

PAUL BOTTRILL  
Director

Paul Bottrill

RORY CHRISTIE  
Director

Rory Christie