

**PROJECT AGREEMENT**  
**pursuant to the Governments Public Private Partnership Programme**  
**between**  
**THE HIGHLAND COUNCIL**  
**and**  
**COMMUNITY SCHOOLS (HIGHLANDS) LIMITED**

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**FAS No. 7212**

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**PROJECT AGREEMENT**

between

- (1) **THE HIGHLAND COUNCIL**, in its capacity as education authority pursuant to the Education (Scotland) Act 1980 and having its principal office at Glenurquhart Road, Inverness (hereinafter referred to as the "**Council**")

and

- (2) **COMMUNITY SCHOOLS (HIGHLANDS) LIMITED** (incorporated in Scotland with registered Number 210981) and having its registered office at 191 West George Street, Glasgow, G2 2LD (hereinafter referred to as the "**Contractor**")

WHEREAS:

- (1) The Council wishes to procure the provision of two new secondary schools, two new primary schools and certain services in relation to the new school buildings and associated facilities.
- (2) In accordance with Her Majesty's Governments' Public Private Partnership Programme and pursuant to a notice published in the Official Journal of the European Communities on 26 November 1999 the Council invited expressions of interest from appropriately qualified consortia for the design, building, financing and maintenance of the Project Facilities and the provision of facilities management and other services at the Project Facilities.

- (3) The Contractor has submitted proposals to the Council to provide the Services and to finance, design and construct the Project Facilities and the Council has selected the Contractor to provide the Project Facilities and the Services pursuant to this Agreement.
- (4) The Council enters into this Agreement in exercise of the powers contained in Section 1 of the Education (Scotland) Act 1980, Section 1 of the Local Government (Contracts) Acts 1997 and all other powers enabling it.
- (5) The Parties intend this Agreement to be a certified contract within the meaning of Section 2 of the Local Government (Contracts) Act 1997, and to meet the certification requirements within Section 3 of the Local Government (Contracts) Act 1997.

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

## **PART 1 - GENERAL**

### **1. DEFINITIONS, INTERPRETATION AND CONSTRUCTION**

The provisions of Part 1 of the Schedule (*Definitions, Interpretation and Construction*) shall apply in relation to the interpretation and construction of this Agreement.

### **2. NOT USED**

### **3. SCOPE OF AGREEMENT AND JURISDICTION**

#### **3.1 Entire Agreement**

This Agreement sets out the entire rights and liabilities of the Parties hereto with respect to the subject matter hereof and (save in respect of fraudulent representations) supersedes all prior representations, understandings,

agreements and documents between or by the Parties regarding any matters dealt with in this Agreement.

### 3.2 **No Reliance**

The Contractor shall be deemed to have inspected and examined the Project Sites and their surroundings and to have satisfied itself as to the nature of the ground and sub-soil at and the form and nature of the Project Sites, the extent and nature of the work and materials necessary for the completion of the Building Works, the means of communication with and (subject to the provisions of clause 8 (*Property Matters*)) access to the Project Sites, the site accommodation it may require and in general to have obtained for itself all necessary information as to risks, contingencies and all other circumstances influencing or affecting the entering into of this Agreement by the Contractor. Without prejudice to the foregoing generality the Contractor acknowledges that:-

3.2.1 subject to clauses 8.4 (*Council Property Warranties*) and 25.2.1 (*Council's Warranties*), it has not entered into this Agreement in reliance on the accuracy or sufficiency of the Supplied Data;

3.2.2 subject to clauses 8.4 (*Council Property Warranties*) and 25.2.1 (*Council's Warranties*), the use of or reliance upon any of the Supplied Data by the Contractor shall be entirely at its own risk; and

3.2.3 except where expressly provided in this Agreement the Contractor shall have no entitlement under this Agreement or otherwise for any reason to extensions of any time limits contained in this Agreement, or to any adjustments to the Unitary Charge or to any other payment or compensation from the Council in respect of the Project.

### 3.3 **Amendments and Waiver**

3.3.1 Except where otherwise provided amendments to any of the Project Documents shall only take effect if they are agreed in writing by the parties to the relevant Project Document.

3.3.1A Except where otherwise provided amendments to this Agreement shall only take effect if they are agreed in writing by the Parties.

3.3.2 The failure of either Party to exercise any contractual right or remedy shall not constitute a formal waiver of that right or remedy unless communicated in writing to the other Party.

3.3.3 Any waiver of any right or remedy arising from a breach of this Agreement shall not constitute a waiver of any right or remedy arising from any other breach of this Agreement.

#### 3.4 **Applicable Law and Jurisdiction**

This Agreement shall be governed by and construed in accordance with the law of Scotland and subject to clause 29 (*Dispute Resolution Procedure*) the Parties hereby irrevocably submit to the jurisdiction of the Scottish Courts. The submission to such jurisdiction shall not limit the right of either Party to take proceedings against the other Party in any other court of competent jurisdiction for the purposes of enforcement of a judgement of a competent Scottish Court.

#### 3.5 **Housing Grants etc Act**

This Agreement is entered into under Her Majesty's Government's Private Finance Initiative and is excluded from Part II of the Housing Grants, Construction and Regeneration Act 1996 by paragraph 4 of The Construction Contracts (Scotland) Exclusion Order 1998 (S.I. 1998/686).

### 4. **REPRESENTATIVES, RELATIONSHIPS AND LIAISON**

#### 4.1 **Council Representative**

4.1.1 The Council Representative has authority to act on behalf of the Council under this Agreement only where, and to the extent that, this Agreement expressly so provides or where subsequently delegated by the Council in terms of this clause 4.1. In the absence of such express provision or delegation, the Council Representative shall have no authority to give



instructions to the Contractor, derogate from or amend this Agreement, to relieve the Contractor of any duty or obligation under this Agreement or otherwise to act on behalf of the Council under this Agreement.

- 4.1.2 The Council may from time to time in writing delegate to the Council Representative any of the powers and authorities vested in the Council pursuant to this Agreement and shall provide the Contractor with a copy of any and all such written delegation of powers and authorities. Any such delegation under this clause 4.1 shall take effect from the date on which such copy is provided to the Contractor or such later date as may be specified in such delegation.
- 4.1.3 Any notice given by the Council Representative to the Contractor under this Agreement or within the terms of such delegation as is referred to in this clause 4.1, but not otherwise, shall bind the Council (for whom the Council Representative shall be deemed to act as agent) as though it had been given by the Council.
- 4.1.4 In the discharge of his functions under this Agreement the Council Representative shall not owe any personal duty to the Contractor and shall incur no personal liability to it.
- 4.1.5 If the Council removes the Council Representative then, until it appoints a replacement, any notification to be made by the Contractor to the Council Representative shall be made to the Council's Director of Education and any action which requires to be taken by the Council Representative shall be taken by the Council's Director of Education.
- 4.1.6 If the Council removes the Council Representative, the Council shall notify the Contractor of such removal in accordance with clause 5 (*Notices*). Until the time of receipt of such notice pursuant to clause 5 (*Notices*) the Contractor will be entitled to

rely on any directions and instructions given by the Council Representative.

**4.2 The Contractor Representative**

4.2.1 The Contractor Representative has authority to act on behalf of the Contractor under this Agreement only where, and to the extent that, this Agreement expressly so provides or where subsequently delegated by the Contractor in terms of this clause 4.2. In the absence of such express provision or delegation, the Contractor Representative shall have no authority to derogate from or amend this Agreement, to relieve the Council of any duty or obligation under this Agreement or otherwise act on behalf of the Contractor under this Agreement.

4.2.2 The Contractor may from time to time in writing delegate to the Contractor Representative any of the powers and authorities vested in the Contractor pursuant to this Agreement and shall provide the Council with a copy of any and all such written delegation of powers and authorities. Any such delegation under this clause 4.2 shall take effect from the date on which such copy is provided to the Council or such later date as may be specified in such delegation.

4.2.3 Any notice given by the Contractor Representative to the Council under this Agreement or within the terms of such delegation as is referred to in this clause 4.2, but not otherwise, shall bind the Contractor (for whom the Contractor Representative shall be deemed to act as agent) as though it had been given by the Contractor.

4.2.4 In the discharge of his functions under this Agreement the Contractor Representative shall not owe any personal duty to the Council and shall incur no personal liability to it.

4.2.5 If the Contractor removes the Contractor Representative, then until it appoints a replacement, any notification to be made by the Council to the Contractor Representative shall be made to the Company Secretary of the Contractor and any action which requires to be taken by the Contractor Representative shall be taken by the Company Secretary of the Contractor.

4.2.6 If the Contractor removes the Contractor Representative, the Contractor shall notify the Council of such removal in accordance with clause 5 (*Notices*). Until the time of receipt of such notice pursuant to clause 5 (*Notices*), the Council will be entitled to rely on any directions and instructions given by the Contractor Representative.

#### 4.2A **Liaison**

The Council and the Contractor shall ensure that the Council Representative and the Contractor Representative liaise on a frequent basis and attend such meetings as are reasonably necessary to secure the proper implementation and discharge of their respective obligations under this Agreement.

#### 4.3 **School Representatives**

4.3.1 The Council Representative may from time to time by notice to the Contractor pursuant to clause 5 (*Notices*), delegate any of his powers 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 Council Representative.

4.3.2 The principal role of the School Representatives shall be to provide day-to-day contact at the Project Facilities with the Contractor for the routine operation of this Agreement and the Contractor and the School Representatives shall liaise with each other for such purpose. Save to the extent that the Council has delegated power and authority to the School Representative pursuant to clause 4.3.1, the Contractor shall

not be obliged to implement any instruction of the Schools Representative and no School Representative shall have authority:-

- (i) to act as agent of, or otherwise bind, the Council except as and to the extent referred to above; or
- (ii) to agree any variation of this Agreement or any document referred to or incorporated herein; or
- (iii) to agree any waiver or concession in relation to any rights or remedies of the Council.

#### 4.4 **Project Liaison Committee**

4.4.1 With effect from the Contract Award Date the Council and the Contractor shall establish and maintain the Project Liaison Committee. The Project Liaison Committee shall meet throughout the Contract Period, and the Project Liaison Committee shall consist of three (3) representatives of the Council and three (3) representatives of the Contractor and a chairman. The chairman of the Project Liaison Committee will be a representative of the Council.

4.4.2 The Project Liaison Committee shall meet monthly prior to the Section 1 Service Commencement Date to review issues relating to the progress, conduct and carrying out of the Building Works.

4.4.3 The Project Liaison Committee shall meet monthly after the Section 1 Service Commencement Date:

- (i) to review issues relating to the day-to-day conduct and carrying out of the Services; and
- (ii) to undertake a monthly review of operations between the Council and the Contractor.

4.4.4 The Project Liaison Committee shall meet quarterly to:

- (i) discuss actual and anticipated changes in the provision of education services by the Council, and possible

- variations to this Agreement to reflect those changes and for the most efficient performance of this Agreement; and
- (ii) undertake a regular review of the delivery of the Services.
- 4.4.5 The Project Liaison Committee shall meet when required to:
- (i) review recurring Service Failures;
- (ii) review recurring instances of Non Availability; and
- (iii) provide a forum for resolving Disputes between the Parties pursuant to the Dispute Resolution Procedure.
- 4.4.6 Neither the Project Liaison Committee itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of this Agreement or to make any decision binding on the Parties. Neither Party shall rely on any act or omission of the Project Liaison Committee, or any member of the Project Liaison Committee acting in that capacity, so as to give rise to any waiver or personal bar in respect of any right, benefit or obligation of either Party under this Agreement.
- 4.4.7 Each member of the Project Liaison Committee (other than the chairman) shall have one vote. The chairman shall not have a vote.
- 4.4.8 A quorum shall be required for the conduct of any business at the Project Liaison Committee and shall be constituted by any two members provided that a representative of each Party is present. Recommendations and decisions of the Project Liaison Committee must have the affirmative vote of all those voting on the matter which must include at least one representative of each of the Council and the Contractor.
- 4.4.9 Meetings of the Project Liaison Committee may be held by telephone or any other form of telecommunication by which

each participant can hear and speak to all other participants at the same time, if so resolved by the Project Liaison Committee.

- 4.4.10 Meetings of the Project Liaison Committee shall be convened on not less than ten (10) Business Days' notice by either Party, save in an emergency in which case as much notice as is reasonably practicable shall be given. A copy of the agenda of the items to be discussed shall accompany notice of the meeting. The Party requesting a meeting of the Project Liaison Committee shall within five (5) Business Days of such meeting provide the other Party with a written record of the meeting.

**4.5 No Agency to the Contractor**

- 4.5.1 No provision of any of the Project Documents shall be construed as a delegation by the Council of any of its statutory authority to the Contractor.
- 4.5.2 Save as otherwise provided in any of the Project Documents, the Contractor shall not be nor be deemed to be an agent of the Council and the Contractor shall not hold itself out as having authority or power to bind the Council in any way.

**4.6 No Agency to the Council**

- 4.6.1 No provision of any of the Project Documents shall be construed as a delegation by the Contractor of any of its powers to the Council.
- 4.6.2 Save as otherwise provided in any of the Project Documents, the Council shall not be nor be deemed to be an agent of the Contractor and the Council shall not hold itself out as having authority or power to bind the Contractor in any way.

**4.7 Binding on Successors**

This Agreement shall be binding on and shall enure to the benefit of the Contractor and the Council and their respective permitted successors and permitted assignees.

## **5. NOTICES**

### **5.1 Notice provisions**

Unless otherwise stated in this Agreement the following provisions shall apply to the giving of any notice (a "**Notice**") required or desired to be given under this Agreement.

### **5.2 Method of Notice**

A Notice shall be in writing and shall be deemed to have been sufficiently given if either:-

- 5.2.1 sent by first class recorded delivery post to; or
- 5.2.2 delivered by hand and received by or on behalf of; or
- 5.2.3 sent by facsimile transmission and followed by written copy by post and a confirmation of sending receipt has been obtained when sending to,

the appropriate addressee as provided in clause 5.3.

### **5.3 Address of Notice**

A Notice shall be properly addressed if addressed as follows:-

- 5.3.1 if to Council, addressed to Director of Corporate Services, Highland Council, Glenurquhart Road, Inverness or if by facsimile to fax number 01463 702182 or otherwise as notified from time to time by the Council to the Contractor, and
- 5.3.2 if to the Contractor, addressed to Mr Ed Lawrie, Community Schools (Highlands) Limited, c/o M J Gleeson Group plc, Haredon House, London Road, North Cheam, Sutton, Surrey SM3 9BS or if by facsimile to fax number 02086 416110] or otherwise as notified from time to time by the Contractor to the Council;

### **5.4 Deemed Receipt**

A Notice shall be deemed to have been received:

- 5.4.1 (where sent by first class recorded delivery post) on the second Business Day after the day on which it was posted; or

5.4.2 (where not posted or faxed) when receipt is acknowledged by the recipient thereof or on proof of delivery; or

5.4.3 (where given by facsimile) where there is confirmation of uninterrupted transmission by a transmission report, within two hours of sending if sent on a Business Day between the hours of 9am and 3pm and by 12pm of the next following Business Day if sent any other time or day.

**5.5 Evidence of Posting**

In proving posting of a Notice sent by recorded delivery it shall be sufficient to provide that the envelope containing the Notice was duly addressed in accordance with the provisions of this clause 5 and posted to the place to which it was addressed.

**6. PROJECT DOCUMENTS, SUPPLEMENTAL PROJECT DOCUMENTS AND SUPPLEMENTAL FUNDING DOCUMENTS**

6.1 On or prior to the Contract Award Date:

6.1.1 the Council shall execute each of the Project Documents other than the Warranty Deeds;

6.1.2 the Contractor shall execute each of the Project Documents other than the Warranty Deeds and shall procure that all other persons expressed to be parties to such Project Documents (save for the Council) shall execute the relevant Project Documents other than the Warranty Deeds;

6.1.3 the Contractor shall execute each of the Supplemental Project Documents and/or the Supplemental Funding Documents and shall procure that all other parties to such Supplemental Project Documents or Supplemental Funding Documents shall execute the relevant Supplemental Project Documents and/or Supplemental Funding Documents.

6.2 The Contractor shall not be permitted to amend, modify or waive any of the obligations of any of the Supplemental Project Documents without the



prior written consent of the Council which consent shall not be unreasonably withheld or delayed unless the said amendment, modification or waiver would materially or adversely affect the ability of the Contractor to perform its obligations under this Agreement.

- 6.3 The Contractor shall be permitted to amend, modify or waive any of the obligations of any of the Supplemental Funding Documents unless the said amendment, modification or waiver would:
- (a) increase the Council's liability under Part 11 of the Schedule (*Termination Compensation*) other than in accordance with clause 17.11 (*Refinancing*);
  - (b) reschedule, replace or otherwise refinance the Contractor's obligations under the Funding Agreement other than in accordance with clause 17.11 (*Refinancing*); or
  - (c) materially and adversely affect the ability of the Contractor to perform its obligations under this Agreement.

## **7. COMMENCEMENT AND EXPIRY OF THIS AGREEMENT**

- 7.1 This Agreement shall take effect on the Contract Award Date.
- 7.2 Subject to the provisions of clause 39 (*Survival*) this Agreement shall terminate on the Contract Expiry Date unless it is terminated prior to such date in accordance with clause 22 (*Termination*).

## **PART 2: PRE-COMMENCEMENT PERIOD**

### **8. PROPERTY MATTERS**

#### **8.1 Grant of Leases at Contract Award Date**

On the Contract Award Date the Council shall grant and the Contractor shall accept the grant of the Leases incorporating the following provisions:-

- 8.1.1 the date of entry under each Lease shall be the Contract Award Date (upon which date the Contractor shall be given vacant possession of each of the Project Sites); and
- 8.1.2 the rent payable under each Lease shall be £1 *per annum* (if asked);
- 8.1.3 On the Contract Award Date the Council undertakes to exhibit to the Contractor a title to the Council's interest in each of the Project Sites no less valid and marketable than as contained in the Title Deeds;
- 8.1.4 The Contractor confirms that it has inspected the Title Deeds and (subject to and without prejudice to the warranties and undertakings contained in this clause 8) is satisfied in all respects with regard to:-
  - 8.1.4.1 the content, validity and completeness of the Council's title to the Project Sites;
  - 8.1.4.2 the marketability of the Council's title to the Project Sites;
  - 8.1.4.3 the extent of the Project Sites; and
  - 8.1.4.4 the nature of any conditions affecting them;
- 8.1.5 The Contractor hereby waives any claim which it might otherwise have against the Council now or in the future in respect of any matter disclosed by the Title Deeds or otherwise in respect of the marketability of the Project Sites as disclosed in the Title Deeds. Such waiver shall be without prejudice to the Contractor's rights in respect of any breach by the Council of the warranties and undertakings contained in this clause 8

which shall override and take precedence over the foregoing waiver.

- 8.1.6 Notwithstanding the foregoing the Council (and not the Contractor) undertakes to implement the Excluded Title Obligations and the Contractor undertakes to allow such implementation.

## 8.2 Registration of Leases

Immediately following the grant of the Leases, the Contractor will arrange for the Leases to be stamped (if necessary) and registered in the Land Register and the Register of Sasines (as the case may be) and in the Books of Council and Session. An extract of each Lease shall be provided to the Council as soon as received from the Keeper of the Registers. The stamp duty (if any) payable on the Leases and the costs of registering each Lease as aforesaid shall be borne by the Contractor.

## 8.3 Property Documents to be delivered at the Contract Award Date

At the Contract Award Date the Council shall deliver to the Contractor (insofar as not previously delivered):-

- 8.3.1 Letters of Obligation from the Council in the Agreed Form;
- 8.3.2 a duly executed Minute of Waiver for the Strathdearn School Site in the Agreed Form and executed in self proving form together with a duly completed Form CPB2 and a cheque in respect of recording dues (or alternatively an undertaking for delivering the same within twenty (20) Business Days thereafter);
- 8.3.3 a duly executed Discharge of the Standard Security by the Council in favour of John Cameron recorded GRS Inverness 27 December 2000 over the Glen Urquhart School Site and a copy of the Disposition of the remainder of the Glen Urquhart School Site in favour of the Council with a copy of the Keepers acknowledgement.

#### 8.4 Council Property Warranties

The Council warrants to the Contractor as at the Contract Award Date (subject to any matter disclosed in the Title Deeds or otherwise previously disclosed in writing to the Contractor's Solicitors) as follows:-

- 8.4.1 there are no missives of sale, agreements, options, rights of pre-emption or other rights relating to any Project Site which are enforceable against the Council or its successors in title and which remain to be performed;
- 8.4.2 the Council has received no notice of any breach or infringement of any title conditions, title obligations or restrictions in relation to any Project Site and is not aware of any such breach or infringement;
- 8.4.3 the Council is not aware of any title indemnity insurance policies effected in relation to any Project Site;
- 8.4.4 the Council is not aware that any of the Project Sites is subject to the interest of:
  - (a) the proprietor of the dominant tenement in a servitude;
  - (b) a member of the public in respect of any right held inalienably by the Crown in trust for the public;
  - (c) any person having a right made real otherwise than by recording in the Register of Sasines or registration in the Land Register.
- 8.4.5 none of the Project Sites is subject to the right or interest of:
  - (a) a lessee under a lease;
  - (b) a crofter or cottar within the meaning of section 3 or 28 (4) respectively of the Crofters (Scotland) Act 1955, or a land holder or statutory small tenant within the meaning of section 2 (2) or 32 (1) respectively of the Small Landholders (Scotland) Act 1911;

- (c) the Crown or any government or other public department, or any public or local authority, under any enactment or rule of law;
  - (d) any other person under any rule of law relating to common interest or joint or common property, not being a right or interest constituting a real right, burden or condition entered into the title sheet of the interest in land under section 6 (1) (e) of the Land Registration (Scotland) Act 1979 or having effect by virtue of a deed recorded in the Register of Sasines;
  - (e) any occupancy rights in terms of the Matrimonial Homes (Family Protection) Act 1981 (as amended);
- 8.4.6 the Council is not aware of any disputes, claims, actions, demands or complaints affecting any of the Project Sites which are outstanding or anticipated;
- 8.4.7 the Council is not aware of any notices given or received which materially and/or prejudicially affect the Project Sites or the Council's interest therein;
- 8.4.8 so far as the Council is aware, the Project Sites are not currently subject to payment of any outgoings;
- 8.4.9 the Council confirms that the Project Sites are greenfield sites and there are no existing buildings, structures or erections on the Project Sites;
- 8.4.10 the Council has not received any notice of enforcement proceedings under the Town and Country Planning (Scotland) legislation having been commenced or notices served and the Council is not aware of any having been proposed;
- 8.4.11 so far as the Council is aware:-
- (i) no planning permission which affects any of the Project Sites is the subject of an existing challenge as to its validity;

- (ii) no planning permission affecting any of the Project Sites has been issued within the last 3 months other than the Planning Consents;
  - (iii) no applications for planning permission in respect of the Project Sites are awaiting determination and no planning decision of deemed refusal is subject to appeal; and
  - (iv) no resolution, proposal, order or act has been made or is contemplated for the compulsory acquisition of any of the Project Sites by the local or any other authority or in relation to any private access serving any of the Project Sites. The Council is not aware of any road widening proposals which affect any of the Project Sites;
- 8.4.12 the Council is not aware of any outstanding order, notice or other requirement of any local or other authority affecting the existing use of the Project Sites or which gives rise to expenditure in compliance with any such order;
- 8.4.13 there are no agreements affecting the Project Sites which would be binding on the Council or its successors in title, save as disclosed in the Title Deeds or as recorded in the Register of Sasines;
- 8.4.14 the Council has received no notice of any breach of statutory requirements in relation to any of the Project Sites and is unaware of any breach of such statutory requirements; and
- 8.4.15 so far as the Council is aware none of the Project Sites is within an area of archaeological importance nor is there any building or erection which comprises a scheduled monument in terms of the Ancient Monuments and Archaeological Areas Act 1979 on any of the Project Sites nor is the Council aware that any of the Project Sites may be subject to an order or

designation which may qualify, regulate or affect its use in the future.

8.4.16 The Council confirms that the Title Deeds are all those which the Council is aware of in relation to/affecting the Project Sites.

8.4.17 The Council confirms that the Contractors Solicitors have been provided with all documents and information of which the Council is aware insofar as relating to the title to the Project Sites including without prejudice to the generality of the foregoing the title burdens and conditions affecting the Project Sites.

#### 8.5 **Third Party Land**

8.5.1 Where as a condition of any planning permission, road construction consent or other statutory consent issued in respect of any of the Project Sites, the Contractor is required to carry out works on land lying outwith any of the Project Sites, then the Council will be obliged to use all reasonable endeavours to procure for the benefit of the Contractor all necessary rights which may be required in order to implement any such planning permission/road construction consent.

8.5.2 Where implementation of the Project requires access to any land owned by the Council and such rights are not granted in the Lease in favour of the Contractor then the Council will be obliged to allow the Contractor all necessary rights which may be required subject always to obtaining the Council's approval (such approval not to be unreasonably withheld or delayed and to be deemed granted where provided for in the Building Works Specification.

8.5.3 Where any Building Works require to be carried out on land outwith the Project Sites and the Contractor is prevented from carrying out the works in question by the lawful action of the relevant land owner then (without prejudice to the Contractor's

obligation to use all reasonable endeavours (other than instigating litigation) to carry out the works in question) the non-completion of such works shall be disregarded in determining whether the Service Commencement Requirements have been met.

**8.6 Ardnamurchan School Site – Specific Issues**

8.6.1 The Council warrants that the Ardnamurchan School Site is connected to a road which will be adopted/publicly maintained with effect from 6 June 2001. Pending such adoption/taking over for public maintenance the Council will procure that the Contractor has free and uninterrupted pedestrian and vehicular access over the said access road and the right to connect to all existing services which may be required as part of the Project.

**8.7 Spean Bridge School Site – Specific Warranties**

8.7.1 The Council warrants that it has implemented its fencing obligations in terms of the Statutory Conveyance by Alastair Ian Donald Cameron in favour of the Council dated 30 March 2000 and recorded GRS Inverness 3 May 2000 save to the extent that the boundary fences are to be erected by the Contractor as part of the Building Works.

**8.8 Strathdearn School Site – Specific Warranties**



8.8.1 Notwithstanding the terms of Clause 8.1.4 hereof the Contractor shall not be deemed to be satisfied with the content, validity and completeness of the Council's Title to the Strathdearn School Site save that the Contractor accepts that the Statutory Conveyance by Colin Douglas Glynne-Percy, Diana Marion Eleanor Osborne and Peter James Glynne-Percy in favour of The Highland Council dated 29th June, 1st July and 6th November 1998 and recorded GRS (Inverness) 22nd December 1998 forms a basis for the Council to found a prescriptive title to the Strathdearn School Site.

8.8.2 The Council warrants that it has a valid and marketable title to the service strip shown as the plan annexed to the Strathdearn Lease and that the pre-emption right contained in the Disposition by Eleanor A M B Glynne-Percy in favour of Colin Douglas Glynne-Percy and was recorded 13 March 1989 is no longer enforceable in respect of the Strathdearn School Site.

**8.9 Grant of Subleases**

8.9.1 Subject to the Council granting the Leases pursuant to clause 8.1, on the Contract Award Date the Contractor shall grant and the Council shall accept the Subleases for each of the Project Sites.

8.12.1.1

8.9.2 Immediately following the grant of the Subleases, the Council will arrange for the Subleases to be stamped (if necessary) and registered in the Land Register of Scotland or the Register of Sasines (as appropriate) and in the Books of Council and Session. An extract of each Sublease shall be provided to the Contractor as soon as received from the Keeper of the Registers. The stamp duty (if any) payable on the Subleases

and the costs of registering each Sublease as aforesaid shall be borne by the Council.

**8.10 Amendment of Lease Period**

8.10.1 If the Section 1 Service Commencement Date occurs after 12 August 2002 then either the Council or the Contractor may at any time thereafter require the Parties to enter into Minutes of Variation of the Leases and Subleases so that each Lease and Sublease is expressly stated to endure until the twenty fifth anniversary of the Section 1 Service Commencement Date.

**9. NOT USED**

**10. DESIGN DEVELOPMENT**

10.1 The Contractor shall:

10.1.1 continue to develop and shall complete the design of the Building Works in accordance with the provisions of Part 4 of the Schedule (*Building Works Provisions*); and

10.1.2 be solely responsible for the design of the Building Works.

**11. CONSTRUCTION OBLIGATIONS**

11.1 The Contractor shall carry out the Building Works or shall procure that the Building Works are carried out so as to ensure that the Building Works:

11.1.1 comply with the Council Requirements;

11.1.2 comply with the Building Works Specification in all respects; and

11.1.3 are completed in accordance with Part 4 of the Schedule (*Building Works Provisions*).

11.2 In the event of any conflict or inconsistency between the Council Requirements and the Building Works Specification, the Council Requirements shall prevail. In the event of any conflict or inconsistency

between the Council Requirements and Legislation, Legislation shall prevail.

11.3 The Contractor shall, when the Building Contractor:

- (a) enters into a Consultant Appointment with any Consultant;
- (b) amends any such Consultant Appointment;
- (c) enters into a Subcontract; or
- (d) amends any such Subcontract,

provide within twenty (20) Business Days of such entry or, as the case may be, such amendment to the Council a Certified Copy of such Consultant Appointment or Subcontract or amendment thereto, as the case may be.

11.4 The Contractor shall procure or shall procure that any:

- 11.4.1 Building Contractor;
- 11.4.2 Consultant; or
- 11.4.3 Subcontractor,

shall execute a Warranty Deed in favour of the Council and deliver the same to the Council within twenty (20) Business Days of the appointment of the relevant Building Contractor, Consultant or Subcontractor.

11.5 Any works carried out during the Service Period to discharge the Contractors obligations pursuant to this Agreement shall be undertaken in accordance with Part 4 of the Schedule (*Building Works Provisions*) to the extent that Part 4 of the Schedule (*Building Works Provisions*) specifically applies to the Service Period.

## **12. COMPLETION OF THE BUILDING WORKS**

12.1 The Contractor shall procure the Building Works are undertaken so that each of the Sections are completed by the relevant Programmed Completion Date.

12.2 In the event that the Contractor becomes aware that progress in completing the Building Works is being or is likely to be delayed such that the Contractor will not meet the Programmed Completion Dates, the Contractor shall as soon as reasonably practicable give written Notice to

the Council, in accordance with the provisions of clause 12.3 (the "**Delay Notice**") of the relevant circumstances.

12.3 The Delay Notice shall:-

- 12.3.1 identify the cause or causes of the delay;
- 12.3.2 state whether, and to what extent, the delay is, or is expected to be, caused by a Force Majeure Event, a Relief Event or a Compensation Event;
- 12.3.3 provide details of the delay and of its expected duration (or the Contractor's reasonable estimate of its expected duration);
- 12.3.4 identify clearly how the Programmed Completion Dates will be affected or the Contractor's reasonable estimate of the extent to which they will be affected, by the delay; and
- 12.3.5 include details of any measures that the Contractor has adopted or proposes or intends to adopt to mitigate the consequences of the delay.

12.4 To the extent that the delay is:

- 12.4.1 caused by a Force Majeure Event; or
- 12.4.2 caused by a Compensation Event;

the Programmed Completion Dates shall be extended by such period as the Council considers reasonable in the circumstances subject to the Contractor using all reasonable endeavours to minimise such delay, and provided that in any event the Delay Notice has been served on the Council within twenty (20) Business Days of the Contractor becoming aware of the occurrence of the event giving rise to the delay. Where the Parties fail to agree the period of extension pursuant to this clause 12.4 within twenty (20) Business Days of the Contractor complying with its obligations pursuant to clause 12.2 then either Party may refer that matter for determination by the Expert.

12.5 **Extensions to the Longstop Date**

To the extent that a delay is caused by:

- 12.5.1 a Force Majeure Event;

12.5.2 a Compensation Event; or

12.5.3 a Relief Event including any works required to be carried out pursuant to clause 27.9 (*Reinstatement*);

the Longstop Date and the Section 5 Longstop Date shall be extended by such period as the Council considers reasonable in the circumstances, subject to the Contractor using all reasonable endeavours to minimise such delay, and provided that in any event a Delay Notice has been served on the Council within twenty (20) Business Days of the Contractor becoming aware of the event giving rise to the delay.

12.6 To the extent that the delay is caused by a Relief Event, the Programmed Completion Dates shall remain unaltered and (without prejudice to the provisions of clause 12.11 (*Provisions relating to Ardnamurchan High School*) the Contractor shall not otherwise be in breach of any provision of this Agreement to the extent that such a breach is caused by the relevant Relief Event and the Contractor will be relieved from any right of the Council arising under clause 22 (*Termination*) to terminate this Agreement.

12.7 In the event that a delay or other loss and/or expense is caused by a Compensation Event, the Contractor shall submit to the Council particulars of:

12.7.1 the direct loss and/or expense incurred or likely to be incurred:

- (i) any financing costs incurred (whether under the Supplemental Funding Documents or otherwise); and
- (ii) any additional cost incurred or likely to be incurred by the Contractor, the Building Contractor and/or the Service Provider in relation to the Building Works and/or the Services;

12.7.2 except where clause 12.7.4 applies, the estimated change in the Unitary Charge and the date on which the Change Adjustment would be implemented;

- 12.7.3 additional borrowings, if any, that the Contractor is able to procure using reasonable endeavours; and
- 12.7.4 where the Contractor is unable having used all reasonable endeavours to procure additional borrowing, proposals as to how and when the Contractor is to be reimbursed by the Council with the intent that the Contractor does not suffer any additional loss or expense through the timing of such reimbursement than is already covered by such reimbursement.
- 12.8 The Council may request from the Contractor such additional information and/or particulars as it may reasonably require in order to ascertain the appropriate extensions of time and/or additional monies to be paid to the Contractor following the occurrence of a Compensation Event.
- 12.9 The Council shall, following receipt of any additional information requested in accordance with clause 12.8 agree with the Contractor the amount of the direct loss and/or expense referred to in clause 12.7.1 (the "**Payment Amount**") and the process and time or times for reimbursement of the Payment Amount. In default of agreement of any matter referred to in this clause 12.9 within ten (10) Business Days either Party may refer the matter for determination in accordance with clause 29 (*Dispute Resolution Procedure*).
- 12.10 The Council shall pay the Payment Amount as agreed or determined where:
- 12.10.1 it is to be funded out of additional borrowings by the Contractor, by making the appropriate Change Adjustment agreed in accordance with clause 12.9; or
- 12.10.2 it is to be reimbursed direct by the Council, in immediately available funds in accordance with the process and times agreed in clause 12.9.
- 12.11 **Provisions relating to Ardnamurchan High School**
- Where the Contractor has been unable to satisfy the Service Commencement Requirements in respect of the elements of Section 1

which comprise part of the Ardnamurchan School Facilities at Ardnamurchan High School by the Programmed Section 1 Completion Date the provisions of this clause 12.11 shall apply and the Contractor shall pay to the Council liquidated and ascertained damages at the rate of FIFTEEN THOUSAND POUNDS (£15,000) STERLING per month from the Programmed Section 1 Completion Date until the date of satisfaction of the Service Commencement Requirements in respect of the Curricular Space at Ardnamurchan High School, such liquidated and ascertained damages to accrue on a monthly basis or part thereof pro rata.

**12.12 Handover Process**

12.12.1 The Contractor shall give the Council Representative not less than ten (10) Business Days notice of the anticipated date of the initial final inspection of each of the Sections and reasonable prior notice of any subsequent inspection. The Contractor shall procure that the Employers Representative is bound to have regard to any reasonable representations by the Council Representative in regard to the issue by the Employers Representative of a certificate of practical completion under the Building Contract and any subsequent certificate.

12.12.2 Following the inspections in respect of each of the Sections referred to in clause 12.12.1 the Contractor shall deliver to the Council such information as is reasonably necessary for the Council to determine whether or not the Service Commencement Requirements have been met in respect of the relevant Sections.

12.12.3 Within five (5) Business Days of receiving the information referred to in clause 12.12.2 the Council shall, where appropriate, issue a Notice to the Contractor confirming that the Service Commencement Requirements in respect of the relevant Sections have been achieved for the purpose only of determining the relevant Service Commencement Date.

- 12.12.4 The issue of a Notice by the Council pursuant to clause 12.12.3 and any comment, or approval or failure to comment by the Council shall not relieve the Contractor of any liability to Deductions or otherwise diminish the obligations of the Contractor under this Agreement.
- 12.12.5 Any Dispute arising out of or in connection with this clause 12.12 shall be referred to an Expert under the Dispute Resolution Procedure for determination and the date on which he determines the Service Commencement Requirements were achieved in respect of a Section shall be the Section 1 Service Commencement Date, the Section 2 Service Commencement Date, the Section 3 Service Commencement Date, the Section 4 Service Commencement Date or the Section 5 Service Commencement Date as the case may be.



## **PART 3 - PROVISION OF THE SERVICES**

### **13. THE SERVICE PERIOD**

- 13.1.1 The Contractor shall commence delivery of the Services at each Section on the relevant Service Commencement Date;
- 13.1.2 The Contractor shall throughout the Service Period provide the Services in accordance with the Service Specification;
- 13.1.3 Subject to the terms of this Agreement the Contractor shall throughout the Service Period make the Project Facilities available for the use of the Council and the Authorised Users during Core Hours; and
- 13.1.4 The Contractor will be obliged to remedy all Snagging in accordance with the programme agreed with the Council.

### **13.2 Subcontracting of Services - Service Level Agreements**

Subject to the provisions of clause 34 (*Assignment and Subcontracting*), the Contractor may discharge any obligation to deliver the Services by entering into a subcontract provided that where the Contractor enters into a Service Level Agreement the Contractor shall comply with its obligations under clauses 13.3 (*Approval by the Council*) and 13.4 (*Service Provider Direct Agreements in favour of the Council*).

### **13.3 Approval by the Council**

The Contractor shall obtain the approval of the Council to the terms of all Service Level Agreements prior to commencement of the relevant Service Level Agreement such approval not to be unreasonably withheld or delayed.

### **13.4 Service Provider Direct Agreements in favour of the Council**

The Contractor shall procure that each Service Provider shall, prior to it providing services under a Service Level Agreement, enter into and deliver to the Council a Service Provider Direct Agreement executed by the Contractor and the Service Provider.

### 13.5 **Service Delivery Plan**

At least twenty (20) Business Days prior to the Programmed Section 1 Completion Date the Contractor shall provide to the Council a Service Delivery Plan in the Agreed Form. The Contractor may from time to time amend the Service Delivery Plan and shall provide to the Council five (5) copies of such amended Service Delivery Plan at least twenty (20) Business Days before the introduction of such amendment. The Council shall be entitled to comment on where, in its view (acting reasonably), the Service Delivery Plan (or any amendment) will or will not meet the Service Specification or would hinder the Council in the discharge by the Council of its obligations under the Education Acts. The Contractor shall give proper consideration to the comments made by the Council and shall amend the Service Delivery Plan to the extent the Contractor deems necessary or appropriate to ensure that the Service Specification is met and/or to ensure that the Services are delivered in a manner which will not wilfully hinder the discharge by the Council of its obligations under the Education Acts.

### 13.6 **Monitoring and Service Failure Procedure**

The Parties shall comply with their obligations under Part 8 of the Schedule (*Monitoring and Service Failure Procedure*).

### 13.7 **General Furniture and Equipment Obligations**

13.7.1 With effect from the relevant Service Commencement Date in respect of each Section the Contractor shall be obliged and undertakes to procure that at all times, the Furniture and Equipment is available at the relevant Project Facilities and that such Furniture and Equipment is in good working order and condition for use by the Council in accordance with this Agreement until the Contract Expiry Date.

13.7.2 The Contractor will procure that the Furniture and Equipment is delivered to, fully installed, tested and commissioned at the

relevant Project Facilities prior to the relevant Service Commencement Date in respect of each Section.

13.7.3 The Contractor shall be obliged and undertakes to deliver to the Council a copy of all operational and technical manuals for and all other documentation necessary for the proper operation of the Furniture and Equipment in the relevant Project Facilities not later than the relevant Service Commencement Date in respect of each Section.

13.7.4 Prior to the relevant Service Commencement Date in respect of each Section the Contractor shall where necessary, advise the Council and its employees on the proper use of the Furniture and Equipment installed at the relevant Project Facilities.

### 13.8 Curricular Equipment

13.8.1 The Council shall identify the Initial Curricular Equipment and notify the Contractor of the Initial Curricular Equipment prior to 31 January 2002.

13.8.2 The Parties shall liaise and adjust the identity of the Initial Curricular Equipment (if necessary), having regard to the availability of any item of Initial Curricular Equipment and the Contractor shall deliver to, fully install, test and commission the Initial Curricular Equipment at the relevant Section prior to the Programmed Completion Date for the relevant Section.

13.8.3 The Council shall identify the Curricular Equipment and notify the Contractor of the Curricular Equipment prior to 31 July 2003.

13.8.4 The Parties shall liaise and adjust the identity of the Curricular Equipment (if necessary), having regard to the availability of any item of Curricular Equipment and agree the timescale for delivery, installation, testing and commissioning of the Curricular Equipment to the Project Facilities.

- 13.8.5 The Contractor shall be obliged and undertakes to procure the provision of the Initial Curricular Equipment and the Curricular Equipment.
- 13.8.6 The Contractor shall, deliver to, fully install, test and commission at the relevant Project Facilities the Curricular Equipment within the timescales agreed pursuant to clause 13.8.4.
- 13.8.7 The Contractor shall, in so far as reasonably practicable, transfer to the Council the benefit of all manufacturers warranties, guarantees and other indemnities in respect of the Initial Curricular Equipment and the Curricular Equipment but will have no ongoing obligations to repair, maintain replace or renew the Initial Curricular Equipment and/or the Curricular Equipment.

**13.9 Catering Arrangements**

The provisions of Part 23 of the Schedule (*Catering Arrangements*) shall apply in relation to the use, management and operation of the Kitchen Facilities.

**14. RELIEF EVENTS, FORCE MAJEURE EVENTS AND SERVICE PERIOD COMPENSATION EVENTS**

- 14.1 The Contractor shall within five (5) Business Days of becoming aware of a Relief Event, Force Majeure Event or a Service Period Compensation Event occurring during the Service Period, provide written details of the same (to the extent available to the Contractor) to the Council (a "**Relief Request**").
- 14.2 The Relief Request shall contain all relevant and necessary information relating to the Relief Event, Force Majeure Event or Service Period Compensation Event and/or any failure to perform including:

- 14.2.1 details of, as the case may be, the Relief Event, Force Majeure Event or Service Period Compensation Event including its nature, the date of its occurrence and its anticipated duration;
  - 14.2.2 the effect of, as the case may be, the Relief Event, Force Majeure Event or Service Period Compensation Event on the Contractor's ability to perform any of its obligations in respect of the Services including details of the relevant Services, the effect on each such Service and the anticipated duration of that effect; and
  - 14.2.3 details of the measures the Contractor has taken or intends to take to mitigate the consequences of, as the case may be, the Relief Event, Force Majeure Event or Service Period Compensation Event.
- 14.3 The Council may request further information from the Contractor which the Council may reasonably require to fulfil its obligations under clause 14.4 and the Contractor shall supply the same within a reasonable period of such request provided the information is available to the Contractor.
- 14.4 Subject to compliance by the Contractor and the Council with their respective obligations under clauses 14.2 and 14.3 and where the Parties agree as to the occurrence of, as the case may be, a Relief Event, Force Majeure Event or Service Period Compensation Event and the effect on the ability of the Contractor to discharge its obligations in terms of this Agreement the Council shall issue as soon as reasonably practicable a notice to the Contractor (a "**Relief Notice**") stating:
- 14.4.1 the relevant obligations which are affected by, as the case may be, a Relief Event, Force Majeure Event or Service Period Compensation Event;
  - 14.4.2 the relevant element of the Services which are affected by, as the case may be, a Relief Event, Force Majeure Event or Service Period Compensation Event; and

14.4.3 the period during which the Contractor shall be relieved in accordance with clause 14.6 in the case of a Relief Event and clause 14.7 in the case of a Force Majeure Event from liability for failing to perform the obligations referred to in clause 14.4.1 (the "**Relief Period**").

If the Parties are unable to agree as to the occurrence of, as the case may be, a Relief Event, Force Majeure Event or Service Period Compensation Event or the effect of such event on the ability of the Contractor to perform its obligations within ten (10) Business Days of the Contractor supplying information pursuant to clauses 14.2 and 14.3, such dispute shall be referred for determination pursuant to clause 29 (*Dispute Resolution Procedure*).

14.5 Notwithstanding the issue of any Relief Notice, the Contractor shall, to the extent that it is able and subject to clause 14.7, use all reasonable endeavours consistent with Good Industry Practice to mitigate the consequences of any Relief Event, Force Majeure Event or Service Period Compensation Event.

14.6 If a Relief Notice is issued in respect of a Relief Event the Contractor shall during the Relief Period be relieved from:

14.6.1 any right of the Council arising under clause 22 (*Termination*) to terminate this Agreement;

14.6.2 any right of the Council to issue a Project Rectification Notice, a Primary School Rectification Notice, Persistent Breach Rectification Notice or a Warning Notice in respect of any Service Failures or incidents of Non Availability occurring as a consequence of the relevant Relief Event; and

14.6.3 otherwise being in breach of any provision of this Agreement to the extent that such a breach is caused by the relevant Relief Event.

14.7 If a Relief Notice is issued in respect of a Force Majeure Event the Contractor shall during the Relief Period be relieved from:

- 14.7.1 any right of the Council arising under clause 22 (*Termination*) to terminate this Agreement; and
  - 14.7.2 any right of the Council to issue a Project Rectification Notice, a Primary School Rectification Notice, Persistent Breach Rectification Notice or a Warning Notice in respect of any Service Failures or an incident of Non Availability occurring as a consequence of the relevant Force Majeure Event; and
  - 14.7.3 otherwise being in breach of any provision of this Agreement to the extent that such a breach is caused by the relevant Force Majeure Event.
- 14.8 Subject to clause 22 (*Termination*) during the period of a Force Majeure Event, the Council shall pay to the Contractor:
- 14.8.1 any element of the Unitary Charge which is directly attributable to any element of the Services which the Contractor continues to provide in accordance with this Agreement; and
  - 14.8.2 such other sums as may be fair and reasonable (determined on a *quantum meruit* basis) in respect of the performance of any acts by the Contractor at the request of the Council.
- 14.9 Subject to clause 14.13 in the event that the Contractor suffers any Losses caused by a Service Period Compensation Event, the Contractor shall submit to the Council particulars of:
- 14.9.1 the direct loss and/or expense incurred or likely to be incurred as a result of the Service Period Compensation Event including:
    - (i) any financing costs incurred (whether under the Supplemental Funding Documents or otherwise); and
    - (ii) any additional cost incurred or likely to be incurred by the Contractor and/or the Service Provider in relation to the Services;

- 14.9.2 except where clause 14.9.4 applies, the estimated change in the Unitary Charge and the date on which the Change Adjustment would be implemented;
  - 14.9.3 additional borrowings, if any, that the Contractor is able to procure using reasonable endeavours; and
  - 14.9.4 where the Contractor is unable having used all reasonable endeavours to procure additional borrowing, proposals as to how and when the Contractor is to be reimbursed by the Council with the intent that the Contractor does not suffer any additional loss or expense through the timing of such reimbursement than is already covered by the reimbursement by the Council.
- 14.10 The Council may request from the Contractor such additional information and/or particulars as it may reasonably require in order to ascertain the appropriate additional monies to be paid to the Contractor following the occurrence of a Service Period Compensation Event.
- 14.11 The Council shall, following receipt of any additional information requested in accordance with clause 14.10 agree with the Contractor the amount of the direct loss and/or expense referred to in clause 14.9.1 (the "**Relief Amount**") and the process and time or times for reimbursement of the Relief Amount. In default of agreement of any matter referred to in this clause 14.11 within ten (10) Business Days either Party may refer the matter for determination in accordance with clause 29 (*Dispute Resolution Procedure*).
- 14.12 The Council shall pay the Relief Amount as agreed or determined where:
- 14.12.1 it is to be funded out of additional borrowings by the Contractor, by making the appropriate Change Adjustment agreed in accordance with clause 14.11; or
  - 14.12.2 it is to be reimbursed direct by the Council, in immediately available funds in accordance with the process and times agreed in clause 14.11.



14.13 Where the Losses claimed by the Contractor in terms of clause 14.9 are less than one thousand pounds (£1,000) Sterling (Indexed) in aggregate in any Payment Year the Contractor will not be entitled to make a claim in terms of clause 14.9 in respect of such Losses.

**15. THIRD PARTY USE**

15.1 Subject to clause 15.2 and clause 15.3, outwith the Core Hours, the Contractor shall be entitled to make the Project Facilities available for use by third parties subject to the prior approval of the Council as to the identity of any third party user and the nature and extent of the proposed use of the Project Facilities, such approval not to be unreasonably withheld or delayed.

15.2 The Council will be entitled to use the Project Facilities outwith Core Hours on giving the Contractor forty eight (48) hours notice, such notice to include details of the Project Facilities involved, the identity of the proposed users, the dates and times of the proposed use and the Council shall reimburse the Contractor in respect of any costs and expenses reasonably and properly incurred as a result of the Council making such a request and using the Project Facilities itself or arranging use of the Project Facilities by Authorised Users.

15.3 Where the Contractor proposes to make the Project Facilities available for use by third parties pursuant to clause 15.1 the Council's right to use the Project Facilities outwith Core Hours pursuant to clause 15.2 shall take precedence save where the Contractor has given the Council six (6) weeks notice of the intended third party use and the Council has approved that use pursuant to clause 15.1. Declaring that where the Council has received notification from the Contractor pursuant to this clause 15.3 the application will be deemed to be approved where no response from the Council has been received within ten (10) Business Days.



## PART 4 - FINANCIAL

### 16. UNITARY CHARGE

- 16.1 In consideration for the provision of the Services the Council shall, from the Section 1 Completion Date, pay the Unitary Charge to the Contractor by way of monthly payments.
- 16.2 The Unitary Charge shall accrue in respect of each Period where:
- 16.2.1 a "**Period**" means each calendar month in any Payment Year provided that the first Period will be deemed to begin on the Section 1 Service Commencement Date and end on the last day of the same calendar month, and the last Period will be deemed to begin on the first day of the month in which the Service Period ends and end on the last day of the Service Period; and
- 16.2.2 a "**Payment Year**" means each period of 365 (or 366 in a leap year) days duration commencing on 1 April in each calendar year and expiring on 31 March in the succeeding year and consisting of twelve (12) Periods provided that the first Payment Year will be deemed to begin on the Section 1 Service Commencement Date and end on 31 March next falling, and the last Payment Year will be deemed to begin on 1 April of the year in which the Service Period ends and ends on the last day of the Service Period.

### 17. INVOICING AND PAYMENTS

#### 17.1 Invoicing

- 17.1.1 Subject to clause 17.1.3, not less than ten (10) Business Days prior to the end of each Period falling after the Section 1 Service Commencement Date the Contractor shall prepare and deliver to the Council a report (a "**Payment Report**") in the Agreed Form setting out:
- (i) the Monthly Services Fee due in respect of such Period;

- (ii) the Monthly Unavailability Deduction (if any) due in respect of the preceding Period; and
  - (iii) the Monthly Service Failure Deduction (if any) and/or Reporting Failure Deduction (if any) due in respect of the preceding Period;
  - (iv) without prejudice to clause 17.2.1 any other amount due and payable from one Party to the other under this Agreement;
  - (v) any VAT payable in respect of any payments;
  - (vi) the applicable Indexation Factor;
  - (vii) any adjustments to reflect previous over payments and/or under payments previously made or determined to be made; and
  - (viii) the net amount owing by the Council to the Contractor or by the Contractor to the Council.
- 17.1.2 The Payment Report delivered pursuant to clause 17.1.1 shall be accompanied by:
- (i) the Performance Report for the preceding Period clearly showing the basis of calculation of each of the amounts referred to in clause 17.1.1; and
  - (ii) an invoice reflecting the amounts set out as due and payable in the Payment Report.
- 17.1.3 The Payment Report in respect of the last Period of this Agreement shall in addition to the matters referred to in clause 17.1.1 include an amount equal to the average Deductions (if any) incurred by the Contractor in the three (3) Periods immediately preceding the last Period of this Agreement.
- 17.1.4 If the Payment Report shows a net amount owing by the Contractor to the Council, the Council shall issue an invoice to the Contractor in respect of such amount and the Contractor shall pay to the Council the amount shown by such invoice not later

than the twentieth (20) Business Day after the Contractor received the invoice from the Council.

## 17.2 Payments

All payments under this Agreement:

- 17.2.1 shall be due and payable:
- (i) in the case of payment of the Unitary Charge, on the last Wednesday in each Period, provided that the Payment Report has been provided by the Contractor pursuant to clause 17.1.1; and
  - (ii) in the case of payments other than those specified in clause 17.2.1 (i) above by the later of:
    - (a) the date specified for payment in this Agreement, or where no such date is specified, twenty (20) Business Days after the date on which the amount of the payment is agreed or determined; and
    - (b) twenty (20) Business Days after the date of issue of an invoice for the payment (or VAT invoice where VAT is payable); and
- 17.2.2 shall be made in pounds sterling by electronic transfer or equivalent instantaneous transfer of funds for value on the day in question to the bank account of the payee (located in the United Kingdom) specified in the invoice for such payment, quoting the invoice number against which payment is made failing which, payment shall be made by cleared funds for value on the day in question to the bank account of the payee (located in the United Kingdom).

## 17.3 Disputed Amounts

- 17.3.1 Prior to the due date for payment either Party shall have the right to dispute, in good faith, any amount specified in an invoice referred to in this Agreement (save where such amount or the

basis of calculating such amount has been agreed or determined).

The Party disputing any such amount shall pay such amount of the invoice in question as is not in dispute and shall be entitled to withhold the balance pending resolution of the dispute.

17.3.2 The Parties shall use all reasonable endeavours to resolve the dispute in question within twenty (20) Business Days of the dispute arising. If they fail so to resolve it, either Party may refer the matter to the Fast Track Expert pursuant to the Dispute Resolution Procedure.

17.3.3 Following resolution of the dispute, any amount agreed or adjudged to be due shall promptly on demand be paid, together with interest thereon at a rate *per annum* equal to the Prescribed Rate from the day after the date on which payment became properly due (as determined by the Fast Track Expert) up to (and including) the date of payment.

#### 17.4 **Late Payments**

If any undisputed payment due under this Agreement remains unpaid after the due date for payment in accordance with clause 17.2, such payment shall bear interest at the Prescribed Rate from the day after the date on which the payment was due up to (and including) the date of payment. The right of either Party to receive interest in respect of the late payment of any sum due shall be without prejudice to such other rights as that Party may have under this Agreement.

#### 17.5 **Wrongful Payments and Overpayments**

17.5.1 A Party shall notify the other Party of any amount which it considers to have been underpaid or wrongfully deducted by the other Party and if the other Party does not dispute all or any of such amounts within fifteen (15) Business Days of the notification, such amounts shall be reflected in the next Payment Report.

17.5.2 Either Party may recover from the other Party or deduct from or add to future payments any amount agreed or determined to have been overpaid, underpaid or wrongfully paid to the other Party or deducted by it however such amount may have arisen including, but not limited to, mistake of law or of fact.

**17.6 Examination of Records**

Without prejudice to any other provisions of this Agreement the Council shall have the right at reasonable hours upon giving the Contractor reasonable notice, and subject to the supervision of the Contractor, to examine the books and records of the Contractor relative to provision of the Services to the extent necessary to verify the accuracy of any accounting statement, charge, computation or claim made pursuant to any of the provisions of this Agreement.

**17.7 VAT**

17.7.1 The Unitary Charge together with any other payments and consideration due from the Council to the Contractor in terms of this Agreement hereunder shall be exclusive of VAT, and all references to charges, fees and prices in this Agreement shall be regarded as exclusive of VAT. The Council shall pay to the Contractor at the same time as the Unitary Charge a sum equal to the VAT chargeable on the value of the provision of the obligations of this Agreement, in addition to the Unitary Charge.

17.7.2 Any invoice or other request for payment of monies due to the Contractor under this Agreement shall be in the same form and contain the same information as if the same were a tax invoice for the purposes of the regulations made under the Value Added Tax Act 1994.

17.7.3 The Contractor shall, if so requested by the Council, furnish such information as may be reasonably required by the Council as to the amount of VAT chargeable in accordance with this Agreement and payable by the Council to the Contractor in

addition to the Unitary Charge. Any overpayment by the Council to the Contractor shall be a sum of money recoverable from the Contractor as a debt due.

**17.8 Set off**

17.8.1 The Contractor shall not be entitled to retain or set off any amount due to the Council by it, but subject to 17.8.2 the Council may 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.

17.8.2 The Council shall not be entitled to set off any amount owed to the Council from any payments due to the Contractor pursuant to clause 23 (*Consequences of Termination*) where such amounts have been accounted for in the calculation of any such payments.

**17.9 Taxation**

All payments due to one Party from another Party under this Agreement shall be calculated and made free and clear of and without deduction for, or on account of, any tax, unless such deduction or withholding is required by law. The Party required to make such deduction or withholding shall account on a timely basis to the appropriate authority in respect of any such deduction or withholding.

**17.10 Change Adjustment**

The provisions of Part 10 of the Schedule (*Change Adjustment*) shall apply in respect of any Change which requires a Change Adjustment.

**17.11 Refinancing**

17.11.1 Without prejudice to the provisions of clause 6.2, the Contractor may at any time effect a Refinancing or a Rescue Refinancing in accordance with this clause 17.11.

17.11.2 If the Contractor wishes to effect a Refinancing, it shall give the Council twenty (20) Business Days' notice in writing. The notice shall specify details of the proposed Refinancing and of



the consents, approvals and documentation which are reasonably required by the Contractor from the Council under this Agreement and the Project Documents to effect the Refinancing. The Council shall give all such consents, approvals and documentation, including, if requested, the execution by the Council of a direct agreement with any Funders, provided that the terms of such documentation shall not impose any obligations on the Council which are, otherwise than as envisaged below, more onerous than the comparable terms of this Agreement or the Project Documents as at the Contract Award Date, or materially or adversely affect the ability of the Contractor to perform its obligations under this Agreement

17.11.3 If a Refinancing results in an increase in the Nominal Equity IRR from that shown in the Actual Financial Model for the period from the date of the Refinancing to the Contract Expiry Date, the Contractor shall allow to the Council the IRR Refinancing Share provided that:

- (i) the IRR Refinancing Share shall never be a negative figure;
- (ii) the IRR Refinancing Share shall be calculated in accordance with the following formula:

$$\text{IRR Refinancing Share} = A$$

where "A" is calculated in accordance with the following formula:-

- (a) where the Post Refinancing Equity IRR is equal to or greater than twenty per cent (20%) but less than twenty five per cent (25%):

$$A = \frac{15(B - C)}{100}$$

where:

- (1) "B" is the Post Refinancing Equity IRR; and

- (2) "C" is the Base Case Equity IRR in the case of an initial Refinancing and the Pre-Refinancing Equity IRR in the case of any subsequent Refinancing;
- (b) where the Post Refinancing Equity IRR is equal to or greater than twenty five per cent (25%) but less than thirty per cent (30%):

$$A = \frac{15 (25 - C) + 30 (B - 25)}{100}$$

where:

- (1) "B" is the Post Refinancing Equity IRR; and
- (2) "C" is the Base Case Equity IRR in the case of an initial Refinancing and the Pre-Refinancing Equity IRR in the case of any subsequent Refinancing;
- (c) where the Post Refinancing Equity IRR is equal to or greater than thirty per cent (30%):

$$A = \frac{15 (25 - C) + 150 + 50 (B - 30)}{100}$$

where:

- (1) "B" is the Post Refinancing Equity IRR; and
- (2) "C" is the Base Case Equity IRR in the case of an initial Refinancing and the Pre-Refinancing Equity IRR in the case of any subsequent Refinancing;
- (d) **"Pre-Refinancing Equity IRR"** means the Nominal Equity IRR, as shown in the Actual Financial Model immediately prior to the conclusion of the proposed Refinancing;
- (e) **"Post Refinancing Equity IRR"** means the Nominal Equity IRR as reflected in the Actual Financial Model as

updated to take into account the proposed Refinancing;  
and

(f) **"Base Case Equity IRR"** means the Nominal Equity IRR as reflected in the Base Case Financial Model.

17.11.4 The IRR Refinancing Share shall be applied to the Adjusted Financial Model and expressed as a percentage in accordance with the provisions of Part 10 of the Schedule (*Change Adjustment*) so that the Nominal Equity IRR which will be demonstrated by the Adjusted Financial Model once the Refinancing has taken place and shall be the Post Refinancing Equity IRR less the IRR Refinancing Share and shall operate so as to reduce the Unitary Charge with effect from the completion of the Refinancing.

17.11.5 Any Funder shall be an **"Authorised Institution"** as such expression is defined in the Banking Act 1987.

17.11.6 The Contractor may effect a Rescue Refinancing at any time without the prior consent of the Council and the Contractor shall provide to the Council written confirmation of the nature and extent of any Rescue Refinancing within twenty (20) Business Days of the Rescue Refinancing. Where a Rescue Refinancing results in the Senior Debt Obligations (adjusted to reflect the Rescue Refinancing) exceeding one hundred and ten (110) per cent of the Senior Debt Obligations then the Council liability in respect of Senior Debt pursuant to Part 11 of the Schedule (*Termination Compensation*) shall not exceed one hundred and ten (110) per cent of the Senior Debt Obligations.

#### 17.12 **Benchmarking**

The provisions of Part 12 of the Schedule (*Benchmarking*) shall apply in relation to benchmarking and market testing.

## **PART 5 - HUMAN RESOURCES**

### **18. TRANSFERRED EMPLOYEES**

#### **18.1 Transferred Employees to be employed by the Contractor**

The Contractor undertakes to the Council that, with effect from the Section 1 Service Commencement Date, the Transferred Employees shall be employed by the Contractor or the Contractor undertakes that it shall procure that the Transferred Employees shall be employed by the Service Provider or any subcontractors, in either case without any break in the continuity of their employment, having at least the same rights and benefits to which they were entitled in connection with their employment by the Council.

#### **18.2 TUPE Regulations to apply**

Without prejudice to clause 18.1, the Contractor and the Council shall give effect to the TUPE Regulations in respect of the Transferred Employees whether or not, in the absence of this provision, they would otherwise apply.

18.3 The Contractor agrees that between the Contract Award Date and the Section 1 Service Commencement Date the Council may:-

18.3.1 replace any employee providing any service which will become part of the Services, provided always that, save with the written consent of the Contractor (which consent shall not be unreasonably withheld), an employee shall be replaced only where that employee's contract of employment has been terminated with the Council, and that no employee is replaced with an employee who has a service length greater than that of the employee he or she is replacing; and/or

18.3.2 increase or reduce the number of employees providing any service which will become part of the Services,

and where employees are replaced and/or their numbers increased or reduced, Part 13 of the Schedule shall be amended accordingly and such employee shall be a Transferred Employee for the purposes of this Agreement.

18.3A In the event that the Council does exercise its rights to replace any employee or increase or reduce the number of employees providing any service which will become part of the Services pursuant to clause 18.3, the Adjusted Financial Model shall be adjusted by a Change Adjustment to reflect the additional annual costs or savings to the Contractor, the Service Provider or any subcontractor.

18.4 The Council undertakes that it shall not, without the prior written consent of the Contractor (which consent shall not be unreasonably withheld) materially vary the terms and conditions of any of the Transferred Employees between the Contract Award Date and the Section 1 Service Commencement Date other than for wage awards or other benefits which are in line with those offered generally for similar status individuals within the Council or any subcontractors' workforce or as is required by law.

**18.5 Information on Transferred Employees**

In the period prior to the Section 1 Service Commencement Date the Council shall within fourteen (14) Business Days of its receipt of a request by the Contractor, the Service Provider or any subcontractor from time to time supply to the Contractor, the Service Provider or subcontractor:

18.5.1 in so far as is reasonably practicable, information which is full, complete and accurate in all material respects (and subject to the terms of the DPA) as to the terms and conditions of employment of all the Transferred Employees at the time of a request for the same, and specifying whether said terms and conditions are contractual or otherwise, (including without limitation remuneration and benefits), collective agreements which relate to the employment of the Transferred Employees and any legally enforceable obligations on the Council to increase or otherwise vary such remuneration and benefits;

18.5.2 the job title, role, length of service and age of all the Transferred Employees at the time of a request for the same;

- 18.5.3 details of any outstanding disputes of a material nature between the Council and any of the Transferred Employees; and
- 18.5.4 any other information and/or documentation relating to the Transferred Employees reasonably required by the Contractor, the Service Provider and/or any sub-contractor.

During the period prior to the Section 1 Service Commencement Date, the Council shall (subject to the terms of the DPA) provide to the Contractor, the Service Provider or any subcontractor all information and documentation in its possession or under its control which updates any information provided in terms of this clause 18.5 as soon as reasonably practicable after it becomes aware of the same.

**18.6 Personnel Records**

The Council shall prior to the Section 1 Service Commencement Date maintain up to date and complete personnel records as far as reasonably practicable regarding the service of each of the Transferred Employees, including all personnel records required to be maintained by law and the Council shall (subject to the provisions of the DPA) within fourteen (14) Business Days of receiving a request from the Contractor, the Service Provider or any subcontractor allow the Contractor, the Service Provider or any subcontractor access to the personnel records referred to in this clause 18.6, and on the Section 1 Service Commencement Date, deliver to the Contractor, the Service Provider or any subcontractor the personnel records relating to the Transferred Employees.

**18.7 Warranty**

The Council warrants and undertakes to the Contractor that the information to be provided under clauses 18.5 and 18.6 prior to the Section 1 Service Commencement Date will be, so far as is reasonably practicable, full, complete and accurate in all material respects.

**18.8 Emoluments**

- 18.8.1 The Council shall be responsible for the payment of all emoluments (including all wages, holiday pay, bonuses, back dated pay award, PAYE and pension contributions) of the Transferred Employees up to, but excluding, the Section 1 Service Commencement Date and shall indemnify the Contractor, and on demand by the Contractor the Service Provider or any subcontractor, against all Losses in respect of the same. For the avoidance of doubt, the Council shall be responsible for payment of any pay increases negotiated by the Scottish Joint Council on behalf of the Council relating to the Transferred Employees which may occur after the Section 1 Service Commencement Date, but which relates to the period prior to the Section 1 Service Commencement Date.
- 18.8.2 In relation to entitlement to holiday pay, where a Transferred Employee has taken less than his/her proportionate holiday entitlement for the then current holiday year prior to the Section 1 Service Commencement Date, the Council shall be obliged to reimburse to the Contractor (or the Service Provider or any subcontractor,) a sum equal to the proportion of holidays accrued but not yet taken and/or paid to the Transferred Employee at the Section 1 Service Commencement Date.
- 18.8.3 Within one (1) month of the Section 1 Service Commencement Date the Council and the Contractor or the Service Provider will meet and negotiate in good faith an apportionment between the Council and the Contractor (or the Service Provider or any subcontractor) of the emoluments of the Transferred Employees as at the Section 1 Service Commencement Date, and in the event of a dispute between the Contractor and the Council the matter may be referred by

either Party to the determination of an Expert in accordance with the Dispute Resolution Procedure. Any sums due to or by the Council or the Contractor, the Service Provider or any subcontractor as a result of such apportionment will be paid within five (5) Business Days of the date on which such apportionment is agreed or determined by the said Expert.

**18.9 Indemnities**

18.9.1 The Contractor shall indemnify the Council on an after tax basis on demand and on demand by the Council any subcontractor of the Council and hold it harmless from and against all Losses in connection with or as a result of any claims or demand by any Transferred Employee or such other employee or former employee who transfers to the Contractor, the Service Provider or any subcontractor arising either under statute or at common law, including any claim which such Transferred Employee may bring at any employment tribunal or court, and without limitation, claims for redundancy pay, unfair dismissal, constructive dismissal, wrongful dismissal, unlawful deductions from wages, breach of contract, sex discrimination, disability discrimination or race discrimination, equal pay, any claim in delict, tort or otherwise (in all cases whether arising under UK or European law) arising from any act, fault, or omission of the Contractor, the Service Provider or any subcontractors in relation to such Transferred Employee or such other employee or former employee on or after the Section 1 Service Commencement Date.

18.9.2 The Contractor shall indemnify the Council and on demand by the Council any subcontractor of the Council against all Losses suffered or incurred by the Council or any subcontractor as a result of any failure by the Contractor, the Service Provider or



its subcontractors to comply fully with its obligations under Regulation 10 (3) of the TUPE Regulations.

18.9.3 The Council shall indemnify the Contractor on an after tax basis on demand, and on demand by the Contractor the Service Provider or any sub-contractor, and hold such party harmless from and against all Losses in connection with or as a result of:

- (i) any claims or demands by any Transferred Employee or any other employee or former employee of the Council, or any of its sub-contractors arising either under statute or at common law, including any claim which such Transferred Employee, or any other employee or former employee of the Council, or any of its sub-contractors, may bring at an employment tribunal or court, and without limitation claims for redundancy pay, unfair dismissal, constructive dismissal, wrongful dismissal, unlawful deductions from wages, breach of contract, sex discrimination, disability discrimination or race discrimination, equal pay, any claim in delict, tort or otherwise (in all cases whether arising under UK or European law) arising from any act, fault or omission of the Council or any person for whom the Council is responsible in relation to such Transferred Employee, or any other employee or former employee of the Council, or any of its subcontractors, prior to but not including the Section 1 Service Commencement Date; and
- (ii) any failure by the Council to fulfil its obligations to any trade union or staff association or any other workers' representatives within the meaning of the Employment Regulations and/or the Employee Directive whether

under Regulation 10(2) of the Employment Regulations and/or the Employee Directive or otherwise.

The Council acknowledges and agrees that the Contractor shall grant an indemnity in favour of the Service Provider and each or any subcontractor to the same extent that the Council is undertaking to indemnify the Contractor in terms of clauses 18.9.3(i) and 18.9.3(ii) and agrees that in the event of a breach of the Council's obligations under those clauses, should the Contractor sustain loss in respect of such breach for the avoidance of doubt that loss shall include the amount, if any, which the Contractor has paid or is required to pay to the Service Provider or any subcontractor by virtue of any indemnity granted by the Contractor in its favour in accordance with the provisions of this clause.

18.9.4 If any contract of employment (other than those relating to Transferred Employees) shall have effect as if originally made between the Contractor, the Service Provider or any subcontractor and the individual concerned as a result of the provisions of the TUPE Regulations and/or any judicial decision interpreting the same:

- (i) the Contractor, the Service Provider or any subcontractor may, upon becoming aware of the same, terminate such contract forthwith; and
- (ii) the Council hereby undertakes to indemnify and keep indemnified the Contractor on demand, or on demand by the Contractor the Service Provider or any subcontractor, and hold such party harmless from and against any losses of any nature arising out of such termination of employment and against any sums payable to or on behalf of such employee in respect of his employment following the Section 1 Service

Commencement Date until such termination of employment.

#### 18.10 Pensions

The Contractor undertakes with the Council that:-

- 18.10.1 the Contractor will or will procure that the Service Provider or its subcontractors will enter into an admission agreement, pursuant to the Local Government Pension Scheme (Scotland) Regulations 1998 (as amended) (the "**LGPS Regulations**"), with the Council and the City of Edinburgh Council, as the administering authority of the Lothian Pension Fund, to provide access for all Transferred Employees to the Local Government Pension Scheme (Scotland) (the "**Local Government Pension Scheme**") on and from the Section 1 Service Commencement Date;
- 18.10.2 the admission agreement referred to in clause 18.10.1 will satisfy the requirements of Regulation 4(6) of the LGPS Regulations;
- 18.10.3 the Contractor will procure that, subject to the subsistence of the admission agreement referred to in clause 18.10.1, the terms thereof and the eligibility requirements of the LGPS Regulations being satisfied and continuing to be satisfied, each of the Transferred Employees will, with effect on and from the Section 1 Service Commencement Date, be entitled to be members of the Local Government Pension Scheme for service with the Contractor or the Service Provider or its subcontractors during the subsistence of this Agreement;
- 18.10.4 in the event that the admission agreement referred to in clause 18.10.1 is not entered into at the Section 1 Service Commencement Date or is terminated prior to the Termination Date, the Contractor will procure the provision of an alternative scheme which will provide retirement and death

benefits in respect of each of the Transferred Employees who were members of or entitled to join the Local Government Pension Scheme that are of broadly comparable overall value (as certified by the Government Actuary's Department or such other actuary appointed by the Council) to the benefits which would have been provided under the Local Government Pension Scheme for and in respect of each such Transferred Employee had they remained or elected to become members of the Local Government Pension Scheme with an entitlement to accrue benefits (the "**Broadly Comparable Scheme**");

- 18.10.5 during the subsistence of this Agreement, in the event that a Transferred Employee retires from service with the Contractor or the Service Provider on or after age 50 on the grounds of redundancy or in the interests of efficiency, the Contractor will procure that such Transferred Employee will be entitled to the immediate payment of any pension and cash lump sum available to him under the Local Government Pension Scheme or the Broadly Comparable Scheme which pension and lump sum will not be subject to any actuarial reduction for early payment;
- 18.10.6 the Contractor will or will procure that the Service Provider or its subcontractors will, during the subsistence of this Agreement, replicate and provide for and in respect of the Transferred Employees the discretionary benefits provided by the Council immediately prior to the Section 1 Service Commencement Date under the Local Government (Discretionary Payments and Injury Benefits) (Scotland) Regulations 1998 (as amended), full details of which have been disclosed to the Contractor;
- 18.10.7 the Contractor and the Council agree that the benefits described in clauses 18.10.5 and 18.10.6 shall be deemed to form part of

the Transferred Employees' contractual conditions of employment with the Council, which will be subject to the application of the TUPE Regulations, whether or not, in the absence of this provision, they would otherwise be subject to the TUPE Regulations;

18.10.8 in the event that the Contractor provides or procures the provision of a Broadly Comparable Scheme, pursuant to clause 18.10.4, the Contractor and the Council agree that the Contractor shall obtain the written consent of such Transferred Employees who wish to transfer their accrued rights under the Local Government Pension Scheme to the Broadly Comparable Scheme and, provided that two or more Transferred Employees consent to such a transfer, the Contractor agrees or shall procure agreement that any such transfer shall be made in accordance with Regulation 119 of the Local Government Pension Scheme (Scotland) Regulations 1998 (as amended);

18.10.9 in the event that any of the Transferred Employees transfers back to the Council or to a different contractor, either following a Cessation of Services or on the Contract Expiry Date or the Termination Date, the Council and the Contractor agree that any transfer to the Local Government Pension Scheme or a different contractor's scheme of any accrued rights under the Broadly Comparable Scheme or, as the case may be, the Local Government Pension Scheme in respect of two or more of the Transferred Employees shall be made on no less favourable a basis than the ongoing funding basis adopted by the Broadly Comparable Scheme or, as the case may be, the Local Government Pension Scheme.

#### 18.11 Cessation of Service

18.11.1 On the Cessation of Services the Council shall use its reasonable endeavours (having regard to the Council's legal

obligations) to procure that there is a transfer pursuant to the TUPE Regulations of the contracts of employment of all Re-transferring Employees to the Council or any other Incoming Service Provider.

18.11.2 The Contractor shall on the date twelve (12) months prior to the Contract Expiry Date or on the first date as soon as reasonably practicable after the Contractor becomes aware that this Agreement is to terminate prior to the Contract Expiry Date prepare and provide to the Council a list of employees wholly or mainly assigned to the provision of the Services as at that date (the "**List of Re-transferring Employees**") and any employee on the List of Re-Transferring Employees shall be a "**Re-transferring Employee**" for the purposes of this Agreement.

18.11.3 The Contractor undertakes that it shall not and shall procure that the Service Provider or any subcontractors shall not, in the period commencing twelve (12) months prior to the Contract Expiry Date or as soon as reasonably practicable after they become aware that this Agreement is to terminate prior to the Contract Expiry Date, without the prior written consent of the Council:

- (i) materially vary the terms and conditions of any of the employees assigned to the provision of the Services (including without limitation, remuneration, benefits, and notice periods) other than for wage awards or other benefits which are in line with those offered generally for similar status individuals within the Contractor, the Service Provider or subcontractors workforce or as is required by law; or
- (ii) increase the numbers of any of the employees assigned to the provision of the Services; or

- (iii) replace any of the employees assigned to the provision of the Services, other than as a replacement on the same terms and conditions for any of the said employees whose contracts of employment with the Contractor, the Service Provider or subcontractor are terminated for any reason

In the event that the written consent of the Council is given in terms of this clause 18.11.3 to increase the number of employees or any employee is replaced, the List of Re-transferring Employees shall be amended accordingly and such new employee or replacement employee shall be a Re-transferring Employee for the purposes of this Agreement.

18.11.4 In the period commencing twelve (12) months prior to the Contract Expiry Date or as soon as reasonably practicable after the Contractor becomes aware that this Agreement is to terminate prior to the Contract Expiry Date the Contractor shall and shall procure that the Service Provider and its subcontractors shall within fourteen (14) Business Days of its receipt of a request by the Council from time to time supply to the Council or any person nominated by the Council:

- (i) in so far as is reasonably practicable, information which is full, complete and accurate in all material respects (and subject to the terms of the DPA) as to the terms and conditions of employment of the Re-Transferring Employees at the time of a request for the same, and specifying whether said terms and conditions are contractual or otherwise (including without limitation remuneration and benefits), collective agreements which relate to the employment of the Re-Transferring Employees and any legally enforceable obligations on the Contractor, the Service Provider or

- its subcontractors to increase or otherwise vary such remuneration and benefits;
- (ii) the job title, role, length of service and age of all the Re-transferring Employees at the time of a request for the same;
  - (iii) details of any outstanding disputes of a material nature between the Contractor, the Service Provider or its subcontractor and any of the Re-transferring Employees; and
  - (iv) any other information and/or documentation relating to the Re-transferring Employees reasonably required by the Council or any Incoming Service Provider.

Prior to the date of the Cessation of Services, the Contractor shall and shall procure that the Service Provider and its subcontractors shall (subject to the terms of the DPA) provide to the Council or any other Incoming Service Provider all information and documentation in its possession or under its control which updates any information provided in terms of this clause 18.11.4 as soon as reasonably practicable after it becomes aware of the same.

18.11.5 The Contractor shall and shall procure that the Service Provider and its subcontractors shall during the subsistence of this Agreement maintain up to date and complete personnel records, as far as is reasonably practicable, regarding the service of each of the employees wholly or mainly assigned to the provision of the Services, including all personnel records required to be maintained by law and the Contractor shall and shall procure that the Service Provider and its subcontractors shall (subject to the provisions of the DPA) within fourteen (14) Business Days of receiving a request from the Council or any person nominated by the Council allow the Council or any



person nominated by the Council access to the personnel records referred to in this clause 18.11.5, and on the date of the Cessation of Services, deliver to the Council or any person nominated by the Council the personnel records relating to the Re-transferring Employees.

18.11.6 The Contractor warrants and undertakes to the Council that the information to be provided under clauses 18.11.4 and 18.11.5 will be, in so far as reasonably practicable, full, complete and accurate, in all material respects.

18.11.7 Upon the Cessation of Services, the Contractor shall indemnify the Council on demand, or on demand by the Council any other Incoming Service Provider, and hold them harmless from and against all Losses arising from:-

- (i) the employment of the Re-transferring Employees during the subsistence of this Agreement provided that, for the avoidance of doubt, the indemnity in this clause 18.11.7 does not relate to the Council's (or any other Incoming Service Provider or sub-contractor's) obligation in terms of the TUPE Regulations to employ the Re-transferring Employees on the terms and conditions of employment to which they were entitled immediately prior to the Cessation of Services nor does it relate to the Council's (or any other Incoming Service Provider or sub-contractor's) obligation to recognise their periods of continuous employment as at the date on which the Cessation of Services occurs; and
- (ii) the termination of such employment during the subsistence of this Agreement.

18.11.8 Upon the Cessation of Services, the Council shall indemnify the Contractor on demand, or on demand by the Contractor the Service Provider or any subcontractor, and hold such party

harmless from and against all Losses arising from any claims or demand by any Re-transferring Employees who transfer to the Council, or any other Incoming Service Provider arising either under statute or at common law, including any claim which such Re-transferring Employee may bring at any employment tribunal or court, and without limitation, claims for redundancy pay, unfair dismissal, constructive dismissal, wrongful dismissal, unlawful deductions from wages, breach of contract, sex discrimination, disability discrimination or race discrimination, equal pay, any claim in delict, tort or otherwise (in all cases whether arising under UK or European law) arising from any act, fault, or omission of the Council or Incoming Service Provider in relation to such Re-transferring Employee on or after the date of Cessation of Services.

18.11.9 If, following the date of Cessation of Services or otherwise, any contract of employment of or collective agreement relating to an individual who is not a Re-transferring Employee shall have effect as if originally made between the Council or any Incoming Service Provider and the individual or trade union concerned as a result of the provisions of the TUPE Regulations or otherwise and/or any judicial decision interpreting the same:-

- (i) the Council or any Incoming Service Provider may upon becoming aware of the same, terminate such contract or agreement forthwith;
- (ii) the Contractor hereby undertakes to indemnify and keep indemnified on demand the Council, or on demand by the Council any other Incoming Service Provider, from and against any Losses of any nature arising out of such termination and any sums payable to or on behalf of such individual in respect of his

employment on or after the Cessation of Services until such termination of employment; and

- (iii) the Contractor shall indemnify and keep indemnified on demand the Council, or on demand by the Council any other Incoming Service Provider, in respect of any such individual on the same terms mutatis mutandis as the Contractor has indemnified the Council and any other Incoming Service Provider in respect of the Re-transferring Employees pursuant to clause 18.11.7.

#### 18.12 Consultation Obligations

18.12.1 In respect of the Cessation of Services the Contractor undertakes and shall procure that the Service Provider or its subcontractors shall comply with their obligations under Regulation 10(2) of the TUPE Regulations.

18.12.2 The Contractor hereby undertakes to indemnify and keep indemnified the Council against all Losses suffered or incurred by the Council as a result of any failure by the Contractor or the Service Provider or its subcontractors to comply fully with their obligations under Regulation 10(2) of the TUPE Regulations.

18.12.3 In respect of the Cessation of Services the Council undertakes that it shall comply with its obligations in respect of such Re-transferring Employees to any trade union or staff association or any other workers' representatives within the meaning of the TUPE Regulations and/or the Employee Directive whether under Regulation 10 of the TUPE Regulations and/or the Employee Directive or otherwise.

18.12.4 The Council hereby undertakes to indemnify and keep indemnified the Contractor, or on demand by the Contractor the Service Provider or any subcontractor, against all Losses suffered or incurred by the Contractor as a result of any failure

by the Council to comply fully with its obligations referred to in clause 18.12.3 above.

**18.13 Special Employment Provisions**

The Contractor shall procure that no Transferred Employee is dismissed by reason of redundancy in the period of twenty four (24) months following the Section 1 Service Commencement Date.

**18.14 Provisions in Service Contracts**

The Contractor shall ensure that the terms of this clause 18 are repeated *mutatis mutandis* in any subcontract or Service Level Agreement.

**19. PERSONNEL ENGAGED IN SERVICES**

**19.1 Trained Personnel**

The Contractor shall procure that all persons engaged in the provision of the Services:

- 19.1.1 are properly trained and adequately supervised;
- 19.1.2 have all appropriate and necessary qualifications and registrations; and
- 19.1.3 have all reasonable skills required,

for the performance of the Services for which they are engaged and that there shall at all times be a sufficient number of such persons engaged in the provision of the Services.

**19.2 References, Enquiries**

- 19.2.1 Save in respect of the Transferred Employees the Contractor shall at all times act with all due diligence and care, in the manner of a prudent employer, in the engagement of any person in connection with the provision of the Services and in particular the Contractor shall not engage any such person unless it shall have obtained satisfactory references in respect of any such person and has carried out such checks as the Contractor may lawfully undertake to establish that no such

person has any criminal conviction or record of dishonesty or violence.

19.2.2 The Contractor shall procure that any Service Provider requests from any person to be employed or engaged in the delivery of the Services at the Project Sites (other than the Transferred Employees) such information (e.g. name, address, date of birth, place of birth, National Insurance number) as required by the Council Representative to facilitate a police check for criminal convictions. The Contractor shall ensure or shall procure that any Service Provider shall ensure that:

- (a) save where prohibited by any Legislation any person to be employed or engaged in the delivery of the Services (other than the Transferred Employees) who refuses to supply such information is not employed or engaged in the delivery of the Services at the Project Sites; and
- (b) any person to be employed or engaged in the delivery of the Services who has given their written permission for such check to be made are aware that any spent convictions will be disclosed on such a check.

### 19.3 **Conduct of Personnel**

The Contractor acknowledges that it is providing the Services in an educational environment and shall procure that the conduct, dress and language of employees engaged directly in the performance of the Services when at the Project Sites is appropriate in the circumstances.

### 19.4 **Obligations of the Service Provider**

The Contractor shall procure that any Service Provider and/or its subcontractors comply with the obligations contained in clauses 19.1, 19.2 and 19.3 as if they were a party thereto.

### 19.5 **Removal of Personnel**

19.5.1 The Council may, if it has reasonable grounds for believing that any person employed or engaged or to be employed or

engaged by the Contractor or any subcontractor involved in connection with provision of the Services is or is likely to become a threat to the health and safety of children and is therefore not a suitable person to be engaged in the provision of a Service (an "**Unsuitable Person**"), by notice in writing to the Contractor require the Contractor:

- (i) to remove or procure the removal of the Unsuitable Person from the Project Sites;
- (ii) to procure that the Unsuitable Person is not engaged or employed directly or indirectly in the provision of any part of the Services at the Project Sites;
- (iii) not to employ or engage the Unsuitable Person directly or indirectly in the provision of any part of the Services at the Project Sites; or
- (iv) to procure that any subcontractor shall not employ or engage the Unsuitable Person directly or indirectly in the provision of any part of the Services.

In exercising their rights under this clause 19.5 the Council shall not act vexatiously, arbitrarily or capriciously when seeking the removal of an Unsuitable Person.

## PART 6 - CHANGE

### 20. CHANGE

20.1 Either Party may request a Change, including a Change required by a Change in Law in accordance with the provisions of Part 14 of the Schedule (*Change Procedure*).

20.2 Any Relevant Cost or Relevant Saving derived from a Change shall be determined and allocated in accordance with Part 14 of the Schedule (*Change Procedure*).

#### 20.3 Deemed Change

20.3.1 The Contractor will use all reasonable endeavours to secure planning permission for the development and construction of Section 5 (the "**Section 5 Planning Permission**").

20.3.2 Where the Contractor fails to secure the Section 5 Planning Permission by 31 August 2001:

- (a) the Contractor will not be required to meet the Service Commencement Requirement in respect of Section 5 in order to achieve the Section 4 Service Commencement Date; and
- (b) the Programmed Section 5 Completion Date will be postponed to 23 September 2003 or such later date as such date may be postponed to from time to time by the Change Procedure or the operation of clause 12.4 (*Completion of the Building Works*).

20.3.3 Where the Contractor fails to secure the Section 5 Planning Permission by 31 August 2002, the Council shall serve a Council Change Notice to exclude the Contractor's obligations to develop and construct Section 5 from this Agreement such Change to be implemented in accordance with the Change Procedure.

20.3.4 Where the Parties fail to agree a Change by the Section 5 Longstop Date pursuant to the Council Change Notice issued in accordance with clause 20.3.3, the Contractor shall no longer be required to complete Section 5 for the purposes of completing the Building Works and the Council shall have no rights to terminate this Agreement as a consequence (directly or indirectly) of Section 5 being excluded from the Contractor's obligations pursuant to this Agreement.



## PART 7: DEFAULT & TERMINATION

### 21. COUNCIL STEP-IN

#### 21.1 Step-In - General

If the Council reasonably believes that:

21.1.1 it needs to take action in connection with the provision of the Services:

- (i) because a serious risk exists to the health or safety of persons or property or to the environment; and/ or
- (ii) to discharge a statutory duty, or

21.1.2 it needs to take action to discharge a statutory duty which is not connected to the provision of the Services,

then the Council shall be entitled to take action in accordance with clauses 21.2 to 21.5 below but subject to the indemnity in clause 21.6.

21.2 If clause 21.1 applies and the Council wishes to take action, the Council shall serve a notice (a "**Step-In Notice**") upon the Contractor in writing of the following:

21.2.1 the action it wishes to take;

21.2.2 the reason for such action;

21.2.3 the date it wishes to commence such action;

21.2.4 the time period which it believes will be necessary for such action;

21.2.5 the criteria for cessation of such action; and

21.2.6 to the extent practicable, the effect on the Contractor and its obligation to provide the Services during the period such action is being taken.

21.3 Following service of a Step-In Notice, the Council shall take such action as notified under clause 21.2 above and any consequential additional action as it reasonably believes is necessary (together, the "**Required Action**"). The Council shall complete the Required Action as soon as reasonably practicable following the service of a Step-In Notice. The Contractor shall

give all reasonable assistance to the Council while the Council is taking such Required Action.

**21.4 Step-In Without the Contractor 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:

21.4.1 the Contractor shall be relieved from its obligations to provide such part of the Services; and

21.4.2 in respect of the period in which the Council is taking the Required Action and provided that the Contractor provides the Council with reasonable assistance (such assistance to be at the expense of the Council to the extent incremental costs are incurred), the Unitary Charge due from the Council to the Contractor shall equal the amount the Contractor would receive if it were satisfying all its obligations under this Agreement including the provision of the Services affected by the Required Action in full over that period.

**21.5 Step-In on Contractor Breach**

If the Required Action is taken as a result of a breach of the obligations of the Contractor under this Agreement, then, 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:

21.5.1 the Contractor shall be relieved of its obligations to provide such part of the Services; and

21.5.2 in respect of the period in which the Council is taking Required Action, the Unitary Charge due from the Council 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 the direct costs of the Council, reasonably and properly incurred in taking the Required Action.

## 21.6 Liability of the Council on Step-In

In respect of the period in which the Council is taking Required Action, the Council shall comply with:-

- 21.6.1 Good Industry Practice;
- 21.6.2 applicable Legislation;
- 21.6.3 the Required Consents; and
- 21.6.4 the obligations of the Contractor in terms of this Agreement to deliver the Services to the extent that such obligations would have been applicable had the Required Action been undertaken by the Contractor,

and the Council shall indemnify the Contractor against any Losses suffered by the Contractor as a result of the Council failing to comply with its obligations in terms of this Clause 21.6.

21.7 Where the Council has completed the Required Action, the Council shall as soon as reasonably practicable notify the Contractor that the Required Action has ceased and that the Contractor is required to commence delivery of the Services affected by the Required Action.

## 22. TERMINATION

### 22.1 Termination by the Council

Subject to clause 22.2 and 22.11, each of the following shall constitute a "**Contractor Default Event**":

- 22.1.1 if at any time:
  - (i) the Contractor Abandons the Building Works;
  - (ii) the Contractor fails to achieve the relevant Service Commencement Date for each Section (other than Section 5) by the Longstop Date;
  - (iii) the Contractor breaches the provisions of clause 34.1 (*Assignment by the Contractor*);
  - (iv) any Insolvency Event occurs; or

- (v) subject to clause 22.2 and the provisions of clause 26.6 (*Exclusivity of Remedy*), there is a breach by the Contractor of its obligations under this Agreement or any Project Document to which the Council is a party which materially and adversely affects the performance of the Services; or
- (vi) where the Council is entitled to terminate this Agreement in the circumstances specified in clause 36.2 (*Change of Control*); or
- (vii) a Service Failure Event occurs; or
- (viii) the Contractor fails to achieve the Section 5 Service Commencement Date by the Section 5 Longstop Date.

22.2 If an event referred to in clause 22.1.1(v) occurs and the event in question is capable of remedy (save in respect of time of performance) the Council shall serve a notice (a "**Remedy Notice**") on the Contractor requiring the Contractor to remedy the breach or breaches referred to in such Remedy Notice within a reasonable period (a "**Remedy Period**"). If a Remedy Notice has been served and if the relevant breach is not remedied to the reasonable satisfaction of the Council within the Remedy Period the breach shall constitute a Contractor Default Event but not otherwise.

22.3 **Council's right to terminate**

22.3.1 If a Contractor Default Event occurs or the Council has a right to terminate this Agreement pursuant to clause 32.3.1 (*Corrupt Gifts*) and/or 22.10.1 (*Termination Following a Force Majeure Event*) and/or 22.5.1 (*Council Voluntary Termination*) the Council may, at its option but subject always to the rights of the Funder under the Funder's Direct Agreement, terminate this Agreement by serving written notice on the Contractor.

22.3.2 This clause 22.3 is without prejudice to either Party's accrued rights in respect of any breach of this Agreement including any breach giving rise to termination of this Agreement save that the

calculation of compensation payable on termination of this Agreement pursuant to clause 23 (*Consequences of Termination*) shall be final and the Council shall not be entitled to set off any claims it may have for antecedent breaches of any Project Document against such compensation.

- 22.3.3 The right to terminate this Agreement set out in clause 22.3.1 (*Council's right to terminate*) shall constitute the only grounds for termination of this Agreement which shall entitle the Council to terminate this Agreement.

#### 22.4 **Notification of a Contractor Default Event**

Where either Party believes that a Contractor Default Event has occurred and without prejudice to clause 22.3.1, that Party shall as soon as is reasonably practicable after it has knowledge of the same notify the other Party of the same and the Parties shall promptly discuss the matter at the appropriate managerial level.

#### 22.5 **Council Voluntary Termination**

- 22.5.1 The Council may, subject to clause 22.5.3, at its absolute discretion and without prejudice to any other rights or remedies which the Council may possess, terminate this Agreement at any time by serving not less than three (3) calendar months' notice.
- 22.5.2 The Council may not revoke or amend a notice served under clause 22.5.1 without the prior written consent of the Contractor.
- 22.5.3 The Council may not, without the prior written consent of the Contractor, terminate this Agreement, or serve notice, under clause 22.5.1 at any time after a right to terminate this Agreement under clause 22.9 has arisen.

#### 22.6 **Termination by the Contractor**

##### **Council Default Events**

Subject to clause 22.7 and clause 22.11, each of the following shall constitute a **"Council Default Event"**:

- 22.6.1 if the Council fails to pay any sum or sums in aggregate in excess of four hundred and fifty thousand pounds (£450,000) sterling (Indexed) due to the Contractor under this Agreement (which sum is not in dispute) and such failure continues for twenty (20) Business Days following receipt by the Council of notice of non-payment issued by the Contractor;
- 22.6.2 subject to clause 22.9 and the provisions of clause 26.6 (*Exclusivity of Remedy*) there is a material breach by the Council of its obligations under this Agreement (other than a breach falling within clause 22.6.1 or 22.6.3) or any other Project Document; or
- 22.6.3 subject to clause 22.8, the expropriation, sequestration or requisition of a material part of the Project Facilities and/or shares of the Contractor by the Council or other Relevant Authority; or
- 22.6.4 breach of the provisions of clause 34.3 (*Assignment by the Council*); or
- 22.6.5 a Discriminatory Change in Law or a Specific Change in Law which, when in effect would, render illegal or impossible (and not merely more expensive) the exercise or enforcement by the Contractor of any of the Contractor's rights which are material to the performance of its financial obligations when taken as a whole or the performance of all or substantially all of the Contractor's obligations under this Agreement; or
- 22.6.6 failure by the Council to fund any Relevant Change in Law which it is required to fund pursuant to Part 14 of the Schedule (*Change Procedure*); or
- 22.6.7 the Council is sequestrated under the Bankruptcy (Scotland) Act 1985 or has a judicial factor appointed over it or its assets, or is dissolved or otherwise wound up; or

22.6.8 the Council makes payments persistently late, which shall occur if the Council delays payment to the Contractor of any single sum in excess of five thousand pounds (£5,000) sterling (Indexed), or the aggregate of sums in excess of five thousand pounds (£5,000) sterling (Indexed) in either case which sums are:

- (i) due for payment; and
- (ii) not in dispute; and
- (iii) have remained unpaid for a period of ten (10) Business Days, after the date for payment pursuant to the terms of this Agreement for a period of three (3) or more occasions in any period of six (6) consecutive months, provided that after the second occasion of such non payment the Contractor has served Notice on the Council warning it of a potential default in terms of this clause 22.6.8.

#### 22.7 Remedial action by the Council

If any breach referred to in clause 22.6.2, 22.6.3, 22.6.4 and 22.6.6 occurs and such breach is capable of remedy the Contractor may serve a notice (a "**Contractor Remedy Notice**" ) on the Council requiring the Council to remedy the breach referred to in such Contractor Remedy Notice within a reasonable period (a "**Council Remedy Period**"). If the relevant breach is not remedied to the reasonable satisfaction of the Contractor within the Council Remedy Period the breach shall constitute a Council Default Event but not otherwise.

#### 22.8 Council Change pursuant to clause 22.6.3

Where a material part of the Project Facilities has been expropriated, sequestered or requisitioned by the Council or other Relevant Authority, the Council shall be entitled to serve a Council Change Notice to exclude the affected part of the Project Facilities from this Agreement. Where the Parties are able to agree an Appraisal to exclude the affected part of the Project Facilities from

this Agreement the Contractor will not be entitled to terminate this Agreement in respect of clause 22.6.3 pursuant to clause 22.9.

**22.9 Contractor's right to terminate**

22.9.1 If a Council Default Event occurs the Contractor may terminate this Agreement on giving written notice to the Council to that effect.

22.9.2 The right to terminate this Agreement set out in clause 22.9.1 and 22.10 (*Termination following a Force Majeure Event*) shall constitute the only grounds for termination of this Agreement which shall entitle the Contractor to terminate this Agreement.

**22.10 Termination following Force Majeure Event**

22.10.1 Upon the occurrence of a Force Majeure Event which renders either Party unable to carry out all or substantially all of its obligations pursuant to this Agreement for a continuous period of one hundred and fifty (150) days, the Party affected may, whilst the Force Majeure Event is continuing, terminate this Agreement and all the Project Documents to which it is a Party in their entirety by serving not less than twenty (20) Business Days' written notice on the other Party.

22.10.2 Where a Change in Law (other than a Discriminatory Change in Law or a Specific Change in Law which renders):

- (i) the performance or exercise by the Contractor of any of its obligations or rights under this Agreement; or
- (ii) the carrying out of the Building Works or delivery of the Services

unenforceable, void, impossible, unlawful or illegal (and not merely more expensive), either Party may terminate this Agreement and all of the Project Documents to which it is a Party in their entirety by serving not less than twenty (20) Business Days notice on the other Party.

**22.11 Disputed termination - reference to Dispute Resolution Procedure**



Notwithstanding any other provision of this clause 22, the Party receiving notice of termination of this Agreement may, within ten (10) Business Days of receipt of such notice in accordance with clause 5 (*Notices*), refer the question of whether or not such notice has been wrongfully served or that as a consequence of any Force Majeure Event or Relief Event which either Party asserts has occurred, the right of termination should not have arisen to the Dispute Resolution Procedure and clause 22.3.1, 22.9.1 or, as the case may be, clause 22.10 shall not take effect until the expiry of such ten (10) Business Days if no reference to the Dispute Resolution Procedure is made or if such reference is made, unless and until it is finally determined in accordance with the Dispute Resolution Procedure that such termination is not at that time wrongful.

### 23. CONSEQUENCES OF TERMINATION

#### Termination by the Council - payment to the Contractor of the Contractor

##### Default Termination Amount.

23.1.1 If the Council terminates this Agreement in accordance with clause 22.3 (*Council's right to terminate following Contractor Default Event*) the Council shall subject to clause 23.1.3 be entitled to either:

- (i) retender the provision of the Services in accordance with paragraph 3.2 of Part 11 of the Schedule (*Termination Compensation*) (the "**Retendering Election**"); or
- (ii) require the Expert in accordance with paragraph 3.3 of Part 11 of the Schedule (*Termination Compensation*) (the "**No Retendering Election**"), to determine the Contractor Default Termination Amount.

23.1.2 Subject to clause 23.1.3, the Council shall notify the Contractor of its election on or before the date falling twenty (20) Business Days from the Termination Date.

23.1.3 The Council shall not be entitled to make a Retendering Election where:

- (i) the Council is not legally able to enter into the New Contract; or
- (ii) following notice from the Contractor or the Funder it is agreed or (failing agreement within twenty (20) Business Days of such notice either Party refers the matter to the Expert for determination pursuant to the Dispute Resolution Procedure) it is determined that a Change in Government Policy has occurred; or
- (iii) the Contractor or the Funder has notified the Council that:
  - (a) the Funder has exercised their rights to step in under clause 5 of the Funder's Direct Agreement; or
  - (b) the Funder has exercised its rights to step in under the Funder's Direct Agreement and has used all reasonable efforts to procure the transfer of the Contractor's rights and liabilities under this Agreement to a Suitable Substitute Contractor but have not done so; or
  - (c) in their opinion there is no Liquid Market,

and in each case either the Council agrees or failing agreement, within twenty (20) Business Days of such Notice either Party refers the matter to the Expert for determination pursuant to the Dispute Resolution Procedure and it is determined that no Liquid Market exists.

23.1.4 Where the Council exercises the No Retendering Election the Council shall at its option pay the Contractor Default Termination Amount either:

- (i) on the twentieth (20th) Business Day following the date upon which the Contractor Default Termination Amount is agreed or determined in a lump sum together with an amount equal to the interest accruing on the Contractor Default Termination Amount from the Due Date until the date of payment at the Prescribed Rate; or
- (ii) subject to clause 23.1.5 in equal six monthly instalments over a period from the date on which the Contractor Default Termination Amount is agreed or determined (the first instalment to be paid on the next occurring payment date pursuant to the Funding Agreement) and remaining instalments being paid on dates falling on six (6) calendar monthly intervals thereafter and ending on the same date as the scheduled final maturity of the Senior Debt (the last instalment to be paid on such scheduled final maturity date) together with interest accruing between the date on which the Contractor Default Termination Amount is agreed or determined and the date of payment of the outstanding amount of such sum from time to time at the Applicable Rate, such interest to be paid in relation to each instalment at the time of payment of that instalment, provided that if any instalment is not paid on the Due Date interest shall be payable at the Prescribed Rate.

23.1.5 Provided that if the Council fails to make payment of any instalment referred to in clause 23.1.4 within five (5) Business Days of its Due Date (save in the case of failure to pay which is solely the result of a technical or administrative delay in the transmission of funds where such payment is made within ten (10) Business Days), or there is a material breach of any other obligation on the Council under this Agreement or the Funder's

Direct Agreement (which, if the Termination Date had not occurred would amount to a Council Default) or, if in the reasonable opinion of the Funder there is any material deterioration in the financial covenant or financial standing of the Council (which shall for these purposes be deemed to have occurred if the rating assigned to the long term debt of the Council by Standard and Poor's Rating Services, a division of The McGraw-Hill Companies, Inc, falls below A (or its equivalent by any other rating agency approved by the Funder (acting reasonably)), then in each such case all outstanding amounts (including where applicable any Breakage Costs) shall become immediately payable by the Council to the Funder or the Contractor as the case may be.

23.1.6 Where the Council exercises the Retendering Election the Council shall pay the Contractor Default Termination Amount no later than the date falling five (5) Business Days after receipt of the Market Value of the Agreement from the New Contractor and interest will accrue on the Contractor Default Termination Amount from the Due Date until the date of payment at the Prescribed Rate.

**23.2 Termination by the Contractor or voluntary termination by the Council - payment to the Contractor of the Council Termination Compensation Amount.**

23.2.1 If either:

- (a) the Contractor terminates this Agreement in accordance with clause 22.9 (*Contractor's right to terminate*); or
- (b) the Council terminates this Agreement in accordance with clause 22.5 (*Council's voluntary termination*),

the Council shall pay to the Contractor the Council Termination Compensation Amount.

23.2.2 the Council shall pay the Council Termination Compensation Amount on the twentieth (20) Business Day following the date upon which the Council Termination Compensation Amount is agreed or determined in a lump sum together with interest accruing on the Council Termination Compensation Amount from the Due Date until the date of payment at the Prescribed Rate.

**23.3 Force Majeure Termination Event - payment to the Contractor of the Force Majeure Termination Amount**

23.3.1 If either Party terminates this Agreement pursuant to clauses 22.10.1 or 22.10.2 (*Termination following a Force Majeure Event*) or clause 27.7.5(ii) (*Uninsurable Risks*) (a "**Force Majeure Termination Event**") the Council will pay to the Contractor the Force Majeure Termination Amount.

23.3.2 The Council shall at its option pay to the Contractor the Force Majeure Termination Amount either:-

- (i) on the twentieth (20) Business Day following the date upon which the Force Majeure Termination Amount is agreed or determined or on such other date as may be agreed by the Parties in a lump sum together with interest accruing from the Due Date until the date of payment at the Prescribed Rate; or
- (ii) in equal six monthly instalments over a period from the date on which the Force Majeure Termination Amount is agreed or determined (the first instalment to be paid on the next occurring payment date pursuant to the Funding Agreement) and remaining instalments being paid on dates falling on six (6) calendar monthly intervals thereafter and ending on the same date as the scheduled final maturity of the Senior Debt (the last instalment to be paid on such scheduled final maturity date) together

with interest accruing between the date on which the Force Majeure Termination Amount and the date of payment of the outstanding amount of such sum from time to time at the Applicable Rate, such interest to be paid in relation to each instalment at the time of payment of that instalment, provided that if any instalment is not paid on the Due Date interest shall accrue and be payable at the Prescribed Rate.

- 23.3.3 Provided that if the Council fails to make payment of any instalment referred to in clause 23.3.2 within five (5) Business Days of its Due Date (save in the case of failure to pay which is solely the result of a technical or administrative delay in the transmission of funds) where such payment is made within ten (10) Business Days), or there is a material breach of any other obligation on the Council under this Agreement or the Funder's Direct Agreement (which, if the Termination Date had not occurred would amount to a Council Default) or, if in the reasonable opinion of the Funder there is any material deterioration in the financial covenant or financial standing of the Council (which shall for these purposes be deemed to have occurred if the rating assigned to the long term debt of the Council by Standard and Poor's Rating Services, a division of The McGraw-Hill Companies, Inc, falls below A (or its equivalent by any other rating agency approved by the Funder (acting reasonably)), then each such case all outstanding amounts (including where applicable any Breakage Costs) shall become immediately payable by the Council to the Funder or the Contractor as the case may be.

**23.4 Corrupt Gifts Termination Amount - payment to the Contractor of the Corrupt Gifts Termination Amount**

23.4.1 If this Agreement is terminated pursuant to clause 32 (*Corrupt Gifts*) the Council will pay to the Contractor the Corrupt Gifts Termination Amount.

23.4.2 The Council shall pay the Corrupt Gifts Termination Amount on the twentieth (20) Business Day following the date upon which the Corrupt Gifts Termination Amount is agreed or determined in a lump sum together with interest accruing from the Due Date until the date of payment at the Prescribed Rate.

**23.5 Consequences of termination or expiry**

23.5.1 All amounts of compensation (other than those calculated under paragraph 3.2 of Part 11 of the Schedule (*Termination Compensation*)) ("**Compensation Amounts**") shall be paid free and clear of all deductions or withholdings whatsoever for or on account of Tax save only as required by Legislation. If any such deduction or withholding is required by Legislation, the Council shall subject to the provisions of clause 23.5.4, be obliged to pay to the Funders and/or the Contractor as the case may be such sums as would after the deduction or withholding has been made, leave the Funders and/or the Contractor as the case may be with the same amount that they would have been entitled to receive in the absence of any such requirement to make deduction or withholding.

23.5.2 Subject to the provisions of clause 23.5.4 if the Funders and/or the Contractor, as the case may be, incur any liability in respect of any Compensation Amounts, the Council shall pay to the Funders and/or the Contractor, as the case may be, such additional amounts as are required to ensure that the net amount received and returned by the Funders and/or the Contractor, as the case may be, after Tax equals the full amount which would

have been received and returned by it had no such liability to Tax arisen.

23.5.3 Subject to the provisions of clause 23.5.4 if the Funders and/or the Contractor, as the case may be, has received a Tax benefit by reason of any deduction or withholding in respect of which the Council has made an increased payment under clause 23.5.1, the Funders and/or the Contractor, as the case may be, shall pay to the Council such amounts as will leave the Funder and/or the Contractor in no worse position than they and/or it would have been in if the deduction or withholding had not been required, provided that:

- (i) the Funders and/or the Contractor, as the case may be, shall exercise proper and reasonable discretion as to the time at which it receives the Tax benefit and shall not be obliged to arrange their business or their Tax affairs in order to be eligible for any benefit; and
- (ii) if the Funders and/or the Contractor, as the case may be, make any payment to the Council on account of any Tax benefit and it subsequently transpires that the Funder and/or the Contractor did not receive that Tax benefit, or received a lesser Tax benefit, the Council shall pay to the Funder and/or the Contractor such sum as shall be necessary to restore the Funder and/or the Contractor to the position that they would have been in had no adjustment or the appropriate adjustment been made under this clause 23.5.3.

23.5.4 Where the Council have made a payment to the Contractor and/or the Funder pursuant to this clause 23.5, that payment shall discharge any liability the Council may have to the Funder and/or the Contractor respectively.

**23.6 Full Satisfaction**



23.6.1 The compensation paid to the Contractor pursuant to and in accordance with the preceding provisions of this clause 23 shall be in full satisfaction of any claim, demand or proceedings by or liability:

- (i) to the Contractor in respect of a Council Default Event or, as the case may be, voluntary termination by the Council pursuant to clause 23.2.1;
- (ii) by the Council in respect of a Contractor Default Event; or
- (iii) to either Party in respect of a Force Majeure Termination Event; or
- (iv) by the Council in respect of a Prohibited Act,

in each case in respect of which termination is effected neither Party may deduct from amounts due and payable to the other under this clause 23 any other sums which are due and payable in terms of any other provisions of this Agreement or any of the Project Documents.

23.6.2 The Parties hereby acknowledge and agree that from the Contract Award Date to the date on which, following an application for judicial review or an audit review, a court determines that the Council did not have power to enter into this Agreement or any Project Document and that this Agreement or any such Project Document is unenforceable, the Council Termination Compensation Amount shall be deemed to be Relevant Discharge Terms for the purposes of Section 6(2) of the Local Government (Contracts) Act 1997.

23.6.3 The Contractor hereby consents to the issue of the Vires Certificate and certification requirements in respect of this Agreement and the Project Documents to which it is a party within Section 3 of the Local Government (Contracts) Act 1997.

**24. HANDBACK PROGRAMME**

- 24.1 On the seventeenth (17th) and twentieth (20th) anniversary of the Section 1 Service Commencement Date there shall be carried out a survey of the Project Facilities (including Plant and Equipment) (the "**Survey**") to establish the works that require to be carried out prior to the Contract Expiry Date to ensure that the Project Facilities shall at the Contract Expiry Date satisfy the Handback Requirements ("**Maintenance Works**").
- 24.2 The Contractor will be obliged to incorporate any Maintenance Works identified by the Survey (insofar as they do not already form part of the Lifecycle Maintenance Schedule and the Planned Maintenance Schedule) into the Lifecycle Maintenance Schedule and the Planned Maintenance Schedule.
- 24.3 Where the Survey identifies Maintenance Works (other than those identified by the Lifecycle Maintenance Schedule and Planned Maintenance Schedule at the date of the Survey) the Contractor shall bear the cost of the Survey and where the Survey identifies no Maintenance Works the Council shall bear the cost of the Survey.
- 24.4 Unless the Council agrees in writing to waive the provisions of this clause 24, thirty six (36) months prior to the Contract Expiry Date there shall be carried out a survey of the Project Facilities (including Plant and Equipment) (the "**Final Survey**") to assess whether the Project Facilities have been and are being maintained by the Contractor in accordance with its obligations in respect of maintenance, repair and renewal pursuant to this Agreement and to establish the works that require to be carried out prior to the Contract Expiry Date to ensure that the Project Facilities shall, at the Contract Expiry Date satisfy the Handback Requirements ("**Final Maintenance Works**").
- 24.5 The Survey to establish the Maintenance Works and the Final Survey to establish the Final Maintenance Works shall be carried out by an independent organisation appointed jointly by both Parties (the

- "**Organisation**") failing agreement on either or both matters as may be determined by an Expert pursuant to the Dispute Resolution Procedure.
- 24.6 The Contractor will be responsible for the costs of the Final Survey.
- 24.7 In carrying out the Survey and, following such Survey, in establishing a list of Final Maintenance Works, the Organisation shall take into account the following in respect of the Project Facilities:
- 24.7.1 their age, character, location and purpose; and
- 24.7.2 any Final Maintenance Works scheduled to be carried out by the Contractor in accordance with the Lifecycle Maintenance Schedule and the Planned Maintenance Schedule between the date on which the Survey was completed and the Contract Expiry Date.
- 24.8 Subject to clause 24.7, the Organisation shall prepare an estimate of cost for each item of the Maintenance Works as well as a proposal in respect of the timing and duration of the works in respect of each item of Maintenance Works (provided that the Organisation shall be instructed that all Maintenance Works are to be completed on or prior to the Contract Expiry Date and that the Maintenance Works require to be carried out so as to minimise any disruption or inconvenience to the normal operation of the Project Facilities). The Contractor shall deliver the Survey to the Council together with the list of Maintenance Works, an estimate of costs, timings and duration of the works (together the "**Proposed Handback Programme**").
- 24.9 Within twenty (20) Business Days of the date of delivery of such Proposed Handback Programme, the Council shall notify the Contractor if it objects to the Proposed Handback Programme and if no such notification is given the Council shall be deemed to have accepted the Proposed Handback Programme.
- 24.10 If no agreement is reached between the Contractor and the Council as to any matter referred to in such Proposed Handback Programme within twenty (20) Business Days of the date of the Contractor's notice under clause 24.8,

then either Party may refer such matter to the Dispute Resolution Procedure for determination:-

- 24.10.1 in the case of an objection in respect of an item of Maintenance Works whether the objection is justified and whether any alternative proposals by the Contractor are more appropriate;
- 24.10.2 in the case of an objection in respect of the timing and duration of the works in respect of an item of Maintenance Works, what programme would be reasonable for the implementation of such item; and
- 24.10.3 in the case of an objection in respect of the cost of the works in respect of an item of Maintenance Works, what amount would represent the reasonable cost of carrying out the works in respect of such item of Maintenance Works, on the assumption that such work will be carried out in accordance with Good Industry Practice.

The Proposed Handback Programme in respect of the Project Facilities accepted by the Council pursuant to clause 24.9 or agreed or determined pursuant to this clause 24.10 shall be the "**Handback Programme**" in respect of the Project Facilities.

24.11 With effect from the date of acceptance or agreement or determination of the Handback Programme pursuant to clause 24.10, the Contractor shall procure that the Maintenance Works are carried out at the cost of the Contractor and in accordance with such Handback Programme.

24.12 **Rectification Reserve**

- 24.12.1 Where the Handback Programme identified Maintenance Works the Council and the Contractor shall, prior to the twenty second (22) anniversary of the Section 1 Service Commencement Date establish a bank account in the joint names of the Council and the Contractor in a bank of the Parties choosing (the "**Rectification Reserve**") (in the event that the Parties are unable

to agree, in a bank as determined by the Expert pursuant to the Dispute Resolution Procedure); and

- 24.12.2 On the first day of each Period following the twenty second (22) anniversary of the Section 1 Service Commencement Date and each subsequent Period the Council will deduct from the Unitary Charge the Rectification Amount and pay such amount into the Rectification Reserve .
- 24.13 The Council will release to the Contractor from the Rectification Reserve an amount equal to the costs identified in the Handback Programme in respect of those Maintenance Works which have been implemented by the Contractor to the reasonable satisfaction of the Council.
- 24.14 Where the Rectification Reserve does not contain sufficient funds to make payment to the Contractor pursuant to clause 24.13, the Council will be required to reduce the Rectification Amount which would otherwise have been payable by the Contractor into the Rectification Reserve to the extent that such sums equal the difference between any payment released to the Contractor pursuant to clause 24.13 and the costs identified in the Handback Programme in respect of those Maintenance Works that have been implemented by the Contractor to the reasonable satisfaction of the Council.
- 24.15 Once the Contractor has fully implemented the Handback Programme to the reasonable satisfaction of the Council, the Council will be required to release to the Contractor all sums accrued to the Rectification Reserve (including any interest).
- 24.16 Where the Maintenance Works have not been carried out by the Contractor to the reasonable satisfaction of the Council by the Contract Expiry Date or the Termination Date the Council will be entitled to retain from the Rectification Reserve (including any interest accrued) such sums as are required to complete any such Maintenance Works not completed in accordance with this clause 24.

## **PART 8: INDEMNITIES AND INSURANCE**

### **25. WARRANTIES**

#### **25.1 Contractor's Warranties**

25.1.1 The Contractor warrants to the Council on the terms set out in Part 15 of the Schedule (*Contractor Warranties*).

25.1.2 Each of the Contractor Warranties is given by the Contractor on the Contract Award Date by reference to the facts and circumstances existing at that date.

25.1.3 Each of the Contractor Warranties shall be separate and independent and, save as expressly provided to the contrary, shall not be limited by reference to any of them or by any other provisions of this Agreement.

#### **25.2 Council's Warranties**

25.2.1 The Council warrants to the Contractor, at the Contract Award Date, the details of the Transferred Employees set out in Part 13 of the Schedule (*Transferred Employees*) are true and complete in all respects.

### **26. INDEMNITIES**

#### **26.1 Contractor Indemnity**

The Contractor shall indemnify and keep indemnified the Council against all Losses whatsoever which may be incurred by the Council or which may be made against the Council by any person (including any officer, servant or agent of the Council but excluding claims by the Contractor against the Council under or in terms of this Agreement) in respect of any loss of or damage to any property and any injury to or sickness or death of any person arising directly or indirectly from:

26.1.1 a negligent act or omission arising in the course of the performance or non-performance of; or

26.1.2 a breach of,

the Contractor's obligations under this Agreement by the Contractor, its employees, agents, representatives, contractors or subcontractors of any tier except to the extent attributable to any act or omission of the Council or its employees, agents or representatives. Provided that the maximum liability of the Contractor for any claim or series of related claims in respect of loss or damage to property under this clause 26.1 shall be restricted to the amount which the Contractor (or if the Contractor fails to make or pursue such claim the Council, as co-insured) recovers under the relevant Contractor Insurances.

**26.2 Council Indemnity**

The Council shall indemnify and keep indemnified the Contractor against all Losses whatsoever which may be incurred by the Contractor or which may be made against the Contractor by any person (including any officer, servant or agent of the Contractor but excluding claims by the Council against the Contractor under or in terms of this Agreement) in respect of any loss of or damage to any property and any injury to or sickness or death of any person arising directly or indirectly from:

- 26.2.1 a negligent act or omission arising in the course of the performance or non-performance of; or
- 26.2.2 a breach of,

the Council's obligations under this Agreement by the Council, its employees, agents or representatives, contractors or subcontractors of any tier except to the extent attributable to any act or omission of the Contractor, its employees, agents, representatives, contractors or subcontractors of any tier. Provided that the maximum liability of the Council for any claim or series of related claims in respect of loss or damage to property under this clause 26.2 shall be restricted to the amount which the Council recovers under the relevant Contractor Insurances.

**26.3 Economic Loss and Mitigation**

- 26.3.1 Neither Party shall be liable to indemnify the other in respect of any consequential loss or loss of profits or economic loss

whatsoever arising out of the indemnities provided for in this clause 26.

26.3.2 The Parties shall take all reasonable steps to mitigate any Losses for which the other Party may be liable under this Agreement.

26.4 **Limit of Indemnity**

26.4.1 Clauses 26.1 and 26.2 shall not apply and a Party (the "**Indemnifier**") shall not be liable or required to indemnify (or otherwise compensate) the other Party (the "**Indemnified**") for:

- (i) Losses to the extent arising from any act or omission (excluding any act or omission which is in accordance with this Agreement) of the Indemnified, its officers or any servant, agent, representative, contractor and/or subcontractor (of any tier) of the Indemnified (including negligence or wilful default) or any failure by the Indemnified to comply with its obligations under this Agreement or any of the Project Documents including any breach of warranty;
- (ii) (where the Indemnified is the Council) Losses to the extent arising from the Contractor's failure to satisfy the Service Commencement Requirements in respect of Curricular Space at Ardnamurchan High School by the Programmed Section 1 Completion Date, in which case liquidated damages payable pursuant to clause 12.11 (*Provisions relating to Ardnamurchan High School*) shall be the Council's sole entitlement to compensation for Losses resulting from such failure;
- (iii) subject to clause 18.9 (*Indemnities*), Losses to the extent attributable to any act or omission occurring prior to the Contract Award Date;
- (iv) Losses in respect of which and to the extent that a payment is made by the Indemnifier and/or any person



on behalf of the Indemnifier to the Indemnified or deductions are made from sums payable to the Indemnifier pursuant to any other provision of this Agreement or the Project Documents; and

- (v) Losses to the extent incurred by the Indemnified in contesting any claims made by a third party against the Indemnified where in contesting such claim the Indemnified has acted unreasonably.

26.4.2 If the Indemnifier pays to the Indemnified an amount in respect of Losses and the Indemnified subsequently recovers (whether by payment, discount, credit, insurance, saving, relief or other benefit or otherwise howsoever and whether such recovery occurs under the terms of this Agreement or otherwise) a sum which is referable to the fact, matter, event or circumstance giving rise to the Losses, the Indemnified shall forthwith repay to the Indemnifier the lesser of:

- (a) an amount equal to the sum recovered (or the value of the savings or benefits obtained) less any costs and expenses incurred by the Indemnified in recovering the same; and
- (b) the amount paid by the Indemnifier to the Indemnified in respect of the Losses.

## 26.5 Settlement of Claims

26.5.1 If the Indemnified receives a notice, demand, letter or other document concerning any claim from which it appears that the Indemnified is or may become entitled to indemnification under this Agreement, the Indemnified shall notify the Indemnifier as soon as reasonably practicable (but in respect of any litigation, arbitration or legal procedure no later than the last date for entering appearance or giving notice of intention to defend those

proceedings) and shall supply a copy of the relevant document to the Indemnified.

26.5.2 Subject to the provisions of this clause 26.5 where notice has been given pursuant to clause 26.5.1 and where it appears that the Indemnified is or may become entitled to indemnification from the Indemnifier in respect of all the liability arising out of the act or omission which is the subject of the claim the Indemnifier shall be entitled to resist the claim in the name of the Indemnified and shall have the absolute conduct of any defence, dispute, compromise or appeal of the claim and of any incidental negotiations and the Indemnified will give the Indemnifier all reasonable co-operation, access and assistance (subject to the recovery of the Indemnified's reasonable costs incurred from the Indemnifier) for the purposes of considering and resisting such claim.

26.5.3 In relation to any claim subject to clause 26.5.2 the Indemnifier shall keep the Indemnified informed as to the conduct of the claim.

26.5.4 Except as permitted by clause 26.5.5, the Indemnified shall not pay or settle any claim without the prior consent of the Indemnifier such consent not to be unreasonably withheld or delayed.

26.5.5 Subject to clause 26.5.4, the Indemnified shall be free to pay or settle any claim only to the extent of the Indemnifieds' legal liability on such terms as it may in its absolute discretion think fit and without prejudice to its rights and remedies under this Agreement in the following circumstances:

- (i) within twenty (20) Business Days of the notice from the Indemnified under clause 26.5.1 the Indemnifier fails to notify the Indemnified of its intention to dispute or have conduct of the claim; or

- (ii) the Indemnifier fails to comply in any material respect with the provisions of clause 26.5.3.

26.5.6 The Indemnified shall be entitled at any time to give notice to the Indemnifier that it is taking over the conduct of any defence, dispute, compromise or appeal of any claim or any incidental negotiations subject to clause 26.5.2. Upon receipt of such notice, the Indemnifier shall promptly take all steps necessary to transfer the conduct of such a claim to the Indemnified and shall provide to the Indemnified all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. In the event that the Indemnified gives notice pursuant to this clause 26.5.6, the Indemnifier shall be released from its indemnity in respect of such claims.

26.5.7 If, following the transfer of the conduct of any claim pursuant to clause 26.5.6, the Indemnified recovers any costs incurred by the Indemnifier pursuant to the claim before such transfer, the Indemnified shall, forthwith upon such recovery, pay such recovered costs to the Indemnifier.

26.5.8 Notwithstanding the rights and obligations conferred by this clause 26.5, in the settlement of claims under this clause 26.5 both the Indemnifier and the Indemnified as a condition of their right to be indemnified hereunder shall comply with reasonable terms and conditions of the Contractor Insurances to the extent that such Contractor Insurances are in force and provided that such terms have been brought to the attention of the Council.

**26.6 Exclusivity of Remedy**

26.6.1 Save as provided in clause 26.6.3 the rights of the Council under Part 9 of the Schedule (*Payment Mechanism*) to:

- (a) make any Monthly Unavailability Deductions shall be the sole and exclusive remedy of the Council in respect

of Non Availability of the Project Facilities or any part thereof; and

- (b) make any Monthly Service Failure Deductions and Reporting Failure Deductions shall be the sole and exclusive remedy of the Council in respect of the Contractor's obligations to perform or procure the performance of Services.

26.6.2 The rights of the Parties under clause 26.1 (*Contractor Indemnity*) and clause 26.2 (*Council Indemnity*) shall be the sole and exclusive remedy of the Parties in respect of any breach of this Agreement by either Party which gives rise to any loss or damage to property and any injury to or sickness or death of any person.

26.6.3 Nothing in clause 26.6.1 shall operate so as to:

- (i) limit the liability of the Contractor in respect of the indemnities given by, the Contractor pursuant to clause 26.1;
- (ii) limit the liability of the Council in respect of the indemnities given by, the Council pursuant to clause 26.2;
- (iii) prejudice the rights of the Parties to terminate this Agreement arising out of clause 22 (*Termination*);
- (iv) limit or affect the obligations of the Parties pursuant to clause 23 (*Consequences of Termination*);
- (v) limit or affect the payment of liquidated and ascertained damages subject to clause 12.11 (*Provisions relating to Ardnamurchan High School*);  
or
- (vi) limit or affect any entitlements of the Parties pursuant to Schedule Part 11 (*Termination Compensation*).

- 26.6.4 Where any remedy (other than a right of termination) is expressly provided for in relation to a particular matter by this Agreement to a Party in respect of any obligation or liability arising out of or in connection with this Agreement such remedy shall be the sole and exclusive contractual (but not procedural) remedy of that Party (save for any other remedies expressly afforded by this Agreement for the same obligations or liability). Subject to clause 3.2.3, to the extent that a remedy is not expressly afforded to a party in relation to that particular matter by this Agreement, all remedies now or hereafter existing at common law or statute shall be available to that Party.
- 26.6.5 Where the Contractor fails to comply with its obligations under clause 12.1 (*Completion of the Building Works*) the Council's sole and exclusive remedy shall be its right to terminate this Agreement pursuant to clause 22.1.1 (ii) (*Termination*), its right to liquidated and ascertained damages pursuant to clause 12.11 (*Provisions relating to Ardnamurchan High School*) and its right to make Monthly Unavailability Deductions pursuant to Part 9 of the Schedule (*Payment Mechanism*).

## **27. INSURANCE**

### **27.1 Insurance Cover**

- 27.1.1 Subject to clause 27.7, the Contractor shall take out and maintain:-
- (i) the Construction Period Insurance in respect of each Section from the Contract Award Date until the date on which each Section satisfies the Service Commencement Requirements; and
  - (ii) the Service Period Insurance from the date on which each Section satisfies the Service Commencement

Requirements and thereafter in respect of each Section throughout the Service Period.

- 27.1.2 Each Party shall not 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 or reduce payment of any claim under any of the insurance policies effected in terms of this Agreement. Each Party shall assist and co-operate with the other Party in relation to bringing claims under such insurance policies.
- 27.1.3 Each Party shall not knowingly do or permit to be done anything which may result in any policy or policies of insurance becoming void or voidable.
- 27.1.4 The Contractor will be required to increase the limits of indemnity set out in the Contractor Insurances annually by reference to the Index or where limits of indemnity are available in specified bands or amounts only to the nearest available amount rounding down.

**27.2 Copies**

On procurement of the policies and on each renewal date, the Contractor shall provide the Council with copies of the policies for all Contractor Insurances (other than the insurances set out on paragraphs 4 of Section A and Section B of Part 19 of the Schedule where the Contractors' obligations will be to provide a summary of the terms of such insurances) within twenty (20) Business Days of a request by the Council in accordance with clause 27.1 together with a list of insurers participating. The Contractor shall within five (5) Business Days of having been requested to do so by the Council supply proof that all relevant premiums due and payable have been paid, that the relevant policy or policies remain in force and that the Council is a named insured on such policies or its interest is endorsed thereon as required.

**27.3 Rights of Subrogation, Notice of Cancellation etc.**

Without prejudice to clause 27.2, the Contractor Insurances) shall contain clauses in terms satisfactory to the Council acting reasonably, to the effect that the insurers agree:

27.3.1 (save where the Council is co-insured under the relevant Contractor Insurances) to waive all rights of subrogation against the Council and its employees, agents and Authorised Users; and

27.3.2 (save to the extent that the Contractor Insurances relate to employers liability and/or motor vehicles policies) that not less than twenty (20) Business Days' prior written notice be given to the Council prior to any cancellation, non-renewal or material modification of any such policy.

#### **27.4 No Acceptance**

The supply to the Council of any certificate of insurance or other evidence of compliance with this clause 27 shall not imply acceptance by the Council that the extent or level of insurance cover is sufficient or, in respect of any proposed variation to the requirements, shall not imply an acceptance by the Council of such variation or that the insurance was not available on Reasonable Commercial Terms, unless the Council accepts any of the proposals of the Contractor under clause 27.7.2 and then only to the extent specifically set out therein.

#### **27.5 Council's Rights to Insure**

Subject to clause 27.7 if the Contractor fails to take out or maintain any of the insurances required by clause 27.1 or clause 27.7.4, the Council may, without prejudice to any of its rights under this Agreement or otherwise and subject to giving the Contractor prior written notice allowing the Contractor a reasonable period to comply with such obligations, be entitled to effect such insurances itself and recover the premiums (and the reasonable administrative and other expenses of so doing) from the Contractor as a debt due.

#### **27.6 Notification of Claims**

- 27.6.1 The Contractor shall notify the Council as a matter of urgency of any accident resulting in death or serious personal injury to any person engaged in the Building Works or the provision of the Services or in material physical damage to the Project Facilities, or any part thereof which is likely to disrupt significantly the use of the Project Facilities as soon as reasonably practicable following the occurrence of such accident or damage.
- 27.6.2 The Contractor shall provide to the Council a report (the "**Insurance Report**") on a six monthly basis identifying:
- (a) all accidents that result in claims under any of the Contractor Insurances;
  - (b) the date of each such accident;
  - (c) brief details of the circumstances of each such accident;
  - (d) the location; and
  - (e) the claimants name (if any) and the actual or estimated cost of any such claim.

**27.7 Uninsurable Risks**

- 27.7.1 In the event that a risk covered by the Contractor Insurances become or is likely to become an Uninsurable Risk the Contractor shall:
- (i) notify the Council within five (5) Business Days of the risk becoming, in the Contractors opinion, or the Contractor becoming aware that the risk may become, in the Contractor's opinion an Uninsurable Risk; and
  - (ii) if the Parties agree, or it is determined in accordance with clause 29 (*Dispute Resolution*) that the risk is an Uninsurable Risk and that the risk becoming an Uninsurable Risk is not caused by the actions of the Contractor, the Building Contractor, any Subcontractor or any Service Provider,



the Parties shall meet to discuss the Contractor's proposals for the management, mitigation or control of the Uninsurable Risk pursuant to clause 27.7.2.

27.7.2 On notifying the Council in terms of clause 27.7.1, the Contractor shall provide detailed proposals as to the manner in which the Uninsurable Risk may be mitigated, managed or controlled including but not limited to any proposals to:

- (i) implement an alternative risk management strategy;  
or
- (ii) procure insurance on terms and conditions other than that set out in the Contractor Insurances or take out a substitute insurance on Reasonable Commercial Terms; or
- (iii) withdraw the Uninsurable Risk from the Contractor Insurances and reduce the Unitary Charge.

Subject to clause 27.7.3, the Contractor and the Council shall, together with their respective insurance advisers, consult on the Contractor's proposals and shall effect any amendment to the Contractor Insurances and/or agree any appropriate and necessary amendment to this Agreement to implement the agreed proposal through a Change Adjustment and the Change Procedure.

27.7.3 Where the requirements of clause 27.7.1 (ii) are satisfied but the Parties are unable to agree a proposal in accordance with clause 27.7.2, then this Agreement shall continue in full force and effect but the Unitary Charge shall be adjusted to deduct an amount equal to the premium that was payable for insurance for the Uninsurable Risk immediately prior to it becoming an Uninsurable Risk and the Contractor Insurances will be adjusted to remove the requirement to retain insurance in respect of the Uninsurable Risk.

27.7.4 The Contractor will be required to review the availability of insurance in respect of any Uninsurable Risk on an annual basis and, should insurance become available in respect of that Uninsurable Risk on Reasonable Commercial Terms, the Contractor will be required to effect such insurance and the Parties shall agree any appropriate and/or necessary amendments to this Agreement (including adjustments to the Unitary Charge to reflect the premium payable) to implement this clause.

27.7.5 On the occurrence of an Uninsurable Risk the Council shall either:

- (i) pay to the Contractor an amount equal to the insurance proceeds that would have been payable (for the avoidance of doubt, excluding any deductible) had the relevant insurance continued and this Agreement will continue in full force and effect; or
- (ii) terminate this agreement and pay to the Contractor an amount equal to the Force Majeure Termination Amount; or
- (iii) issue a Council Change Notice in accordance with Part 14 of the Schedule (*Change Procedure*) to either:
  - (a) exclude any element of the Project Facilities from this Agreement; or
  - (b) require alternative repair works to be carried out.

**27.8 Application of Proceeds**

27.8.1 Subject to the Funder's Direct Agreement the proceeds of any insurance policies effected (save any insurances in respect of loss of revenue) in terms of this Agreement shall be applied as follows:-

- (i) in the case of third party legal liability or employees liability insurance, in satisfaction of the claim in respect of which such proceeds are payable; and
- (ii) in the case of physical damage insurance or professional indemnity insurance, so as to ensure the performance by the Contractor of its obligations under this Agreement.

27.8.2 Subject to the Funder's Direct Agreement, if, despite using its reasonable endeavours (which obligation shall not require the Contractor to appeal against any decision of the relevant planning authority) the Contractor is unable to obtain the necessary planning, third party or building consents required to repair or reinstate damage by a risk covered by any material damage policy within the Contractor Insurances, the Council shall issue a Council Change Notice in accordance with Part 14 of the Schedule (*Change Procedure*) to either:

- (i) exclude any element of the Project Facilities from this Agreement (provided that the Council and Contractor agree any consequential changes to the Project Documents); or
- (ii) require alternative repair works to be carried out.

In the event of clause 27.8.2(i) only, and subject to the Funder's Direct Agreement all proceeds of the Contractor Insurances paid in respect of physical damage (other than in respect of the loss of receipt of the Unitary Charge) shall be paid to the Council.

27.8.3 Subject to the Contractor Insurances and the Funder's Direct Agreement, to the extent that the Council requires any

reinstatement of Project Facilities which are not in accordance with the Building Works Specification then any such reinstatement shall be a Council Change and the provisions of Part 14 of the Schedule (*Change Procedure*) shall apply provided that the Council shall not be liable for the cost of such Council Change unless the reinstatement costs (including design, construction, commissioning, material costs, lifecycle, maintenance and operational costs) are greater than if the Project Facilities were reinstated in accordance with the Building Works Specification.

**27.9 Reinstatement**

27.9.1 Subject to clause 27.7 and clause 27.8.2 (*Application of Proceeds*) and the terms of the Funder's Direct Agreement in order to satisfy the Contractor's obligations in terms of clause 13.1.3 (*The Service Period*) where the Project Facilities require to be repaired or reinstated following damage covered by the Contractor Insurances the Contractor will be required to repair or reinstate the Project Facilities and all insurance proceeds received under any physical damage policies contained within the Contractor Insurances shall be applied (to the extent required) to repair, reinstate and replace each part or parts of the Project Facilities in respect of which the proceeds were received.

27.9.2 Subject to the Funder's Direct Agreement all insurance proceeds paid under any physical damage policies contained within the Contractor Insurances in respect of a single event (or a series of related events) in an amount in excess of fifty thousand pounds) (£50,000) sterling (Indexed) shall be paid to an account in the joint names of the Council and the Contractor.

27.9.3 Subject to clause 27.8 (*Application of Proceeds*), where a claim is made or proceeds of insurances are received or are receivable under any physical damage policies contained within the Contractor Insurances in respect of a single event (or a series of related events) the ("**Relevant Incident**") in an amount in excess of fifty thousand £50,000 sterling (Indexed):

- (i) the Contractor shall deliver as soon as practicable and in any event within twenty (20) Business Days after the making of the claim a plan prepared by the Contractor for the carrying out of the works necessary (the "**Reinstatement Plan**") to repair, reinstate or replace the assets which are the subject of the relevant claim or claims in accordance with clause 27.9.3 (ii) below (the "**Reinstatement Works**"). In the event that, having regard to the nature of the Reinstatement Works the Contractor is unable to provide the Reinstatement Plan within twenty (20) Business Days the Parties shall agree a reasonable extension of time to allow the Contractor to prepare the Reinstatement Plan and in any event the Contractor shall be required to prepare the Reinstatement Plan within forty (40) Business Days. The Reinstatement Plan shall set out:
  - (A) if not the Building Contractor, the identity of the person proposed to effect the Reinstatement Works; and
  - (B) the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Reinstatement Works will become fully operational); and

- (C) details of the interface arrangements (including decant proposals) during the completion of the Reinstatement Works,

which Reinstatement Plan shall be subject to the prior written approval of the Council which approval shall be deemed to have been given where the Council has not responded to the Reinstatement Plan within twenty (20) Business Days following the date of its delivery to the Council.

- (ii) following approval, or deemed approval as the case may be of the Reinstatement Plan in accordance with clause 27.9.3 (i) within a reasonable timescale:
  - (A) the Reinstatement Plan will be adopted;
  - (B) the Contractor shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the Reinstatement Plan approved by the Council;
  - (C) subject to the Funder's Direct Agreement the proceeds received under any physical damage policies contained within the Contractor Insurances in respect of the Relevant Incident (the "**Relevant Proceeds**") (together with any interest accrued) may be withdrawn by the Contractor from the account referred to in clause 27.9.2 above as required to enable it to make payments in accordance with the terms of the contractual arrangements, referred to in clause 27.9.3 (ii) (B) above, and to meet any other costs and expenses of the Contractor for the sole purposes of funding the Reinstatement Works;
  - (D) the Council 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 or are being carried out and completed in accordance with the contractual arrangements referred to in clause 27.9.3 (ii) (B), 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 nor shall any Project Rectification Notice, Primary School Rectification Notice or Warning Notices accrue in respect of the event giving rise to the claim;

- (E) the Council undertakes to use reasonable endeavours to assist the Contractor in the carrying out of the Reinstatement Plan; and
- (F) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Council and in accordance with clause 27.10 below the Council shall permit withdrawal by the Contractor of any Relevant Proceeds then held in the account referred to in clause 27.9.2 above that have not been paid under clause 27.9.3. (ii) (C) above, in respect of the Relevant Incident, together with any interest accrued.

27.10 Save in the circumstances set out on clause 27.8.2, where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace any Project Facilities, the Contractor shall carry out the work in accordance with the Council Requirements and the Building Works Specification so that on completion of the work, the provisions of this Agreement are complied with.

## 27.11 Premium Increases

27.11.1 If the Contractor considers that the premium or deductible in respect of any physical damage policy forming part of the Contractor Insurances on its renewal has increased by more than one thousand pounds (£1,000) sterling (Indexed) as a result of the number and/or nature of claims made under such policy in connection with any act, omission, neglect or default of the Council or any of its agents or employees or any other person for whom the Council is responsible ("**Council Related Claims**") the Contractor shall deliver to the Council, not less than fifteen (15) Business Days prior to the renewal date for such policy, a report prepared by the Contractor's insurance adviser setting out the following:

- (a) the renewal premium and deductible including the amount of the increase in such premium or deductible over the previous year's premium and deductible;
- (b) a statement setting out the claims history under the policy for the period affecting the renewal premium or deductible, giving details of the Council Related Claims;
- (c) an attribution of the reasons for the premium or deductible increase including those arising from:-
  - (i) changes to the insurance market generally, other than general market increases caused by the Council (together with related claims) and/or Council Related Claims;
  - (ii) changes in the scope and limits of liability of the policy;
  - (iii) claims made under the policy, whether or not Council Related Claims; and
  - (iv) other causes; and



(d) the increase in premium or deductible which is reasonably and equitably attributable to the Council Related Claims.

27.11.2 The Council shall within ten (10) Business Days after receipt of the report referred to in clause 27.11.1 above notify the Contractor of any matters in such report with which it does not agree. Where the Parties fail to agree such matters within ten (10) Business Days of the Contractor delivering the report to the Council, the same shall be referred to in the Dispute Resolution Procedure for determination.

27.11.3 Any increase in the premium and/or deductible (as the case may be) agreed or determined to be attributable to Council Related Claims shall be payable by the Council to the Contractor, such amount to be paid by the Council (in the case of increased premiums) each time a renewal premium in respect of the relevant policy is paid by the Contractor or (in the case of increased deductible) within twenty (20) Business Days of invoice by the Contractor in respect of any claims for which the deductible is increased until such time as the report prepared in accordance with this paragraph states (or is determined) that the relevant Council Related Claims no longer affect the premium and deductible payable by the Contractor.

#### 27.12 **Vandalism**

27.12.1 This clause 27.12 sets out the obligations of the Parties for repairing or replacing (or paying for the repair of) the Project Facilities or any part thereof which has been damaged by vandalism.

27.12.2 Subject to clause 27.12.3 the Contractor shall, at its own cost and within the relevant Rectification Period set out in the Service Specification, repair or replace the Project Facilities or any part thereof which has been damaged by vandalism.

27.12.3 The Council will be solely responsible for the cost of repair or replacement of the Project Facilities or any part thereof which is damaged as a result of vandalism:

- (i) during School Hours;
- (ii) outwith School Hours but during Core Hours to the extent that such vandalism occurs within Designated Areas, and
- (iii) outwith Core Hours where the Council is using the Project Facilities pursuant to clause 15.2 to the extent that such vandalism occurs within Designated Areas,

to the extent of the deductible under the relevant policy of insurance maintained by the Contractor in terms of Part 19 of the Schedule (*Contractor Insurances*) only or to the extent that the Contractor is unable to recover such costs under the Contractor Insurances as a result of any act or omission of the Council.

27.12.4 Where the Council are unable to fund the repair or replacement of vandalism referred to in clause 27.12.3, the Council will be entitled to instruct a Council Change in respect of the said repair or replacement.

27.12.5 The Contractor will be under an obligation to mitigate the costs incurred in repairing and/or replacing the Project Facilities or any part thereof damaged as a result of vandalism for which the Council is financially responsible pursuant to clause 27.12.3.

## **28. NEGATIVE COVENANTS**

28.1 The Contractor undertakes to the Council that it will not without the prior consent of the Council (such consent not to be unreasonably withheld or delayed):

28.1.1 engage in any business other than the entry into and implementation of this Agreement and the Project Documents and any related and consequential transactions;

28.1.2 form or acquire or dispose of any subsidiary;

- 28.1.3 acquire any business or undertaking or sell or dispose of the business or undertaking or any substantial part thereof of it or any of its subsidiaries or subsidiary undertakings;
- 28.1.4 incur any indebtedness, other than its obligations under any Funding Agreement and any other Project Document or Supplemental Funding Documents, or assume or guarantee any indebtedness of any other person;
- 28.1.5 not create or permit to subsist any Security Interest on, over or affecting the whole or any part of its undertaking or assets, present or future other than any interest created under the Funding Agreement, any retention of title provisions in a suppliers standard conditions of supply of goods acquired in the ordinary course of business or any liens (in the ordinary course of business or arising by law);

## PART 9 : MISCELLANEOUS

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### 29. DISPUTE RESOLUTION PROCEDURE

The Dispute Resolution Procedure set out in Part 16 of the Schedule (*Dispute Resolution Procedure*) shall apply to all disputes, differences and/or claims between the Parties in regard to the interpretation or application of, or arising from, this Agreement (herein referred to as a "**Dispute**") and except where otherwise provided either Party shall be entitled to refer such a Dispute to the Dispute Resolution Procedure at any time. Except to the extent otherwise provided in the Dispute Resolution Procedure a decision of the Dispute Resolution Procedure shall be final and binding on the Parties.

### 30. CONFIDENTIALITY

#### 30.1 General

Each Party shall hold in confidence both during and after the termination of this Agreement, subject to the terms of clause 30.3 all documents and other information in whatever form, whether technical, commercial or financial, supplied by or on behalf of the other Party pursuant to this Agreement, (including without limitation, all documents and information supplied in the course of any proceedings under the Disputes Resolution Procedure) (all herein referred to as "**Confidential Information**"). Each Party shall not, without the prior written consent of the other Party (such consent not to be unreasonably withheld or delayed), disclose or transfer Confidential Information to any person, other than the authorised representatives or agents (including professional advisers, contractors, and in the case of the Contractor, the Funder, Subcontractors and Service Providers or prospective funders, prospective Subcontractors or prospective Service Providers), of that Party subject always to ensuring that all such persons are aware of and agree to abide by the confidentiality undertakings of the Parties.

## 30.2 Exclusions

The provisions of clause 30.1 shall not apply to any Confidential Information:

- 30.2.1 to the extent that it is in or enters the public domain through no fault of the recipient party under this Agreement or is trivial or obvious;
  - 30.2.2 which was rightfully acquired from a third party who was not under any obligations of confidence owed to either of the Parties hereto in relation to such Confidential Information;
  - 30.2.3 which is required to be disclosed by Legislation or any court or process of arbitration;
  - 30.2.4 which is required to be disclosed by the regulations of any recognised share exchange;
  - 30.2.5 which is required to be disclosed to or by any Minister of the Crown, government department, the Scottish Executive, the Scottish Ministers, regulatory or fiscal body, parliamentary committee or authority whether governmental, quasi-governmental or otherwise and their authorised agents (including professional advisers);
  - 30.2.6 which is required to be disclosed for the purposes contemplated by this Agreement; or
  - 30.2.7 which is required to be disclosed to an Expert or a Fast Track Expert appointed pursuant to Part 16 of the Schedule (*Dispute Resolution Procedure.*); or
  - 30.2.8 which is required to be disclosed in connection with any Benchmarking Exercise, Market Test Proposal, or tendering or pricing exercise undertaken with a view to letting a contract in respect of all or part of a relevant parties obligations under this Agreement.
- 30.3 Each Party undertakes that if it or its professional advisers, agents, contractors, and in the case of the Contractor, their funders or Subcontractors, become (or are reasonably likely to become) legally

compelled to disclose any such Confidential Information, it shall give written notice thereof to the other Party to the extent permitted by law, to include details of the proposed form, nature and purpose of the disclosure, as expeditiously as possible.

30.4 Each Party confirms and undertakes to the other Party that it is acting in this matter as a principal and not as agent or broker for any other person, and that it shall be responsible for any breach of the terms of this Agreement by itself, its professional advisers, agents, contractors, and in the case of the Contractor, the Funder or Service Providers.

**30.5 Continuation of Obligations of Confidentiality**

The obligations of the Parties under this clause 30 shall continue for a period of five (5) years following the date of termination of this Agreement notwithstanding such termination.

**31. INTELLECTUAL PROPERTY**

**31.1 Design and Other Data**

The Contractor shall, subject always to the provisions of clause 35 of this Agreement:-

31.1.1 make available to the Council on request without charge all materials documents and data of any nature (including without limitation all Design Data) acquired or brought into existence in any manner whatsoever by or on behalf of the Contractor for the purposes of the carrying out the Building Works or in the provision of the Services and which might reasonably be required by the Council for the purposes of exercising its rights or carrying out its duties under this Agreement or carrying out any statutory duty; and

31.1.2 use all reasonable endeavours to make available to the Council on request all such materials, documents and data acquired or brought into existence by third parties as may reasonably be required for the purposes referred to in clause 31.1.1.

### 31.2 Licence to the Councils

The Contractor hereby grants to the Council a perpetual, non-transferable, non-exclusive, royalty-free licence to copy, adapt and/or distribute to its permitted sub-licensees solely for the purposes of:-

- (i) carrying out its obligations under this Agreement or its statutory functions, (but only at or with respect to or utilising any of the Project Facilities) exercising its rights under this Agreement, the re-tendering of the Project and/or performing any Required Action in terms of clause 21 (*Council Step-In*); or
- (ii) following termination of this Agreement completing the Building Works at the Project Sites; or
- (iii) following termination of this Agreement using extending, improving and maintaining the Project Sites and the Plant and Equipment (but always excluding any Intellectual Property Rights protecting or comprised in the application of the software used to deliver the Helpdesk, but including any data relating to the Services generated using such software) (together, (i), (ii), and (iii) above being the "**Permitted Purposes**")

any Design Data or other data including without limitation any calculations, designs, design information, specifications, plans, drawings, graphs, sketches, models and/or other materials and all eye readable or computer or other machine readable data prepared by or on behalf of the Contractor relating to the Services and the delivery of the Services the Intellectual Property in which is, or becomes vested in the Contractor and where any Intellectual Property in such items is vested in any third party, the Contractor shall, at the Contractor's cost, procure the grant of a like licence of such Intellectual Property to the Council for the Permitted Purposes and at any time. The Council shall have the right to grant sub-licences under the licence set out in this clause 31.2 to any third party for the Permitted Purposes.

**31.3 Licence to the Contractor**

The Council hereby granted to the Contractor a non-transferrable, non-exclusive, royalty-free licence to copy, adapt and/or distribute to its permitted sub-licensees solely for the purposes of either:-

- (i) carrying out the Building Works; or
- (ii) the performance of the Services; or
- (iii) performing its obligations under this Agreement

all and any Supplied Data subject to the following restrictions:-

- (A) the licence shall terminate on the earlier of the Contract Expiry Date and the Termination Date;
- (B) the Contractor may only reproduce any Intellectual Property which is, or becomes vested in the Council when accompanied by a notice to the effect that the Intellectual Property is the property of the Council.

The Contractor shall have the right to grant sub-licences under the licence set out in this clause 31.3 to any third party with which the Contractor enters into a contract under which such third party is obliged to either:

- (1) complete some or all of the Building Works at the Project Sites; or
- (2) operate or maintain some or all of the Project Sites.

**31.4 Computerised Data**

31.4.1 If the Council (acting reasonably) requires computer software (including without limitation database management software) to view and/or print any of the Design Data, Project Documents, Supplemental Project Documents or data, materials and documents provided to the Council in terms of clause 37 and the Council does not already have the right to execute such software, and licences to use such software are not commercially available, then the Contractor shall procure for the benefit of the Council at no charge the grant of a licence or sub-licence for and supply of any such software or database to enable the Council or its



nominee to access and otherwise use such data for the purpose of this Agreement.

**31.5 Indemnity to the Council**

The Contractor shall indemnify the Council and each sub-licensee of the Council in terms of clause 31.2 from and against all Losses arising from or incurred by reason of any claim, demand or action made or brought by any person which allege that use of Design Data, Project Documents, Supplemental Project Documents (other than such provided by the Council to the Contractor) infringes Intellectual Property. The foregoing provisions of this clause 31.4 shall not apply to the extent that such claim, demand or action arises as a result of a breach by the Council of clause 31.2 and/or 31.9. The provisions of clause 26.4 (*Limit of Indemnity*) and clause 26.5 (*Settlement of Claims*) shall apply to claims under this clause 31.5.

**31.6 Indemnity to the Contractor**

Notwithstanding clause 3.2.2, the Council shall indemnify the Contractor, the Building Contractor and each Consultant, Subcontractor and Service Provider from and against all Losses arising from or incurred by reason of claims, demands, or actions made or brought by any person which allege that use of Supplied Data (other than Design Data provided by the Contractor to the Council) infringes Intellectual Property. The foregoing provisions of this clause 31.6 shall not apply to the extent that such claim, demand, or action arises as a result of use of such data other than as expressly licensed in 3.1.2. The provisions of clause 26.4 (*Limit of Indemnity*) and clause 26.5 (*Settlement of Claims*) shall apply to claims under this clause 31.6.

**31.7 Third Party Rights**

Clause 31.5 (*Indemnity to the Council*) and clause 31.6 (*Indemnity to the Contractor*) are intended to create legal rights for third parties under this Agreement enforceable by such parties through a Court action in their own name. Notwithstanding such third party rights:

31.7.1 the Council and/or the Contractor may terminate this Agreement in accordance with the terms hereof without the consent of any such third party; and

31.7.2 the Council and/or the Contractor may vary the terms of this Agreement in accordance with the terms hereof without the consent of such third party.

**31.8 Further Assurances**

The Contractor and the Council each undertakes at the request of the other to execute all documents and use reasonable endeavours to do all acts which may be necessary to bring into effect or confirm the terms of any ~~assignment or licence~~ contained in this clause 31.

**31.9 No Assignment or Sublicensing**

Other than as expressly set out in this clause 31 and subject to clause 34, neither Party may assign, transfer or sub-licence any licence granted to it under this clause 31.

**31.10 Exclusion of Implied Licences**

Other than as expressly set out in this clause 31, nothing in this Agreement is intended to transfer or grant another party any right to use Intellectual Property. The Parties hereby exclude all implied warranties, conditions, terms and/or licences relating to/of Intellectual Property.

**32. CORRUPT GIFTS**

32.1 The Contractor shall not, and shall procure that persons for whom it is responsible under this Agreement shall not, offer or give or agree to give to any person in the employ of the Council any gift or consideration of any kind as inducement or reward for doing or forbearing to do any act or showing favour or forbearing to show disfavour to any person in relation to this Agreement.

32.2 The Contractor represents to the Council that:

32.2.1 neither the Contractor nor any person for whom it is responsible under this Agreement has offered or given or agreed to give to any person in the employ of the Council any gift or consideration

of any kind as an inducement or reward for doing or forbearing to do any act in relation to the obtaining or execution of this Agreement; and

32.2.2 in connection with the obtaining or execution of this Agreement no commission has been paid or agreed to be paid by the Contractor or to its knowledge on its behalf.

32.3 Subject as provided in clause 32.4 any material breach of clause 32.1 or 32.2 or the commission of any offence by the Contractor or any person for whom it is responsible under this Agreement under the Prevention of Corruption Acts 1889 to 1916 in relation to this Agreement (hereinafter referred to as the "**Prohibited Act**") shall entitle the Council to act as follows:

32.3.1 if the Prohibited Act was committed by or on the instructions of any director of the Contractor, and in the case of any conviction under the Prevention of Corruption Acts 1889-1916 which is not the subject of appeal, then the Council shall be entitled to terminate this Agreement;

32.3.2 without prejudice to its other rights under clause 32, if the Prohibited Act was committed by or on the instructions of any director or employee of the Contractor, and in the case of a conviction under the Prevention of Corruption Acts 1889 to 1916 is not the subject of appeal, then the Council shall be entitled to require the Contractor to dismiss such employee or director;

32.3.3 without prejudice to its other rights under clause 32, the Council shall be entitled to require the Contractor to dismiss any director or any employee of the Contractor who was aware of any act or instructions which gave rise to the Prohibited Act (not the subject of an appeal referred to in clause 32.3) and who did not use his reasonable endeavours to prevent such Prohibited Act;

- 32.3.4 without prejudice to its other rights under clause 32, if the Prohibited Act was committed by or on the instructions of any subcontractor of the Contractor or any employee of such subcontractor, and in the case of any conviction under the Prevention of Corruption Acts 1889 - 1916 which is not the subject of appeal, then the Council shall be entitled either to require the termination of the appointment of such subcontractor and the appointment of a new subcontractor within twenty (20) Business Days or, in the case of an employee acting independently, the termination of the employment of that employee;
- 32.3.5 without prejudice to its other rights under clause 32, if the Prohibited Act was committed by or on the instructions of any other person for whom the Contractor is responsible under this Agreement, and in the case of any conviction under the Prevention of Corruption Acts 1889 - 1916 is not the subject of appeal, then the Council shall be entitled to require such other action be taken by the Contractor, consistent with the Council's other rights under clause 32 as the Council reasonably considers to be necessary;
- 32.4 In exercising its rights or remedies under clause 32 the Council shall:
  - 32.4.1 act in a reasonable and proportionate manner having regard to such matters as the gravity of, and the identity of the person performing, the Prohibited Act and any actions of the Contractor; and
  - 32.4.2 give all due consideration, where appropriate, to action other than termination of this Agreement under clause 32.3 including but not limited to requiring the Contractor to take such other action as is envisaged in clause 32.3.
- 32.5 The Contractor shall, and shall procure that the Building Contractor, any Service Providers and its Subcontractors shall, put in place procedures

requiring each of their Company Secretaries to verify on an annual basis on behalf of each of its directors and employees that they have not committed or instructed the commission of a Prohibited Act.

32.6 The Contractor shall permit the Council, or procure that the Council is permitted, to have access to the documentation relating to the procedures put in place pursuant to clause 32.5 at such times as the Council may reasonably request to ensure compliance with clause 32.5. In the event of the commission of any Prohibited Act, the Contractor will increase the monitoring of the acts of its directors, employees and subcontractors in order to minimise the possibility of the occurrence of any other Prohibited Act in such manner as the Council may reasonably request.

### **33. NON-DISCRIMINATION**

#### **33.1 General**

The Contractor shall not discriminate directly or indirectly against any person because of their colour, race, nationality or ethnic origin and without prejudice to that generality shall comply with the employer's statutory obligations under the Race Relations Act 1976 and shall comply with the Commission for Race Equality's Race Relations Code of Practice in Employment from time to time insofar as consistent with any published Code of Practice or Guidelines of the Council.

#### **33.2 Sex and Disability Discrimination**

The Contractor shall at all times comply with the provisions of the Sex Discrimination Act 1976 and the Disability Discrimination Act 1995 and any related published Codes of Practice or Guidelines provided by the Council to the Contractor from time to time.

#### **33.3 Observance by Third Parties**

The Contractor shall take all reasonable steps to procure that the obligations contained in clauses 33.1 and 33.2 are complied with by all servants, employees or agents of the Contractor and of any Service Provider and by

all contractors or sub-contractors of any tier engaged in the provision of the Services.

**33.4 Evidence of Compliance**

The Contractor shall provide such information as the Council may reasonably request for the purpose of assessing the Contractor's compliance with the foregoing provisions of this clause 33 including, if requested, examples of any instructions, recruitment, advertisements and details of procedures for monitoring applicants and employees.

**34. ASSIGNATION AND SUB-CONTRACTING**

**34.1 Assigination by the Contractor**

The Contractor shall not, without the prior consent of the Council assign, transfer, create or allow to subsist any security, encumbrance, trust or interest in the Project Documents or any part thereof or any benefit or interest therein or thereunder other than an assignation in security to the Funder pursuant to the Funding Agreement or any Security Interest permitted to be created in terms of clause 28.1.

**34.2 Subcontracting**

Subject to the terms of this Agreement the Contractor may in accordance with Good Industry Practice subcontract or sublet to any person the performance of any of its duties, obligations or responsibilities under this Agreement.

**34.3 Assigination by the Council**

The rights and/or obligations of the Council under this Agreement and any of the Project Documents shall not (without the prior consent of the Contractor) be novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) to another person other than:

- 34.3.1 the Government (or any department, office, instrumentality or agency of it) or any local authority which (in any such case) has the legal capacity and sufficient financial resources to perform the obligations of the Council under this Agreement and any of the Project Documents; or

34.3.2 subject to clause 34.3.3 below, any person who has the legal capacity to perform the obligations of the Council under this Agreement and the Project Documents and whose obligations under this Agreement and the Project Documents are validly and enforceably guaranteed by the Council, the Government (or any department, office, instrumentality or agency of it) or any local authority which (in any such case) has the legal capacity and sufficient financing resources to perform the obligations of the Council under this Agreement and any of the Project Documents;

34.3.3 for the purposes of clause 34.3.2 above, an obligation shall be deemed to be validly and enforceably guaranteed if the relevant body has delivered a legal opinion to the Contractor stating that the guarantee is fully valid and enforceable in accordance with its terms (subject to customary qualifications and assumptions) from a reputable firm of solicitors approved in advance by the Contractor (such approval not to be unreasonably withheld or delayed) having appropriate experience of the matters opined upon.

### **35. COMPLIANCE WITH LEGISLATION**

35.1 Subject to their respective obligations in terms of the Change Procedure, the Parties shall perform their obligations under this Agreement and any of the Project Documents in accordance with Legislation.

35.2 Without prejudice to the generality of clause 35.1, the Contractor shall give all notices, obtain and maintain in full force and effect, and pay all fees required to be paid in relation to all permits, authorisations, licences, consents and other necessary approvals in relation to the provision of the Services as is required for the proper performance of the Contractor's duties and obligations under this Agreement or any Project Document.

35.3 Without prejudice to the generality of clause 35.1, the Contractor shall, and shall procure that its agents, contractors, subcontractors and each Service Provider shall, comply in all respects with its obligations in terms of any relevant Legislation in relation to management or protection of Personal Data which it is processing in terms of this Agreement or any of the Project Documents, including (without limitation) the DPA, and in particular the Contractor shall, and shall procure that its agents, contractors, subcontractors and each Service Provider shall:-

35.3.1 notify the Data Protection Commissioner under the DPA of any processing they perform under the terms of this Agreement or any of the Project Documents;

35.3.2 implement and maintain appropriate technical and organisational measures against unauthorised and unlawful processing of Personal Data and against accidental loss and destruction of or damage to Personal Data; and

35.3.3 allow the Council and/or its duly authorised representatives reasonable access to its offices and relevant systems as may be required to ensure compliance with the DPA in relation to any processing they perform under the terms of this Agreement or any of the Project Document.

### **36. CHANGE OF CONTROL**

36.1 The Contractor shall be permitted by the Council to transfer shares of whatever class at any time during the Contract Period unless such a transfer is prohibited by the provisions of clause 36.2.

36.2 The Contractor shall not be permitted by the Council to transfer shares pursuant to clause 36.1 where either:

36.2.1 that transfer would in the period of twelve (12) months from the Section 1 Service Commencement Date result in the shares of the Contractor (of whatever class) being held other than in the legal and beneficial ownership of the Shareholders identified in



Part 20 of the Schedule (*Contractor Details*) or in the same proportions in which such share capital is held by them at the Contract Award Date save to the extent that such transfer is required:

- (i) by virtue of the creation, enforcement or transfer of any security held by the Funder; or
- (ii) pursuant to the Shareholders Agreement; and/or

36.2.2 that transfer would result in shares of the Contractor being owned by a Prohibited Person;

### **37. RECORDS**

37.1 Save to the extent that information is to be provided or records maintained elsewhere in this Agreement the Contractor shall, and shall procure that its subcontractors and their agents, contractors and any Service Provider, shall maintain a true and complete set of records relating to the performance of the Project and the Contractor shall maintain a complete up to date and orderly documentation record of all transactions entered into by the Contractor for the purposes of discharging its obligations under this Agreement.

37.2 The Contractor shall ensure that:

37.2.1 all documents kept pursuant to clause 37.1 shall be kept in good order and shall be made available at all reasonable times for inspection by the Council and any third party identified by the Council on reasonable grounds including without prejudice to the generality of the foregoing any Governmental audit organisation and the Contractor shall make available (or, as the case may be, procure the availability of) such items of clarification or substantiation as may be required by the Council in relation thereto including such oral or written explanations as may be considered necessary by the Council (acting reasonably); and

- 37.2.2 The Contractor and any agent, contractor, sub-contractor and Service Provider shall provide the Council with one copy of any or all of the documents referred to in clause 37.1 free of charge within five (5) Business Days of the Council's request for the same. Where the Council requires additional or subsequent copies of such documents the Contractor shall provide such copies as soon as is reasonably practicable, and at the Council's cost.
- 37.3 At the Contract Expiry Date the Contractor shall and shall procure that its agents, employees contractors and sub-contractors shall give notice to the Council if they intend to destroy any document referred to in clause 37.1 (and any other records the Contractor is required to keep under any Project Document). The Council may on receipt of such notice intimate to the Contractor that it wishes to take possession of such documents as are required by the Council which documents will be delivered to the Council at the Contractor's cost. If the Council fails to respond to such a notice within thirty (30) Business Days the Contractor may destroy such documents.
- 37.4 The Contractor shall maintain such contemporaneous records in relation to the Contractor's obligations under this Agreement and other documentation in relation to the Contractor's obligations under this Agreement as shall be reasonably required by the Council to support the Council in any criminal or civil proceedings by or against the Council. The Contractor shall ensure that all such records and other documentation are complete and accurate and shall provide all reasonable assistance as may be required by the Council to support any such criminal or civil proceedings.

**38. SEVERABILITY**

If any of the provisions of any Project Document is found to be illegal, void, invalid and/or otherwise unenforceable, such provision shall to that extent be deemed to be severed and deleted from the relevant Project Document without prejudice to the rest of the relevant Project Document and any other Project Document which shall continue in full force and effect.

**39. SURVIVAL**

The provisions of clauses 1, 23, 29, 30, 31, 32, 37 and this clause 39 shall survive the termination of this Agreement and continue in full force and effect along with any other clauses or Parts of the Schedule necessary to give effect to them.

**IN WITNESS WHEREOF** these presents consisting of this and the preceding 123 pages together with the schedule in twenty three parts and four annexures have been signed as follows:

**SUBSCRIBED** for and on behalf of **THE HIGHLAND COUNCIL** at Glasgow on the Twelfth day of June 2001 by a proper officer in the presence of:

.....Witness .....  
Duly Authorised Signatory  
.....Full Name  
.....  
.....Address .....  
..... Full Name

**SUBSCRIBED** for and on behalf of **COMMUNITY SCHOOLS (HIGHLANDS) LIMITED** at Glasgow on the Twelfth day of June 2001 by one of its directors/authorised signatories in the presence of:

.....Witness .....  
Duly Authorised Signatory  
.....Full Name  
.....  
.....Address .....  
..... Full Name