

## Schedule 1

### Definitions and Interpretation

#### 1 Definitions

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

**5 Year Maintenance Plan** means the plan, to be prepared by or on behalf of the Authority, for any works for the maintenance or repair of the Facilities, including the renewal or replacement of plant or equipment as necessary, during each five year period for the duration of the Project Term, which shall be updated not later than [♦] Business Days prior to the commencement of each Contract Year (and any amendments thereto)

**1999 Act** means the Local Government Act 1999

**Actual Completion Date** means the date on which the Works have been completed in accordance with this Agreement, as such date shall be stated in the Certificate of Practical Completion or, in the event of dispute, as such date may be determined in accordance with the Dispute Resolution Procedure

**Additional Permitted Borrowing** means on any date, the amount equal to the amount of principal outstanding under the Senior Financing Agreements (as the same may from time to time be amended, whether or not with the approval of the Authority) in excess of the amount of principal scheduled under the Senior Financing Agreements at Financial Close to be outstanding at that date but only to the extent that:

- (a) this amount is less than or equal to the Additional Permitted Borrowings Limit; and
- (b) in respect of any Additional Permitted Borrowing, the Agent is not in material breach of its obligations under clause 10(d)(iii) of the Direct Agreement as it applies to such Additional Permitted Borrowing and provided further that any such excess amount of principal which is invested as part of any Qualifying Variation shall not be counted as Additional Permitted Borrowing

and provided further that any such excess amount of principal which is: (i) invested as part of any Qualifying Variation or (ii) outstanding from time to time as a result of any drawing under the Senior Financing Agreements as entered into at the date of this Contract, disregarding any subsequent amendment or (iii) outstanding from time to time as a result of any amendment to the Senior Financing Agreements in respect of which the Authority has agreed that its liabilities on a termination may be increased pursuant to Clause 3.4(a), shall not be counted as Additional Permitted Borrowing

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

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

**Adjusted Amount** has the meaning given in clause 40.15(c) (*Insurance*)

**Administering Authority**<sup>1</sup> means [*name of administering authority*] Council of [*address*] acting in its capacity as administrator of the Scheme

**Admission Body** means a transferee admission body for the purposes of regulation 5A of the LGPS Regulations

**Affected Party** has the meaning given to it in the definition of Force Majeure Event in this Schedule 1 (*Definitions and Interpretation*)

**Affiliate** means in relation to any person, any Holding Company or any Subsidiary of that person or any Subsidiary of such Holding Company

**Agent** means [♦] in its capacity as agent for the Senior Lenders under the Senior Financing Agreements

**Agreed Form** means in relation to any document, the form of the document agreed between the parties and initialled by or on behalf of the parties for the purpose of identification

**Agreement** means this agreement (including its Schedules)

**Ancillary Intellectual Property Rights** means any and all Intellectual Property Rights which are not Generated Intellectual Property Rights including without limitation any Intellectual Property Rights created prior to the date of this Agreement by the Service Provider

**Ancillary Rights** means such rights of passage over, access to and egress from the Site as shown in the Site Plan where:

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<sup>1</sup> This definition will be required only if there is a transfer of staff under the Transfer of Undertakings Regulations (**TUPE**) and the Service Provider is becoming an admitted body to the Local Authority Pension Scheme. The administering authority will be the same as the Council in Social Services projects but the definition is required to acknowledge its different status.

- (a) areas shown coloured [blue] are exclusively licensed to the Service Provider during the period shown on the relevant Site Plan;
- (b) areas shown coloured [red] are non-exclusively licensed to the Service Provider during the period shown on the relevant Site Plan; and
- (c) areas shown coloured [brown] are non-exclusively licensed to the Service Provider for the purpose of the passing and re-passing of pedestrians, vehicles and plant during the period shown on the relevant Site Plan but not for occupation by the Service Provider or any Service Provider Party

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

**Annual Service Plan** has the meaning given to it in clause 49.5 (c) (*Best Value*)

**Annual Service Report** has the meaning given to it in clause 49.5 (*Best Value*)

**Appropriate Limit** has the meaning given to it in clause 64.7 (*Freedom of Information Act*)

**Approved Purposes** has the meaning given to it in clause 63.1 (*Intellectual Property*)

**Approved RDD Item** means an item of Reviewable Design Data which has been returned or deemed to have been returned marked "*no comment*" or "*proceed subject to amendment*" under the Review Procedure

**As-built Drawings** means drawings, technical information, models, operation and maintenance manuals and technical information of a like nature to encompass the method of construction, manufacture, operation and maintenance of each element of the Facilities in sufficient detail to allow a competent person to understand all material elements of the construction of the Facilities and to maintain, dismantle, reassemble, adjust and operate all plant, equipment, fixtures, structures and construction elements thereof

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

- (a) any land or buildings;
- (b) any equipment;
- (c) any books and records (including operating and maintenance manuals, health and safety manuals and other know how);

- (d) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred);
- (e) any revenues and any other contractual rights; and
- (f) any Intellectual Property Rights,

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

**Assigned Employees** has the meaning given to it in clause 32.1(a) (*Employment Obligations on Expiry/Termination*)

**Associated Companies** means, in respect of a relevant company, a company which is a Subsidiary, a Holding Company or a company that is a Subsidiary of the ultimate Holding Company of that relevant company, and in the case of the Service Provider shall include Hold Co and each of the Shareholders and the term **Associate** shall be interpreted accordingly<sup>2</sup>

**Authority Break Point Date** means [ ]<sup>3</sup>

**Authority Change** means any Change requested by the Authority which the Service Provider is obliged to implement pursuant to the Change Protocol

**Authority Change Notice** means a written notice served by the Authority requiring a Change, in accordance with paragraph 2.2 of Part 1 of the Change Protocol

**Authority Collateral Agreements** means:

- (a) the Construction Warranty;
- (b) the FM Contractor Direct Agreement;
- (c) the Services Contractor Direct Agreement;
- (d) the Collateral Warranties from each member of the Professional Team,

and **Authority Collateral Agreement** shall mean any of them

**Authority Commissioning** means the commissioning activities as identified in the Outline Commissioning Plan to be carried out by the Authority before the Actual Completion Date

**Authority Consents** means any consent which as a matter of Legislation, the Services Provider is not eligible to obtain

<sup>2</sup> If a fund or limited partnership or "50:50" owned vehicle (which is not a "subsidiary") or similar is in the relevant ownership chain of the Service Provider, this definition will need to be expanded to cover it. See further footnote 2 and Section 34 of SOPC4.

<sup>3</sup> To be bid as part of the ISDS. See footnote to clause 55.2 (Termination on Authority Break Point Date).

**Authority Construction Requirements** means the requirements of the Authority in relation to the design and construction of the Facilities set out in Schedule 3 (*Authority Construction Requirements*)

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

- (a) an expropriation, sequestration or requisition of a material part of the Assets and/or shares of the Service Provider by the Authority or other Relevant Authority;
- (b) a failure by the Authority to make payment of any amount of money exceeding £[ ]<sup>4</sup> (indexed) that is due and payable by the Authority under this Agreement within thirty (30) Business Days of service of a formal written demand by the Service Provider, where the amount fell due and payable [two (2)] (or more) months prior to the date of service of the written demand;
- (c) a breach by the Authority of its obligations under this Agreement which substantially frustrates or renders it impossible for the Service Provider to perform its obligations under this Agreement for a continuous period of [two (2)] months; or
- (d) a breach by the Authority of clause 69.1 (Assignment and Subcontracting)

**Authority Equipment** means any equipment owned by the Authority including, for the avoidance of doubt, the equipment to be installed prior to the Actual Completion Date as is listed in the Authority Construction Requirements and the Final Commissioning Plan<sup>5</sup>

**Authority Existing Employee** means in relation to any service equivalent to any of the Services all these persons employed by the Authority under a contract of employment (excluding to avoid doubt (without limitation) any person employed by the Authority as an independent service provider or persons employed by any sub-contractor engaged by the Authority) who are wholly or substantially engaged in the provision of that service as at the Service Commencement Date

**Authority Party** means any officer, agent or employee of the Authority acting in the course of his office or employment including any sub-contractors supplied by the Authority in relation to the Services and **Authority Related Parties** shall be construed accordingly

**Authority Policies** means the policies of the Authority listed in Schedule 21 (*Authority Policies*)

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<sup>4</sup> The amount would depend on the size of the contract but it should be reasonably substantial, not less than one monthly service payment.

<sup>5</sup> To be adapted by the Authority on a project specific basis.

**Authority Post-Completion Commissioning** means the commissioning activities as identified in the Outline Commissioning Plan to be carried out by the Authority after the Actual Completion Date

**Authority Property** has the meaning given to it in clause 8.1(b) (*Service Provider's Indemnity*)

**Authority Representative** means the representative [to be] appointed by the Authority pursuant to clause 10.4 (*Authority Representative*)

**Authority Warranted Data** means the information relating to Relevant Employees set out or described in Part 2 of Schedule 14 (*Employment Matters*)<sup>6</sup>

**Available** has the meaning given to it in the Payment Mechanism and **Unavailable, Availability** and **Unavailability** shall be construed accordingly

**Base Case** means the financial model in the Agreed Form (as updated from time to time in accordance with the provisions of this Agreement) agreed between the parties prior to the date of this Agreement for the purpose of, amongst other things, calculating the Service Payment

**Base Senior Debt Termination Amount** means, subject to clause 3.4 (No Increased Liability):

- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the Service Provider to the Senior Lenders in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing); and
- (b) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Service Provider to the Senior Lenders as a result of prepayment in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing) or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement, subject to the Service Provider and the Senior Lenders mitigating all such costs to the extent reasonably possible,

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

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account) held by or on behalf of the Service Provider on the Termination Date;

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<sup>6</sup> The definition, as it relates to workforce information, may not be required if there is no TUPE transfer. It is possible that other information may be warranted, (e.g. title information) in which case the definition needs adapting.

- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Service Provider as a result of prepayment of amounts outstanding in respect of Permitted Borrowings (other than in respect of Additional Permitted Borrowing) or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement;
- (iv) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Service Provider as a result of enforcing any other rights it may have

**Beneficiary** has the meaning given in clause 8.4 (*Conduct of Claims*)

**Best Value Change in Law** means a Change in Law which comprises:

- (a) an order made by the Secretary of State in the exercise of powers conferred upon him by Section 4 of the 1999 Act the substance of which amounts to a change in a performance standard or a change in the definition of or details of a performance indicator (as opposed to a change in the description of a performance indicator);
- (b) a direction made by the Audit Commission in the exercise of powers conferred upon it by Sections 44 and 46 of the Audit Commission Act 1998 which in substance is similar to an order referred to in (a) above; or
- (c) Guidance issued by the Secretary of State or Audit Commission or other competent authority in respect of (a) or (b) above

**Best Value Duty** means the duty imposed on the Authority by Section 3 of the 1999 Act in relation to, inter alia, any one or more of the Services

**Best Value Performance Plans** means the best value performance plans which are required to be published by the Authority by 31 March each year in accordance with Section 6 of the 1999 Act

**Best Value Review** means the review which is required to be conducted by the Authority in accordance with Section 5 of the 1999 Act

**Best Value Review Date** means the [DATE TO BE INSERTED] and each [fifth] anniversary thereof during the Service Period or such other date or dates for a Best Value Review as the Authority may specify in a Best Value Performance Plan

**Best Value Review Plan** has the meaning given to it in clause 49.6(e) (*Best Value*)

**Best Value Service Change Notice** has the meaning given to it in clause 49.5(b) (*Best Value*)

**Building Manual** means the manual for the Works containing:<sup>7</sup>

- (a) a copy of the health and safety file pursuant to the CDM Regulations;
- (b) all As-built Drawings;
- (c) copies of all guarantees, warranties and maintenance agreements relating to the Works;
- (d) copies of all test certificates relating to the Works;
- (e) copies of all manufacturers' technical literature relating to the Works; and
- (f) copies of all operating and maintenance manuals relating to the Works

**Business Day** means a day (other than a Saturday or Sunday) on which banks are open for domestic business in the City of London

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

**Care Functionality** means:<sup>8</sup>

- (a) the following matters as shown on the [1:500 scale development control plan]:
  - i. the points of access to and within the [development site] and the [buildings];
  - ii. the relationship between one or more [buildings] that comprise the [development]; and
  - iii. the adjacencies between different Hospital departments [referenced to a drawing number or numbers];
- (b) the following matters as shown on the [1:200/1:100 scale plans] - (referenced to a list of drawing numbers in the Service Provider's Proposals for example):

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<sup>7</sup> This list will be project specific and must be compatible with any requirements set out in the Authority Construction Requirements and/or the Services Specification.

<sup>8</sup> To be amended on a project specific basis.

- i. the points of access to and within the [development site] and the [buildings];
  - ii. the relationship between one or more [buildings];
  - iii. the adjacencies between different Hospital departments; and
  - iv. the adjacencies between rooms within the Hospital departments;
- (c) the quantity, description and areas (in square metres) of those rooms and spaces shown on the [Schedules of Accommodation];
- (d) the location and relationship of equipment, furniture, fittings and user terminals as shown on the [1:50 loaded room plans] in respect of:
- i. all bed and trolley positions;
  - ii. internal room elevations;
  - iii. actual ceiling layouts; and
  - iv. [other project specific requirements might need to be considered, for example with regard to theatres and imaging departments]; and
- (e) the location of and the inter-relationships between rooms within a department as shown on ♦ scale drawings,

but only insofar as each of the matters listed in (a) to (e) above relate to or affect Clinical Use

**Care Services** means [the personal care and related services to be provided by the Authority to the Service Users]

**CDM Regulations** means the Construction (Design and Management) Regulations 2007 (and **CDM Regulation** shall be construed accordingly)

**Certificate of Practical Completion** means the certificate to be issued by the Independent Tester in accordance with clause 21.12 (*Pre-Completion Commissioning and Completion*) in the form set out in Part 3 of Schedule 5 (*Construction Matters*)

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

**Cessation Date** means any date on which the Service Provider or the relevant sub-contractor ceases to be an Admission Body other than as a result of the termination of this Agreement or because it ceases to employ Eligible Employees

**Changes** means any change to the Works or Services, whether by addition, modification, omission or otherwise made in accordance with the Change Protocol otherwise than such as may be reasonably required for the purpose of rectification of inconsistencies pursuant to clause 15.7 (*Rectification of Service Provider Proposals*) or changes to the Service Delivery Plan pursuant to clause 24.3 (*Changes to the Service Delivery Plan*)

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

- (a) Legislation, other than any Legislation which on the Commencement Date has been published:
  - (i) in a draft Bill as part of a Government Departmental Consultation Paper;
  - (ii) in a Bill;
  - (iii) in a draft statutory instrument; or
  - (iv) as a proposal in the Official Journal of the European Communities;
- (b) any Guidance or

any applicable judgment of a relevant court of law which changes a binding precedent

**Change in Ownership** means:

- (a) any sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the shares in the Service Provider [and/or Hold Co] [and/or ♦] (including the control over the exercise of voting rights conferred on those shares or the control over the right to appoint or remove directors or the rights to dividends); and/or
- (b) any other arrangements that have or may have or which result in the same effect as paragraph (a) above

**Change Protocol** means the procedure set out in Schedule 17 (*Change Protocol*)

**CIS Scheme** has the meaning given in clause 39.8(*Construction Industry Tax Deduction Scheme*)

**Code** means the Code of Practice on Workforce Matters in Local Authority Service Contracts as currently contained in DCLG Circular 3/03 Annex D

**Code Dispute Resolution Procedure** means the procedure set out in Part 3 of Schedule 14 (*Employment Matters*)

**Code Obligations** means the express obligations of the Service Provider in clause 31.21 (*Compliance with Code Obligations*) which derive from the Code

**Collateral Warranties** means the agreements between each member of the Professional Team, the Construction Contractor and the Authority in the form set out in Part 3 of Schedule 8 (*Authority Collateral Agreements*) and **Collateral Warranty** shall mean any of them

**Commencement Date** means the date of this Agreement

**Commercially Sensitive Information** means the sub set of Confidential Information listed in column 1 of Schedule 19 (*Commercially Sensitive Information*) in each case for the period specified in column 2 of Schedule 19 (*Commercially Sensitive Information*)

**Commissioners** has the meaning given to it in clause 39.3 (*Taxation*)

**Commissioning End Date** means the date by which the parties' commissioning activities are to be completed in accordance with the Final Commissioning Plan

**Committed Stand-by Facilities** means [a standby Facilities committed to by the Senior Lenders at the date of this Agreement for the purposes of funding any unforeseen cost overruns, increased expenses or loss of revenues to be incurred by the Service Provider]

**Community Use** means use of the Facilities by members of the public or other organisations at the invitation of the Authority

**Compensation Event** means a breach by the Authority of any of its obligations under this Agreement

**Compensation Regulations** means the Local Government (Discretionary Payments) Regulations 1996 (as amended) and the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2000 (as amended)

**Completion Criteria** means the completion tests, process and procedures set out in Schedule 7 (*Outline Commissioning and Completion Criteria*)

**Confidential Information** means:

- (a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual

Property Rights and know-how of either party and all personal data and sensitive personal data within the meaning of the DPA; and

(b) Commercially Sensitive Information

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

**Construction Contract** means the design and build contract dated the same date as this Agreement (in the Agreed Form) between the Service Provider and the Construction Contractor as amended from time to time in accordance with this Agreement

**Construction Contractor** means [INSERT NAME AND COMPANY REGISTERED NUMBER], or such other sub-contractor as the Service Provider may, subject to clause 7.1(b) (*Warranties*), appoint to carry out the Works

**Construction Contractor Warranty** means the agreement between the Construction Contractor and the Authority in the form set out in Part 1 of Schedule 8 (*Authority Collateral Agreements*)

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

**Contingent Funding Liabilities** means [*definition to be inserted*]<sup>9</sup>

**Contract Month** means any month in a Contract Year provided that:<sup>10</sup>

- (a) the first Contract Month shall commence on the [Service] Commencement Date and end on the last day of the month in which the [Service] Commencement Date occurs; and
- (b) the last Contract Month shall begin on the first day of the month in which the last day of the Contract Period occurs and end on that day

**Contract Period** means the period from and including the Commencement Date to the Expiry Date, or if earlier, the Termination Date

**Contract Year** means a period of twelve (12) Contract Months commencing on ♦, provided that:

<sup>9</sup> In certain circumstances there may be liabilities of the Service Provider's Shareholders which are triggered as a result of termination of the contract. Details of these should be included here.

<sup>10</sup> Project specific depending on when the Service Payments will be made.

- (a) the first Contract Year shall be the period commencing on the [Service] Commencement Date and ending on the immediately following ♦; and
- (b) the final Contract Year shall be the period commencing on the final day of the Contract Period and ending on the earlier of the Expiry Date or the Termination Date <sup>11</sup>

**Contractor Change Notice** has the meaning given in the Change Protocol

**Convictions** means, other than in relation to minor road traffic offences, any previous prosecutions, convictions, cautions and binding-over orders

**COSHH** means [*to be defined*]

**Criminal Records Bureau Check** means the check made with the Criminal Records Bureau as described in clause 34.1 (*Criminal Records Bureau*)

**Cumulative Capital Expenditure** means the aggregate of:

- (a) all Capital Expenditure which has been incurred as a result of each General Change in Law that has come into effect during the Service Period; and
- (b) the amount of Capital Expenditure that is agreed, or determined to be required, as a result of a General Change in Law under clause 45 (Change in Law)

**Custodian** means [*to be specified*]

**Custody Agreement** means the agreement between the Authority, the Service Provider and Custodian in respect of the safe custody of the [Financial Model][Base Case]

**Customer Satisfaction Survey** has the meaning given in clause 49.4 (*Best Value and continuing value for money*)

**Customer Satisfaction Survey Date** means the date which is [*Insert Number*] months prior to each Best Value Review Date

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

**Defects** means any defect or fault in the Works and/or the Facilities (not being a Snagging Matter) which occurs due to a failure by the Service Provider to meet the Authority Construction Requirements and/or the Service Provider Proposals or otherwise to comply with its obligations under this Agreement

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<sup>11</sup> Project specific depending on Service Commencement Date and payment cycle.

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

**Design and Construction Quality Plan** means the document set out in Part 2 of Schedule 5 (*Construction Matters*)

**Direct Losses** means all damage, losses, indebtedness, claims, actions, cash, expenses (including the cost of legal or professional services, legal costs being an agent/client, client paying basis), proceedings, demands and charges whether arising under statute, contract or at common law but to avoid doubt, excluding Indirect Losses

**Directive** means the EC Acquired Rights Directive 77/187 as amended

**Disclosed Data** means any Design Data and any other written information, data and documents (including, to avoid doubt, data and documents concerning the Title Deeds and any rights of any person in respect of the Site (but excluding information contained in the First Employee List or any subsequently updated version of that list) made available or issued to the Service Provider or any Service Provider Party in connection with the Project by, or on behalf of, the Authority (or any Authority Party) whether before or after the execution of this Agreement

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

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

**Dispute Resolution Procedure** means the procedure set out in Schedule 24 (*Dispute Resolution Procedure*)

**Distribution** means:

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

Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms;

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

**DPA** means the Data Protection Act 1998

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

**Eligible Employees** means:

- (a) the Transferring Employees who are active members of [or eligible to join] the LGPS on a Relevant Transfer Date;
- (b) [the Transferring Original Employees who are active members of [or eligible to join] either the LGPS or a broadly comparable scheme provided by their existing employer on a Relevant Transfer Date;
- (c) any other individuals nominated by the Service Provider or a relevant sub-contractor (as appropriate)

**Employee Liability Information** means the information which a transferor is obliged to notify to a transferee pursuant to Regulation 11(2) of TUPE regarding any person employed by him who is assigned to the organised grouping of resources or employees which is the subject of the Relevant Transfer and also such employees as fall within Regulation 11(4) of TUPE

**Environmental Information Regulations** means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such regulations

**Equipment** means ♦<sup>12</sup>

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

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<sup>12</sup> The categories and definition of Equipment will be Project specific.

**Escrow Account** means the Escrow Account as defined in the Senior Financing Agreements

**Estates Maintenance Service Specification** means the Service Specification set out in Schedule 11 (*Service Specification*)

**Estimated Change in Project Costs** means in relation to clause 36 (*Compensation Event*), clause 45 (*Changes in Law*) and Schedule 17 (*Change Protocol*), the aggregate of any estimated increase in construction costs, operating costs and financing costs less the aggregate of any reduction in construction costs, operating costs and financing costs

**Estimated Increased Maintenance Costs** has the meaning given in clause (b) (*Maintenance*)

**Exempt Refinancing** means:

- (a) any Refinancing that was fully taken into account in the calculation of the Service Payment;
- (b) a change in taxation or change in accounting treatment;
- (c) the exercise of rights waivers, consents and similar actions which relate to day to day administrative and supervisory matters and which are in respect of:
  - (i) breach of representations warranties or undertakings;
  - (ii) movement of monies between the Project Accounts in accordance with the terms of the Senior Financing Agreements as at Financial Close;
  - (iii) late or non-provision of information or amendments to sub-contracts;
  - (iv) amendments to Sub-Contracts;
  - (v) approval of revised technical and economic assumptions for financial model;
  - (vi) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Financing Agreements);
  - (vii) restrictions imposed by the Senior Lenders on the dates at which the Senior Debt can be advanced to the Service Provider under the Senior Financing Agreements and/or amounts released from the [Escrow Account] during the [Initial Availability Period], each as defined in the Senior Financing Agreements and which are

given as a result of any failure by the Service Provider to ensure that the construction work is performed in accordance with the agreed construction programme and which are notified in writing by the Service Provider or the Senior Lenders to the Authority prior to being given;

- (viii) changes to milestones for drawdown and/or amounts released from the [Escrow Account] during the [Initial Availability Period] set out in the Senior Financing Agreements and which are given as a result of any failure by the Service Provider to ensure that construction work is performed in accordance with the agreed construction programme and which are notified in writing by the Service Provider or the Senior Lenders to the Authority prior to being given;
  - (ix) failure by the Service Provider to obtain any consent by statutory bodies required by the Senior Financing Agreements; or
  - (x) voting by the Senior Lenders and the voting arrangements between the Senior Lenders in respect of the levels of approval required by them under the Senior Financing Agreements;
- (d) [any amendment, variation or supplement of any agreement approved by the Authority as part of any qualifying Variation under this Agreement];
- (e) any sale of shares in the Service Provider [or Hold Co] by the Shareholders or securitisation of the existing rights and/or interests attaching to shares in the Service Provider [or Hold Co] provided that this paragraph (e) shall in respect of shares in Hold Co only apply for as long as Hold Co holds 100% of the issued share capital of the Service Provider;
- (f) any sale or transfer of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements or securitisation of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements; or
- (g) any Qualifying Bank Transaction

**Expiry Date** means [◆]<sup>13</sup>

**Facilities** means the buildings [and other facilities] together with the Services Media for all required utilities and services to be provided, maintained and serviced in accordance with this Agreement located on [and consisting of] the Site

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<sup>13</sup> The exact date will need to be inserted in here.

**Fees Regulations** means The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

**Final Commissioning Plan** means the plan to be jointly developed and agreed by the Authority and the Service Provider in accordance with the provisions of clause 21.1 (*Final Commissioning Plan*)

**Final Employee List** has the meaning given to it in clause 31.8 (*TUPE and Employment Matters*)

**Final Warning Notice** has the meaning given to it in clause 52.2 (*Persistent Breach*)

**Financial Close** has the meaning given to it in the Senior Financing Agreements

**Financial Model** means the financial model in the Agreed Form (which has been delivered by the Service Provider to the Authority as a working CD Rom) as updated from time to time in accordance with this Agreement

**Financing Agreements** means all or any of the agreements or instruments to be entered into by the Service Provider or any of its Associated Companies relating to the financing of the Project (including Initial Financing Agreements and any agreements or instruments to be entered into by the Service Provider or any of its Associated Companies relating to the re-scheduling of their indebtedness or any Refinancing)

**Financing Default** means [◆]<sup>14</sup>

**First Employee List** means that information set out in Part 1 of Schedule 14 (*Employment Matters*)

**First Service Provider** means the person with whom the Authority initially contracted for the provision of services which are similar to the Services

**FM Contract** means the agreement relating to the provision of the FM Services dated the Commencement Date (in the Agreed Form) between the Service Provider and the FM Contractor

**FM Contractor** means [*Insert Name and Company Number*], or such other facilities management contractor as the Service Provider may, subject to clause 7 (*Warranties*), appoint to provide the FM Services

**FM Contractor Direct Agreement** means the agreement between the FM Contractor and the Authority in the form set out in Part 3 of Schedule 8 (*Authority Collateral Agreements*)

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<sup>14</sup> See clause 66.6(d) (*Further Information*). This should be defined by reference to the borrower defaults under the Senior Financing Agreements (and applies whether or not the Senior Lenders choose to accelerate their loan). Please note that this obligation is additional to the obligations of the Agent under clause 10(d) of the Direct Agreement (see Section 31.5 of SoPC4).

**FM Services** means the Asset Maintenance Service<sup>15</sup>

**FOIA** means the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such Act

**FOIA Code** has the meaning given to it in clause 64.8 (*Freedom of Information*)

**Force Majeure Event** means the occurrence after the Commencement Date of:

- (a) war, civil war, armed conflict or terrorism; or
- (b) nuclear, chemical or biological contamination, unless the source or cause of the contamination is the result of actions or breach of the Service Provider/any Service Provider Party; or
- (c) pressure waves caused by devices travelling at supersonic speeds,

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

**Future Service Provider** has the meaning given to it in clause 31.19(a) (*TUPE and Employment Matters*)

**General Change in Law** means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law or a Best Value Change in Law

**Generated Intellectual Property Rights** means any and all Intellectual Property Rights created after the date of this Agreement and during the term of this Agreement and which are in whole or substantially connected with the Project and including without limitation any Intellectual Property Rights arising in the Project Data

**Good Industry Practice** means using standards, practices, methods and procedures conforming to Legislation and exercising that degree of skill, care, diligence, prudence and foresight which would reasonably and ordinarily be expected from time to time of a skilled and experienced person engaged in the same type of undertaking under the same or similar circumstances

**Government** means the government of the United Kingdom

**Ground Physical and Geophysical Investigation** means the investigation of all the conditions of and surrounding the Site and of any extraneous materials in, on or under the Site (including its surface and subsoil) to enable the Facilities to

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<sup>15</sup> To be specified on a project specific basis. The Services are to be hard FM Services and not subject to a Market Test. Neither will clause 52.5 (*Replacement of Non-Performing Services Contractor*) apply.

be designed and constructed and the Works to be carried out with due regard for those conditions and the seismic activity (if any) in the region of the Site

**Guidance** means any applicable guidance or directions with which the Service Provider is bound to comply

**Holding Company** [has the meaning given to it in Section 1159 of the Companies Act 2006<sup>16</sup>]

**Hold Co** means [*insert the name of the Service Provider's holding company*]<sup>17</sup>

**Increased Monitoring Notice** has the meaning given to it in clause 28.5 (*Increased Monitoring Notices*)

**Indemnifier** has the meaning given to it in clause 8.4 (*Conduct of Claims*)

**Independent Certifier** means [♦] or such substitute as may be permitted pursuant to this Agreement

**Independent Certifier Appointment** means the contract dated the Commencement Date in the form set out in Part 5 of Schedule 8 (*Authority Collateral Agreements*) between the Authority, the Service Provider, the Independent Certifier, the Senior Lender and the Construction Contractor

**Indirect Losses** means the loss of profits, loss of use, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature

**Information** has the meaning given under Section 84 of the Freedom of Information Act 2000

**Initial Financing Agreements** means the Financing Agreements entered into on the Commencement Date which are as follows:

[♦]

copies of which have been initialled by the parties for the purposes of identification and **Initial Financing Agreement** means any of them

**Insurance Term** means any terms and/or conditions required to be included in a policy of Required Insurance by clause 40.3 (*Nature of the Insurance*) and/or Schedule 18 (*Insurance Matters*) but excluding any risk

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<sup>16</sup> If the Act has not been implemented at the time of this Agreement, replace the reference with: "Section 736 of the Companies Act 1985, as amended by section 144 of the Companies Act 1989".

<sup>17</sup> Whether or not this definition is used will depend upon the financial structure which is adopted. If there is no 100% holding company used as part of the Project structure then this definition should not be used. References to **Holding Company** however must remain.

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

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

**Interim Project Report** means [◆]<sup>18</sup>

**Intervening Contract** means a contract with the Authority for the provision of services which are similar to the Services, at times after they were provided under a contract with the First Service Provider and before they are to be provided by the Service Provider

**Irrevocable VAT** has the meaning given to it in clause 46.1 (*Payment of Irrevocable VAT*)

**Joint Insurance Account** means the joint bank account in the names of both the Authority and the Service Provider, having account number [*Insert Number*] and held with [*Insert Name*]

**Legislation** means:

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

in each case in the United Kingdom

**Liaison Procedure** means the procedure set out in Schedule 10 (*Liaison Procedure*)

**Local Authority** means a principal council (as defined in Section 270 of the Local Government Act 1972) or any body of government in England established as a successor to principal councils in relation to [social care functions]

**Local Government Pension Scheme and LGPS** means the Local Government Pension Scheme established pursuant to regulations made by the Secretary of

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<sup>18</sup> The Authority should insert a definition setting out the board headings and issues which it requires it to cover.

State in exercise of powers under sections 7 and 12 of the Superannuation Act 1972 as amended from time to time

**Long Stop Date** means the date [six (6)] months after the Planned Completion Date

**Maintenance Works** means any works for maintenance or repair of the Facilities that are necessary to ensure that the Facilities are maintained in accordance with the Estates Maintenance Service Specifications and the relevant Service Delivery Plan and that the Facilities comply with the Authority Construction Requirements and the Service Provider Proposals (including, without limitation, the renewal or replacement of any plant or equipment) throughout the Contract Period

**Market Tested Services** means the [Utilities Management Service, Grounds Maintenance Service, Building Cleaning Service Pest Control Service and Waste Management Service]<sup>19</sup>

**Market Testing Procedure** means the procedure set out in Schedule 16 (*Market Testing Procedure*)

**Market Testing Dates** means the [ ] anniversary of the Commencement Date and each [ ] anniversary thereafter and **Market Testing Date** means any of them

**Named Employee** has the meaning given to it in clause 34.1(a) (*Site Security and Personnel Issues*)

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

**New Employees** means those new employees employed by the Service Provider to provide the Services who will be working alongside the Transferring Employees

**New Employers** has the meaning given to it in clause 33.14(b) (*Pension Matters*)

**Normal Working Hours** means the following hours [*to be specified*] **[DN: Check Review Procedure - there are now Access Hours]**

**Notifiable Financings** means any Refinancing described in paragraph (a) or (c) of the definition of Refinancing and any other arrangement put in place by the Service Provider or another person which has an effect which is similar to those described in paragraphs (a) or (c) or which has the effect of limiting the Service

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<sup>19</sup> To be specified on a project specific basis.

Provider's or any Associated Company's ability to carry out any such arrangement described in paragraphs (a) or (c)

**Option Period** has the meaning given to it in clause 40.13 (*Insurance*)

**Original Employee** means those employees of the Authority who as a result of the application of TUPE, in relation to what was done for the purposes of carrying out the contract between the Authority and the First Contractor, became employees of someone other than the Authority

**Original Senior Commitment** means the amount committed under the Senior Financing Agreements as at Financial Close (as adjusted to take into account any Qualifying Variation)

**Outline Commissioning Plan** means the programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the commissioning activities of the parties set out in outline in Schedule 17 (*Outline Commissioning Plan and Completion Criteria*)

**Past Service Reserve** means the actuarial value, calculated on the basis that the provisions of Section 62 of the Pensions Act 1995 applies directly to the Local Government Pension Scheme or Contractor Scheme (the **Transferring Scheme**), of the aggregate of the benefits, whether immediate, prospective or contingent, payable under the Transferring Scheme to and in respect of each transferring member, his spouse and dependants, by reference to pensionable service in the Transferring Scheme, but making proper allowance for projected increases in the rate of pensionable salary of each transferring member from the cessation of pensionable service to the expected date of withdrawal, retirement or death and increases (whether or not pursuant to a legal obligation) in pensions in payment using demographic and actuarial assumptions which are overall no less conservative than those adopted for the most recent funding valuation of the Transferring Scheme

**Payment Mechanism** means the provisions set out in Schedule 15 (*Payment Mechanism*)

**Payment Report** has the meaning given to it in clause 38.2 (*Payment Report*)

**Performance Guarantees** means the guarantees to the Service Provider in respect of the Construction Contract, the FM Contract and [*insert details of any other guarantees to be given*]

**Performance Point Deductions** has the meaning given to it in the Payment Mechanism

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

- (a) advance to the Service Provider under the Senior Financing Agreements, provided that such advance is not made under the Committed Stand-by Facilities;
- (b) Additional Permitted Borrowing;
- (c) advance to the Service Provider under the Committed Stand-by Facilities which is made solely for the purpose of funding any cost overruns, increased expenses or loss of revenue which the Service Provider incurs, provided that such funds are not used in substitution for other sources of committed funding designated for those purposes; and
- (d) interest and, in respect of the Initial Financing Agreements only (prior to any subsequent amendment), other amounts accrued or payable under the terms of the Senior Financing Agreements and

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

**Persistent Breach** means a breach for which a Final Warning Notice has been issued which has continued for more than [◆] days or recurred in [◆]<sup>20</sup> or more months within the six (6) month period after the date on which such Final Warning Notice is served on the Service Provider

**Personal Data** means personal data as defined in the DPA which is supplied to the Service Provider by the Authority or obtained by the Service Provider in the course of performing the Project Operations

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

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

**Physical Damage Policy** means the policies in respect of the Required Insurances procured pursuant to paragraph [1] of Part 1 and paragraph [1] of Part 2 of Schedule 18 (*Insurance Matters*)

**Planned Completion Date** means [◆]

**Post-Completion Commissioning** means commissioning activities carried out by the Authority or the Service Provider (as the case may be) as is identified in the Outline Commissioning Plan

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<sup>20</sup> Project specific.

**Pre-Completion Commissioning** means the commissioning activities to be carried out by either party prior to the Actual Completion Date as identified in the Outline Commissioning Plan

**Prescribed Rate** means two per cent above the base rate from time to time of [*insert name*] Bank plc

**Pre-Refinancing Equity IRR** means the nominal post-tax (i.e. post-tax with respect to the Service Provider, pre-tax with respect to the Shareholders) Equity IRR calculated immediately prior to the Refinancing

**Principal** has the meaning given to it in clause 39.5(a)(ii) (Construction Industry Tax Deduction Scheme)

**Professional Team** means the architect, structural engineer, mechanical and electrical engineer [*specify other relevant design consultants*]<sup>21</sup> employed by the Construction Contractor in connection with the Works

**Programme** means the programme set out in Schedule 6 (*The Programme*) as revised and issued by the Service Provider (or on its behalf) from time to time pursuant to clause 18 (*Programme and Dates for Completion*)

**Programmed Maintenance** means the maintenance work which the Authority is to carry out in accordance with the Schedule of Programmed Maintenance

**Prohibited Act** means:

- (a) offering, giving or agreeing to give to any servant of the Authority any gift or consideration of any kind as an inducement or reward:
  - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with the Authority; or
  - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Authority;
- (b) entering into this Agreement or any other contract with the Authority in connection with which commission has been paid or has been agreed to be paid by the Service Provider or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Authority; or
- (c) committing any offence:

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<sup>21</sup> Only relevant where the Construction Contract is not design and build.

- (i) under the Prevention of Corruption Acts 1889-1916;
  - (ii) under Legislation creating offences in respect of fraudulent acts; or
  - (iii) at common law in respect of fraudulent acts in relation to this Agreement or any other contract with the Authority;
- (d) defrauding or attempting to defraud or conspiring to defraud the Authority

**Project** means the provision of serviced accommodation by the Service Provider as contemplated by this Agreement including the carrying out of the Works and the provision of the Services

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

**Project Data** means:

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

**Project Documents** means the following agreements:

- (a) the Construction Contract;
- (b) the FM Contract;
- (c) the Services Contract;
- (d) the Performance Guarantees; and
- (e) [insert any other significant Project Documents to which the Authority is not a party],

entered into by the Service Provider for the performance of the obligations under this Agreement, copies of which have been initialled by the parties for the purposes of identification

**Project Operations** means the carrying out of the Works, the Service Provider Pre-Completion Commissioning and the Service Provider Post-Completion Commissioning, the maintenance of the Facilities (including the renewal or replacement of plant), the management and provision of the Services and the

performance of all other obligations of the Service Provider under this Agreement from time to time

**Proposed Workforce** has the meaning given to it in clause 31.10(a) (*TUPE and Employment Matters*)

**Qualifying Bank Transaction** means:

- (a) the syndication by a Senior Lender, in the ordinary course of its business, of any of its rights or interests in the Senior Financing Agreements;
- (b) the grant by a Senior Lender of any rights of participation, or the disposition by a Senior Lender of any of its rights or interests (other than as specified in paragraph (a) above), in respect of the Senior Financing Agreements in favour of:
  - (i) any other Senior Lender;
  - (ii) any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2001/12/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EEA member state;
  - (iii) a local authority or public authority;
  - (iv) a trustee of a charitable trust which has (or has had at any time during the previous two years) assets of at least £10 million (or its equivalent in any other currency at the relevant time);
  - (v) a trustee of an occupational pension scheme or stakeholder pension scheme where the Authority has (or has had at any time during the previous two years) at least 50 members and assets under management of at least £10 million (or its equivalent in any other currency at the relevant time);
  - (vi) an EEA or Swiss Insurance Undertaking;
  - (vii) a Regulated Collective Investment Scheme;
  - (viii) any Qualifying Institution;
  - (ix) any other institution in respect of which the prior written consent of the Authority has been given; and/or

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

**Qualifying Change in Law** means:

- (a) a Discriminatory Change in Law;
- (b) a Specific Change in Law;
- (c) a General Change in Law, which comes into effect during the Service Period and which involves Capital Expenditure; or
- (d) a Best Value Change in Law,

which was not foreseeable at the date of this Agreement

**Qualifying Institution** means [♦]<sup>22</sup>

**Qualifying Refinancing** means any Refinancing that will give rise to a Refinancing Gain greater than zero which is not an Exempt Refinancing

**Qualifying Variation** means either:

- (a) a change in the [Works and/or] the Service in respect of which an Authority Change Notice or a Contractor Change Notice has been served and, in the case of:
  - (i) an Authority Change Notice, the Authority has confirmed the change and, where the Contractor is not funding all or part of the required Capital Expenditure, the Authority has agreed to meet all or the remaining part (as appropriate) of such Capital Expenditure; and
  - (ii) a Contractor Notice of Change, the change has been accepted by the Authority; or
- (b) a Qualifying Change in Law,

and in respect of which any documents or amendments to the Project Documents which are required to give effect to such change in [the Works and/or] Service or Qualifying Change in Law have become unconditional in all respects

**Quality Plans** means the Design and Construction Quality Plan and the Service Quality Plans

**Recipient** has the meaning given to it in clause 39.1 (*VAT on Payments*)

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<sup>22</sup> If there are particular institutions which for particular reasons do not come within the other heads of Qualifying Bank Transaction, bidders may propose to the Authority that such institutions be included as Qualifying Institutions. In the light of the broad drafting of the other provisions in the definition of Qualifying Bank Transaction, any such proposal must be specific and limited. Broad group definitions will not be entertained. For a listed bond transaction, however, the following may be inserted:

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

**Refinancing** means:

- (a) any amendment, variation, novation, supplement or replacement of any Financing Agreement (other than any Subordinated Financing Agreement);
- (b) the exercise of any right, or the grant of any waiver or consent, under any Financing Agreement (other than any Subordinated Financing Agreement);
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Financing Agreements (other than any Subordinated Financing Agreement) or the creation or granting of any other form of benefit or interest in either the Financing Agreements (other than the Subordinated Financing Agreements) or the contracts, revenues or assets of the Service Provider whether by way of security or otherwise; or
- (d) any other arrangement put in place by the Service Provider or another person which has an effect which is similar to any of paragraphs (a) to (c) above or which has the effect of limiting the Service Provider's or any Associated Company's ability to carry out any of paragraphs (a) to (c) above

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

- A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Agreement following the Refinancing
- B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Agreement following the Refinancing and
- C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR

**Regulated Collective Investment Scheme** has the meaning given in the rules from time to time of the Financial Services Authority

**Reinstatement Plan** has the meaning given to it in clause 40.17(a) (*Insurance*)

**Reinstatement Works** has the meaning given to it in clause 40.17(a) (*Insurance*)

**Relevant Authority** means any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom or of the European Union

**Relevant Employees** means the employees who are the subject of a Relevant Transfer

**Relevant Incident** has the meaning given to it in clause 40.17 (*Insurance*)

**Relevant Payment** has the meaning given to it in clause 40.13 (*Insurance*)

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

**Relevant Proceeds** has the meaning given to it in clause 40.17(b)(iii) (*Insurance*)

**Relevant Service Transfer** [only applicable if phased Service implementation]

**Relevant Transfer** means a relevant transfer for the purposes of TUPE

**Relevant Transfer Date** means the date on which an Eligible Employee transfers to the Service Provider and/or one or more sub-contractor by virtue of a Relevant Transfer

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

- (a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, riot and civil commotion;
- (b) failure by any statutory undertaker, utility company, local authority (other than the Authority) or other like body to carry out works or provide services;
- (c) any accidental loss or damage to the Site or any roads servicing it;
- (d) any failure or shortage of power, fuel or transport;
- (e) any blockade or embargo which does not constitute a Force Majeure Event; and
- (f) any:
  - (i) official or unofficial strike;
  - (ii) lockout;

- (iii) go-slow; or
- (iv) other dispute,

generally affecting the construction or facilities management industry or a significant sector of it;

- (g) opening up of the Works pursuant to clause 16.7 (*Right to open up*) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with the Dispute Resolution Procedure that the opening up of the Works was reasonable in the light of other defects previously discovered by the Authority),

unless any of the events listed in paragraphs (a) to (f) inclusive arises (directly or indirectly) as a result of any wilful default or wilful act of the Service Provider or any Service Provider Party

**Remuneration Costs** has the meanings given to it in clause 31.10(b) (*TUPE and Employment Matters*)

**Reorganisation Costs** has the meaning given to it in clause 31.10(c) (*TUPE and Employment Matters*)

**Requests for Information** has the meaning set out in the FOIA or the Environmental Information Regulations as relevant (where the meaning set out for the term **request** shall apply)

**Required Action** has the meaning given to it in clause 29.3 (*Authority Right of Step In*)

**Required Insurances** means the insurances specified in Part 1 and Part 2 of Schedule 18 (*Insurances Matters*) and any other insurances required by Legislation

**Resident** means any person who is utilising the Facilities and/or receiving the Services including any person vending at the Facilities<sup>23</sup>

**Restricted Share Transfer** means the transfer of shares or any interest in shares of the Service Provider to any person whose business is substantially concerned with the sale, distribution or manufacture of arms, tobacco, alcoholic beverages, gaming or pornography or any other person who would not be a fit and proper person to carry out the Services having regard to the Authority being a public sector body

**Retendering Information** has the meaning given to it in clause 32.1(a) (*Employment obligations on Expiry/Termination*)

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<sup>23</sup> Consider whether this definition is appropriate on a scheme specific basis e.g. is a separate definition of Resident required.

**Retention Fund Account** has the meaning given to it in clause 61.5 (*Survey on Expiry*)

**Return Date** has the meaning given to it in clause 32.5 (*Employment obligations on Expiry/Termination*)

**Returning Employees** has the meaning given to it in clause 32.5 (*Employment obligations on Expiry/Termination*)

**Reviewable Design Data** means the plans, drawings, documents and information relating to the Works listed in Appendix 3 of the Review Procedure

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

**Revised Senior Debt Termination Amount** means subject to clauses 3.4 (*No Increased Liability*):

- (a) all amounts outstanding at the Termination Date, including interest and (other than in respect of Additional Permitted Borrowings) Default Interest accrued as at that date, from the Service Provider to the Senior Lenders under the Senior Financing Agreements and including in respect of Permitted Borrowing;
- (b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Service Provider to the Senior Lenders as a result of a prepayment in respect of Permitted Borrowing, or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement, subject to the Service Provider and the Senior Lenders mitigating all such costs to the extent reasonably possible,

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

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account) held by or on behalf of the Service Provider on the Termination Date;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Service Provider as a result of a prepayment of amounts outstanding in respect of Permitted Borrowing or, in the case of early

termination of interest rate hedging arrangements only, as a result of termination of this Agreement;

- (iv) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Service Provider as a result of enforcing any other rights it may have; and
- (v) all APB Distributions

**Retail Price Index** and **RPI** means the index published in Table 5 (excluding mortgage interest payments) of Business Monitor (MM23) published by the Office for National Statistics or failing such publication or in the event of a fundamental change to the index, such other index as the parties may agree, or such adjustments to the index as the parties may agree (in each case with the intention of putting the parties in no better nor worse position than they would have been had the index not ceased to be published or the relevant fundamental change not been made) or, in the event that no such agreement is reached, as may be determined in accordance with clause 73 (*Dispute Resolution*)<sup>24</sup>

**Schedule of Programmed Maintenance** means the programme referred to in clause 25.1 (*Maintenance*) to be submitted to the Trust Representative pursuant to the Review Procedure

**Scheme**<sup>25</sup> means the [*name of Pension Scheme*] Scheme

**Secretary of State** means the Secretary of State for Communities and Local Government

**Senior Debt** means the financing provided by the Senior Lenders under the Senior Financing Agreements

**Senior Financing Agreements** means [*to be listed*], as at the Commencement Date, or as amended with the prior written approval of the Authority pursuant to clause **Error! Reference source not found.** (*No Increased Liability*)

**Senior Lender** means a person who is providing finance to the Service Provider under the Senior Financing Agreements

**Senior Lenders Direct Agreement** means the senior lenders direct agreement dated on or about the date of this Agreement in the form set out in Part 4 of Schedule 8 (*Senior Lenders Direct Agreement*) and made between the Authority, the Service Provider and the agent for the Senior Lenders under the Senior Financing Agreements

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<sup>24</sup> To be checked by financial advisors.

<sup>25</sup> This will be required only if there is a TUPE transfer.

**Service Commencement Date** means the [ ] day of [ ] 20[◆]<sup>26</sup> or such other date agreed by the parties as the date on which the Service Provider assumes responsibility for the provision of (or procuring the provision by the relevant Sub-Contractors of) the Services in accordance with the terms of this Agreement

**Service Delivery Plans** means the proposals for the method of providing the Services to satisfy the Service Specifications as are set out in Schedule 12 (*Service Delivery Plans*)

**Service Failure Points** has the meaning given in the payment mechanism

**Service Payment** means the payment calculated in accordance with the Payment Mechanism

**Service Payment** has the meaning given in the Payment Mechanism

**Service Period** means the period referred to in clause 2.2 (*Provision of Services*)

**Service Provider Admission Agreement** means an admission agreement entered into in accordance with Regulation 5(A) of the LGPS Regulations 1997 (as amended from time to time) by the Administering Authority, the Authority and the Service Provider or relevant Sub-Contractor (as appropriate)

**Service Provider Default** means any one of the following:

*Material Breach*

- (a) a breach by the Service Provider of any of its obligations under this Agreement which materially and adversely affects the performance of the Services;

*Persistent Breach*

- (b) a Persistent Breach occurs;

*Winding Up*

- (c) a petition to wind up the Service Provider [Hold Co] is presented (except any winding up petition which is presented by a creditor on frivolous or vexatious grounds which is not dismissed, discharged or withdrawn within ten (10) Business Days) or a court makes an order that the Service Provider be wound up or a resolution for a voluntary winding-up of the Service Provider [or Hold Co] is passed (except for the purposes of an amalgamation or reconstruction not involving or arising out of insolvency, the terms of which have previously been notified to and approved in writing by the Authority, acting reasonably);

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<sup>26</sup> If Service Commencement Date is the same as the Actual Completion Date, a separate definition may not be required. However, note its use in clause 31 (TUPE and Employment Matters).

### *Appointment of Receiver*

- (d) any receiver or manager in respect of the Service Provider [or Hold Co] is appointed or possession is taken by or on behalf of any creditor of any property that is the subject of a charge;

### *Voluntary Arrangement*

- (e) any voluntary arrangement is made for a composition of debts or a scheme of arrangement is approved under the Insolvency Act 1986 or the Companies Act 2006<sup>27</sup> (except for the purposes of an amalgamation or reconstruction not involving or arising out of insolvency, the terms of which have previously been notified to and approved by the Authority acting reasonably);

### *Administration Order*

- (f) an administration order is made or an administrator is appointed in respect of the Service Provider [or Hold Co];

### *Sub-Contracting and Assignment*

- (g) a breach by the Service Provider of its obligations under clause 69.2 (Assignment and Sub-Contracting) occurs;

### *Change in Control*

- (h) a breach of clause 70.1 (Change in Control) occurs;

### *Abandonment*

- (i) the abandonment of the Project by the Service Provider;

### *Long Stop Date*

- (j) the Actual Completion Date has not occurred by the Long Stop Date;

### *Unavailability Deductions*

- (k) in any [insert number]<sup>28</sup> month period the Authority has been entitled to reduce the amount of the Service Payment by more than [insert number]<sup>29</sup> per cent through Unavailability Deductions;

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<sup>27</sup> If the Act has not been implemented at the time of this Agreement, replace the reference with: "Section 736 of the Companies Act 1985, as amended by section 144 of the Companies Act 1989".

<sup>28</sup> The number of months will depend on the Payment Mechanism but it should be not less than 3 and not more than 6.

<sup>29</sup> Again the percentage will depend on the Payment Mechanism but recommended this should be not less than 20%.

### *Performance Failure Deductions*

- (l) in each and every month of any [*insert number*]<sup>30</sup> month period the Authority has been entitled to reduce the amount of the Service Payment by more than [*insert number*]<sup>31</sup> per cent through Performance Failure Deductions;

### *Service Failure Points*

- (m) the Service Provider being awarded [*insert number*]<sup>32</sup> or more Service Failure Points in any [*insert number*]<sup>33</sup> month rolling period;

### *Insurances*

- (n) a breach by the Service Provider of its obligations to take out and maintain any of the Required Insurances;

### *Care Standards*

- (o) a failure by the Service Provider to fulfil the registration requirements under the Care Standards Act 2000

### **Service Provider Party** means:

- (a) an officer, servant or agent of the Service Provider, or any Affiliate of the Service Provider and any officer, servant or agent of such a person;
- (b) any Sub-Contractor or other sub-contractor of the Service Provider of and any of their officers, servants or agents;
- (c) any person on or at any of the Facilities at the express or implied invitation of the Service Provider (other than an Authority Party); and
- (d) any person undertaking Third Party Use,

and **Service Provider Parties** shall be construed accordingly

**Service Provider Pre-Completion Commissioning** means the Pre-Completion Commissioning to be carried out by the Service Provider and identified in the Outline Commissioning Plan

**Service Provider Proposals** means the document set out in Schedule 4 (*Service Provider Proposals*)

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<sup>30</sup> The number of months will depend on the Payment Mechanism but recommended it should be not less than 3 and not more than 6.

<sup>31</sup> Again the percentage will depend on the Payment Mechanism but this should be not less than 20%.

<sup>32</sup> Project specific depending on Payment Mechanism.

<sup>33</sup> Project Specific depending on Payment Mechanism.

**Service Provider Representative** means the person [to be] appointed by the Service Provider pursuant to clause 10.1 (*Service Provider Representative*)

**Service Provider Scheme** has the meaning given to it in clause 33.7 (*Pension Matters*)

**Service Provider Share** means the percentage figure corresponding to that part of the Cumulative Capital Expenditure at the relevant time, as shown in the first column of the table set out below<sup>34</sup>

Column 1	Column 2	Column 3	Column 4
<b>Cumulative Allowable Expenses (as a % of the Capital Cost of the Facilities)</b>	<b>Service Provider share of Allowable Expenses (as a % of the Allowable Expenses)</b>	<b>Authority's Cost Share (as a % of the Allowable Expenses)</b>	<b>Cumulative Service Provider share of Allowable Expenses (as a % of the Capital Cost of the Facilities)</b>
<0.05%	[100%]	[0%]	[0.05%]
0.05% - 0.5%	[75%]	[25%]	[0.38%]
>0.5% - 1%	[50%]	[50%]	[0.63%]
>1% - 5%	[25%]	[75%]	[1.63%]
>5% - 20%	[10%]	[90%]	[3.13%]
>20%	[0%]	[100%]	[3.13%]

**Service Provider Warranted Data** means ♦<sup>35</sup>

**Service User** means a person receiving the Services (or any of them) at the Facilities including for the avoidance of doubt, the Residents, [any visitors to the Facilities] and Authority staff and **Service Users** shall be construed accordingly

**Services** means the [Change Service]<sup>36</sup> Contract Management Services, the Helpdesk Service, the Asset Maintenance Service, the Utilities Management Service, the Grounds Maintenance Service, the Building Cleaning Service, the Pest Control Service and the Waste Management Service required to satisfy the Service Specifications set out in Schedule 11 (*Services Specification*) and a **Service** shall mean any of them

<sup>34</sup> Table is suggested share. Project specific.

<sup>35</sup> Whether there will be any and what it would be will be project specific.

<sup>36</sup> The Change Protocol assumes there will be a Change Service and the Authority should consult with 4ps to discuss the drafting of an appropriate specification.

**Services Contract** means the agreement relating to the provision of the Services (except the FM Services) dated the Commencement Date (in the Agreed Form) between the Service Provider and the Services Contractor

**Services Contractor** means [*insert name and company register number*] or such other sub-contractor as the Service Provider may, subject to clause 7.1(b) (*Warranties*) appoint to carry out the Services except for the FM Services

**[Services Contractor Direct Agreement** means the agreement between the Services Contractor and the Authority in the form set out in Part 3 of Schedule 8 (*Authority Collateral Agreements*)

**Services Costs** has the meaning given to it in clause (Market Testing)

**Services Media** means all pipes, sewers, drains, mains, ducts, conduits, gutters, water courses, wires, cables, meters, switches, channels, flues and all other conducting media appliances and apparatus including any fixtures, louvers, cowls and other ancillary apparatus

**Services Quality Plan(s)** means the documents set out in Schedule 13 (*Service Quality Plans*) and **Service Quality Plan** shall mean any of them

**Services Specification** means the specifications set out in Schedule 11 (*Services Specification*) and a **Service Specification** shall mean any of them

**Service Commencement Date** means the transfer on a date agreed by the parties to the Service Provider of responsibility for provision of (or procuring the provision by Sub-Contractors of) the Services in accordance with the Agreement

**Shareholder** means any person from time to time holding share capital in the Service Provider or Hold Co

**Site Conditions** means the conditions of the Site including (but not limited to) climatic, hydrological, hydro geological, ecological, environmental, geotechnical and archaeological conditions

**Site Plan** means the plan of the Site set out in Part 2 of Schedule 2 (*Land Matters*)

**Site** means the area edged [red] on the relevant Site Plan together with the Facilities

**Snagging Matters** means minor items of outstanding work (including in relation to landscaping) which would not materially impair the Authority's use and enjoyment of the Facilities or the carrying out by the Authority of the Care Services or the performance of the Services by the Service Provider

**Snagging Notice** means the notice to be issued by the Independent Certifier in accordance with clause 21.10 (*Snagging Notice*)

**Specific Change in Law**<sup>37</sup> means any Change in Law which specifically refers to the provision of the construction, operation and maintenance of accommodation for [older people/people with disabilities] and the provision of care services to [older people/people with disabilities] or to the holding of shares in companies whose main business is the construction, operation and maintenance of accommodation for [older people/people with disabilities] and the provision of care services to [older people/people with disabilities]

**Statutory Deduction** has the meaning given to it in clause 39.5(a)(iii) (Construction Industry Tax Deduction Scheme)

**Sub-Contractor Legislation** has the meaning given to it in clause 39.5(a)(i) (Construction Industry Tax Deduction Scheme)

**Sub-Contractors** means the counterparties of the Service Provider to the Project Documents (including, for the avoidance of doubt, the Construction Contractor and/or the FM Contractor and/or the Services Contractor) or any person engaged by the Service Provider from time to time as may be permitted by this Agreement to procure the provision of the Works and/or the Services (or any of them). References to **sub-contractors** means sub-contractors (of any tier) of the Service Provider

**Sub-Contracts** means the contracts entered into by the Service Provider (including, for the avoidance of doubt, the Construction Contract, the FM Contract and the Services Contract) and **Sub-Contract** shall mean any of them

**Subordinated Financing Agreements** means those of the Initial Financing Agreements entered into on the Commencement Date which are as follows: [list to be inserted] or as amended with the prior written approval of the Authority

**Subordinated Lender** means a person providing finance under a Subordinated Financing Agreement

**Subsidiary** has the meaning given to it in Section 1159 of the Companies Act 2006<sup>38</sup>

**Substitute Services** has the meaning given to it in clause 59.5(a) (*Effect of Termination*)

**Suitable Substitute Service Provider** means a person approved by the Authority (such approval not to be unreasonably withheld or delayed) as:

- (a) having the legal capacity, power and authority to become a party to and perform the obligations of the Service Provider under this Agreement; and

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<sup>37</sup> This definition will need amending to reflect the nature of the transaction.

<sup>38</sup> If the Act has not been implemented at the time of use of this Contract, replace the reference with "Section 736 of the Companies Act 1985, as amended by Section 144 of the Companies Act 1989".

- (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of the Service Provider under this Agreement

**Supplier** has the meaning given to it in clause 39.1 (*VAT on Payments*)

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

**Termination Date** means the date of termination of this Agreement in accordance with clause 60 (*Effect of Termination*)

**Termination Notice** means a notice terminating this Agreement given by the Authority or the Service Provider (as the case may be) under any clause of this Agreement

**Termination Sum** means any compensation payable by the Authority to the Service Provider on an early termination of this Agreement under Schedule 22 (*Compensation on Termination*) (excluding the Highest Compliant Tender Price)

**Third Party Costs** has the meaning given to it in clause 44.4(c) (*Third Party Use*)

**Third Party Income** has the meaning given to it in clause 44.4(b) (*Third Party Use*)

**Third Party Use** means use of the Facilities other than by the Authority or an Authority Party and other than for Community Use

**Third Party Use Proposal** means any proposal containing all relevant information on the proposed Third Party Use

**Threshold Equity IRR** means [*insert number*]<sup>39</sup> per cent

**Title Deeds** means the certified copies of the title deeds to the Site which have been supplied to (and examined by) the Service Provider and with which the Service Provider is deemed by its execution of this Agreement to be satisfied with regard to their content, validity and completeness

**Transfer Amount** means the aggregate of the Transfer Values as at the Relevant Transfer Date of, respectively, those Eligible Employees who elect to transfer their benefits

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<sup>39</sup> This information will need to be provided by the Service Provider. This is the nominal post tax (with respect to the Service Provider) Equity IRR set out in the Base Case, which excludes the effects of any anticipated refinancing.

**Transfer Date** means the date the Transferring Employees are transferred to the employment of the Contractor and the date that the Transferring Original Employees are transferred to the employment of a subsequent contractor

**Transfer Value** means the actuarial value of the benefits of each member of the Local Government Pension Scheme or Contractor Scheme (on a secondary transfer of employees), as the case may be, who elects to transfer their benefits pursuant to the terms of this Agreement calculated on a Past Service Reserve basis and without any reduction having been applied to reflect any deficiencies in the assets relative to the liabilities of the Local Government Pension Scheme or Contractor Scheme

**Transferring Employee** means an employee of the Authority whose contract of employment becomes, by virtue of the application of TUPE in relation to what is done for the purposes of carrying out this contract between the Authority and the Service Provider, a contract of employment with someone other than the Authority

**Transferring Original Employee** means an Original Employee:

- (a) whose contract of employment becomes, by virtue of the application of TUPE in relation to what is done for the purposes of carrying out a contract between the Authority and the Service Provider, a contract of employment with someone other than his existing employer; and

whose contract of employment on each occasion when an Intervening Contract was carried out became, by virtue of the application of TUPE in relation to what was done for the purposes of carrying out the Intervening Contract, a contract of employment with someone other than his existing employer

**TUPE** means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (246/2006) and any other regulations enacted for the purpose of implementing the Directive with English law

**Unavailability Deductions** has the meaning given to it in the Payment Mechanism

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

- (a) insurance is not available to the Service Provider in respect of the Project in the worldwide insurance market with reputable insurers of good standing in respect of that risk; or
- (b) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom

**Unprogrammed Maintenance** has the meaning given to it in clause 25.3 (*Unprogrammed Maintenance*)

**VAT** means any value added taxes

**Workforce Information** means the details set out in Part 2 of Schedule 14 (*Employment Matters*)

**Works** means the design (including the preparation of all Design Data), construction, testing, commissioning and completion of the Facilities (including any temporary works) [and the installation of Equipment] to be performed by the Service Provider in accordance with this Agreement (as varied, amended or supplemented from time to time in accordance with this Agreement)

**Works Period** means the period from the Commencement Date to the last Service Commencement Date

**[Works Stipulations** means those requirements and obligations set out in Part ♦ of the Authority Construction Requirements]<sup>40</sup>

## 2 Interpretation

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

- 2.1 The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
- 2.2 Except where the context expressly requires otherwise, references to clauses, sub-clauses, paragraphs, sub-paragraphs, Parts and Schedules are references to clauses, sub-clauses, paragraphs, sub-paragraphs and Parts of and Schedules to this Agreement and references to sections, appendices and attachments (if any) are references to sections, appendices and attachments to or contained in this Agreement.
- 2.3 The Schedules to this Agreement are an integral part of this Agreement and a reference to this Agreement includes a reference to the Schedules.
- 2.4 Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.
- 2.5 Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.

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<sup>40</sup> To be included on a project specific basis.

- 2.6 The language of this Agreement is English. All correspondence, notices, drawings, Design Data, test reports, certificates, specifications and information shall be in English. All operating and maintenance instructions, name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Agreement shall be in English.
- 2.7 Save where stated to the contrary, references to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments to agreements or documents) a reference to that agreement or document as amended, supplemented, substituted, novated or assigned.
- 2.8 References to any Legislation are to be construed as references to that Legislation as from time to time amended or to any Legislation from time to time replacing, extending, consolidating or amending the same provided that the provisions of this paragraph shall be without prejudice to the operation of clause 46 (Changes in Law) and Schedule 17 (Change Protocol) which shall operate in relation to a Change in Law on the basis set out in this Agreement.
- 2.9 References to a public organisation (other than the Authority) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation. References to other persons (other than the Authority) shall include their successors and assignees.
- 2.10 References to a deliberate act or omission of the Authority or any Authority Party shall be construed having regard to the interactive nature of the activities of the Authority and of the Service Provider and the expression shall exclude acts or omissions which were within the contemplation of the parties or which were otherwise provided for in this Agreement.
- 2.11 The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
- 2.12 Reference to parties means the parties to this Agreement and references to a party mean one of the parties to this Agreement.
- 2.13 In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word other or including or in particular shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.

- 2.14 All of the Service Provider's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Authority and to be performed at the Service Provider's own cost and expense.
- 2.15 References to amounts or sums expressed to be index linked are references to amounts or sums in [give base date reference] (Base Date) prices which require to be adjusted whenever the provision containing the amount or sum is given effect in accordance with this Agreement to reflect the effects of inflation after that date. The adjustment shall be measured by changes in the relevant index published for that Contract Year as calculated in accordance with the following formula:

$$\text{Amount or sum in [date] prices} \times \frac{\text{RPI}_d}{\text{RPI}_0}$$

Where RPI<sub>d</sub> is the value of the Retail Prices Index published or determined with respect to the month of [relevant month, or other date] most recently preceding the date when the provision in question is to be given effect and RPI<sub>0</sub> is the value of the Retail Prices Index in respect of [date].

- 2.16 Reference to a document being in the Agreed Form is a reference to the form of the relevant document agreed between the parties and for the purpose of identification initialled by each of them or on their behalf.
- 2.17 Where this Agreement states that an obligation shall be performed no later than or within or by a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event the latest time for performance shall be noon on the last Business Day for performance of the obligations concerned.
- 2.18 Where this Agreement states that an obligation shall be performed no later than or by a prescribed number of Business Days before a base date or by a date which is prescribed number of Business Days before a base date, the latest time for performance shall be noon on the last Business Day for performance of the obligations concerned.<sup>41</sup>

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<sup>41</sup> DN: Consider whether this is necessary.