

**Schedule 8**

**Authority Collateral Agreements**

**Part 1) - Construction Contractor Warranty**

**Dated [◆]**

**[AUTHORITY]**

**[SENIOR FUNDER]**

**[SERVICE PROVIDER]**

**[CONSTRUCTION CONTRACTOR]**

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**CONSTRUCTION CONTRACTOR  
COLLATERAL AGREEMENT**

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This Collateral Agreement is made on

200◆

## Between

- (1) [ ] (the **Authority**);
- (2) [ ]<sup>1</sup> (the **Senior Funder**);
- (3) [ ] (the **Construction Contractor**); and
- (4) [ ] (the **Service Provider**).

## Whereas

- (A) The Authority and the Service Provider have agreed the terms on which the Service Provider will design, develop and construct and provide certain services in connection with the redevelopment of the Authority's facilities (the **Development**) at the Site (as that expression is defined in the Project Agreement) and, accordingly, have entered into the Project Agreement and the Project Documents.
- (B) *[description of funding arrangements]*
- (C) the Service Provider and the Construction Contractor have entered into a contract dated [◆] (the **Construction Contract**) for the carrying out and completion of Works defined in the Project Agreement (the **Works**, which expression shall include any additional works carried out by the Construction Contractor under the Construction Contract in connection with any modifications or variations made thereunder) in connection with the Project.
- (D) This Construction Contractor's Collateral Agreement (the **Agreement**) is one of the Authority Collateral Agreements contemplated by the Project Agreement.

## It is agreed

### 1 Definitions and Interpretation

#### 1.1 Definitions

In this Agreement, the following terms shall, unless the context otherwise requires, have the following meanings:

**Ancillary Documents** has the meaning given in the Project Agreement

**Business Day** means a day other than a Saturday, Sunday or a bank holiday in England

**Construction Contract** has the meaning given in the Project Agreement

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<sup>1</sup> The standard form is drafted on the basis that the project is bank financed. This template will need to be adapted if different funding arrangements are used.

## Social Care Procurement Pack – Model Documentation

**Event of Service Provider Default** has the meaning given in the Construction Contract

**Funders** has the meaning given in the Project Agreement

**Funders' Direct Agreement** is the agreement of even date herewith between, amongst others, the Service Provider, the Construction Contractor and the Senior Funder

**Novation Agreement** has the meaning given in clause 4.5(b)(i) (*Implementation of Novation*)

**Novation Effective Date** means the date of performance of the obligations set out in clause 4.5(b) (*Implementation of Novation*)

**Parent Company Guarantee** has the meaning given in the Construction Contract

**Project Agreement** means the Project Agreement of even date herewith between (1) the Authority and (2) the Service Provider

**Proposed Novation Date** has the meaning given in clause 4.1 (*Proposed Substitute*)

**Proposed Novation Notice** has the meaning given in clause 4.1 (*Proposed Substitute*)

**Proposed Step-in Date** has the meaning given in clause 3.1 (*Step-in Notice*)

**Proposed Substitute** has the meaning given in clause 4.1 (*Proposed Substitute*)

**Security Documents** has the meaning given in the Funders' Direct Agreement

**Step-in Date** means the date of issue of the Step-in Undertaking

**Step-in Notice** has the meaning given in clause 3.1 (*Step-in Notice*)

**Step-in Period** means the period commencing on the Step-in Date and ending on the earliest of:

- (a) the date of the first anniversary of the Step-in Date (but subject always to clause 4.7 (*Extension of Step-In Period*));
- (b) the Step-out Date;
- (c) the Novation Effective Date; and
- (d) termination of the Construction Contract under clause 3.3 (*Restriction of Right of Termination*)

**Step-in Undertaking** has the meaning given in clause 3.2(d) (*Notice of Obligations and Step-in Undertaking*)

**Step-out Date** has the meaning given in clause 3.4(a) (*Step-Out*)

**Termination Notice** has the meaning given in clause 2.4 (*Termination Notice*)

## 1.2 Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- (a) headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- (b) all references to clauses are references to clauses of this Agreement;
- (c) all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- (d) all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- (e) any reference to time of day shall be a reference to London time;
- (f) the words **herein**, **hereto** and **hereunder** refer to this Agreement as a whole and not to the particular clause in which such word may be used;
- (g) words importing the singular include the plural and vice versa;
- (h) words importing a particular gender include all genders;
- (i) **person** includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;
- (j) any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;
- (k) references to **party** means a party to this Agreement and references to **parties** shall be construed accordingly;
- (l) all monetary amounts are expressed in pounds sterling;
- (m) references to the word **includes** or **including** are to be construed without limitation;
- (n) the obligations of any party under this Agreement are to be performed at that party's own cost and expense;

- (o) terms used in this Agreement that are defined in the Project Agreement or the Ancillary Documents shall have the meanings given to them in the Project Agreement or the Ancillary Documents, as appropriate.

### 1.3 *the Service Provider*

The parties acknowledge that the Service Provider is only a party to this Agreement for the purpose of confirming its agreement to and acceptance of the terms set out in this Agreement.

## **2 Termination Notice and Authority Termination**

### 2.1 *Construction Contractor's Warranties and Undertakings*

The Construction Contractor warrants and undertakes to the Authority that it has complied with and fulfilled and shall continue to comply with and fulfil its duties and obligations arising under or by virtue of the Construction Contract, provided that the Authority shall only be entitled to make a claim against the Construction Contractor under this clause 2.1 if the Project Agreement has terminated and shall not be entitled to do so during the Step-in Period or after the Construction Contract has been novated under clause 4 (*Novation*).

### 2.2 *Liability of Construction Contractor*

Any liability arising from any claim for breach of the warranty under or pursuant to clause 2.1 shall be in addition to and without prejudice to any other present or future liability of the Construction Contractor to the Authority (including, without prejudice to the generality of the foregoing, any liability in negligence) and shall not be released, diminished or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by or on behalf of the Authority by any person nor by any action or omission of any person whether or not such action or omission might give rise to an independent liability of such person to the Authority provided always that the Construction Contractor shall owe no greater duties or obligations to the Authority under this Agreement than it owes or would have owed to the Service Provider under the Construction Contract.

### 2.3 *Copyright*

Without prejudice to the generality of clause 2.1, the Construction Contractor hereby warrants to the Authority that it will grant to the Authority such rights and licences as are granted in clauses 51.2 and 51.3 (*Intellectual Property Rights*) of the Construction Contract as being granted by the Construction Contractor to the Service Provider on the terms and subject to the conditions therein set out.

### 2.4 *Indemnity Insurance*

The Construction Contractor warrants to the Authority that:

- (a) the Construction Contractor shall without prejudice to its obligations under this Agreement and/or at law and/or otherwise take out and maintain:

- (i) such insurance as the Construction Contractor is required to take out and maintain pursuant to the terms of the Construction Contract;
- (ii) professional indemnity insurance with a well established insurance company or underwriter of repute in an amount of not less than [ten] million pounds (£[10,000,000]) per annum from the date of commencement of the Works until twelve years after the date of practical completion of the Development for the purposes of the Construction Contract to cover the Construction Contractor's obligations and liabilities relating to design under or in connection with this Agreement,

provided always that such insurance is available in the market at commercially reasonable rates and the Construction Contractor agrees to inform immediately the Authority if such insurance ceases to be available at commercially reasonable rates and both parties shall enter into meaningful discussions as to how the Authority can be protected in the absence of such insurance and the Construction Contractor hereby agrees to effect such alternative protection for the Authority's benefit and that as and when it is reasonably requested to do so by the Authority the Construction Contractor shall provide for inspection documentary evidence that such insurances are being properly maintained; and

- (b) the provisions of this Agreement have been disclosed to the Construction Contractor's professional indemnity insurer.

### 2.5 *Termination Notice*

The following provisions shall apply to termination of the Construction Contract:

- (a) the Construction Contractor undertakes not to terminate the Construction Contract on account of an Event of Service Provider Default without first giving the Authority not less than fifteen (15) Business Days' prior written notice specifying the grounds for that termination. Subject to clause 2.4(b) any such notice, other than one given in circumstances where there is no default under the Construction Contract by the Service Provider or the Construction Contractor, shall be a **Termination Notice**;
- (b) where the Construction Contractor's right to terminate is subject to the terms of the Funders' Direct Agreement then the Construction Contractor shall notify the Authority of the same as soon as reasonably practicable upon becoming aware of the provisions of the Funders' Direct Agreement applying. Thereafter as soon as the Construction Contractor becomes entitled to terminate the Construction Contract free from the constraints contained in the Funders' Direct Agreement, whether upon the expiry of the Step-in Period (as such term is defined in the Funders' Direct Agreement) or otherwise, then the Construction Contractor undertakes to the Authority not to terminate the Construction Contract on account of an Event of Service Provider Default (whether occurring before or after the Construction Contractor's right to terminate the Construction Contract was free from the constraints of the Funders' Direct Agreement) without first

giving the Authority not less than fifteen (15) Business Days' prior notice specifying the grounds for that termination and noting that the Construction Contractor's right of termination is not subject to the Funders' Direct Agreement. Any such notice, other than one given in circumstances where there is no default under the Construction Contract by the Service Provider or the Construction Contractor, shall for the purposes of this Agreement also be a Termination Notice and the provisions of this Agreement shall apply accordingly;

- (c) notwithstanding any provision of the Construction Contract to the contrary, on termination of the Project Agreement by the Authority, the parties agree that the Construction Contract shall not come to an end except in accordance with the terms of this Agreement;
- (d) the Authority acknowledges that it shall not be entitled to exercise its rights under clauses 3 (*Step-In and Step-Out*) and 4 (*Novation*) where the event giving rise to termination of the Project Agreement is an Event of Construction Contractor Default (as that term is defined in the Construction Contract) whether or not at the relevant time there has been notice to terminate the Construction Contract for such an Event of Construction Contractor Default or not.

### 3 Step-In and Step-Out

#### 3.1 *Step-in Notice*

If the Authority has terminated the Project Agreement in accordance with the terms of the Project Agreement or if the Authority has received a Termination Notice, then subject to the provisions of this Agreement, the Authority may give written notice to the Construction Contractor (a **Step-in Notice**) of the intention of the Authority to issue a Step-in Undertaking on a specified date (the **Proposed Step-in Date**) provided that such Proposed Step-in Date shall be:

- (a) no later than five (5) Business Days after termination of the Project Agreement where this has been terminated by the Authority; and
- (b) no earlier than the date falling five (5) Business Days prior to the date of expiry of the Termination Notice and no later than the date of expiry of the Termination Notice where a Termination Notice has been given by the Construction Contractor. The Authority shall provide a copy of any Step-in Notice to the Senior Funder at the same time as the Step-in Notice is given to the Construction Contractor,

provided that, unless the Construction Contractor otherwise consents, only one (1) Step-in Notice may be given during the period of this Agreement. Subject to clause 5.1 (*Rights of Termination*) the Construction Contractor shall not be entitled to terminate the Construction Contract until after the Proposed Step-in Date.

### 3.2 Notice of Obligations and Step-in Undertaking

The following provisions shall apply on issue of a Step-In Notice pursuant to clause 3.1:

- (a) within five (5) Business Days of receipt of any Step-in Notice, the Construction Contractor shall give written notice to the Authority of any sums of which the Construction Contractor has actual knowledge which are due and payable but unpaid by the Service Provider and of any other material obligations or liabilities, of which the Construction Contractor has actual knowledge, which should have been performed or discharged by the Service Provider under the Construction Contract, in each case, as at the date of the Step-in Notice;
- (b) the Construction Contractor shall inform the Authority in writing as soon as reasonably practicable of:
  - (i) any change in such sums, obligations or liabilities referred to in clause 3.2(a); and
  - (ii) any further sums, obligations or liabilities thereafter falling due and payable but unpaid or falling due for performance or discharge and unperformed or undischarged (as the case may be),

in each case of which the Construction Contractor has actual knowledge, before the Step-in Date;

- (c) the Construction Contractor shall give the Authority the information referred to in clauses 3.2(a) and 3.2(b) in good faith and may not give any further notifications pursuant to clause 3.2(b) less than two (2) Business Days prior to the Proposed Step-in Date. The Authority shall not be required to assume any liability under a Step-in Undertaking for any outstanding obligations or liabilities of the Service Provider to the Construction Contractor which are not notified to the Authority pursuant to clauses 3.2(a) or 3.2(b);
- (d) not later than the Proposed Step-in Date the Authority shall decide if it is prepared to issue a Step-in Undertaking. If it does so decide, the Authority shall promptly give the Construction Contractor written notification of such decision and, at the same time, provide a copy of such notification to the Senior Funder. Subject to the prior performance by the Senior Funder of its obligations under clause 3.2(e), the Authority shall deliver to the Construction Contractor on the Proposed Step-in Date, a written undertaking in form and substance agreed with the Construction Contractor (both the Authority and the Construction Contractor acting reasonably) (the **Step-in Undertaking**), incorporating a clause in terms similar to clause 11 (*Default Interest*) (but only to the extent that there will not be double counting of default interest accruing under the Construction Contract and this Agreement), and undertaking to the Construction Contractor:
  - (i) to pay or procure the payment to the Construction Contractor, within fifteen (15) Business Days of demand by the Construction Contractor, of

- any sum due and payable but unpaid by the Service Provider to the Construction Contractor under the Construction Contract before the Step-in Date and which has been notified by the Construction Contractor to the Authority in accordance with clause 3.2(a) or 3.2(b);
- (ii) to perform or discharge or procure the performance or discharge of any unperformed or undischarged obligations of the Service Provider under the Construction Contract which shall have fallen due for performance or discharge before the Step-in Date and which have been notified by the Construction Contractor to the Authority in accordance with clause 3.2(a) or 3.2(b) within such period as the Construction Contractor may reasonably require;
  - (iii) to pay or procure the payment of any sum due and payable by the Service Provider under the Construction Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to clauses 3.4 and 4.5(c)(ii)) but not, to avoid doubt, any sum due in respect of any services provided before the Step-in Date; and
  - (iv) to perform or discharge or procure the performance or discharge of any obligations of the Service Provider under the Construction Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to clauses 3.4 and 4.5(c)(ii) (*Implementation of Novation*)) but not, to avoid doubt, to perform or discharge or to procure the performance or discharge of any obligations in respect of any Works provided before the Step-in Date;
- (e) following notification of the Authority's decision pursuant to clause 3.2(d), the Senior Funder shall, on or before the Proposed Step-in Date, take any action which is necessary unconditionally and irrevocably to release the Construction Contract and the Parent Company Guarantee from the security constituted by the Security Documents;
  - (f) upon release of the Parent Company Guarantee in accordance with clause 3.2(e), the Service Provider shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority in accordance with clause [8] of the same;
  - (g) if the Authority shall not have issued the Step-in Undertaking on or before the Proposed Step-in Date the Step-in Notice shall be deemed to have been withdrawn and the rights and obligations of the parties shall be construed as if the Step-in Notice had not been given.

### 3.3 *Restriction of Right of Termination*

During or in respect of the Step-in Period, the Construction Contractor confirms to the Authority that it shall continue to observe and perform its duties and obligations under

the Construction Contract and shall, without prejudice to clause 5.1 (*Rights of Termination*), only be entitled to exercise its rights of termination under the Construction Contract:

- (a) by reference to an Event of Service Provider Default arising during the Step-in Period provided that no event of default by the Service Provider under the Project Agreement (whether resulting in termination of the Project Agreement or otherwise, and notwithstanding that it has occurred during the Step-in Period) shall entitle the Construction Contractor to exercise such rights of termination during the Step-in Period; or
- (b) if the Authority fails to pay when due any amount owed to the Construction Contractor or fails to perform or discharge when falling due for performance or discharge any obligation under the Step-in Undertaking or fails to procure such payment or performance or discharge; or
- (c) if such rights of termination arise in circumstances where there is no default under the Construction Contract by the Authority or the Construction Contractor.

### 3.4 Step-Out

The Authority:

- (a) may, at any time, give the Construction Contractor at least thirty (30) days' prior written notice to terminate the Step-in Period on a date specified in the notice (the **Step-out Date**); and
- (b) shall give the Construction Contractor at least thirty (30) days' prior written notice that (subject to clause 4.4(b) (*Consent Withheld*)) the Step-in Period will end due to the occurrence (subject to clause 4.7 (*Extension of Step-In Period*)) of the first anniversary of the Step-in Date;

provided that:

- (i) the Authority has performed and discharged in full or procured the performance and discharge in full of any obligations of the Service Provider under the Construction Contract in relation to the maintenance of records and the provision of reports during the Step-in Period so as to permit the Construction Contractor to monitor the performance of the Service Provider's other obligations under the Construction Contract; and
- (ii) all liability under the Step-in Undertaking pursuant to any claims made up to the date specified in either clause 3.4(a) or clause 3.4(b) (as the case may be) shall have been fully and unconditionally discharged,

and the Authority shall be released from the Step-in Undertaking on the expiry of the Step-in Period in accordance with clauses 3.4(a) and 3.4(b). Such release

shall not affect the continuation of the Service Provider's obligations towards the Construction Contractor under the Construction Contract.

### 3.5 *Senior Funder*

The Senior Funder is a party to this Agreement solely for the purposes of taking the benefit of its rights under clause 2.4(d) (*Termination Notice*) and clause 3 and, subject to clauses 3.2(e), 4.5(a) (*Implementation of Novation*), 7.2(a) (*Restriction on Assignment*) and 12.1 (*Senior Funder's Warranty and Undertaking*) shall have no rights or obligations or liabilities hereunder.

## 4 **Novation**

### 4.1 *Proposed Substitute*

At any time that the Authority is entitled to give a Step-in Notice pursuant to clause 3.1 or at any time during the Step-in Period the Authority may give notice (a **Proposed Novation Notice**) to the Construction Contractor that it wishes itself or another person (a **Proposed Substitute**) to assume, by way of sale, transfer or other disposal, the rights and obligations of the Service Provider under the Construction Contract and specifying a date (the **Proposed Novation Date**):

- (a) falling not later than fifteen (15) Business Days after termination of the Project Agreement where this has been terminated by the Authority;
- (b) falling not later than the expiry of the Termination Notice where a Proposed Novation Notice is given by the Authority at a time when it is entitled to give a Step-in Notice pursuant to clause 3.1 (*Step-In Notice*); and
- (c) falling not later than twenty-eight (28) Business Days after the date of the Proposed Novation Notice, where a Proposed Novation Notice is given during a Step-in Period,

the Authority shall provide a copy of any Proposed Novation Notice to the Senior Funder at the same time as the Proposed Novation Notice is given to the Construction Contractor. Save as provided in clause 4.4, only one (1) Proposed Novation Notice may be given during the period of this Agreement. Without prejudice to clauses 3.3 (*Restriction of Right of Termination*) and 5.1 (*Rights of Termination*), the Construction Contractor shall not be entitled to terminate the Construction Contract during the notice period specified in a Proposed Novation Notice.

### 4.2 *Information for Consent to Novation*

If the Proposed Novation Notice specifies the Authority as the Proposed Substitute, the Construction Contractor's consent to the novation shall be deemed to have been given automatically. Where the Proposed Substitute is not the Authority, a novation in accordance with a Proposed Novation Notice shall only be effective if the Construction Contractor consents to that novation in writing in accordance with clause 4.3 and the Authority shall (as soon as practicable) supply the Construction Contractor with the following information:

- (a) the name and registered address of the Proposed Substitute;
- (b) the names of the shareholders in the Proposed Substitute and the share capital owned by each of them;
- (c) the names of the directors and the secretary of the Proposed Substitute;
- (d) details of the means by which it is proposed to finance the Proposed Substitute (including the extent to which such finance is committed and any conditions precedent as to its availability for drawing); and
- (e) the resources (including contractual arrangements) which are to be available to the Proposed Substitute to enable it to perform its obligations under the Construction Contract.

### 4.3 *Grant of Consent*

The Construction Contractor may withhold or delay consent to a novation only where the Proposed Substitute is not the Authority and the Authority has failed to show to the Construction Contractor's satisfaction (acting reasonably) that:

- (a) the Proposed Substitute has the legal capacity, power and authorisation to become a party to and perform the obligations of the Service Provider under the Construction Contract; and
- (b) the technical competence and financial standing of and the technical and financial resources available to the Proposed Substitute are sufficient to perform the obligations of the Service Provider under the Construction Contract.

and the Construction Contractor shall notify the Authority in writing, within five (5) Business Days of the later of receipt of a Proposed Novation Notice and all information required under clause 4.2, as to whether or not it has decided to grant such consent (together with an explanation of its reasons if it has decided to withhold its consent) and, at the same time, provide a copy of the same to the Senior Funder.

### 4.4 *Consent withheld*

If, in accordance with clause 4.3, the Construction Contractor withholds its consent to a Proposed Novation Notice, the Authority shall be entitled to give one (1) or more subsequent Proposed Novation Notices, pursuant to the provisions of clause 4.1, containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute which (where the replacement Proposed Substitute is not the Authority) the Authority has good cause to believe would fulfil the requirements of clauses 4.3(a) and 4.3(b), provided that only one (1) Proposed Novation Notice may be outstanding at any one time, and provided further that:

- (a) where a Step-in-Notice has not been issued, any revised Proposed Novation Date shall be a date falling no later than the date specified in clause 4.1(a) or 4.1(b) as appropriate; and

- (b) if the Proposed Novation Notice was served during the Step-in Period, any revised Proposed Novation Date shall be a date falling not later than twenty (20) Business Days after the date of the revised Proposed Novation Notice.

### 4.5 *Implementation of Novation*

If the Construction Contractor consents to a novation pursuant to a Proposed Novation Notice (whether automatically or otherwise), then on the Proposed Novation Date and without prejudice to clause 5.1 (*Rights of Termination*) the following provisions shall apply:

- (a) following such notification and in the absence of any prior release in accordance with clause 3.2(e), the Senior Funder shall, on or before the Proposed Novation Date, take any action which is necessary unconditionally and irrevocably to release the Construction Contract and the Parent Company Guarantee from the security constituted by the Security Documents;
- (b) upon release of the Parent Company Guarantee in accordance with clause 4.5(a), the Service Provider shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority in accordance with clause 8 of the same;
- (c) subject to the prior performance by the Senior Funder and the Service Provider of their respective obligations under clauses 4.5(a) and 4.5(a) the Proposed Substitute shall become a party to the Construction Contract in place of the Service Provider and, thereafter, shall be treated as if it was and had always been named as a party to the Construction Contract in place of the Service Provider; and
- (d) the Construction Contractor, the Service Provider and the Proposed Substitute shall enter into a novation agreement (the **Novation Agreement**) and any other requisite agreements, in form and substance satisfactory to the Construction Contractor (acting reasonably), pursuant to which:
  - (iii) the Proposed Substitute shall be granted all of the rights of the Service Provider under the Construction Contract (including those arising prior to the end of the Step-in Period);
  - (iv) subject to the Construction Contractor giving to the Proposed Substitute within three (3) Business Days of receipt of the Proposed Novation Notice such notice as is referred to in clause 3.2(a) and to the provisions of clauses 3.2(b) and 3.2(c), mutatis mutandis, the Proposed Substitute shall assume all of the obligations and liabilities of the Service Provider under the Construction Contract (including those arising prior to the end of any Step-in Period and those arising during the period of the Proposed Novation Notice);

provided that the Construction Contractor will not be in breach of any of its obligations under this Agreement if the Proposed Substitute does not enter into one or other of such agreements.

### 4.6 *Release of Authority*

On and after the Novation Effective Date:

- (a) the Construction Contractor shall owe its obligations under the Construction Contract (whether arising before, on or after such date) to the Proposed Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge; and
- (b) if the Authority shall have entered into a Step-in Undertaking, the Authority will be released from the Step-in Undertaking, provided that:
  - (i) all obligations of the Authority under the Step-in Undertaking which have accrued up to the Novation Effective Date and are identifiable as at that date shall have been fully and unconditionally discharged; and
  - (ii) the Authority has performed and discharged in full or procured the performance and discharge in full of the obligations of the Service Provider under the Construction Contract in relation to the maintenance of records and the provision of reports during the Step-in Period up to the Novation Effective Date so as to permit the Construction Contractor to monitor the performance of the Service Provider's other obligations under the Construction Contract;
- (c) The Authority and the Construction Contractor shall use all reasonable endeavours to agree and the Authority shall use reasonable endeavours to procure that the Proposed Substitute agrees any amendments to the Construction Contract necessary to reflect clause 3.2(b) and the fact that the Project Agreement may have terminated at the time of the Novation Effective Date.

### 4.7 *Termination After Novation*

After the Novation Effective Date the Construction Contractor shall only be entitled to exercise its rights of termination under the Construction Contract:

- (a) in respect of any Event of Service Provider Default arising after that date in accordance with the Construction Contract; or
- (b) if the Proposed Substitute does not discharge the obligations and liabilities assumed by it under clause 4.5(b)(ii) which relate to matters arising prior to the end of the Step-in Period within fifteen (15) Business Days following the Novation Effective Date.

### 4.8 *Extension of Step-In Period*

As at the date of the first anniversary of the Step-in Date, if the Step-in Period has not previously ended, and:

- (a) the Authority is in the course of conducting discussions in good faith with a Proposed Substitute (the novation to whom has been approved by the Construction Contractor whether automatically or otherwise in accordance with clause 4.3), the Step-in Period shall be extended and shall continue until such date as is proposed by the Authority and agreed by the Construction Contractor; or
- (b) contracts have been exchanged by the Authority with a Proposed Substitute (which has been approved by the Construction Contractor in accordance with clause 4.3) as at such date,

the Step-in Period shall be extended and shall continue until the date such contracts are completed, provided that such date shall not be later than thirty (30) Business Days after exchange.

## 5 **Rights and Obligations under the Construction Contract**

### 5.1 *Rights of Termination*

In the event that:

- (a) no Step-in Notice or Proposed Novation Notice is given before a Termination Notice expires or within fifteen (15) Business Days after termination of the Project Agreement by the Authority; or
- (b) a Step-in Undertaking is not issued on the Proposed Step-in Date; or
- (c) the Step-in Notice is withdrawn or, pursuant to clause 3.2(g) (*Notice of Obligations and Step-in Undertaking*), deemed to have been withdrawn; or
- (d) the Step-in Period ends before the occurrence of the Novation Effective Date; or
- (e) in the absence of a Step-in Undertaking, the Construction Contractor withholds its consent to a novation pursuant to a Proposed Novation Notice, in accordance with clause 4.3 (*Grant of Consent*), and does not subsequently grant consent to a novation in accordance with clause 4.4 (*Consent Withheld*) on or before the Proposed Novation Date; or
- (f) in the absence of a Step-in Undertaking, the obligations of the Proposed Substitute set out in clause 4.5 (*Implementation of Novation*) are not performed on the Proposed Novation Date; or
- (g) the Construction Contractor is entitled to terminate the Construction Contract under clause 3.3 (*Restriction of Right of Termination*) or 4.6 (*Termination after Novation*); or

- (h) the Authority exercises its right to Step-out under clause 3.4(a) (*Step-Out*), then on the Step-out Date,

the Construction Contractor shall be entitled to exercise all of its rights under the Construction Contract and act upon any and all grounds for termination available to it in relation to the Construction Contract whenever occurring; and/or pursue any and all claims and exercise any and all rights and remedies against the Service Provider.

### 5.2 *Service Provider's Obligations to Continue*

Until completion of a novation pursuant to clause 4.5 (*Implementation of Novation*) (unless the terms of such novation expressly preserve an obligation or liability of the Service Provider), the Service Provider shall continue to be liable for all its obligations and liabilities, whenever occurring, under or arising from the Construction Contract notwithstanding:

- (a) the service of a Step-in Notice or the issue of a Step-in Undertaking or the expiry of the Step-in Period or the release of a Step-in Undertaking; or
- (b) the service of a Proposed Novation Notice; or
- (c) any other provision of this Agreement.

## 6 **Revocation of Notices**

A Termination Notice and a Step-in Notice may each be revoked (in writing to the recipient) by the party giving them before the expiry of their respective notice periods. Upon any such revocation, the rights and obligations of the parties shall be construed as if the relevant notice had not been given.

## 7 **Assignment**

### 7.1 *Binding on Successors and Assigns*

This Agreement shall be binding on and shall enure to the benefit of the parties and their respective successors and permitted assigns. In the case of the Authority, its successors shall include any person to which the Secretary of State, in exercising his statutory powers to transfer property, rights and liabilities of the Authority upon the Authority ceasing to exist, transfers the rights and obligations of the Authority under this Agreement.

### 7.2 *Restriction on Assignment*

No party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others (such consent not to be unreasonably withheld or delayed), provided that:

- (a) the Senior Funder may assign or transfer its rights and obligations to a successor trustee of the Funders under the Funding Agreements without the consent of any other party and this clause 7.2 shall not prevent any Funder assigning or

transferring its rights under the Funding Agreements and the Security Documents in accordance with the terms of the Funding Agreements;

- (b) the Service Provider shall not assign this Agreement within five (5) years from the Commissioning End Date unless such assignment is to the Senior Funder;
- (c) the Authority shall be entitled, without the consent of any other party, to transfer all its rights and obligations hereunder, to any person to whom it assigns or otherwise disposes of the benefit of the Project Agreement in accordance with clause [50] (*Assignment, Sub-Contracting and Changes in Control*) of the Project Agreement and, otherwise, with the Service Provider's and the Construction Contractor's consent (not to be unreasonably withheld or delayed);
- (d) nothing in this clause 7.2 shall restrict the rights of the Secretary of State to effect a statutory transfer; and
- (e) the Construction Contractor shall assign this Agreement to any party to whom it assigns the Construction Contract (in accordance with the terms of that agreement).

### **8 Confidentiality**

- 8.1 The parties shall be bound to observe, mutatis mutandis, the terms of clause [◆] of the Construction Contract with respect to any information or document referred to in clause [◆] of the Construction Contract which shall come into its possession pursuant to this Agreement.
- 8.2 The Construction Contractor agrees that the Authority shall be entitled to disclose the terms of this Agreement to ◆ and HM Treasury and that the Authority shall be free to use and disclose such information on such terms and in such manner as the ◆ and/or HM Treasury see fit.

### **9 Notices**

Any notice given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by registered post or recorded delivery to the party named therein at the address of such party shown in this Agreement or such other address as such party may by notice in writing nominate for the purpose of service and if sent by registered post or recorded delivery shall be deemed (subject to proof to the contrary) to have been received forty-eight (48) hours after being posted.

## 10 Payments and Taxes

### 10.1 *Payments*

All payments under this Agreement to any party shall be made in pounds sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified to the other parties from time to time.

### 10.2 *VAT*

All amounts stated to be payable by any party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate and each party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

### 10.3 *Deductions from payments*

All sums payable by a party to any other party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation, save as may be required by Legislation.

## 11 Default Interest

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

## 12 Authority

### 12.1 *Senior Funder's Warranty and Undertaking*

The Senior Funder represents and warrants to and undertakes to each of the Authority, the Construction Contractor and the Service Provider that the Senior Funder is duly authorised by each of the Funders to assume the obligations expressed to be assumed by them under this Agreement and to undertake on behalf of each Funder in the terms of this Agreement so as to bind each Funder as if it were a party.

### 12.2 *Authority*

The Authority shall not be obliged to make any enquiry as to the authority of the Senior Funder in doing any act or entering into any document or making any agreement under or in connection with this Agreement.

### 13 Expiry

The rights of the Senior Funder under this Agreement shall be extinguished upon the repayment by the Service Provider of all sums due and owing to the Funders by the Service Provider under the Funding Agreements or where the Construction Contract is terminated.

### 14 Aggregate Liability

Notwithstanding any other provision of this Agreement, the Construction Contractor's aggregate liability from time to time under this Agreement and the Construction Contract shall not at any time exceed its maximum liability as stated in the Construction Contract (as amended or varied).

### 15 Third party Rights

It is agreed for the purposes of the Contracts (Rights of Third parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained herein except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with clause 7 (*Assignment*).

### 16 Agency

#### 16.1 *No Delegation*

No provision of this Agreement shall be construed as a delegation by the Authority of any of its statutory authority to any other party.

#### 16.2 *No Agency*

Save as otherwise provided in this Agreement, no other party shall be or be deemed to be an agent of the other parties nor shall any party hold itself out as having authority or power to bind the other parties in any way.

#### 16.3 *Independent Construction Contractor*

The parties shall, at all times, be independent Construction Contractors and nothing in this Agreement shall be construed as creating any partnership between the parties or any relationship of employer and employee between the parties.

### 17 Whole Agreement

17.1 This Agreement (when read together with the Project Agreement, the Construction Contract, the Parent Company Guarantee and the Funders' Direct Agreement) contains or expressly refers to the entire agreement between the parties with respect to the specific subject matter of this Agreement and expressly excludes any warranty, condition or other undertaking implied by Legislation or by custom and supersedes all previous agreements and understandings between the parties with respect thereto and each of the parties acknowledges and confirms that it does not enter into this Agreement in

reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

- 17.2 Nothing in this Agreement is intended to or shall operate so as to exclude or limit any liability for fraud or fraudulent misrepresentation.

### **18 Waiver**

Failure by any party at any time to enforce any provision of this Agreement or to require performance by the other parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant party to enforce any provision in accordance with its terms.

### **19 Counterparts**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full and original instrument for all purposes.

### **20 Severability**

If any condition, clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

### **21 Costs and Expenses**

Each party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

### **22 Amendments**

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the parties.

### **23 Governing Law and Jurisdiction**

#### *23.1 Law*

This Agreement shall be governed by and construed in all respects in accordance with English law.

#### *23.2 Jurisdiction*

The parties each submit to the jurisdiction of the English Courts as regards any claim or matter arising in relation to this Agreement.

In witness whereof the parties have executed this Agreement as a Deed the day and year first written above.

# Social Care Procurement Pack – Model Documentation

The common seal of )  
**The Authority** )  
was affixed to this deed in the presence of )

.....  
Authorised Signatory

.....  
Authorised Signatory

# Social Care Procurement Pack – Model Documentation

Executed as a deed by ) .....  
**The Senior Funder** ) Director  
acting by two directors or by a director and its )  
secretary ) .....  
 ) Director/Secretary

Executed as a deed by ) .....  
**Construction Contractor** ) Director  
acting by two directors or by a director and its )  
secretary ) .....  
 ) Director/Secretary

Executed as a deed by ) .....  
**Service Provider** ) Director  
acting by two directors or by a director and its )  
secretary ) .....  
 ) Director/Secretary

**Part 2) - Collateral Warranty**

*[To be included on a project specific basis]*

**Part 3) - FM Contractor/Services Contractor Direct Agreement**

**Dated**

**200◆**

**AUTHORITY**

**SENIOR FUNDER**

**SERVICE PROVIDER**

**SERVICES CONTRACTOR**

---

**SERVICES CONTRACTOR DIRECT  
AGREEMENT**

---

# Social Care Procurement Pack – Model Documentation

This **Services Contractor Collateral Agreement** is made on [date]

**Between:**

- (1) [◆] (the **Authority**);
- (2) [◆]<sup>2</sup> (the **Senior Funder**);
- (3) [◆] (the **Services Contractor**); and
- (4) [◆] (**Service Provider**).

**Whereas:**

- (A) The Authority and the Service Provider have agreed the terms on which the Service Provider will design, develop and construct and provide certain services in connection with the redevelopment of [description of facilities] (the **Development**) at the Site (as that expression is defined in the Project Agreement) and, accordingly, have entered into the Project Agreement and the Project Documents.
- (B) [Description of financing arrangements].
- (C) [Description of documents entered into by the Service Provider as security for its obligations.]
- (D) The Services Contractor and the Service Provider have entered into an agreement of even date herewith relating to the provision of certain of the Services (as defined in the Project Agreement) by the Services Contractor to enable the Service Provider to discharge its obligations to the Authority regarding such Services under the Project Agreement and the Project Documents (the **Sub-Contract**).
- (E) This Services Contractor's Collateral Agreement (the **Agreement**) is one of the Services Contractors' Collateral Agreements contemplated by the Project Agreement.

**Now it is hereby agreed** as follows:

## **1 Definitions and Interpretation**

### 1.1 Definitions

In this Agreement, the following terms shall, unless the context otherwise requires, have the following meanings:

**Ancillary Documents** has the meaning given in the Project Agreement

**Business Day** means a day other than a Saturday, Sunday or a bank holiday in England

**Event of Service Provider Default** has the meaning given in the Services Contract

## Social Care Procurement Pack – Model Documentation

**Funders** has the meaning given in the Project Agreement

**Funders' Direct Agreement** is the agreement of even date herewith between, amongst others, the Service Provider, the Services Contractor and the Senior Funder

**Novation Agreement** has the meaning given in clause 4.5(b)(ii) [insert clause title]

**Novation Effective Date** means the date of performance of the obligations set out in clause 4.5(b)

**Parent Company Guarantee** has the meaning given in the Services Contract

**Project Agreement** means the Project Agreement of even date herewith between (1) the Authority and (2) the Service Provider

**Proposed Novation Date** has the meaning given in clause 4.1 (*Proposed Substitute*)

**Proposed Novation Notice** has the meaning given in clause 4.1 (*Proposed Substitute*)

**Proposed Step-in Date** has the meaning given in clause 3.1 (*Step-in Notice*)

**Proposed Substitute** has the meaning given in clause 4.1 (*Proposed Substitute*)

**Security Documents** has the meaning given in the Funders' Direct Agreement

**Services Contract** has the meaning given in the Project Agreement

**Step-in Date** means the date of issue of the Step-in Undertaking

**Step-in Notice** has the meaning given in clause 3.1 (*Step-in Notice*)

**Step-in Period** means the period commencing on the Step-in Date and ending on the earliest of:

- (c) the date of the first anniversary of the Step-in Date (but subject always to clause 4.7 (*Extension of Step-In Period*));
- (d) the Step-out Date;
- (e) the Novation Effective Date; and
- (f) termination of the Services Contract under clause 3.3 (*Restriction of Right of Termination*)

**Step-in Undertaking** has the meaning given in clause 3.2(d) [*insert clause title*]

**Step-out Date** has the meaning given in clause 3.4(a) [*insert clause title*]

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<sup>2</sup> The standard form is drafted on the basis that the project is bank financed. This template will need to be adapted if different funding arrangements are used.

**Termination Notice** has the meaning given in clause 2.3 (*Termination Notice*)

## 1.2 Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- (a) headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- (b) all references to clauses are references to clauses of this Agreement;
- (c) all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- (d) all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- (e) any reference to time of day shall be a reference to London time;
- (f) the words **herein**, **hereto** and **hereunder** refer to this Agreement as a whole and not to the particular clause in which such word may be used;
- (g) words importing the singular include the plural and vice versa;
- (h) words importing a particular gender include all genders;
- (i) **person** includes any individual, partnership, firm, Authority, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;
- (j) any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;
- (k) references to **party** means a party to this Agreement and references to **parties** shall be construed accordingly;
- (l) all monetary amounts are expressed in pounds sterling;
- (m) references to the word **includes** or **including** are to be construed without limitation;
- (n) the obligations of any party under this Agreement are to be performed at that party's own cost and expense;

- (o) terms used in this Agreement that are defined in the Project Agreement or the Ancillary Documents shall have the meanings given to them in the Project Agreement or the Ancillary Documents, as appropriate.

## 2 Termination Notice and Authority Termination

### 2.1 Services Contractor's Warranties and Undertakings

The Services Contractor warrants and undertakes to the Authority that it has complied with and fulfilled and shall continue to comply with and fulfil its duties and obligations arising under or by virtue of the Services Contract, provided that the Authority shall only be entitled to make a claim against the Services Contractor under this clause 2.1 if the Project Agreement has terminated and shall not be entitled to do so during the Step-in Period or after the Services Contract has been novated under clause 4.

### 2.2 Liability of Services Contractor

Any liability arising from any claim for breach of the warranty under or pursuant to clause 2.1 shall be in addition to and without prejudice to any other present or future liability of the Services Contractor to the Authority (including, without prejudice to the generality of the foregoing, any liability in negligence) and shall not be released, diminished or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by or on behalf of the Authority by any person nor by any action or omission of any person whether or not such action or omission might give rise to an independent liability of such person to the Authority provided always that the Services Contractor shall owe no greater duties or obligations to the Authority under this Agreement than it owes or would have owed to the Service Provider under the Services Contract.

### 2.3 Termination Notice

The following provisions shall apply to termination of the [Services Agreement] [FM Agreement]:

- (a) the Services Contractor undertakes not to terminate the [FM] [Services] Contract on account of an Event of Service Provider Default without first giving the Authority not less than [fifteen (15)] Business Days' prior written notice specifying the grounds for that termination. Subject to clause 2.3(b) any such notice, other than one given in circumstances where there is no default under the FM Contract by the Service Provider or the Services Contractor, shall be a **Termination Notice**;
- (b) where the Services Contractor's right to terminate is subject to the terms of the Funders' Direct Agreement then the Services Contractor shall notify the Authority of the same as soon as reasonably practicable upon becoming aware of the provisions of the Funders' Direct Agreement applying. Thereafter as soon as the Services Contractor becomes entitled to terminate the Services Contract free from the constraints contained in the Funders' Direct Agreement, whether upon the expiry of the Step-in Period (as such term is defined in the Funders'

Direct Agreement) or otherwise, then the Services Contractor undertakes to the Authority not to terminate the Services Contract on account of an Event of Service Provider Default (whether occurring before or after the Services Contractor's right to terminate the Services Contract was free from the constraints of the Funders' Direct Agreement) without first giving the Authority not less than [fifteen (15)] Business Days' prior notice specifying the grounds for that termination and noting that the Services Contractor's right of termination is not subject to the Funders' Direct Agreement. Any such notice, other than one given in circumstances where there is no default under the Services Contract by the Service Provider or the Services Contractor, shall for the purposes of this Agreement also be a Termination Notice and the provisions of this Agreement shall apply accordingly;

- (c) notwithstanding any provision of the Services Contract to the contrary, on termination of the Project Agreement by the Authority, the parties agree that the Services Contract shall not come to an end except in accordance with the terms of this Agreement;
- (d) the Authority acknowledges that it shall not be entitled to exercise its rights under clauses 3 (Step-in and Step-out) and 4 (Novation) where the event giving rise to termination of the Project Agreement is an Event of Soft Services Provider Default (as that term is defined in the Services Contract) whether or not at the relevant time there has been notice to terminate the Services Contract for such an Event of Soft Services Provider Default or not.

### 3 Step-In and Step-Out

#### 3.1 Step-in Notice

If the Authority has terminated the Project Agreement in accordance with the terms of the Project Agreement or if the Authority has received a Termination Notice, then subject to the provisions of this Agreement, the Authority may give written notice to the Services Contractor (a **Step-in Notice**) of the intention of the Authority to issue a Step-in Undertaking on a specified date (the **Proposed Step-in Date**) provided that such Proposed Step-in Date shall be:

- (a) no later than [five (5)] Business Days after termination of the Project Agreement where this has been terminated by the Authority; and
- (b) no earlier than the date falling 5 days prior to the date of expiry of the Termination Notice and no later than the date of expiry of the Termination Notice where a Termination Notice has been given by the Services Contractor. the Authority shall provide a copy of any Step-in Notice to the Senior Funder at the same time as the Step-in Notice is given to the Services Contractor,

provided that unless the Services Contractor otherwise consents, only one Step-in Notice may be given during the period of this Agreement. Subject to clause 5.1 below, the Services Contractor shall not be entitled to terminate the Services Contract until after the Proposed Step-in Date.

### 3.2 Notice of Obligations and Step-in Undertaking

- (a) Within [three (3)] Business Days of receipt of any Step-in Notice, the Services Contractor shall give written notice to the Authority of any sums of which the Services Contractor has actual knowledge which are due and payable but unpaid by the Service Provider and of any other material obligations or liabilities, of which the Services Contractor has actual knowledge, which should have been performed or discharged by the Service Provider under the Services Contract, in each case, as at the date of the Step-in Notice.
- (b) The Services Contractor shall inform the Authority in writing as soon as reasonably practicable of:
  - (i) any change in such sums, obligations or liabilities referred to in clause 3.2(a); and
  - (ii) any further sums, obligations or liabilities thereafter falling due and payable but unpaid or falling due for performance or discharge and unperformed or undischarged (as the case may be);

in each case of which the Services Contractor has actual knowledge, before the Step-in Date.

- (c) The Services Contractor shall give the Authority the information referred to in clauses 3.2(a) and 3.2(b) in good faith and may not give any further notifications pursuant to clause 3.2(b) less than [two (2)] Business Days prior to the Proposed Step-in Date. The Authority shall not be required to assume any liability under a Step-in Undertaking for any outstanding obligations or liabilities of the Service Provider to the Services Contractor which are not notified to the Authority pursuant to clauses 3.2(a) or 3.2(b).
- (d) Not later than the Proposed Step-in Date the Authority shall decide if it is prepared to issue a Step-in Undertaking. If it does so decide, the Authority shall promptly give the Services Contractor written notification of such decision and, at the same time, provide a copy of such notification to the Senior Funder. Subject to the prior performance by the Senior Funder of its obligations under clause 3.2(e), the Authority shall deliver to the Services Contractor on the Proposed Step-in Date, a written undertaking in form and substance agreed with the Services Contractor (both the Authority and the Services Contractor acting reasonably) (the **Step in Undertaking**), incorporating a clause in terms similar to clause 11 (but only to the extent that there will not be double counting of default interest accruing under the Services Contract and this Agreement), and undertaking to the Services Contractor:
  - (i) to pay or procure the payment to the Services Contractor, within [fifteen (15)] Business Days of demand by the Services Contractor, of any sum due and payable but unpaid by the Service Provider to the Services Contractor under the Services Contract before the Step-in Date and

which has been notified by the Services Contractor to the Authority in accordance with clause 3.2(a) or 3.2(b);

- (ii) to perform or discharge or procure the performance or discharge of any unperformed or undischarged obligations of the Service Provider under the Services Contract which shall have fallen due for performance or discharge before the Step-in Date and which have been notified by the Services Contractor to the Authority in accordance with clause 3.2(a) or 3.2(b) within such period as the Services Contractor may reasonably require;
  - (iii) to pay or procure the payment of any sum due and payable by the Service Provider under the Services Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to clauses 3.4 and 4.5(c)(ii)) but not, to avoid doubt, any sum due in respect of any Services provided before the Step-in Date; and
  - (iv) to perform or discharge or procure the performance or discharge of any obligations of the Service Provider under the Services Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to clauses 3.4 and 4.5(c)(ii)) but not, to avoid doubt, to perform or discharge or to procure the performance or discharge of any obligations in respect of any Services provided before the Step-in Date.
- (e) Following notification of the Authority's decision pursuant to clause 3.2(d), the Senior Funder shall, on or before the Proposed Step-in Date, take any action which is necessary unconditionally and irrevocably to release the Services Contract and the Parent Company Guarantee from the security constituted by the Security Documents.
- (f) Upon release of the Parent Company Guarantee in accordance with clause 3.2(e), the Service Provider shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority in accordance with clause [♦] of the same.
- (g) If the Authority shall not have issued the Step-in Undertaking on or before the Proposed Step-in Date the Step-in Notice shall be deemed to have been withdrawn and the rights and obligations of the parties shall be construed as if the Step-in Notice had not been given.

### 3.3 Restriction of Right of Termination

During or in respect of the Step-in Period, the Services Contractor confirms to the Authority that it shall continue to observe and perform its duties and obligations under the Services Contract and shall, without prejudice to clause 5.1, only be entitled to exercise its rights of termination under the Services Contract:

- (a) by reference to an Event of Service Provider Default arising during the Step-in Period provided that no event of default by the Service Provider under the Project Agreement (whether resulting in termination of the Project Agreement or otherwise, and notwithstanding that it has occurred during the Step-in Period) shall entitle the Services Contractor to exercise such rights of termination during the Step-in Period; or
- (b) if the Authority fails to pay when due any amount owed to the Services Contractor or fails to perform or discharge when falling due for performance or discharge any obligation under the Step-in Undertaking or fails to procure such payment or performance or discharge; or
- (c) if such rights of termination arise in circumstances where there is no default under the Services Contract by the Authority or the Services Contractor.

### 3.4 Step-Out

- (a) the Authority may, at any time, give the Services Contractor at least 30 days' prior written notice to terminate the Step-in Period on a date specified in the notice (the **Step-Out Date**);
- (b) the Authority shall give the Services Contractor at least [thirty (30)] days' prior written notice that (subject to clause 4.4(b)) the Step-in Period will end due to the occurrence (subject to clause 4.7) of the first anniversary of the Step-in Date;

provided that

- (i) the Authority has performed and discharged in full or procured the performance and discharge in full of any obligations of the Service Provider under the Services Contract in relation to the maintenance of records and the provision of reports during the Step-in Period so as to permit the Services Contractor to monitor the performance of the Service Provider's other obligations under the Services Contract; and
- (ii) all liability under the Step-in Undertaking pursuant to any claims made up to the date specified in either clause 3.4(a) or clause 3.4(b) (as the case may be) shall have been fully and unconditionally discharged,

the Authority shall be released from the Step-in Undertaking on the expiry of the Step-in Period in accordance with clauses 3.4(a) and 3.4(b). Such release shall not affect the continuation of the Service Provider's obligations towards the Services Contractor under the Services Contract.

### 3.5 Senior Funder

The Senior Funder is a party to this Agreement solely for the purposes of taking the benefit of its rights under clause 2.4(d) and clause 3 and, subject to clauses 3.2(e), 4.5(a), 7.2(a) and 12.1 shall have no rights or obligations or liabilities hereunder.

### 4 Novation

#### 4.1 Proposed Substitute

At any time that the Authority is entitled to give a Step-in Notice pursuant to clause 3.1 or at any time during the Step-in Period the Authority may give notice (a **Proposed Novation Notice**) to the Services Contractor that it wishes itself or another person (a **Proposed Substitute**) to assume, by way of sale, transfer or other disposal, the rights and obligations of the Service Provider under the Services Contract and specifying a date (the **Proposed Novation Date**):

- (a) falling not later than [fifteen (15)] Business Days after termination of the Project Agreement where this has been terminated by the Authority;
- (b) falling not later than the expiry of the Termination Notice where a Proposed Novation Notice is given by the Authority at a time when it is entitled to give a Step-in Notice pursuant to clause 3.1; and
- (c) falling not later than [twenty-eight (28)] Business Days after the date of the Proposed Novation Notice, where a Proposed Novation Notice is given during a Step-in Period,

The Authority shall provide a copy of any Proposed Novation Notice to the Senior Funder at the same time as the Proposed Novation Notice is given to the Services Contractor. Save as provided in clause 4.4, only one Proposed Novation Notice may be given during the period of this Agreement. Without prejudice to clauses 3.3 and 5.1, the Services Contractor shall not be entitled to terminate the Services Contract during the notice period specified in a Proposed Novation Notice.

#### 4.2 Information for Consent to Novation

If the Proposed Novation Notice specifies the Authority as the Proposed Substitute, the Services Contractor's consent to the novation shall be deemed to have been given automatically. Where the Proposed Substitute is not the Authority, a novation in accordance with a Proposed Novation Notice shall only be effective if the Services Contractor consents to that novation in writing in accordance with clause 4.3 and the Authority shall (as soon as practicable) supply the Services Contractor with the following information:

- (a) the name and registered address of the Proposed Substitute;
- (b) the names of the shareholders in the Proposed Substitute and the share capital owned by each of them;
- (c) the names of the directors and the secretary of the Proposed Substitute;
- (d) details of the means by which it is proposed to finance the Proposed Substitute (including the extent to which such finance is committed and any conditions precedent as to its availability for drawing); and

- (e) the resources (including contractual arrangements) which are to be available to the Proposed Substitute to enable it to perform its obligations under the Services Contract.

### 4.3 Grant of Consent

The Services Contractor may withhold or delay consent to a novation only where the Proposed Substitute is not the Authority and the Authority has failed to show to the Services Contractor's satisfaction (acting reasonably) that:

- (a) the Proposed Substitute has the legal capacity, power and authorisation to become a party to and perform the obligations of the Service Provider under the Services Contract; and
- (b) the technical competence and financial standing of and the technical and financial resources available to the Proposed Substitute are sufficient to perform the obligations of the Service Provider under the Services Contract.

The Services Contractor shall notify the Authority in writing, within [five (5)] Business Days of the later of receipt of a Proposed Novation Notice and all information required under clause 4.2, as to whether or not it has decided to grant such consent (together with an explanation of its reasons if it has decided to withhold its consent) and, at the same time, provide a copy of the same to the Senior Funder.

### 4.4 Consent withheld

If, in accordance with clause 4.3, the Services Contractor withholds its consent to a Proposed Novation Notice, the Authority shall be entitled to give one or more subsequent Proposed Novation Notices, pursuant to the provisions of clause 4.1, containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute which (where the replacement Proposed Substitute is not the Authority) the Authority has good cause to believe would fulfil the requirements of clauses 4.3(a) and 4.3(b), provided that only one Proposed Novation Notice may be outstanding at any one time, and provided further that:

- (a) where a Step-in-Notice has not been issued, any revised Proposed Novation Date shall be a date falling no later than the date specified in clause 4.1(a) or 4.1(b) as appropriate; and
- (b) if the Proposed Novation Notice was served during the Step-in Period, any revised Proposed Novation Date shall be a date falling not later than [twenty-eight (28)] Business Days after the date of the revised Proposed Novation Notice.

### 4.5 Implementation of Novation

- (a) If the Services Contractor consents to a novation pursuant to a Proposed Novation Notice (whether automatically or otherwise), then on the Proposed Novation Date and without prejudice to clause 5.1:

- (i) following such notification and in the absence of any prior release in accordance with clause 3.2(e), the Senior Funder shall, on or before the Proposed Novation Date, take any action which is necessary unconditionally and irrevocably to release the Services Contract and the Parent Company Guarantee from the security constituted by the Security Documents; and
- (ii) upon release of the Parent Company Guarantee in accordance with clause 4.5(a)(i), the Service Provider shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority in accordance with clause [♦] of the same;

and on the Proposed Novation Date and without prejudice to clause 5.1:

(b)

- (i) subject to the prior performance by the Senior Funder and the Service Provider of their respective obligations under clause 4.5(a)(i) and 4.5(a)(ii) the Proposed Substitute shall become a party to the Services Contract in place of the Service Provider and, thereafter, shall be treated as if it was and had always been named as a party to the Services Contract in place of the Service Provider; and
- (ii) the Service Provider and the Proposed Substitute shall enter into a novation agreement (the **Novation Agreement**) and any other requisite agreements, in form and substance satisfactory to the Services Contractor (acting reasonably), pursuant to which:
  - (A) the Proposed Substitute shall be granted all of the rights of the Service Provider under the Services Contract (including those arising prior to the end of the Step-in Period);
  - (B) subject to the Services Contractor giving to the Proposed Substitute within [three (3)] Business Days of receipt of the Proposed Novation Notice such notice as is referred to in clause 3.2(a) and to the provisions of clauses 3.2(b) and 3.2(c), mutatis mutandis, the Proposed Substitute shall assume all of the obligations and liabilities of the Service Provider under the Services Contract (including those arising prior to the end of any Step-in Period and those arising during the period of the Proposed Novation Notice); provided that the Services Contractor will not be in breach of any of its obligations under this Agreement if the Proposed Substitute does not enter into one or other of such agreements.

(c) On and after the Novation Effective Date:

- (i) the Services Contractor shall owe its obligations under the Services Contract (whether arising before, on or after such date) to the Proposed

Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge; and

- (ii) If the Authority shall have entered into a Step-in Undertaking, the Authority will be released from the Step-in Undertaking, provided that:
  - (A) all obligations of the Authority under the Step-in Undertaking which have accrued up to the Novation Effective Date and are identifiable as at that date shall have been fully and unconditionally discharged; and
  - (B) the Authority has performed and discharged in full or procured the performance and discharge in full of the obligations of the Service Provider under the Services Contract in relation to the maintenance of records and the provision of reports during the Step-in Period up to the Novation Effective Date so as to permit the Services Contractor to monitor the performance of the Service Provider's other obligations under the Services Contract.
- (d) the Authority and the Services Contractor shall use all reasonable endeavours to agree and the Authority shall use reasonable endeavours to procure that the Proposed Substitute agrees any amendments to the Services Contract necessary to reflect clause 3.2(b) and the fact that the Project Agreement may have terminated at the time of the Novation Effective Date.

#### 4.6 Termination After Novation

After the Novation Effective Date the Services Contractor shall only be entitled to exercise its rights of termination under the Services Contract:

- (a) in respect of any Event of Service Provider Default arising after that date in accordance with the Services Contract; or
- (b) if the Proposed Substitute does not discharge the obligations and liabilities assumed by it under clause 4.5(b)(ii) which relate to matters arising prior to the end of the Step-in Period within [fifteen (15)] Business Days following the Novation Effective Date.

#### 4.7 Extension of Step-In Period

As at the date of the first anniversary of the Step-in Date, if the Step-in Period has not previously ended, and:

- (a) the Authority is in the course of conducting discussions in good faith with a Proposed Substitute (the novation to whom has been approved by the Services Contractor whether automatically or otherwise in accordance with clause 4.3), the Step-in Period shall be extended and shall continue until such date as is proposed by the Authority and agreed by the Services Contractor; or

- (b) contracts have been exchanged by the Authority with a Proposed Substitute (which has been approved by the Services Contractor in accordance with clause 4.3) as at such date,

the Step-in Period shall be extended and shall continue until the date such contracts are completed, provided that such date shall not be later than [thirty (30)] Business Days after exchange.

### 5 Rights and Obligations under the Services Contract

#### 5.1 Rights of Termination

If:

- (a) no Step-in Notice or Proposed Novation Notice is given before a Termination Notice expires or within [fifteen (15)] Business Days after termination of the Project Agreement by the Authority; or
- (b) a Step-in Undertaking is not issued on the Proposed Step-in Date; or
- (c) the Step-in Notice is withdrawn or, pursuant to clause 3.2(g), deemed to have been withdrawn; or
- (d) the Step-in Period ends before the occurrence of the Novation Effective Date; or
- (e) in the absence of a Step-in Undertaking, the Services Contractor withholds its consent to a novation pursuant to a Proposed Novation Notice, in accordance with clause 4.3, and does not subsequently grant consent to a novation in accordance with clause 4.4 on or before the Proposed Novation Date; or
- (f) in the absence of a Step-in Undertaking, the obligations of the Proposed Substitute set out in clause 4.5 are not performed on the Proposed Novation Date; or
- (g) the Services Contractor is entitled to terminate the Services Contract under clause 3.3 or 4.6; or
- (h) the Authority exercises its right to Step-out under clause 3.4(a), then on the Step-out Date,

the Services Contractor shall be entitled to:

- (i) exercise all of its rights under the Services Contract and act upon any and all grounds for termination available to it in relation to the Services Contract whenever occurring; and/or
- (j) pursue any and all claims and exercise any and all rights and remedies against the Service Provider.

#### 5.2 Service Provider's Obligations to Continue

Until completion of a novation pursuant to clause 4.5 (unless the terms of such novation expressly preserve an obligation or liability of the Service Provider), the Service Provider shall continue to be liable for all its obligations and liabilities, whenever occurring, under or arising from the Services Contract notwithstanding:

- (a) the service of a Step-in Notice or the issue of a Step-in Undertaking or the expiry of the Step-in Period or the release of a Step-in Undertaking; or
- (b) the service of a Proposed Novation Notice; or
- (c) any other provision of this Agreement.

### 6 Revocation of Notices

A Termination Notice and a Step-in Notice may each be revoked (in writing to the recipient) by the party giving them before the expiry of their respective notice periods. Upon any such revocation, the rights and obligations of the parties shall be construed as if the relevant notice had not been given.

### 7 Assignment

#### 7.1 Binding on Successors and Assigns

This Agreement shall be binding on and shall enure to the benefit of the parties and their respective successors and permitted assigns. In the case of the Authority, its successors shall include any person to which the Secretary of State, in exercising his statutory powers to transfer property, rights and liabilities of the Authority upon the Authority ceasing to exist, transfers the rights and obligations of the Authority under this Agreement.

#### 7.2 Restriction on Assignment

No party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others (such consent not to be unreasonably withheld or delayed), provided that:

- (a) the Senior Funder may assign or transfer its rights and obligations to a successor Authority<sup>3</sup> of the Funders<sup>3</sup> under the Funding Agreements without the consent of any other party and this clause 7.2 shall not prevent any Funder assigning or transferring its rights under the Funding Agreements and the Security Documents in accordance with the terms of the Funding Agreements; and
- (b) the Service Provider shall not assign this Agreement within [five (5)] years from the Commissioning End date;
- (c) the Authority shall be entitled, without the consent of any other party, to transfer all its rights and obligations hereunder, to any person to whom it assigns or otherwise disposes of the benefit of the Project Agreement in

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<sup>3</sup> Amend terminology depending on funding arrangements.

accordance with clause 50 of the Project Agreement and, otherwise, with the Service Provider's and the Services Contractor's consent (not to be unreasonably withheld or delayed);

- (d) nothing in this sub-clause shall restrict the rights of the Secretary of State to effect a statutory transfer;
- (e) the Services Contractor shall assign this Agreement to any party to whom it assigns the Services Contract (in accordance with the terms of that agreement).

### **8 Confidentiality**

- 8.1 The parties shall be bound to observe, mutatis mutandis, the terms of clause [♦] of the Services Contract with respect to any information or document referred to in clause [♦] of the Services Contract which shall come into its possession pursuant to this Agreement.]
- 8.2 The Services Contractor agrees that the Authority shall be entitled to disclose the terms of this Agreement to the Department of Health and HM Treasury and that the Authority shall be free to use and disclose such information on such terms and in such manner as the Department of Health and/or HM Treasury see fit.

### **9 Notices**

Any notice given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by registered post or recorded delivery to the party named therein at the address of such party shown in this Agreement or such other address as such party may by notice in writing nominate for the purpose of service and if sent by registered post or recorded delivery shall be deemed (subject to proof to the contrary) to have been received 48 hours after being posted.

### **10 Payments and Taxes**

#### 10.1 Payments

All payments under this Agreement to any party shall be made in pounds sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified to the other parties from time to time.

#### 10.2 VAT

- (a) All amounts stated to be payable by any party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.
- (b) Each party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

### 10.3 Deductions from Payments

All sums payable by a party to any other party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation, save as may be required by Law.

## 11 Default Interest

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

## 12 Authority

### 12.1 Senior Funder's Warranty and Undertaking

The Senior Funder represents and warrants to and undertakes to each of the Authority, the Services Contractor and that the Senior Funder is duly authorised by each of the Funders to assume the obligations expressed to be assumed by them under this Agreement and to undertake on behalf of each Funder in the terms of this Agreement so as to bind each Funder as if it were a party.

### 12.2 Authority

The Authority shall not be obliged to make any enquiry as to the authority of the Senior Funder in doing any act or entering into any document or making any agreement under or in connection with this Agreement.

## 13 Expiry

The rights of the Senior Funder under this Agreement shall be extinguished upon the repayment by the Service Provider of all sums due and owing to the Funders by the Service Provider under the Funding Agreements or where the Services Contract is terminated.

## 14 Aggregate Liability

Notwithstanding any other provision of this Agreement, the Services Contractor's aggregate liability from time to time under this Agreement and the Services Contract shall not at any time exceed its maximum liability as stated in the Services Contract (as amended or varied).

## 15 Third party Rights

It is agreed for the purposes of the Contracts (Rights of Third parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained herein except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with clause 7.

### **16 Agency**

#### 16.1 No Delegation

No provision of this Agreement shall be construed as a delegation by the Authority of any of its statutory authority to any other party.

#### 16.2 No Agency

Save as otherwise provided in this Agreement, no other party shall be or be deemed to be an agent of the other parties nor shall any party hold itself out as having authority or power to bind the other parties in any way.

#### 16.3 Independent Contractor

The parties shall, at all times, be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the parties or any relationship of employer and employee between the parties.

### **17 Whole Agreement**

17.1 This Agreement (when read together with the Project Agreement, the Services Contract, the Parent Company Guarantee and the Funders' Direct Agreement) contains or expressly refers to the entire agreement between the parties with respect to the specific subject matter of this Agreement and expressly excludes any warranty, condition or other undertaking implied at Law or by custom and supersedes all previous agreements and understandings between the parties with respect thereto and each of the parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

17.2 Nothing in this Agreement is intended to or shall operate so as to exclude or limit any liability for fraud or fraudulent misrepresentation.

### **18 Waiver**

Failure by any party at any time to enforce any provision of this Agreement or to require performance by the other parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant party to enforce any provision in accordance with its terms.

### **19 Counterparts**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full and original instrument for all purposes.

**20 Severability**

If any condition, clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

**21 Costs and Expenses**

Each party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

**22 Amendments**

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the parties.

**23 Governing Law and Jurisdiction**

23.1 Law

This Agreement shall be governed by and construed in all respects in accordance with English law.

23.2 Jurisdiction

The parties each submit to the jurisdiction of the English Courts as regards any claim or matter arising in relation to this Agreement.

**In Witness** whereof the parties have executed this Agreement as a Deed the day and year first written above.

The common seal of )  
**[Authority]** )  
was hereunto affixed and authenticated by: )

Executed as a deed by ) .....  
**[Senior Funder]** ) Director  
acting by two of its directors or by a director and )  
its secretary ) .....  
) Director/Secretary

# Social Care Procurement Pack – Model Documentation

Executed as a deed by ) .....  
**[Services Contractor]** ) Director  
acting by two of its directors or by a director and ) .....  
its secretary ) Director/Secretary

Executed as a deed by ) .....  
**[Service Provider]** ) Director  
acting by two of its directors or by a director and ) .....  
its secretary ) Director/Secretary

**Part 4) - FM Contractor/Services Contractor Direct Agreement**

**Dated**

**200◆**

**AUTHORITY**

**SENIOR FUNDER**

**SERVICE PROVIDER**

**FM CONTRACTOR**

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**FM CONTRACTOR DIRECT  
AGREEMENT**

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# Social Care Procurement Pack – Model Documentation

This FM Contractor Collateral Agreement is made on [date]

## Between:

- (1) [◆] (the **Authority**);
- (2) [◆]<sup>4</sup> (the **Senior Funder**);
- (3) [◆] (the **FM Contractor**); and
- (4) [◆] (**Service Provider**).

## Whereas:

- (A) The Authority and the Service Provider have agreed the terms on which the Service Provider will design, develop and construct and provide certain services in connection with the redevelopment of [description of facilities] (the **Development**) at the Site (as that expression is defined in the Project Agreement) and, accordingly, have entered into the Project Agreement and the Project Documents.
- (B) [Description of financing arrangements].
- (C) [Description of documents entered into by the Service Provider as security for its obligations.]
- (D) The FM Contractor and the Service Provider have entered into an agreement of even date herewith relating to the provision of certain of the Services (as defined in the Project Agreement) by the FM Contractor to enable the Service Provider to discharge its obligations to the Authority regarding such Services under the Project Agreement and the Project Documents (the **[FM Contract]**).
- (E) This FM Contractor's Collateral Agreement (the **Agreement**) is one of the FM Contractors' Collateral Agreements contemplated by the Project Agreement.

**Now it is hereby agreed** as follows:

## 1 Definitions and Interpretation

### 1.1 Definitions

In this Agreement, the following terms shall, unless the context otherwise requires, have the following meanings:

**Ancillary Documents** has the meaning given in the Project Agreement

**Business Day** means a day other than a Saturday, Sunday or a bank holiday in England

**Event of Service Provider Default** has the meaning given in the Services Contract

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**Funders** has the meaning given in the Project Agreement

**Funders' Direct Agreement** is the agreement of even date herewith between, amongst others, the Service Provider, the FM Contractor and the Senior Funder

**Novation Agreement** has the meaning given in clause 4.5(b)(ii) [insert clause title]

**Novation Effective Date** means the date of performance of the obligations set out in clause 4.5(b)

**Parent Company Guarantee** has the meaning given in the Services Contract

**Project Agreement** means the Project Agreement of even date herewith between (1) the Authority and (2) the Service Provider

**Proposed Novation Date** has the meaning given in clause 4.1 (*Proposed Substitute*)

**Proposed Novation Notice** has the meaning given in clause 4.1 (*Proposed Substitute*)

**Proposed Step-in Date** has the meaning given in clause 3.1 (*Step-in Notice*)

**Proposed Substitute** has the meaning given in clause 4.1 (*Proposed Substitute*)

**Security Documents** has the meaning given in the Funders' Direct Agreement

**Services Contract** has the meaning given in the Project Agreement

**Step-in Date** means the date of issue of the Step-in Undertaking

**Step-in Notice** has the meaning given in clause 3.1 (*Step-in Notice*)

**Step-in Period** means the period commencing on the Step-in Date and ending on the earliest of:

- (a) the date of the first anniversary of the Step-in Date (but subject always to clause 4.7 (*Extension of Step-In Period*));
- (b) the Step-out Date;
- (c) the Novation Effective Date; and
- (d) termination of the Services Contract under clause 3.3 (*Restriction of Right of Termination*)

**Step-in Undertaking** has the meaning given in clause 3.2(d) [insert clause title]

**Step-out Date** has the meaning given in clause 3.4(a) [insert clause title]

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<sup>4</sup> The standard form is drafted on the basis that the project is bank financed. This template will need to be adapted if different funding arrangements are used.

**Termination Notice** has the meaning given in clause 2.3 (*Termination Notice*)

## 1.2 Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- (a) headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- (b) all references to clauses are references to clauses of this Agreement;
- (c) all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- (d) all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- (e) any reference to time of day shall be a reference to London time;
- (f) the words **herein**, **hereto** and **hereunder** refer to this Agreement as a whole and not to the particular clause in which such word may be used;
- (g) words importing the singular include the plural and vice versa;
- (h) words importing a particular gender include all genders;
- (i) **person** includes any individual, partnership, firm, Authority, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;
- (j) any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;
- (k) references to **party** means a party to this Agreement and references to **parties** shall be construed accordingly;
- (l) all monetary amounts are expressed in pounds sterling;
- (m) references to the word **includes** or **including** are to be construed without limitation;
- (n) the obligations of any party under this Agreement are to be performed at that party's own cost and expense;

- (o) terms used in this Agreement that are defined in the Project Agreement or the Ancillary Documents shall have the meanings given to them in the Project Agreement or the Ancillary Documents, as appropriate.

## 2 Termination Notice and Authority Termination

### 2.1 FM Contractor's Warranties and Undertakings

The FM Contractor warrants and undertakes to the Authority that it has complied with and fulfilled and shall continue to comply with and fulfil its duties and obligations arising under or by virtue of the Services Contract, provided that the Authority shall only be entitled to make a claim against the FM Contractor under this clause 2.1 if the Project Agreement has terminated and shall not be entitled to do so during the Step-in Period or after the Services Contract has been novated under clause 4.

### 2.2 Liability of FM Contractor

Any liability arising from any claim for breach of the warranty under or pursuant to clause 2.1 shall be in addition to and without prejudice to any other present or future liability of the FM Contractor to the Authority (including, without prejudice to the generality of the foregoing, any liability in negligence) and shall not be released, diminished or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by or on behalf of the Authority by any person nor by any action or omission of any person whether or not such action or omission might give rise to an independent liability of such person to the Authority provided always that the FM Contractor shall owe no greater duties or obligations to the Authority under this Agreement than it owes or would have owed to the Service Provider under the Services Contract.

### 2.3 Termination Notice

The following provisions shall apply to termination of the [Services Agreement] [FM Agreement]:

- (a) the FM Contractor undertakes not to terminate the [FM] [Services] Contract on account of an Event of Service Provider Default without first giving the Authority not less than [fifteen (15)] Business Days' prior written notice specifying the grounds for that termination. Subject to clause 2.3(b) any such notice, other than one given in circumstances where there is no default under the FM Contract by the Service Provider or the FM Contractor, shall be a **Termination Notice**;
- (b) where the FM Contractor's right to terminate is subject to the terms of the Funders' Direct Agreement then the FM Contractor shall notify the Authority of the same as soon as reasonably practicable upon becoming aware of the provisions of the Funders' Direct Agreement applying. Thereafter as soon as the FM Contractor becomes entitled to terminate the Services Contract free from the constraints contained in the Funders' Direct Agreement, whether upon the expiry of the Step-in Period (as such term is defined in the Funders' Direct

Agreement) or otherwise, then the FM Contractor undertakes to the Authority not to terminate the Services Contract on account of an Event of Service Provider Default (whether occurring before or after the FM Contractor's right to terminate the Services Contract was free from the constraints of the Funders' Direct Agreement) without first giving the Authority not less than [fifteen (15)] Business Days' prior notice specifying the grounds for that termination and noting that the FM Contractor's right of termination is not subject to the Funders' Direct Agreement. Any such notice, other than one given in circumstances where there is no default under the Services Contract by the Service Provider or the FM Contractor, shall for the purposes of this Agreement also be a Termination Notice and the provisions of this Agreement shall apply accordingly;

- (c) notwithstanding any provision of the Services Contract to the contrary, on termination of the Project Agreement by the Authority, the parties agree that the Services Contract shall not come to an end except in accordance with the terms of this Agreement;
- (d) the Authority acknowledges that it shall not be entitled to exercise its rights under clauses 3 (Step-in and Step-out) and 4 (Novation) where the event giving rise to termination of the Project Agreement is an Event of Soft Services Provider Default (as that term is defined in the Services Contract) whether or not at the relevant time there has been notice to terminate the Services Contract for such an Event of Soft Services Provider Default or not.

### 3 Step-In and Step-Out

#### 3.1 Step-in Notice

If the Authority has terminated the Project Agreement in accordance with the terms of the Project Agreement or if the Authority has received a Termination Notice, then subject to the provisions of this Agreement, the Authority may give written notice to the FM Contractor (a **Step-in Notice**) of the intention of the Authority to issue a Step-in Undertaking on a specified date (the **Proposed Step-in Date**) provided that such Proposed Step-in Date shall be:

- (a) no later than [five (5)] Business Days after termination of the Project Agreement where this has been terminated by the Authority; and
- (b) no earlier than the date falling 5 days prior to the date of expiry of the Termination Notice and no later than the date of expiry of the Termination Notice where a Termination Notice has been given by the FM Contractor. the Authority shall provide a copy of any Step-in Notice to the Senior Funder at the same time as the Step-in Notice is given to the FM Contractor,

provided that unless the FM Contractor otherwise consents, only one Step-in Notice may be given during the period of this Agreement. Subject to clause 5.1 below, the FM Contractor shall not be entitled to terminate the Services Contract until after the Proposed Step-in Date.

### 3.2 Notice of Obligations and Step-in Undertaking

- (a) Within [three (3)] Business Days of receipt of any Step-in Notice, the FM Contractor shall give written notice to the Authority of any sums of which the FM Contractor has actual knowledge which are due and payable but unpaid by the Service Provider and of any other material obligations or liabilities, of which the FM Contractor has actual knowledge, which should have been performed or discharged by the Service Provider under the Services Contract, in each case, as at the date of the Step-in Notice.
- (b) The FM Contractor shall inform the Authority in writing as soon as reasonably practicable of:
  - (i) any change in such sums, obligations or liabilities referred to in clause 3.2(a); and
  - (ii) any further sums, obligations or liabilities thereafter falling due and payable but unpaid or falling due for performance or discharge and unperformed or undischarged (as the case may be);

in each case of which the FM Contractor has actual knowledge, before the Step-in Date.

- (c) The FM Contractor shall give the Authority the information referred to in clauses 3.2(a) and 3.2(b) in good faith and may not give any further notifications pursuant to clause 3.2(b) less than [two (2)] Business Days prior to the Proposed Step-in Date. The Authority shall not be required to assume any liability under a Step-in Undertaking for any outstanding obligations or liabilities of the Service Provider to the FM Contractor which are not notified to the Authority pursuant to clauses 3.2(a) or 3.2(b).
- (d) Not later than the Proposed Step-in Date the Authority shall decide if it is prepared to issue a Step-in Undertaking. If it does so decide, the Authority shall promptly give the FM Contractor written notification of such decision and, at the same time, provide a copy of such notification to the Senior Funder. Subject to the prior performance by the Senior Funder of its obligations under clause 3.2(e), the Authority shall deliver to the FM Contractor on the Proposed Step-in Date, a written undertaking in form and substance agreed with the FM Contractor (both the Authority and the FM Contractor acting reasonably) (the **Step in Undertaking**), incorporating a clause in terms similar to clause 11 (but only to the extent that there will not be double counting of default interest accruing under the Services Contract and this Agreement), and undertaking to the FM Contractor:
  - (i) to pay or procure the payment to the FM Contractor, within [fifteen (15)] Business Days of demand by the FM Contractor, of any sum due and payable but unpaid by the Service Provider to the FM Contractor under the Services Contract before the Step-in Date and which has been

notified by the FM Contractor to the Authority in accordance with clause 3.2(a) or 3.2(b);

- (ii) to perform or discharge or procure the performance or discharge of any unperformed or undischarged obligations of the Service Provider under the Services Contract which shall have fallen due for performance or discharge before the Step-in Date and which have been notified by the FM Contractor to the Authority in accordance with clause 3.2(a) or 3.2(b) within such period as the FM Contractor may reasonably require;
  - (iii) to pay or procure the payment of any sum due and payable by the Service Provider under the Services Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to clauses 3.4 and 4.5(c)(ii)) but not, to avoid doubt, any sum due in respect of any Services provided before the Step-in Date; and
  - (iv) to perform or discharge or procure the performance or discharge of any obligations of the Service Provider under the Services Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to clauses 3.4 and 4.5(c)(ii)) but not, to avoid doubt, to perform or discharge or to procure the performance or discharge of any obligations in respect of any Services provided before the Step-in Date.
- (e) Following notification of the Authority's decision pursuant to clause 3.2(d), the Senior Funder shall, on or before the Proposed Step-in Date, take any action which is necessary unconditionally and irrevocably to release the Services Contract and the Parent Company Guarantee from the security constituted by the Security Documents.
- (f) Upon release of the Parent Company Guarantee in accordance with clause 3.2(e), the Service Provider shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority in accordance with clause [♦] of the same.
- (g) If the Authority shall not have issued the Step-in Undertaking on or before the Proposed Step-in Date the Step-in Notice shall be deemed to have been withdrawn and the rights and obligations of the parties shall be construed as if the Step-in Notice had not been given.

### 3.3 Restriction of Right of Termination

During or in respect of the Step-in Period, the FM Contractor confirms to the Authority that it shall continue to observe and perform its duties and obligations under the Services Contract and shall, without prejudice to clause 5.1, only be entitled to exercise its rights of termination under the Services Contract:

- (a) by reference to an Event of Service Provider Default arising during the Step-in Period provided that no event of default by the Service Provider under the Project Agreement (whether resulting in termination of the Project Agreement or otherwise, and notwithstanding that it has occurred during the Step-in Period) shall entitle the FM Contractor to exercise such rights of termination during the Step-in Period; or
- (b) if the Authority fails to pay when due any amount owed to the FM Contractor or fails to perform or discharge when falling due for performance or discharge any obligation under the Step-in Undertaking or fails to procure such payment or performance or discharge; or
- (c) if such rights of termination arise in circumstances where there is no default under the Services Contract by the Authority or the FM Contractor.

### 3.4 Step-Out

- (a) the Authority may, at any time, give the FM Contractor at least 30 days' prior written notice to terminate the Step-in Period on a date specified in the notice (the **Step-Out Date**);
- (b) the Authority shall give the FM Contractor at least [thirty (30)] days' prior written notice that (subject to clause 4.4(b)) the Step-in Period will end due to the occurrence (subject to clause 4.7) of the first anniversary of the Step-in Date;

provided that

- (i) the Authority has performed and discharged in full or procured the performance and discharge in full of any obligations of the Service Provider under the Services Contract in relation to the maintenance of records and the provision of reports during the Step-in Period so as to permit the FM Contractor to monitor the performance of the Service Provider's other obligations under the Services Contract; and
- (ii) all liability under the Step-in Undertaking pursuant to any claims made up to the date specified in either clause 3.4(a) or clause 3.4(b) (as the case may be) shall have been fully and unconditionally discharged,

the Authority shall be released from the Step-in Undertaking on the expiry of the Step-in Period in accordance with clauses 3.4(a) and 3.4(b). Such release shall not affect the continuation of the Service Provider's obligations towards the FM Contractor under the Services Contract.

### 3.5 Senior Funder

The Senior Funder is a party to this Agreement solely for the purposes of taking the benefit of its rights under clause 2.4(d) and clause 3 and, subject to clauses 3.2(e), 4.5(a), 7.2(a) and 12.1 shall have no rights or obligations or liabilities hereunder.

## 4 Novation

### 4.1 Proposed Substitute

At any time that the Authority is entitled to give a Step-in Notice pursuant to clause 3.1 or at any time during the Step-in Period the Authority may give notice (a **Proposed Novation Notice**) to the FM Contractor that it wishes itself or another person (a **Proposed Substitute**) to assume, by way of sale, transfer or other disposal, the rights and obligations of the Service Provider under the Services Contract and specifying a date (the **Proposed Novation Date**):

- (a) falling not later than [fifteen (15)] Business Days after termination of the Project Agreement where this has been terminated by the Authority;
- (b) falling not later than the expiry of the Termination Notice where a Proposed Novation Notice is given by the Authority at a time when it is entitled to give a Step-in Notice pursuant to clause 3.1; and
- (c) falling not later than [twenty-eight (28)] Business Days after the date of the Proposed Novation Notice, where a Proposed Novation Notice is given during a Step-in Period,

The Authority shall provide a copy of any Proposed Novation Notice to the Senior Funder at the same time as the Proposed Novation Notice is given to the FM Contractor. Save as provided in clause 4.4, only one Proposed Novation Notice may be given during the period of this Agreement. Without prejudice to clauses 3.3 and 5.1, the FM Contractor shall not be entitled to terminate the Services Contract during the notice period specified in a Proposed Novation Notice.

### 4.2 Information for Consent to Novation

If the Proposed Novation Notice specifies the Authority as the Proposed Substitute, the FM Contractor's consent to the novation shall be deemed to have been given automatically. Where the Proposed Substitute is not the Authority, a novation in accordance with a Proposed Novation Notice shall only be effective if the FM Contractor consents to that novation in writing in accordance with clause 4.3 and the Authority shall (as soon as practicable) supply the FM Contractor with the following information:

- (a) the name and registered address of the Proposed Substitute;
- (b) the names of the shareholders in the Proposed Substitute and the share capital owned by each of them;
- (c) the names of the directors and the secretary of the Proposed Substitute;
- (d) details of the means by which it is proposed to finance the Proposed Substitute (including the extent to which such finance is committed and any conditions precedent as to its availability for drawing); and

- (e) the resources (including contractual arrangements) which are to be available to the Proposed Substitute to enable it to perform its obligations under the Services Contract.

### 4.3 Grant of Consent

The FM Contractor may withhold or delay consent to a novation only where the Proposed Substitute is not the Authority and the Authority has failed to show to the FM Contractor's satisfaction (acting reasonably) that:

- (a) the Proposed Substitute has the legal capacity, power and authorisation to become a party to and perform the obligations of the Service Provider under the Services Contract; and
- (b) the technical competence and financial standing of and the technical and financial resources available to the Proposed Substitute are sufficient to perform the obligations of the Service Provider under the Services Contract.

The FM Contractor shall notify the Authority in writing, within [five (5)] Business Days of the later of receipt of a Proposed Novation Notice and all information required under clause 4.2, as to whether or not it has decided to grant such consent (together with an explanation of its reasons if it has decided to withhold its consent) and, at the same time, provide a copy of the same to the Senior Funder.

### 4.4 Consent withheld

If, in accordance with clause 4.3, the FM Contractor withholds its consent to a Proposed Novation Notice, the Authority shall be entitled to give one or more subsequent Proposed Novation Notices, pursuant to the provisions of clause 4.1, containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute which (where the replacement Proposed Substitute is not the Authority) the Authority has good cause to believe would fulfil the requirements of clauses 4.3(a) and 4.3(b), provided that only one Proposed Novation Notice may be outstanding at any one time, and provided further that:

- (a) where a Step-in-Notice has not been issued, any revised Proposed Novation Date shall be a date falling no later than the date specified in clause 4.1(a) or 4.1(b) as appropriate; and
- (b) if the Proposed Novation Notice was served during the Step-in Period, any revised Proposed Novation Date shall be a date falling not later than [twenty-eight (28)] Business Days after the date of the revised Proposed Novation Notice.

### 4.5 Implementation of Novation

- (a) If the FM Contractor consents to a novation pursuant to a Proposed Novation Notice (whether automatically or otherwise), then on the Proposed Novation Date and without prejudice to clause 5.1:

- (i) following such notification and in the absence of any prior release in accordance with clause 3.2(e), the Senior Funder shall, on or before the Proposed Novation Date, take any action which is necessary unconditionally and irrevocably to release the Services Contract and the Parent Company Guarantee from the security constituted by the Security Documents; and
- (ii) upon release of the Parent Company Guarantee in accordance with clause 4.5(a)(i), the Service Provider shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority in accordance with clause [◆] of the same;

and on the Proposed Novation Date and without prejudice to clause 5.1:

(b)

- (i) subject to the prior performance by the Senior Funder and the Service Provider of their respective obligations under clause 4.5(a)(i) and 4.5(a)(ii) the Proposed Substitute shall become a party to the Services Contract in place of the Service Provider and, thereafter, shall be treated as if it was and had always been named as a party to the Services Contract in place of the Service Provider; and
- (v) the Service Provider and the Proposed Substitute shall enter into a novation agreement (the **Novation Agreement**) and any other requisite agreements, in form and substance satisfactory to the FM Contractor (acting reasonably), pursuant to which:
  - (A) the Proposed Substitute shall be granted all of the rights of the Service Provider under the Services Contract (including those arising prior to the end of the Step-in Period);
  - (B) subject to the FM Contractor giving to the Proposed Substitute within [three (3)] Business Days of receipt of the Proposed Novation Notice such notice as is referred to in clause 3.2(a) and to the provisions of clauses 3.2(b) and 3.2(c), mutatis mutandis, the Proposed Substitute shall assume all of the obligations and liabilities of the Service Provider under the Services Contract (including those arising prior to the end of any Step-in Period and those arising during the period of the Proposed Novation Notice); provided that the FM Contractor will not be in breach of any of its obligations under this Agreement if the Proposed Substitute does not enter into one or other of such agreements.

(c) On and after the Novation Effective Date:

- (i) the FM Contractor shall owe its obligations under the Services Contract (whether arising before, on or after such date) to the Proposed

Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge; and

- (ii) If the Authority shall have entered into a Step-in Undertaking, the Authority will be released from the Step-in Undertaking, provided that:
  - (A) all obligations of the Authority under the Step-in Undertaking which have accrued up to the Novation Effective Date and are identifiable as at that date shall have been fully and unconditionally discharged; and
  - (B) the Authority has performed and discharged in full or procured the performance and discharge in full of the obligations of the Service Provider under the Services Contract in relation to the maintenance of records and the provision of reports during the Step-in Period up to the Novation Effective Date so as to permit the FM Contractor to monitor the performance of the Service Provider's other obligations under the Services Contract.
- (d) the Authority and the FM Contractor shall use all reasonable endeavours to agree and the Authority shall use reasonable endeavours to procure that the Proposed Substitute agrees any amendments to the Services Contract necessary to reflect clause 3.2(b) and the fact that the Project Agreement may have terminated at the time of the Novation Effective Date.

#### 4.6 Termination After Novation

After the Novation Effective Date the FM Contractor shall only be entitled to exercise its rights of termination under the Services Contract:

- (a) in respect of any Event of Service Provider Default arising after that date in accordance with the Services Contract; or
- (b) if the Proposed Substitute does not discharge the obligations and liabilities assumed by it under clause 4.5(b)(ii) which relate to matters arising prior to the end of the Step-in Period within [fifteen (15)] Business Days following the Novation Effective Date.

#### 4.7 Extension of Step-In Period

As at the date of the first anniversary of the Step-in Date, if the Step-in Period has not previously ended, and:

- (a) the Authority is in the course of conducting discussions in good faith with a Proposed Substitute (the novation to whom has been approved by the FM Contractor whether automatically or otherwise in accordance with clause 4.3), the Step-in Period shall be extended and shall continue until such date as is proposed by the Authority and agreed by the FM Contractor; or

- (b) contracts have been exchanged by the Authority with a Proposed Substitute (which has been approved by the FM Contractor in accordance with clause 4.3) as at such date,

the Step-in Period shall be extended and shall continue until the date such contracts are completed, provided that such date shall not be later than [thirty (30)] Business Days after exchange.

### 5 Rights and Obligations under the Services Contract

#### 5.1 Rights of Termination

If:

- (a) no Step-in Notice or Proposed Novation Notice is given before a Termination Notice expires or within [fifteen (15)] Business Days after termination of the Project Agreement by the Authority; or
- (b) a Step-in Undertaking is not issued on the Proposed Step-in Date; or
- (c) the Step-in Notice is withdrawn or, pursuant to clause 3.2(g), deemed to have been withdrawn; or
- (d) the Step-in Period ends before the occurrence of the Novation Effective Date; or
- (e) in the absence of a Step-in Undertaking, the FM Contractor withholds its consent to a novation pursuant to a Proposed Novation Notice, in accordance with clause 4.3, and does not subsequently grant consent to a novation in accordance with clause 4.4 on or before the Proposed Novation Date; or
- (f) in the absence of a Step-in Undertaking, the obligations of the Proposed Substitute set out in clause 4.5 are not performed on the Proposed Novation Date; or
- (g) the FM Contractor is entitled to terminate the Services Contract under clause 3.3 or 4.6; or
- (h) the Authority exercises its right to Step-out under clause 3.4(a), then on the Step-out Date,

the FM Contractor shall be entitled to:

- (i) exercise all of its rights under the Services Contract and act upon any and all grounds for termination available to it in relation to the Services Contract whenever occurring; and/or
- (j) pursue any and all claims and exercise any and all rights and remedies against the Service Provider.
- (k)

## 5.2 Service Provider's Obligations to Continue

Until completion of a novation pursuant to clause 4.5 (unless the terms of such novation expressly preserve an obligation or liability of the Service Provider), the Service Provider shall continue to be liable for all its obligations and liabilities, whenever occurring, under or arising from the Services Contract notwithstanding:

- (a) the service of a Step-in Notice or the issue of a Step-in Undertaking or the expiry of the Step-in Period or the release of a Step-in Undertaking; or
- (b) the service of a Proposed Novation Notice; or
- (c) any other provision of this Agreement.

## 6 Revocation of Notices

A Termination Notice and a Step-in Notice may each be revoked (in writing to the recipient) by the party giving them before the expiry of their respective notice periods. Upon any such revocation, the rights and obligations of the parties shall be construed as if the relevant notice had not been given.

## 7 Assignment

### 7.1 Binding on Successors and Assigns

This Agreement shall be binding on and shall enure to the benefit of the parties and their respective successors and permitted assigns. In the case of the Authority, its successors shall include any person to which the Secretary of State, in exercising his statutory powers to transfer property, rights and liabilities of the Authority upon the Authority ceasing to exist, transfers the rights and obligations of the Authority under this Agreement.

### 7.2 Restriction on Assignment

No party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others (such consent not to be unreasonably withheld or delayed), provided that:

- (a) the Senior Funder may assign or transfer its rights and obligations to a successor Authority<sup>5</sup> of the Funders<sup>5</sup> under the Funding Agreements without the consent of any other party and this clause 7.2 shall not prevent any Funder assigning or transferring its rights under the Funding Agreements and the Security Documents in accordance with the terms of the Funding Agreements; and
- (b) the Service Provider shall not assign this Agreement within [five (5)] years from the Commissioning End date;

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<sup>5</sup> Amend terminology depending on funding arrangements.

- (c) the Authority shall be entitled, without the consent of any other party, to transfer all its rights and obligations hereunder, to any person to whom it assigns or otherwise disposes of the benefit of the Project Agreement in accordance with clause 50 of the Project Agreement and, otherwise, with the Service Provider's and the FM Contractor's consent (not to be unreasonably withheld or delayed);
- (d) nothing in this sub-clause shall restrict the rights of the Secretary of State to effect a statutory transfer;
- (e) the FM Contractor shall assign this Agreement to any party to whom it assigns the Services Contract (in accordance with the terms of that agreement).

### **8 Confidentiality**

- 8.1 The parties shall be bound to observe, mutatis mutandis, the terms of clause [♦] of the Services Contract with respect to any information or document referred to in clause [♦] of the Services Contract which shall come into its possession pursuant to this Agreement.]
- 8.2 The FM Contractor agrees that the Authority shall be entitled to disclose the terms of this Agreement to the Department of Health and HM Treasury and that the Authority shall be free to use and disclose such information on such terms and in such manner as the Department of Health and/or HM Treasury see fit.

### **9 Notices**

Any notice given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by registered post or recorded delivery to the party named therein at the address of such party shown in this Agreement or such other address as such party may by notice in writing nominate for the purpose of service and if sent by registered post or recorded delivery shall be deemed (subject to proof to the contrary) to have been received 48 hours after being posted.

### **10 Payments and Taxes**

#### 10.1 Payments

All payments under this Agreement to any party shall be made in pounds sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified to the other parties from time to time.

#### 10.2 VAT

- (a) All amounts stated to be payable by any party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.

- (b) Each party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

### 10.3 Deductions from Payments

All sums payable by a party to any other party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation, save as may be required by Law.

## 11 Default Interest

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

## 12 Authority

### 12.1 Senior Funder's Warranty and Undertaking

The Senior Funder represents and warrants to and undertakes to each of the Authority, the FM Contractor and that the Senior Funder is duly authorised by each of the Funders to assume the obligations expressed to be assumed by them under this Agreement and to undertake on behalf of each Funder in the terms of this Agreement so as to bind each Funder as if it were a party.

### 12.2 Authority

The Authority shall not be obliged to make any enquiry as to the authority of the Senior Funder in doing any act or entering into any document or making any agreement under or in connection with this Agreement.

## 13 Expiry

The rights of the Senior Funder under this Agreement shall be extinguished upon the repayment by the Service Provider of all sums due and owing to the Funders by the Service Provider under the Funding Agreements or where the Services Contract is terminated.

## 14 Aggregate Liability

Notwithstanding any other provision of this Agreement, the FM Contractor's aggregate liability from time to time under this Agreement and the Services Contract shall not at any time exceed its maximum liability as stated in the Services Contract (as amended or varied).

### 15 Third party Rights

It is agreed for the purposes of the Contracts (Rights of Third parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained herein except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with clause 7.

### 16 Agency

#### 16.1 No Delegation

No provision of this Agreement shall be construed as a delegation by the Authority of any of its statutory authority to any other party.

#### 16.2 No Agency

Save as otherwise provided in this Agreement, no other party shall be or be deemed to be an agent of the other parties nor shall any party hold itself out as having authority or power to bind the other parties in any way.

#### 16.3 Independent Contractor

The parties shall, at all times, be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the parties or any relationship of employer and employee between the parties.

### 17 Whole Agreement

17.1 This Agreement (when read together with the Project Agreement, the Services Contract, the Parent Company Guarantee and the Funders' Direct Agreement) contains or expressly refers to the entire agreement between the parties with respect to the specific subject matter of this Agreement and expressly excludes any warranty, condition or other undertaking implied at Law or by custom and supersedes all previous agreements and understandings between the parties with respect thereto and each of the parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

17.2 Nothing in this Agreement is intended to or shall operate so as to exclude or limit any liability for fraud or fraudulent misrepresentation.

### 18 Waiver

Failure by any party at any time to enforce any provision of this Agreement or to require performance by the other parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant party to enforce any provision in accordance with its terms.

## 19 Counterparts

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full and original instrument for all purposes.

## 20 Severability

If any condition, clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

## 21 Costs and Expenses

Each party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

## 22 Amendments

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the parties.

## 23 Governing Law and Jurisdiction

### 23.1 Law

This Agreement shall be governed by and construed in all respects in accordance with English law.

### 23.2 Jurisdiction

The parties each submit to the jurisdiction of the English Courts as regards any claim or matter arising in relation to this Agreement.

**In Witness** whereof the parties have executed this Agreement as a Deed the day and year first written above.

The common seal of )  
[Authority] )  
was hereunto affixed and authenticated by: )

# Social Care Procurement Pack – Model Documentation

Executed as a deed by ) .....  
**[Senior Funder]** ) Director  
acting by two of its directors or by a director and ) .....  
its secretary ) Director/Secretary

Executed as a deed by ) .....  
**[FM Contractor]** ) Director  
acting by two of its directors or by a director and ) .....  
its secretary ) Director/Secretary

Executed as a deed by ) .....  
**[Service Provider]** ) Director  
acting by two of its directors or by a director and ) .....  
its secretary ) Director/Secretary

**Part 5) - Senior Lenders Direct Agreement**

**Part 6) - Independent Certifier Appointment**

**Dated**

**2006**

**[AUTHORITY]**

**[SERVICE PROVIDER]**

**[INDEPENDENT CERTIFIER]**

**[FUNDER]**

**[CONSTRUCTION CONTRACTOR]**

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**INDEPENDENT CERTIFIER  
CONTRACT**

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# Social Care Procurement Pack – Model Documentation

**This Deed** is made [♦]

**Between:**

- (1) [♦] (the **Authority**);
- (2) [♦] (**Service Provider**);
- (3) [♦] (the **Independent Certifier**);
- (4) [♦] (the **Funder** being one of the Funders)<sup>6</sup>; and
- (5) [♦] (the **Construction Contractor**);

**Whereas:**

- (A) The Service Provider and the Authority have entered into an agreement for the financing, design and construction of and the provision of certain services in connection with [details of facilities] at the Site (the **Project**) pursuant to the Government's private finance initiative (the **Project Agreement**) under the terms of which they have jointly agreed to appoint an Independent Certifier.
- (B) The Service Provider has entered into the Construction Contract with the Construction Contractor for the development of [details of facilities] at the Site.
- (C) [describe funding arrangements]
- (D) The Independent Certifier is an independent adviser willing to provide services to the Service Provider and the Authority and for the benefit of the Funders.
- (E) The Service Provider and the Authority have jointly agreed to engage the Independent Certifier to carry out the duties and obligations ascribed to the Independent Certifier in the Project Agreement upon the terms of this Deed.

**It Is Agreed** as follows:

## **1 Interpretation**

- 1.1 Unless the context otherwise requires, words and expressions defined in the Project Agreement have the same meanings in this Deed as in the Project Agreement.
- 1.2 The headings in this Deed do not affect its interpretation.
- 1.3 Unless the context otherwise requires, all references to clauses and Schedules are references to clauses of and schedules to this Deed.

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<sup>6</sup> This may need to be defined if not defined in the Project Agreement.

## 2 Appointment

- 2.1 The Service Provider and the Authority jointly appoint the Independent Certifier to perform the obligations and tasks which are ascribed to the Independent Certifier under the Project Agreement and which are set out in Appendix 1 upon the terms and conditions set out below. The Construction Contractor is a party to this Deed solely to make the commitments on its part as expressly made in this Deed, and, for the avoidance of doubt, the Independent Certifier shall have no liability to the Construction Contractor<sup>7</sup>.
- 2.2 The Independent Certifier shall provide the services under clause 2.1 (the **Services**) independently, fairly and impartially to and as between the Service Provider and the Authority in relation to the Project Agreement at such times and at such locations as the parties shall agree from time to time. In performing the Services, the Independent Certifier shall have regard to the interest of the Funders. Whilst the Independent Certifier may take account of any representations made by the Service Provider and the Authority and the Construction Contractor (as appropriate) [and the Funder's Technical Adviser] the Independent Certifier shall not be bound to comply with any representations made by any of them in connection with any matter on which the Independent Certifier is required to exercise his professional judgement.

### 2.3 Varied Services

The Independent Certifier shall carry out and perform any additional and/or varied services required for the implementation of the Project reasonably required by the Authority and the Service Provider which are not included in, or which are omitted from, the Services (the **Varied Services**) subject to prior agreement by the Authority and the Service Provider to the costs thereof and the following provisions shall apply:

- (a) if the Independent Certifier shall at any time be required to perform Varied Services, it shall give to the Authority and the Service Provider a written estimate of the cost thereof (taking into account any reduction in work or other expense which might also occur as a result of the circumstances giving rise to the Varied Services); and
- (b) where a change to the Project occurs pursuant to the terms of the Project Agreement (whether by virtue of a Change, change to the Programme or otherwise) which may materially impact on the Services or otherwise on the Independent Certifier, the Authority and the Service Provider shall promptly notify the Independent Certifier of such change. The Independent Certifier shall within [◆] Business Days of receiving such notification, notify the Authority and the Service Provider of the impact of such change, if any, on the Services, including whether

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<sup>7</sup> It has been suggested on some projects that the Construction Contractor should receive the benefit of a duty of care from the Independent Certifier (whether under this agreement or through a collateral warranty). Authority should consider the implications fully and seek advice from their legal advisers on this point. Authority's interests are likely to be prejudiced as a result. Issues that need to be considered include: whether this would increase the fee, whether the financial liability of the ITC would be diluted (e.g. consider any cap on liability) and whether the ITC's liability to the Authority may be prejudiced as a result of any claim made by the Construction Contractor, whether there could be any adverse impact on the resources of the ITC and whether the Construction Contractor's remedy should lie against the Service Provider in the event of any claim.

such change gives rise to any Varied Services and the provisions of this clause 2.3 shall apply accordingly.

- 2.4 The Independent Certifier shall promptly and efficiently provide the Services and the Varied Services:
- (a) with the reasonable care, skill and diligence to be expected of a properly qualified and competent professional adviser who has held itself out as competent and experienced in rendering such services for projects of a similar size, nature, scope and complexity to the Project; and
  - (b) in accordance with all applicable Legislation and Guidance.
- 2.5 All instructions to the Independent Certifier must be given signed and given jointly by the Authority Representative and the Service Provider Representative or such other person appointed pursuant to clause [11] of the Project Agreement (*Representatives*), and for the avoidance of doubt, the Independent Certifier shall not act in accordance with any instructions given to him by either the Authority or the Service Provider (or any other person) not given in accordance with the provisions of this clause 2.5.
- 2.6 The Independent Certifier shall comply with all reasonable instructions given to it by the Service Provider and the Authority pursuant to clause 2.5 except and to the extent that the Independent Certifier reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Deed or prejudices or might prejudice the exercise by the Independent Certifier of its professional judgement in accordance with clauses 2.2 and 2.4. The Independent Certifier shall promptly confirm in writing to the Service Provider and the Authority whether or not it shall comply with any such instruction setting out the grounds upon which the decision is made.
- 2.7 The Authority, the Service Provider and the Construction Contractor agree to co-operate with and provide reasonable assistance to the Independent Certifier to familiarise the Independent Certifier with all necessary aspects of the Project to enable the Independent Certifier to carry out its obligations under this Deed.
- 2.8 The Independent Certifier shall be deemed to have full knowledge of the provisions of the Project Agreement, the Construction Contract, the FM Contract, the Services Contract and the [Sub-Construction Contractor Co-operation Agreement (as defined in the Construction Contract)] such as relates to the Services and shall be deemed to be aware of and to have taken full account of all the undertakings and warranties, both expressed and implied, on the part of the Service Provider and the Authority which are set out in the Project Agreement, provided always that true and accurate copies have been delivered to the Independent Certifier.
- 2.9 Subject to clause 2.10, the Independent Certifier shall use the following partners, directors or employees: [*insert names of individuals*] in connection with the performance of the Services and such persons' services shall be available when necessary and for so long as may be necessary to ensure the proper performance by the Independent Certifier of the

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Services. Such persons shall have full authority to act on behalf of the Independent Certifier for all purposes in connection with the Services.

- 2.10 The Independent Certifier may by written notice to the Authority and the Service Provider replace the staff identified in clause 2.9 by taking account the need for liaison, continuity, level of qualification and availability of personnel in respect of the Project. Such replacement shall be subject to approval in writing by the Service Provider and the Authority (not to be unreasonably withheld or delayed).

### 3 Duration

- 3.1 The Services shall commence on the date of this Deed.<sup>8</sup>
- 3.2 The parties hereby agree that this Deed governs all of the Services provided by the Independent Certifier in relation to the Project whether before or after the date hereof.

### 4 Fee<sup>9</sup>

- 4.1 The Service Provider shall pay to the Independent Certifier a fee of [♦] for the Services provided in relation to the Project Agreement. The fee is exclusive of value added tax and inclusive of disbursements. The Independent Certifier shall issue an invoice to the Service Provider on a monthly basis in accordance with Part 1 of Appendix 2. The date on which the invoice is received by the Service Provider shall constitute the due date. The final date for payment by the Service Provider shall be thirty (30) days after receipt of the Independent Certifier's invoice. If Varied Services are provided then they shall be paid for equally by the Authority and the Service Provider or as otherwise agreed.
- 4.2 Not later than [five (5)] Business Days after the due date ascertained in accordance with clause 4.1, the Service Provider may give written notice to the Independent Certifier stating the amount which the Service Provider proposes to pay and the basis on which the amount is calculated.
- 4.3 Where the Service Provider intends to withhold payment of any amount stated in the invoice, the Service Provider and the Authority shall give written notice to the Independent Certifier not later than [five (5)] Business Days before the final date for payment pursuant to clause 4.1. The notice shall state the amount to be withheld and the ground or grounds for withholding the payment and if there is more than one ground, the notice shall identify the amount attributable to each ground.
- 4.4 If the Service Provider fails to pay the Independent Certifier any sum payable under this Deed by the final date for payment, the Service Provider shall pay the Independent Certifier simple interest on that sum from the final date for payment until the actual date of payment at the Default Interest Rate.

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<sup>8</sup> Authority to amend according to specific requirements.

<sup>9</sup> This drafting assumes that the Service Provider is responsible for paying the Independent Certifier. Authority should consider whether this will be the case and should ensure that bidders are required to bid on the appropriate basis. It may be better value for money for the Authority to pay an element of the fee itself, although the Authority must ensure that it is able to meet such a commitment.

- 4.5 If the Service Provider fails to pay the amounts properly due pursuant to these provisions and no notice to withhold the payment has been given pursuant to clause 4.3, the Independent Certifier may suspend performance of any or all of the Services. This right is subject to the Independent Certifier first giving the Service Provider and the Authority not less than [seven (7)] Business Days' notice in writing of such intention stating the grounds for suspension. The right to suspend performance shall cease when the Service Provider pays the amount properly due. [Any period of suspension of the Services in accordance with this clause 4.5 shall be disregarded in computing any contractual time limit to complete work directly or indirectly affected by the exercise of the rights conferred by this clause 4.5 or as the case may be, the time for completion of such work shall be extended by a period equal to the period of suspension.]<sup>10</sup>
- 4.6 Without prejudice to clause 2.5, neither the Authority nor the Service Provider shall issue instructions or do anything which does or is reasonably likely materially to increase the fees payable to the Independent Certifier without the prior approval of the other (such approval not to be unreasonably withheld or delayed).
- 4.7 As soon as the Independent Certifier becomes aware of the same and before acting on the same the Independent Certifier shall inform the Authority and the Service Provider of any instructions given to him pursuant to clause 2.5 which will or could reasonably be expected to increase the fees payable to the Independent Certifier under the terms of this Deed. The Independent Certifier shall if requested by either the Service Provider or the Authority provide both the Authority and the Service Provider with as detailed an estimate as is reasonably practicable of the increase to the fees payable to it if it carries out such instructions. The estimate of increased fees shall be based upon the rates contained in Part 2 of Appendix 2.
- 4.8 The obligations of the Service Provider and the Authority to pay the Independent Certifier for any Varied Services shall be several and not joint.

### **5 Limitations On Authority**

The Independent Certifier shall not:

- (a) make or purport to make any alteration or addition to or omission from the design of the Facilities (including, without limitation, the setting of performance standards) or issue any instruction or direction to any Construction Contractor or professional consultant employed or engaged in connection with the Project; or
- (b) (unless both the Service Provider and the Authority consent in writing) consent or agree to any waiver or release of any obligation of the Service Provider or the Authority under the Project Agreement or of any Construction Contractor or professional consultant employed or engaged in connection with the Project,

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<sup>10</sup> Authority to consider whether this or similar drafting necessary for compliance with the Housing Grants and Construction Act 1995.

and, for the avoidance of doubt, the Independent Certifier shall not express an opinion on and shall not interfere with or give any advice, opinion or make any representation in relation to any matters which are beyond its role and responsibilities under this Deed.

### 6 Termination

- 6.1 The Service Provider and the Authority may by joint notice in writing (a **Joint Notice**) immediately terminate this Deed if the Independent Certifier:
- (a) is in breach of any of the terms of this Deed which, in the case of a breach capable of remedy, shall not have been remedied by the Independent Certifier within twenty (20) Business Days of receipt by the Independent Certifier of a Joint Notice specifying the breach and requiring its remedy;
  - (b) is incompetent, guilty of gross misconduct and/or any material failure, negligence or delay in the provision of the Services and/or its other duties under this Deed;
  - (c) fails or refuses after written warning to provide the Services and/or its other duties under this Deed reasonably and as properly required of him; or
  - (d) is subject to an event analogous to any of the events set out in paragraphs (c), (d), (e) or (f) of the definition of a Service Provider Default as set out in the Project Agreement.
- 6.2 If the Project Agreement is rescinded, terminated or repudiated for any reason and, notwithstanding that the validity of such rescission, termination or repudiation may be disputed, this Deed may be terminated by Joint Notice and with immediate effect.
- 6.3 Following any termination of this Deed, but subject to any set-off or deductions which the Service Provider or the Authority may be entitled properly to make as a result of any breach of this Deed by the Independent Certifier, the Independent Certifier shall be entitled to be paid in full and final settlement of any valid claim which the Independent Certifier may have in consequence thereof, any fees due under clause 4 in respect of the Services carried out in accordance with this Deed prior to the date of termination.
- 6.4 Termination of this Deed shall be without prejudice to any accrued rights and obligations under this Deed as at the date of termination (including the right of the Service Provider and the Authority to recover damages from the Independent Certifier).
- 6.5 If this Deed is terminated in accordance with clause 6.1, the Service Provider and the Authority shall use reasonable endeavours to engage an alternative Independent Certifier within twenty (20) Business Days, subject to Legislation and public procurement rules. If within such period the Service Provider and the Authority are unable to procure the appointment of an alternative Independent Certifier on reasonable commercial terms, the Independent Certifier shall pay to the Service Provider and/or the Authority, as the case may be, any reasonable incremental loss, damage or extra costs suffered by each of them.
- 6.6 If the Service Provider fails to make a payment of any undisputed sum to the Independent Certifier within twenty [(20)] Business Days of the expiry of any notice issued pursuant to

clause 4.5 in respect of such sum, the Independent Certifier may issue a further written notice to the Authority and the Service Provider specifying that the payment remains outstanding (the **Second Notice**) and if payment is not made within [twenty (20)] Business Days of receipt of the Second Notice the Independent Certifier may issue a further written notice terminating this Deed with immediate effect.

- 6.7 Termination of this Deed shall not affect the continuing rights and obligations of the Service Provider, the Authority and the Independent Certifier under clause 7 (Confidential Information and Copyright), 8 (*Professional Indemnity Insurance*), 5 (*Limitations on Authority*), 17 (*Dispute Resolution Procedure*) and this clause 6 or under any other clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

### **7 Confidential Information and Copyright**

- 7.1 The Independent Certifier shall treat as secret and confidential and shall not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of or permit to be made use of any unpublished information relating to the Service Provider's or the Authority's or the Construction Contractor's (if appropriate) technology or other know-how business plans or finances or any such information relating to a subsidiary, supplier, customer or client of the Service Provider or the Authority or the Construction Contractor (if appropriate) where the information was received during the period of this Deed except as may be reasonably necessary in the performance of the Services. Upon termination of this Deed for whatever reasons the Independent Certifier shall offer to deliver up to the Service Provider or the Authority (as appropriate) all working papers, computer disks and tapes or other material and copies provided to or prepared by him pursuant either to this Deed or to any previous obligation owed to the Service Provider or the Authority provided always that the Independent Certifier shall be entitled to retain copies of all such items where such offer is accepted.
- 7.2 The obligation to maintain confidentiality does not apply to any information or material to the extent that the Independent Certifier is compelled to disclose any such information or material by law or any regulatory or Government authority.
- 7.3 The copyright in all reports, and other documents produced by the Independent Certifier in connection with the Project shall remain vested in the Independent Certifier but the Independent Certifier grants to the Service Provider and Authority and their nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such reports and other documents and to reproduce the information contained in them for any purpose related to the Project including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Project. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.
- 7.4 The Independent Certifier shall not be liable for use by any person of the documents, (including reports, details, plans, specifications, schedules, computer programs, software, consents and any other papers, works, reports and inventions produced by the

Independent Certifier) for any purpose other than that for which the same were prepared by or on behalf of the Independent Certifier.

### 8 Professional Indemnity Insurance

8.1 Without prejudice to its obligations under this Deed, or otherwise at law, the Independent Certifier shall maintain professional indemnity insurance with a limit of indemnity of not less than [ten million pounds (£10,000,000)]<sup>11</sup> for any one claim in respect of any neglect, error or omission on the Independent Certifier's part in the performance of its obligations under this Deed for the period commencing on the date of this Deed and expiring twelve (12) years after:

- (a) the date of final certification of the Works; or
- (b) the termination of this Deed,

whichever is the earlier, provided that such insurance is available in the market place at commercially reasonable rates.

8.2 The Independent Certifier shall maintain such insurance with reputable insurers carrying on business in the United Kingdom.

8.3 Any increased or additional premium required by insurers by reason of the Independent Certifier's own claims record or other acts, omissions, matters or things particular to the Independent Certifier shall be deemed to be within commercially reasonable rates.

8.4 The Independent Certifier shall as soon as reasonably practicable inform the Service Provider and the Authority if such insurance ceases to be available at commercially reasonable rates in order that the Independent Certifier and the Service Provider and the Authority can discuss means of best protecting the respective positions of the Service Provider and the Authority and the Independent Certifier in respect of the Project in the absence of such insurance.

8.5 The Independent Certifier shall fully co-operate with any measures reasonably required by the Service Provider and the Authority including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if the Service Provider and the Authority undertake in writing to reimburse the Independent Certifier in respect of the net cost of such insurance to the Independent Certifier above commercially reasonable rates.

8.6 The Independent Certifier shall, prior to commencing the provision of the Services and as soon as reasonably practicable following renewal dates, produce for inspection by the Service Provider and the Authority documentary evidence that such insurance is being properly maintained.

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<sup>11</sup> Authority to take advice from insurance advisors on appropriate level of PII cover for the scheme.

8.7 The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of this Deed for any reason whatsoever, including (without limitation) breach by the Service Provider and the Authority.

### 9 Limitation of Liability

9.1 With the exception of liability for death, personal injury and/or any other liability that cannot lawfully be excluded or limited, the Independent Certifier's maximum [aggregate] liability to all parties, under or in connection with this Deed, whether in contract or in tort, or for breach of statutory duty is limited to £[♦] million.<sup>12</sup>

9.2 [Notwithstanding anything to the contrary stated elsewhere in this Deed, the parties hereby expressly agree that the Independent Certifier shall have no liability to any party under or in connection with this Deed for any claim or claims related to terrorism, asbestos or toxic mould.]<sup>13</sup>

9.3 No action or proceedings under or in connection with this Deed shall be commenced against the Independent Certifier after the expiry of twelve years from the completion of the Services.

### 10 Notices

All notices or other communications required in connection with this Deed shall be in writing and sent by hand, by first class pre-paid post or by facsimile transmission to the relevant address or facsimile number set out in the Project Agreement or in the case of the Independent Certifier to its registered office for the attention of the company secretary or to such other address or facsimile number as a party to this Deed may notify to another party to this Deed in writing.

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<sup>12</sup> It is suggested that an appropriate cap may depend on the capital value of the scheme, such as:

- ♦ Up to £10M capital value - £1M cap
- ♦ Greater than £10m and up to £25M capital value - £2M cap
- ♦ Greater than £25M and up to £50M capital value - £3M cap
- ♦ Greater than £50M and up to £100M capital value - £5M cap
- ♦ Greater than £100M capital value - £10M cap

However, Authority to consider what it an appropriate cap on liability depending on the project-specific circumstances and should ensure that this is specified prior to asking for tender to provide these Services to ensure that bids are based on the required cap.

<sup>13</sup> This may be appropriate where the IT's insurance cover excludes liability for these occurrences. Authority to check.

## 11 Assignment

- 11.1 The Independent Certifier shall not assign or transfer any of its rights or obligations under this Deed or sub-contract the whole or any part of the Services.<sup>14</sup>
- 11.2 Neither the Service Provider nor the Authority shall be entitled to assign or transfer any of their respective rights or obligations under this Deed save that the parties hereby consent to any such assignment or transfer which is contemporaneous to the assignment or transfer of the Project Agreement and is made to the same assignee or transferee. In the event that the Project Agreement is novated to a third party, the term **Project Agreement** shall include any replacement contract arising from such novation.
- 11.3 The Independent Certifier shall not be entitled to contend that any person to whom this Deed is assigned in accordance with clause 11.2 is precluded from recovering under this Deed any loss incurred by such assignee resulting from any breach of this Deed (whenever happening) by reason that such person is an assignee and not a named promisee under this Deed.

## 12 Cumulative Rights and Enforcement

- 12.1 Any rights and remedies provided for in this Deed whether in favour of the Service Provider or the Authority or the Independent Certifier are cumulative and in addition to any further rights or remedies which may otherwise be available to the parties.
- 12.2 The duties and obligations of the Independent Certifier arising under or in connection with this Deed are owed to the Service Provider and the Authority both jointly and severally and the Service Provider and the Authority may accordingly enforce the provisions hereof and pursue their respective rights hereunder in their own name, whether separately or with each other.
- 12.3 the Service Provider and the Authority covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Deed which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the other without the other's prior written consent, such consent not to be unreasonably withheld or delayed.

## 13 Waiver

The failure of any party at any one time to enforce any provision of this Deed shall in no way affect its right thereafter to require complete performance by any other party, nor shall the waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

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<sup>14</sup> Where the Independent Certifier intends to sub-contract any part of the Services, this should be stated in the bid submitted to the Authority and additional drafting should be included to identify any such sub-Construction Contractors and to ensure that the Independent Certifier remains liable for the relevant part of the Services. The Authority should consider whether it is appropriate to obtain a warranty from such sub-Construction Contractors.

### 14 Severability

In the event that any term, condition or provision contained in this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision shall, to that extent, be omitted from this Deed and the rest of this Deed shall stand, without affecting the remaining clauses.

### 15 Counterparts

This Deed may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

### 16 Variation

A variation of this Deed is valid only if it is in writing and signed by or on behalf of each party.

### 17 Dispute Resolution Procedure

17.1 All disputes shall be resolved in accordance with terms equivalent (mutatis mutandis) to the Dispute Resolution Procedure as set out in the Project Agreement (excluding for the avoidance of doubt the Liaison Committee [and the Fast Track Dispute Resolution Procedure]).<sup>15</sup>

17.2 The Service Provider, the Authority and the Independent Certifier shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Deed.

### 18 Governing Law and Jurisdiction

18.1 Subject to clause 17, this Deed shall be governed by and construed in accordance with the laws of England, and (subject as aforesaid) the parties hereby submit to the non-exclusive jurisdiction of the courts of England and Wales.

18.2 No action or proceedings may be commenced against the Independent Certifier for any breach of this Deed after the expiry of twelve (12) years following the date of completion of the Services or the termination of this Deed, whichever is the earlier.

### 19 Delivery

This Deed is delivered on the date written at the start of this Deed.

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<sup>15</sup> Authorities should consider whether this is appropriate or whether a more specific DRP should be included in this document. This may depend on whether the DRP contained in the Project Agreement is considered to be Construction Act compliant.

### 20 Third Party Rights

Save as expressly set out herein, no provision of this Deed is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party against any party to this Deed.

**In Witness Whereof** the parties have executed and delivered this Deed on the date first written above.

## Appendix 1

### Scope of Services - Independent Certifier Contract<sup>16</sup>

The Independent Certifier shall perform the role of Independent Certifier as referred to in clauses ♦ (including complying with any time limits specified in such clauses) and Schedules ♦ of the Project Agreement<sup>17</sup> by providing the following scope of Services:

#### 1 Monthly Report and Completion Certification

The Independent Certifier shall:

- 1.1 During the Works, provide the Authority and the Service Provider with a monthly report on the activities carried out by the Independent Certifier.
- 1.2 Undertake regular inspections during the Works, as necessary, in accordance with the [periods set out in the Completion Criteria]<sup>18</sup>. Report on the completion status of the Project, identifying any work that is not compliant with the Authority Construction Requirements, the Service Provider Proposals, the Approved Reviewable Design Data (**Approved RDD**) and/or the Completion Criteria.
- 1.3 Certify the Actual Completion Date and issue a Certificate of [Phase] Practical Completion in accordance with the Project Agreement.
- 1.4 Within [five (5)] Business Days of issue of the Certificate of Practical Completion, issue a Snagging Notice specifying any Snagging Matters. Monitor and review rectification of such Snagging Matters in accordance with the Project Agreement.
- 1.5 Review the programme for the rectification of all Snagging Matters to be carried out and advise the Service Provider and the Authority as appropriate.

And in order to enable the Independent Certifier to discharge these primary functions which are to be performed independently, fairly and impartially to and as between the Service Provider and the Authority and having regard to the interests of Funders, the Independent Certifier shall discharge the further duties described below.

#### 2 General

The Independent Certifier shall:

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<sup>16</sup> Authority to ensure that the scope of services is appropriate.

<sup>17</sup> Authority to insert and other relevant references.

<sup>18</sup> Insert periods here if not included in Completion Criteria.

- 2.1 Familiarise itself with the Project Agreement (including the Design Data, the Design and Construction Quality Plan<sup>19</sup> and any Changes issued from time to time and any other relevant documentation or information referred to in the Project Agreement, relevant Service Specifications and Service Delivery Plans and the Construction Contract to the extent necessary to be in a position to carry out the Services in accordance with the terms of the Project Agreement and this Deed.
- 2.2 Following notification by the Service Provider, pursuant to clauses 21.4 (*Notice to Independent Certifier*) and 21.5 (*Pre-Completion Inspection*) of the Project Agreement, inspect and comment as required on the Works [each relevant Phase] as required by the Completion Process.

### 3 Design Review

- 3.1 For the avoidance of doubt, nothing in this paragraph 3 or elsewhere in this Deed shall impose any design liability on the Independent Certifier, and any design liability shall remain with the parties responsible for such design under the Project Agreement. The Services required under this paragraph 3 shall be supervisory in nature and shall not require the Independent Certifier to approve (or otherwise) the suitability of the design under the Project Agreement.
- 3.2 The Independent Certifier shall:
- (a) Monitor and report upon the implementation of the Design and Construction Quality Plan for the construction, structural and engineering services design for the Project.
  - (a) Monitor the detailed working drawings and specifications for a sample number and type of rooms which in his professional judgment is appropriate to be selected by the Independent Certifier to verify that they comply with the Approved RDD as described in the Project Agreement. The Independent Certifier has indicated that in normal circumstances [twenty-five percent (25%)] of rooms should be sampled. If in the professional judgment of the Independent Certifier, because of the results of its sample or other circumstances a different sampling percentage is appropriate, he shall provide a detailed report in respect of that and, if so agreed (or determined as between the Service Provider and the Authority by the Dispute Resolution Procedure) any change in the percentage sampling resulting in a change in fees will be borne by the Service Provider and the Authority as they shall agree or as determined by the Dispute Resolution Procedure.
  - (b) [Review the detailed design information for any approved design or specification Changes for compliance with the performance and quality standards of the Project Agreement the Contractor Quality Plan.

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<sup>19</sup> Insert reference to any equipment list or other document as appropriate.

### 4 Procedure Review

The Independent Certifier shall:

- 4.1 Monitor the operation of the quality assurance procedures of the Construction Contractor at regular intervals (maximum [three (3)] months) during the execution of the Works.
- 4.2 The Independent Certifier shall familiarise itself with the proposed procedures and programmes for the testing and commissioning of the [mechanical and electrical engineering services] prior to the Authority's occupation.
- 4.3 Monitor the procedures for the identification, approval and recording of agreed Changes to the Works in accordance with the Project Agreement.
- 4.4 Review any samples or mock ups as required by [the Authority Construction Requirements] and check that they have been approved in accordance with the Project Agreement.

### 5 Construction Review

The Independent Certifier shall:

- 5.1 Visit the Site and monitor the Works for their compliance with the Authority Construction Requirements, the Service Provider Proposals and the Approved RDD<sup>20</sup>. The frequency and timing of the Independent Certifier's visits are dependent on the progress of construction on Site. The Construction Contractor shall agree a programme with the Independent Certifier for the inspection of key construction processes and the completed [Phases of the] Works and shall give the Independent Certifier advance notice of these Works being carried out on Site. The Independent Certifier shall identify any aspect of the Works which needs to be inspected before being covered over by subsequent activity so that he may satisfy himself that these have been constructed in accordance with the Design and Construction Quality Plan without the need for opening up.
- 5.2 Randomly check that the Works are being undertaken in accordance with the Design and Construction Quality Plan that has been agreed by the Authority and the Service Provider.
- 5.3 Review the written mechanical and electrical engineering services testing and commissioning procedure. Undertake selective witnessing of the Mechanical and Electrical services testing and commissioning. The Independent Certifier has indicated that these sampling proportions should amount to approximately [fifty] percent [(50%)]. The Independent Certifier shall review [one hundred] percent [(100%)] of all test results. If in the professional judgment of the Independent Certifier, because of the results of witnessing (or because of other circumstances) a different sampling percentage is appropriate he shall provide a detailed report in respect of that and any change in the percentage sampling resulting in a change of fees will be borne by the Service Provider, the Authority or the Construction Contractor as they shall agree, failing such agreement, as determined by the Dispute Resolution Procedure.

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<sup>20</sup> Authority to insert any other relevant documents.

- 5.4 Inspect rectification works which have previously prevented the Independent Certifier from certifying the Project as complete. Concurrent with the issue of the Certificate of Practical Completion, agree a list of Snagging Matters with the Service Provider together with its programme for implementation and issue a Snagging Notice in accordance with clause 21.10 (*Snagging Notice*) of the Project Agreement.
- 5.5 Check the production of the relevant operating manuals, relevant approvals, test results, inspection records and as built drawings and monitor the timely handover of this documentation.

### **6 Participation In Dispute Resolution**

As and when required by the Authority or the Service Provider, the Independent Certifier shall participate in the Dispute Resolution Procedure of the Project Agreement (as such term is defined in the Project Agreement) to the extent that issues under the Project Agreement which have been referred to the said Dispute Resolution Procedure relate to the Independent Certifier's other obligations and tasks as set out in this Appendix 1 and this Deed.

**Appendix 2**

**Part 1) - Schedule of Drawdown of Fees**

**Appendix 2**

**Part 2) - Schedule of Daily Rates**

# Social Care Procurement Pack – Model Documentation

The seal of )  
**[Authority]** )  
hereunto affixed is authenticated by: )

Executed and delivered as a Deed by ) .....  
**[Service Provider]** ) Director  
acting by two directors or by a director and its )  
secretary ) .....  
 ) Director/Secretary

Executed and delivered as a Deed by ) .....  
**[Independent Certifier]** ) Director  
acting by two directors or by a director and its )  
secretary ) .....  
 ) Director/Secretary

Executed and delivered as a Deed by ) .....  
**[Construction Contractor]** ) Director  
acting by two directors or by a director and its )  
secretary ) .....  
 ) Director/Secretary

Executed and delivered as a Deed by ) .....  
**[Funder]** ) Director  
acting by two directors or by a director and its )  
secretary ) .....  
 ) Director/Secretary