

# **Standard Project Agreements (hub DBFM & NPD Model) User's Guide**

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- the Authority will pay for available facilities and deductions will be made from the annual service payment if the facilities are not available or the services are otherwise not provided in accordance with the Authority's requirements.

Differences in operation between revenue funded facilities and facilities procured using conventional capital funding have been minimised as far as possible on the basis that, as far as possible, an Authority should be free to operate its revenue funded facilities in the same way as facilities provided using conventional capital funding and that good estate management practices should not depend on the financing route that was used to make the investment in the facilities. As such, the capital funded design and build contract used in hub closely resembles the construction elements of the Standard Project Agreements and a relatively narrow scope of hard facilities management services has been proposed for the Standard Project Agreements under which the private sector will provide planned maintenance (including lifecycle replacement) and reactive maintenance to the buildings and hard landscaping. In turn this should produce a simplified service specification and associated performance monitoring and contract management arrangements for Authorities.

SFT's approach has been:

- to promote maximum value for money through commercially reasonable risk transfer consistent with the principles outlined above;
- to adhere to the hub DBFM structure and NPD principles approved by Scottish Ministers;
- to simplify the documents as far as possible consistent with a robust commercial structure and financeability;
- to minimise transaction costs with a standard that should be reasonably acceptable by contractors, investors and funders as well as procuring authorities.



- Energy efficient design will be a design requirement and will be managed through design review, monitoring during construction and testing by appropriate completion tests prior to handover.
- Malicious damage will be a public sector risk although the service provider will still provide the reactive maintenance to rectify malicious damage, subject to reimbursement of costs. The Authority will be best placed to manage this risk given that it will, as standard, be retaining responsibility for security and portering/janitorial services at the facilities and so any attempt to transfer this risk to the private sector is unlikely to represent value for money.
- Internal decoration, window cleaning (and floor coverings) and Authority equipment are excluded from the maintenance service. The Authority will have minimum periodic maintenance obligations for these items. The service also excludes PAT testing of the Authority's electrical equipment.
- Variations are regulated by a version of the Change Protocol developed for the BSF programme in England. The SFT intends to use experience from projects to produce a standard catalogue for Low Value Changes that it will provide as supplementary guidance in due course. The Change Protocol includes an option that allows the Authority to carry out certain very minor classes of changes for itself.
- Additional drafting is provided in Appendix 2 of this Guide to deal with issues that are commonly encountered on individual projects, such as planning challenge or unforeseeable asbestos, and should be used where these are relevant to particular projects. Appendix 2 also contains alternative drafting to deal with sector and/or Authority specific matters.

## **SFT Contact**

Should you have any questions on a standard Project Agreement please contact the SFT team assisting with your specific project (<http://www.scottishfuturestrust.org.uk>).



For ease of future contract management, SFT does not expect to see the Standard Project Agreements amended to any individual law firm's house style. Clause and paragraph numbering should be preserved through the use of lettered additions and "not used" deletions. Automatic numbering and hyperlinked cross references should be maintained.

Footnotes still appear in those parts of the Schedules to the Standard Project Agreements that contain stand-alone contracts (e.g. Funders' Direct Agreement). These should be removed as appropriate before the document is issued for a specific project.



## Chapter 3: hub projects

The hub DBFM version of the Standard Project Agreement is appropriate for use by hubcos.

### Hub specific features

The Authority's contracting counter-party will be an SPV, a wholly owned subsidiary of the hubco for the relevant territory (referred to in the Standard Project Agreement as "Sub-hubco"). The Authority (and other participants) will have the option, but no obligation, under the hubco Shareholders' Agreement to invest in the subordinated debt of the SPV.

Consistent with the Scottish Government's requirement that equity returns on revenue funded projects must be fixed or capped, a mechanism has been provided (Clauses 36 and 45) under which profits earned by the SPV that would otherwise be paid to the equity investors (i.e. the holders of the SPV's shares and subordinated debt) will be shared equally with the Authority once a minimum threshold level of equity return (as fixed in the template DBFM Project Agreement within the Territory Partnering Agreement) has been achieved. If profits are such that the equity return would exceed a second threshold were all the profits to be distributed to equity, all further profit distributions will be payable to the Authority. The Authority's shares of excess profits may either be paid to it in lump sums or be used to reduce the future service payments.

### Multi-occupier facilities

Where there will be more than one user of the facilities, one Authority (from among the Participants) will be the lead Authority. Only the lead Authority will normally enter into the Project Agreement with the SPV. The lead Authority will in turn have appropriate back-to-back contractual arrangements with the other users. Authorities may wish to consider whether the SPV should be required to procure collateral warranties in favour of the other authorities as well as those in favour of the lead Authority.

In most case it is likely that the facilities will be owned by the lead Authority. However, in certain cases they will be owned by the SPV or held by it on a ground lease. In that case the parties will also enter into a lease of the facilities and there will be no title warranty by the lead Authority.

Any intention to move away from these positions should be agreed in advance with the hub Programme Delivery Office in SFT.

## Chapter 4: NPD projects

The NPD model version of the Standard Project Agreements is for use on revenue funded accommodation NPD projects.

### Key features

The NPD model is defined by the broad core principles of:

- enhanced stakeholder involvement in the management of projects;
- no dividend bearing equity; and
- capped private sector returns.

Projects funded using NPD principles will pay a fixed return to the holders of the subordinated debt of the SPV. All other distributions to equity (i.e. the holders of the shares and subordinated debt of the SPV) will be prohibited. Surpluses arising after satisfying all precedent lines in the cash cascade, subject to any agreed prudent reserve, will either be payable to the Authority either in lump sums as they arise or used to reduce the future service payments.

Other key features of the NPD model are:

- **Corporate structure:** the Authority will contract with an SPV (referred to in the Standard Project Agreements as “Project Co”) which will be majority owned and controlled by the private sector investors. The Authority will own a “golden share” in the SPV which gives it certain controls over the corporate, governance and management structures within the SPV. The SPV’s articles of association must incorporate the mandatory NPD articles, produced by the SFT, that enshrine the fundamental principles of the NPD model.
- **Public Interest Director:** One of the SPV’s directors will be appointed by the SFT. The Public Interest Director will bring an independent voice to the SPV’s board and ensures a greater degree of transparency and accountability.
- **Refinancing:** Under the NPD model the Public Interest Director has the right to instigate a refinancing on the same basis as an Authority may instigate a refinancing under SoPC4 guidance.

Further detail on the NPD model is contained in the NPD Explanatory Note available from the SFT.

## Chapter 5: NHS Bodies

Being based on a previous Scottish Standard Health PPP Contract, use of the Standard Project Agreements by NHS bodies might be expected to require the least adaptation. However, because the Standard Project Agreements have been developed in anticipation of a pipeline of mostly non-acute healthcare projects, modifications have been made to bring the general approach somewhat into line with arrangements previously used for local authority accommodation (particularly schools) projects. Where the facilities deliver acute healthcare and require to operate on a 24/7 basis, it may be appropriate to revert to some of the measures in the Scottish Standard Health PPP Contract (in particular the measurement of service performance by sessions rather than days and the commissioning arrangements around handover of the new facilities), and in this regard NHS bodies must liaise, and agree an approach with, SFT.

### Key changes

In addition to the general changes in scope of services and risk transfer positions mentioned in Chapter 1, aspects of the Standard Project Agreements that are different from the former NHS standard document that NHS bodies will wish to note in particular are:

- Performance measurement by days rather than sessions
- No pre-completion and post-completion commissioning
- Warning notice mechanism and termination triggers linked to deductions rather than service failure points
- Malicious damage risk is retained by the public sector (see Clause 49A).

### Value Added Tax

NHS bodies should consider their VAT status in relation to any input tax that they will incur in relation to a project, such as on the monthly service payments and utility supplies, and the application of section 41 of the VAT Act.

## **Chapter 6: Local authorities**

### **General**

Local authority specific drafting is required in relation to matters such as:

- The Local Government Contracts Act 1997 (see Form 11 in Appendix 2)
- Authority rights to assign (Clause 57 - see Form 10 in Appendix 2)
- Authority Events of Default (Clause 39 - see Form 9 in Appendix 2)
- Best Value (see Form 12 in Appendix 2)

### **Schools**

Where the facilities are a school, provisions may be relevant to deal with matters such as:

- Development constraints re adjacent operating school facilities(see Form 4 in Appendix 2)
- School representative (see Form 1 in Appendix 2)
- Dates for service commencement (see note to Clause 14.4 in Appendix 1)
- Use of the facilities - additional hours, community use, third party use (see Form 6 in Appendix 2)
- Janitors (see note to Schedule Part 12 in Appendix 1)

### **Pensions**

If employees are expected to transfer to a service provider and they are members of the LGPS, suitable alternative drafting is provided in Form 8 in Appendix 2.

## **Chapter 7: FE Colleges**

### **General**

FE College specific drafting is required in relation to matters such as:

- Authority rights to assign (Clause 57 - see Form 10 in Appendix 2)
- Authority Events of Default (Clause 39 - see Form 9 in Appendix 2)

FE Colleges may also wish to consider provisions that are relevant to schools projects (see Chapter 6).

## APPENDIX 1 - Clause specific comments

Clause	Comment
Recitals	<p>Recitals to be drafted on a project-by-project basis.</p> <p>The Agreement must contain reference to its exclusion from the Housing Grants, Construction and Regeneration Act 1996. Suggested drafting as follows:</p> <p><i>This Agreement is entered into pursuant to a project applying principles similar to the principles of the private finance initiative and is excluded from the Housing Grants, Construction and Regeneration Act 1996 by virtue of the Construction Contracts (Scotland) Exclusion Order 1998 (SI 1998/686).</i></p>
2	<p>The Standard Project Agreements assume that contract signature and financial close will be simultaneous. If there are project specific reasons why a condition or event cannot be satisfied until after contract signature, the Agreement will need to be amended accordingly. In those circumstances, any conditions precedent ("CPs") should be limited as far as possible to items of real significance that cannot be satisfied prior to signature. This approach is necessary to minimise the risk of a party terminating the Agreement for failure to satisfy a trivial or insignificant CP. If financial close and contract signature are not simultaneous, owing to the existence of any CPs, the parties will need to agree how risks relating to interest rate fluctuations between contract signature and financial close are to be allocated. Consideration will also need to be given as to whether the definition of Project Term should be amended so as to commence on financial close rather than the date of signature of the Agreement.</p>
4.1	<p>The Independent Tester Contract is dealt with in Clause 15 (<i>Independent Tester</i>) and Schedule Part 13 (<i>Independent Tester Contract</i>). The Standard Project Agreements envisage that the independent tester will have obligations jointly to the Authority and the SPV. If, in exceptional cases, these obligations are owed to the SPV alone, the definition of Ancillary Documents should be extended to cover the Independent Tester Contract.</p>
4.3.1	<p>The Authority's consent should not be given unless the Additional Permitted Borrowing Limit has been reached.</p>
4.4 (NPD version)	<p>The SPV's obligation, under the NPD model, to pay Surpluses to the Authority is subject to the provisions/restrictions contained in the Funding Agreements. Authorities will need to do diligence on the Funding Agreements before financial close and ensure that the provisions/restrictions on the payment of Surpluses are appropriate and the drafting in Clause 4.4 protects the Authority from any changes to the Funding Agreements that would alter these.</p>
4.7 (4.8 in NPD version)	<p>The term "Funding Default" should be defined by reference to the borrower defaults under the Senior Funding Agreements (and applies whether or not the Senior Funders choose to accelerate their loan). Please note that this obligation is additional to the obligation of the Agent under paragraph 9.4 of Schedule Part 4 (<i>Funders' Direct Agreement</i>).</p>
4.8 (4.9 in NPD version)	<p>The Authority should insert a definition of Interim Project Report that sets out the broad headings and issues which it requires to cover. The Interim Project Report ought to include any information that the SPV is required to provide to the Senior</p>

Clause	Comment
	Funders under the Senior Funding Agreements in these circumstances.
5.2.4	Reference to NHS Requirements is applicable where the Authority or a Community Services Provider is a health board. Other Authorities to consider additional requirements they may have on a project specific basis.
5.3.1	Reference to NHS Requirements is applicable where the Authority or a Community Services Provider is a health board. Other Authorities to consider additional requirements they may have on a project specific basis.
5.4 to 5.5	Consider what joint working arrangements are necessary to provide a practical approach to interface with the soft service provider (which may be the Authority itself).
5.5	Applicable where the Authority or a Community Service Provider is a health board. The NHS and You replaces Patient Rights and Responsibilities. This provision is intended to capture 'customer service' aspects of healthcare provision and is not intended to capture e.g. the NHS Plan. Other Authorities may wish to consider using a corresponding provision or expanding this provision on a project specific basis.
6.1	This Standard Project Agreements do not envisage that third party revenue generation activities will form part of the Project. This Clause (and the Agreement generally) will need to be amended as appropriate to provide for any other activities to be carried out as part of the Project (e.g. additional income generation activities to be conducted on Site).
8	Where the Facilities are a school, suitable drafting to provide for a school representative is in Form 1 in Appendix 2.
9	<p>The Standard Project Agreements are drafted on the basis that the Site has been selected by the Authority. If the Site is to be selected by the SPV then these provisions will need to be reviewed and amended as appropriate.</p> <p>The Authority retains title risk. Under Clause 9 the Authority grants licences that are subject to the Reserved Rights and only those title matters that are included within the definition of Title Conditions. The private sector parties are required to comply only with disclosed Title Conditions and Reserved Rights. The Authority must arrange for suitable title due diligence to be carried out by its own or external legal advisors and the preparation of the Title Conditions and Reserved Rights document that discloses any title matters that may reasonably be expected to interfere in any way with the construction of the Facilities and/or provision of the Services.</p>
9.1.1	To be reviewed on a project specific basis. Where a project involves phased construction or refurbishment project a phased programme of access may be required
10	This Standard Project Agreement assumes that the SPV is able to carry out any investigations necessary to satisfy itself in relation to Site Conditions. To the extent that it is not practical for the SPV to investigate areas of the Site (for example, due to Authority occupation of Facilities on Site), the drafting at Clauses 10.3 and 10.4 can be included to provide the SPV with appropriate relief. These Clauses provide that the Authority bears any additional costs arising out of

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Clause	Comment
	<p>unforeseen conditions in areas which the SPV cannot investigate and which cannot be reasonably identified by the SPV. Areas of the Site to which this carve out applies should be clearly identified in the Agreement.</p> <p>It may be appropriate, where additional surveys are recommended by the SPV acting in accordance with good industry practice and in good faith during the bidding process (or the New Project Approval Process on a hub project, as the case may be) but were not instructed by the Authority or permitted by the to be carried out, that these should be specifically carved out of Clause 10.3.</p> <p>The risk that an Authority assumes in terms of Clauses 10.3 and 10.4 where relevant (i.e. where there are areas of the Site under existing buildings that are not capable of survey) will include the risk of asbestos. The risk of asbestos on other areas of the Site should be considered on a project specific basis. The Standard Project Agreements assume, and it will ordinarily be expected, that the SPV takes this risk (including on projects that involve the demolition of existing buildings where the SPV ought to be in a position, on the basis of its knowledge and expertise, to evaluate the need for asbestos removal and factor this in to its demolition proposals). In exceptional cases (e.g. on refurbishment projects) where the treatment of asbestos will be a particularly sensitive issue it may be appropriate for an Authority to consider risk sharing that involves a process for carrying out asbestos surveys and the SPV pricing asbestos works on the basis of those surveys. If the Authority considers that risk-sharing will offer an appropriate and value for money solution it should use the drafting in Form 2 in Appendix 2.</p>
11.1.1	<p>Where, on a project specific basis, there are certain Consents which only the Authority can obtain, or Consents which the SPV can obtain only with input from the Authority, appropriate drafting should be included in this Clause 11 and cross referred to in Clause 5.2.1. Acceptance of any such responsibility by the Authority should be narrowly prescribed. A similar approach should be followed where there are legislative requirements in relation to the Facilities which can only be complied with by, or that require the input or co-operation of, the Authority as occupier or user of the Facilities or any part of them. Again, acceptance of any such responsibility by the Authority should be narrowly prescribed.</p>
11.1.2	<p>If the detailed planning permission includes conditions with which the Authority (as owner/occupier of the Facilities) must comply, appropriate drafting should be included in this Clause 11 and cross-referred to in Clause 5.2.1. The costs associated with any planning agreements etc should be for the account of the SPV.</p>
11.3 to 11.11	<p>Form 3 in Appendix 3 contains drafting that can be used where financial close is reached less than 12 weeks after detailed planning permission is granted. In line with market practice, this drafting places the risk of judicial review of the planning permission within that 12 week period with the Authority. Thereafter judicial review risk transfers to the SPV. The risk transferred to the Authority excludes any judicial review or challenge that arises from the SPV's conduct during or compliance with the planning process.</p>
12	<p>The design requirements for thermal and energy efficiency and for monitoring and remedies that existed in this Clause in the Scottish Standard Health PPP Contract have been removed. See comments at Schedule Part 6.</p> <p>If the Authority has specific fuel source requirements in relation to energy, such as</p>



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Clause	Comment
	biomass or photovoltaic cells, or multi-fuel capability, drafting should be added to ensure that if the SPV fails to provide or maintain the necessary equipment and that results in the Authority incurring increased fuel costs or losses of income, the SPV will be obliged to compensate the Authority whether or not it has incurred Deductions.
12.1.1	Health Boards need to ensure compliance with HDL (2002)11 "Corporate Governance: Statement on Internal Control (SIC)".
12.4.3	Applicable where the Authority is a health board. Other Authorities should consider additional requirements they may have on a project specific basis.
12.5	It is essential that the Authority reviews the final version of the SPV's Proposals shortly before contract signature in order to ensure that these satisfy the Authority's requirements for Operational Functionality and that it is happy to give sign-off on this limited basis. The Authority must have the right to notify the SPV of its comments/qualifications in relation to Operational Functionality.
12.6.3	On hub Projects where there is more than one Relevant Participant, the Participants may require that representatives of each have similar rights as referred to in here and in Clause 12.6.4.
13.1.1	On hub Projects where there is more than one Relevant Participant, the Participants may require that representatives of each have similar rights as referred to in this Clause 13.1 ( <i>Access to Site</i> ).
14.3	Where the Works are being carried out on an operational site the Authority may wish to consider restrictions on the types of works that the SPV will be entitled to carry out during certain key dates (e.g. during exam periods). Where such restrictions are imposed the Authority will need to ensure that it has the opportunity to comment/object under the Review Procedure where proposed changes to the Programme will impact on these key dates. See Form 4 in Appendix 2 for optional drafting that affords the Authority a remedy where construction works cause disruption to the provision of Authority Services/Community Services at existing facilities.
14.5	If the Authority wishes to place additional constraints on when service commencement may occur (for example only during school holidays) this Clause should be amended as required. Authorities should remember that the more restrictive its requirements the greater the risk that will be priced by bidders.
14.6	Provision for notification of early completion has been included to enable the parties (at their discretion) to consider early occupation by the Authority of the Facilities. The consequential amendments required as a result of agreeing to early completion (e.g. in relation to commissioning, phasing, equipment procurement, service payments) would have to be considered and agreed on a project specific basis at the time.  If the Authority is not willing to accept early completion of the Facilities under any circumstances, this Clause may be deleted.
15.1	The standard form Independent Tester Contract is set out at Schedule Part 13 and provides that the Independent Tester will be appointed jointly by the parties

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Clause	Comment
16	Any provisions relating to equipment to be drafted on a project specific basis (including tailoring of the Service Level Specification).
17	<p>The Standard Project Agreements assume that the Authority and the SPV will each undertake inspection and commissioning activities both prior to and after completion. Parties need to consider which commissioning activities have to occur before and which after completion (and, in each case, by whom) on a project specific basis. The Standard Project Agreements envisage that the Final Commissioning Programme will set out all requirements and obligations in relation to the development, nature, principles and performance of the completion tests to be performed to enable certification of completion to take place.</p> <p>The commissioning process is to be developed and agreed on a project specific basis and the Agreement amended as necessary to reflect project specific arrangements. Pre-completion commissioning is likely not to be relevant in many cases, in which event this Clause can be simplified by removing the references to it.</p>
17.4	The Authority should describe any other core requirements to be complied with in relation to the SPV's commissioning activities.
17.7.2	The Authority should consider what the Authority's commissioning activities, if any, will entail. Parties will need to consider when the Authority's commissioning activities (including, for example, installing of its own equipment) will be carried out.
17.13	This Clause makes the certificate of the Independent Tester conclusive as regards the Actual Completion Date/Payment Commencement Date unless there is manifest error (for example a clearly erroneous date), bad faith or fraud. It is in the interests of both parties that there is certainty about when payment commences. Both parties should have remedies under the Independent Tester Contract if he wrongly issues or refuses to issue his certificate. Damages (claimed from the Independent Tester) should always be a sufficient remedy if payment starts prematurely or is wrongly delayed by reason of fault on the part of the Independent Tester.
17.18	Documentation to be specified on a project by project basis. Documents might include, for example: the appropriate sections of health and safety file, as-built drawings and maintenance manuals; and results of technical commissioning.
18.1 to 18.4	The Authority should consider what commissioning/services start-up activities will be carried out by the SPV and what commissioning activities will be carried out by the Authority during this period. The Payment Mechanism and Service Level Specification may need to be structured so as to reflect the intention of the parties in relation to services start up during this period. The standard Payment Mechanism does not envisage any structuring of this type and may therefore need to be adjusted in project specific cases. It will depend on the significance of each party's activities during this period and will depend on how step-up of payments during this period are structured. If not relevant these Clauses may be deleted.
18.5	To be amended on a project specific basis. For example, operational manuals may need to be made available at an earlier date depending on the timing of commissioning activities. Further, it may be possible, for the SPV to provide draft manuals to the Authority for comment prior to finalisation and suitable

Clause	Comment
	amendments should be made to the Clause where relevant. It is expected that substantially complete manuals will be available by the Actual Completion Date with final drafts being made available within an agreed time thereafter. The Authority should list any other manuals required.
18.8	This Clause may be deleted if not relevant.
19.6	The discovery of fossils and antiquities is treated as a Relief Event entitling the SPV to an extension of time in accordance with Clause 29 but leaving the financial risks of such discovery with the SPV. If there is a known problem on the Site the provisions relating to discoveries may need to be reviewed and amended on a project specific basis
21	Any provisions relating to IT to be included on a project specific basis.
22	In schools projects it was usual to include drafting to deal with different types of use of the Facilities by the Authority during the school day, during additional hours and for third party use and sometimes managing third party use was transferred to the service provider with arrangements for sharing income derived from third party use. Under the more limited scope of the services, this drafting may no longer be relevant, especially if the service provider is not responsible for controlling the opening and closing of the Facilities. If, however, an Authority considers that it wishes to make provision for some of or all of these arrangements it should refer to the drafting, based on the former standard schools project agreement, in Form 6 in Appendix 2.
23	<p>There are no deductions during periods when planned preventative maintenance is taking place in accordance with the agreed Schedule of Programmed Maintenance. Authorities must ensure that risk in relation to maintenance and replacement lies with the SPV and will need to:</p> <ul style="list-style-type: none"> <li>• develop their output specifications (in sufficient detail) and Payment Mechanism</li> <li>• consider the grounds for objection in paragraph 3.9 of the Review Procedure</li> </ul> <p>in the light of this requirement (and the Authority's output requirements). Although Schedule Part 18 (<i>Handback Procedure</i>) deals with the hand-back of the asset on expiry, the Authority may wish to reserve the right to carry out periodic surveys to ensure that regular maintenance is in fact carried out. The Authority should not get involved in the micromanagement of planned maintenance but should have the ability to ensure that any significant deterioration in the facility is avoided. Alternatively, this may already be achieved via the deductions in the Payment Mechanism.</p>
23.3	Authorities will need to consider this provision in the light of how unplanned maintenance will in fact be carried out by the SPV. For example, if maintenance personnel are to be present full time on the Site, it may be more appropriate not to require advance notification, but to reserve a right to defer or reschedule any work if it is actually carried out at an inconvenient time.
23.13	The Standard Project Agreements place responsibility for interior decoration of walls with the Authority and that this will be done on a regular basis. Authorities

Clause	Comment
	<p>should consider on a project by project basis whether they also wish to take on responsibility for ceilings and floor coverings. The drafting allows the SPV to step-in and perform these tasks where the Authority's failure to is likely to have an adverse effect on the Facilities, Services and/or the SPV's obligations.</p> <p>Authorities will need to consider the cost implications of these responsibilities in preparing their business cases for projects. They will also need to consider the interface between these obligations and the design and specification of the Facilities (i.e. the impact that the design and specification will have on the Authority's ongoing internal redecoration responsibilities), as would be the case on any capital-funded project.</p>
23.13.2	Include if the Authority wishes to take on this responsibility and adjust the Services Specification.
23.13.3	Include if the Authority wishes to take on this responsibility and adjust the Services Specification.
23.13.4	Delete if the right to carry out Derogated Low Value Changes is not included in Schedule Part 16 ( <i>Change Protocol</i> ).
23.14	Breach of this Clause will be an Excusing Cause by virtue of Clause 51.2.1.
23.22 to 23.24	This drafting has been introduced because of the change in risk transfer in regard to Utilities. If the SPV makes material use of Utilities to achieve Rectification of Availability Failures it should bear the associated costs. It is suggested that a <i>de minimis</i> level is set to avoid the time and effort required to make relatively trivial claims. The SFT has suggested that this is linked to the average normal daily cost of each utility, but Authorities may prefer to adopt a simpler cash sum in which case it should be index linked.
24.3	The warning notice regime is now triggered by the levels of Deductions being made from the Annual Service Payment. The trigger levels in this Clause need to be calibrated and to be consistent with that in Clause 40.1.9.
24.5	The Authority step-in mechanism from the Scottish Standard Health PPP Contract has been replaced with the mechanism from SoPC4 which was also adopted on schools projects.
25	Clause 25 contains drafting for projects that envisage staff transfers. Alternative drafting for projects where no staff transfers are envisaged is included in Form 7 in Appendix 2.
25.3	The drafting reflects current (May 2011) TUPE legislation which does not protect pension entitlement.
25.4	Reference to the Whitely Agreement applies to staff in the health sector only and should be deleted by other authorities.
25.6	The Clause as drafted does not apply to Transferring Private Sector Employees since it is assumed that risk in such cases lies with the incumbent service provider. If in fact the risk is to lie with the Authority, the Authority will need to assess whether the inclusion of Transferring Private Sector Employees in this

Clause	Comment
	Clause would represent value for money.
<b>25.7</b>	Review on a project specific basis.
<b>25.9</b>	<p>The First Employee List will normally detail the following: (i) staff reference number (ii) date of birth (iii) age (iv) job title (v) start date (vi) continuous service date (length of reckonable service) (vii) contract hours (viii) sex (M/F) (ix) location (x) department (xi) NI letter (A or D) (xii) scale and point (xiii) salary (xiv) superannuation (xv) allow/deduction code. This is not an exhaustive list.</p> <p>The information provided by the Authority prior to financial close may be inaccurate e.g. due to staff turnover) by the time service transfer occurs. Rather than rely on the Authority warranting the employee information, the Standard Project Agreements provide for the SPV's price to be adjusted to reflect the cost effect of differences between the information about the Authority's workforce given to the SPV when it submitted its final bid (or, in the case of a hub project, its Stage 2 Submission) (which can be adjusted prior to financial close to reflect up to date information) and the actual workforce that transfers to the Service Provider.</p>
<b>25.10</b>	Clause 25.12 allows for further adjustments to be made where information contained in the final list is incorrect.
<b>25.11.1</b>	These details are taken from the SPV's final bid (or, on a hub project, the relevant Stage 2 Submission). Authorities and their advisors should ensure that the bid (or the Stage 2 Submission) contains sufficient detail to ensure that the SPV's workforce assumptions are transparent. This will enable the Authority to audit adjustments to the Annual Service Payments to reflect changes in the employee information in the Final Employee List.
<b>25.11.2</b>	In other words, these costs are the allowance made by the SPV for continuing payments of salary, NI, pension contributions, etc to the workforce it proposes to establish to provide the Services.
<b>25.11.3</b>	These costs are the non-recurring costs of establishing the SPV's workforce. These might include, for example, possible redundancy costs if the workforce whom the SPV expects to inherit from the Authority does not match the required profile. It is assumed for the purposes of this document that any re-profiling of the workforce is carried out by the SPV after the Relevant Service Transfer Date. The drafting will need to be reviewed if it is agreed that the Authority will undertake this task.
<b>25.12</b>	This is how the SPV is compensated for any mismatch between the information it was given about the workforce when preparing its final bid (or, on a hub project, producing the Stage 2 Submission) and the correct information based on the actual workforce at the time of service transfer.
<b>25.14.1</b>	If there are too few transferring employees to establish the SPV's projected workforce at the time of service transfer, this does not reduce the SPV's staff costs, because additional staff will have to be recruited to fill the gaps. If there is re-profiling before Transfer at the request of the SPV or if other changes have been included in pricing assumptions then this Clause should be amended to reflect costing assumptions. If final bids were (or, on a hub project, a Stage 2 Submission was) invited on the basis that the Authority will assume costs of

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Clause	Comment
	redundancy this Clause will need to be developed to reflect the correct basis.
25.14.4	The SPV may have made binding contractual commitments, having relied in good faith on information provided by the Authority.
25.20	If there are existing private sector providers of services to the Authority, the contracts with those providers should be examined to establish if a similar obligation exists in favour of the Authority. If so, the Authority should consider if better value for money would be obtained if this Clause 25.20 and Clause 25.21 were to extend to all Transferring Employees.
25.23	See note on Clause 25.20 regarding the need to review existing contracts.
25.29	The Authority should ensure relevant policies are identified to the SPV at an early stage in the bidding process (or, on a hub project, the New Project Approval process).
25.35	Authorities should ensure that this obligation is passed on in the contract with the new service provider.
25.39	This Clause only applies if the Authority is a health board.
26	This Clause will not be used where there are no transferring employees.  The standard drafting assumes that pensions will be provided by way of a GAD scheme. For authorities where the LGPS is applicable, alternative drafting is set out in Form 8 in Appendix 2.
26.1	Authorities should ensure that certificates from the Government Actuary's Department in respect of relevant pension schemes are available prior to contract signature and also three months before each Relevant Service Transfer Date.
26.3	The requirements as to the provision of documentation concerning the SPV or Service Provider's pension scheme are as stated in "Public Private Partnerships in Scotland- Protocol and Guidance concerning Employment Issues".
26.5.2	In accordance with "Public Private Partnerships in Scotland – Protocol and Guidance concerning Employment Issues NHS. Authorities must require broadly comparable pension arrangements to be secured on second or subsequent transfers. These should, as a minimum, protect the benefits which enabled the first scheme into which relevant staff transferred to be certified by GAD.
26.6	As envisaged by HM Treasury guidance ("Fair Deal for Staff Pensions: Procurement of Bulk Transfer Agreements and Related Issues" published June 2004) the SPV may include in their price a risk premium for Bulk Transfers. This will reflect the concern of their actuarial advisors that the Initial Bulk Transfer Terms may not properly reflect the liabilities that the SPV's pension scheme will be required to accept in the event that bulk transfers take place. If this happens, the parties will need to ensure that the agreement records exactly what assumptions have been made and how any perceived risk has been priced. For example, the SPV may have assumed that 40% of those eligible exercise their right to transfer accrued entitlement from the NHS Pension Scheme. If fewer than that actually transfer, the Authority will wish to ensure that any excess risk pricing is removed. Conversely, if greater numbers exercise their right to transfer, the

Clause	Comment
	<p>SPV will expect an upwards adjustment. In both cases, the basis on which adjustments are to be calculated should be made clear and the formula for doing this should be specified in the SPV's final bid (or, on a hub project, Stage 2 Submission).</p> <p>It is important that the assumptions are agreed as soon as possible as experience suggests there is scope for dispute.</p>
26.9	Where an Authority is satisfied that it is not practicable for the SPV to procure such an arrangement it is permissible to agree that the SPV will procure provision of alternative pensions for new joiners.
27.1	The Standard Project Agreements assume that the Project is a stand-alone development and not part of a larger site and therefore the Authority's rights here apply in relation to the Facilities only. Authorities should refer to any other relevant areas (e.g. existing premises from which the Authority operates) as necessary on a project specific basis.
27.5	The Standard Project Agreements assume that Authority Policies will include any relevant rules, regulations and requirements of the Authority relating to the conduct of staff (including those in respect of security arrangements).
27.9	This Clause is only applicable where staff transfers are envisaged.
27.10 to 27.12	The Authority should consider and review Clauses 27.10 to 27.12 in light of its own policies in relation to disclosure checks and disclosure of convictions, and the extent to which these obligations apply during the construction and/or operational periods. The Authority's requirements in this regard should correspond to the relevant sector and the extent to which the SPV's staff are likely to be in contact with children, the elderly or vulnerable persons.
27.14	Authorities should note that the procedures in Clause 27.14 will be governed by Data Protection law. To the extent that the Authority envisages receiving information concerning the SPV employees, the Agreement will need to oblige the SPV to include a relevant Clause in the contract of employment of the relevant employees.
27.18 to 27.21	The requirements in these Clauses may be deleted for non-NHS projects and for NHS projects where they are not relevant.
28	The drafting has been amended to place obligations on both parties, recognising that both parties may keep hazardous materials at the Facilities. The Authority should consider who is best placed to maintain the COSHH register for the Facilities.
28.4	Where the Authority considers it appropriate, a carve-out may be provided to cover the case of phased construction and handover for the Site.
29	<p>Delay Events give rise to an extension of time for completion of construction. Compensation is payable for all Delay Events (other than Force Majeure or Relief Events) as follows:</p> <ul style="list-style-type: none"> <li>• Authority Changes – Schedule Part 16 (<i>Change Protocol</i>)</li> </ul>

Clause	Comment
	<ul style="list-style-type: none"> <li>• Clauses 29.9 to 29.13</li> <li>• Relevant Change in Law referred to in Clause 32 (<i>Changes in Law</i>).</li> </ul> <p>Delay Events may apply after the original completion date. However, the Authority should be under no obligation to accept early completion where the SPV has completed prior to the revised completion date.</p>
29.3.1	The issue of an Authority Change Notice will not, in itself, give rise to a Delay Event as the SPV will be obliged to continue to carry out the Project Operations until such time as the Change is agreed. The Authority may wish to consider whether the Project Operations ought to be suspended whilst the Change process is ongoing e.g. to avoid abortive works and costs being incurred, in which case it would be appropriate to factor the time/cost implications of such suspension in the SPV's claim for a Delay Event and Compensation Event.
29.3.9	Include where Clauses 10.3 and 10.4 are used.
29.10.4	Include where Clauses 10.3 and 10.4 are used.
30.1	Should particular project specific circumstances warrant, the list of events could be extended to include other similar events with the SFT's approval. However, the Authority should not permit the inclusion of a "catch-all" provision to the extent that any event outside the control of the parties should be a Relief Event. Only approved specified events should be listed. Equally, authorities are free to delete any item from this list if project specific circumstances merit, although examples of this have been, and are expected to remain, extremely rare.
32	The Authority should review the proposed Service Level Specification to clarify whether the SPV has any responsibility for ensuring the Facilities are compliant following future Changes in Law. It may be appropriate, if not, to review this Clause 32 and Clause 29 ( <i>Delay Events</i> ). Where the SPV is taking residual value risk, the drafting in Clause 32 should be reviewed on a project specific basis and agreed in conjunction with SFT.
32.3	Changes in Law relating to the extent of irrecoverable VAT are dealt with in Clause 35 ( <i>VAT and Construction Industry Tax Deduction Scheme</i> ).
32.4.3	<p>The Authority has a say over the manner in which any Changes are implemented in accordance with the provisions of Schedule Part 16 and the SPV's grounds for objections to such changes are limited to the grounds referred to in Clause 32.4.3(i).</p> <p>The financial consequences of such changes in law rest with the Authority (including in relation to the cost of obtaining any necessary Consent). The risks of obtaining the Consents remain with the SPV.</p>
34	<p>If the Authority intends to make a capital contribution, drafting should be added here. Capital contributions must not exceed 49% of total cost for NPD projects and 45% for hub DBFM projects.</p> <p>As capital contributions will always be project specific, no standard drafting is provided. Factors that are likely to need to be taken into account and provide for</p>



Clause	Comment
	<p>in the drafting include:</p> <ul style="list-style-type: none"> <li>• ensuring that capital is reflected in value already delivered in the project</li> <li>• implications for compensation on termination</li> <li>• VAT status (especially if the capital contribution is funded by grant monies from a third party source)</li> </ul>
34.1	<p>Practical completion of the Works triggers commencement of payment of the unitary charge. Where phased completion is envisaged, the payment mechanism should be structured so that payment of a relevant percentage of the unitary charge commences on practical completion, with build-up of the payment being linked to completion of each phase of post completion service commissioning, if any, (so that an increase in payments is triggered by completion of each phase until full payment is reached). The basic principle is that the Authority only pays for what it, in fact, receives.</p>
34.2	<p>The drafting here and in Section 2 of Schedule Part 14 (<i>Payment Mechanism</i>) assumes that the Authority will pay for services delivered in the current Contract Month at the end of the current Contract Month. In order to allow sufficient time for reporting and agreeing performance and any resulting Deductions, monitoring and reporting will work two months behind. Thus, payment for month 3 will be invoiced near the beginning of month 3 and paid before the last working day of month 3 and will be based on service performance in month 1. Month 2 will be spent reporting and agreeing that performance. This is considered to be the optimum timing for value for money consistent with the principle that payment should not be made before services have been delivered. An Authority proposing any alternative payment cycle will have to demonstrate to SFT the value for money benefit.</p>
34.3	<p>SPV to specify the manner of payment.</p>
36	<p><b>Hub</b></p> <p>This Clause contains the equity return sharing and capping drafting provisions. Note that the breach drafting is in Clause 45. The threshold levels for sharing and capping the return to equity will be those set out in the template DBFM Project Agreement within the relevant Territory Partnering Agreement.</p> <p><b>NPD</b></p> <p>This Clause contains the obligation on the SPV to pay Surpluses to the Authority and obliges compliance with the NPD Requirements (principally related to the structure and governance arrangements within the SPV). This should be read in conjunction with the Mandatory NPD Articles of Association.</p>
36.8.2	<p>Consider whether it is necessary to set out how the reduction is to be calculated and applied.</p>
37	<p>SFT considers that having custody of the financial model contracted to a third party such as the National Computing Centre is an unnecessary cost and that parties ought to be able to safeguard their own copies of the base case financial model and any amended versions during the life of the project. The Authority</p>

Clause	Comment
	should ensure that it has suitable contract management arrangements in place for obtaining updates of the financial model, as well as arrangements for safeguarding these. The Authority will be required to supply the SFT with a copy of the financial model at financial close and whenever it is amended.
39.1	<p>See Form 9 of Appendix 2 for additional Authority Events of Default to be included where the Authority is not a health board.</p> <p>Clause 39 in Version 1 included an Authority Event of Default that would be triggered by the Authority's failure to provide access to allow the SPV to carry out [Project Co's / Sub-hubco's] Remedial Services. This has been deleted in Version 2, the rationale being that the Authority's failure to provide access for the SPV to perform any of its obligations under the Agreement is already covered by the Authority Event of Default in Clause 39.1.1 and there is no reason to treat the private sector's ability to access the Facilities for the [Project Co's /Sub-hubco's] Remedial Services any differently from its ability to access the Facilities for performance of any of its other obligations.</p>
40.1.1	Delete limb (e) if all relevant parties are incorporated and resident in Scotland.
40.1.2	If it is critical for project specific reasons to meet the scheduled date for completion, the Authority may need to include an earlier trigger which would enable it to terminate prior to the longstop date if it became clear at a given point in time that the longstop date was incapable of being met.
40.1.6	The Authority should note that this provision is intended to address the situation where the SPV is responsible for a significant contravention of health and safety law which would (in the Authority's perception) make the SPV's position untenable but might not otherwise be caught by the "material breach" event of default (at Clause 40.1.3(a)) because there may not (arguably) be a material impact on the provision of the Community Services.
40.1.9	This and the next ground as well as the triggers in Clause 24.3 ( <i>Warning Notices</i> ) need to be calibrated and related to the performance measures in Schedule Part 12 ( <i>Service Requirements</i> ) and the requirements of Schedule Part 14 ( <i>Payment Mechanism</i> ).
42.2	Drafting for Authority break-points has been provided. The Authority should consider carefully whether it requires one of more specific break-points when it can terminate the contract at a pre-agreed cost in terms of compensation. Any Authority wishing to include this drafting must consult the SFT. If this is not required, Clause 42.2 should be deleted.
45	<p><b>Hub</b></p> <p>This Clause contains the Authority's remedy for breach by the SPV of the equity return sharing/capping provisions in Clause 36.</p> <p><b>NPD</b></p> <p>This Clause contains the Authority's remedy for breach by the SPV of its obligations to pay Surpluses and comply with the NPD Requirements.</p>

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Clause	Comment
46	In Version 2, Clause 46.4 has been amended to capture both Authority Voluntary Termination and Authority Termination on a Break-Point Date as the compensation on termination payments for both these scenarios are detailed in the same Section of Schedule Part 17. The drafting that appeared as Clause 46.6 in Version 1 has been deleted as a consequence.
46.6 to 46.12	The grossing up provisions are drafted on the basis of compensation payments which are calculated by reference to the return the shareholders/subordinated debt holders in the SPV would have received but for the termination. If the basis of calculation of the compensation payment differs from this these provisions will need to be considered in the light of such alternative basis of calculation.
46.13	The limits on Authority's rights of set-off do not apply to compensation payable on termination for the SPV default.
47.2	The Authority should include project specific provisions (e.g. relating to equipment, IT, planning, land and Authority assets or information etc). The Authority should consider what protection is required to ensure compliance with the handover provisions on a project specific basis (taking into account the nature, importance and value of the assets that the handover provisions will apply to).
47.2.1	The Authority should add other project specific items
47.2.4	The Authority should insert any project specific provisions regarding IT and Equipment etc
49.1.1	This mirrors the indemnity given by the Authority in relation to its employees in Clause 49.2.1. The SPV should manage the risks covered by the indemnity (and the fact that there is no carve out for causation) by putting appropriate insurance cover in place (which it is required by law to do), which contains satisfactory non-vitiation provisions (see Clause 53.6 ( <i>Subrogation and Vitiatio</i> )).
49.1.2	Deliberate acts or omissions do not include acts or omissions which are within the contemplation of the parties or provided for in this Agreement (see paragraph 10 of Section 2 ( <i>Interpretation</i> ) of Schedule Part 1( <i>Definitions and Interpretation</i> )).
49.2	A general indemnity has not been included in relation to Authority breach. The SPV has its express rights under the agreement (for example, Delay Event, Compensation Event and Excusing Causes) and its rights to sue for breach of contract in order to recover any additional loss.
49.2.1	See note on Clause 49.1.1
49.2.3	The Authority's indemnities relating to physical damage in Clauses 49.2.3 and 49.2.4 do not cover physical damage caused by negligent acts or omissions. The SPV should insure against that risk. Authorities should not act as insurers of last resort in those circumstances.  The indemnity in Clause 49.2.3 also excludes liability for acts of malicious damage, which are dealt with under Clause 49A.
49A	The drafting now included in Clause 49A is based on what was Form 5 of the User's Guide that accompanied Version 1, with changes having been made to

Clause	Comment
	<p>address the following:</p> <ul style="list-style-type: none"> <li>- the drafting now refers only to “malicious damage” rather than to “malicious damage or vandalism” on the basis that these amount to the same thing;</li> <li>- malicious damage caused by [Project Co / Sub-hubco] Parties should remain a private sector risk;</li> <li>- the private sector should not be penalised for the consequences of a Service Event where the Authority’s Representative has agreed that a Service Event was caused by malicious damage (other than by a private sector related party) and the Authority has not instructed Rectification. An Excusing Cause to this effect has therefore been added to Clause 51 and the private sector’s right to go ahead and Rectify now only need apply where failure to do so will increase the costs of delivering the Services (see Clause 49A.3.3).</li> </ul>
51	The list of Excusing Causes needs to be considered on a project specific basis.
51.2	On projects which include phased working, it is possible that Delay Events affecting construction work may also have an impact on service delivery. For this reason, it may be necessary to include additional Excusing Causes on a project specific basis, although Authorities should take care not to do so automatically (for example, Relief Events do not give relief from deductions for service failure in any circumstances, even though they are classified as Delay Events).
51.2.2	Include limb (e) in phased projects, otherwise delete.
51.2.3	Include where the Authority or other Community Services Provider is a health board and there are clinical services being provided at the Facilities. Other Authorities may wish to consider using a corresponding provision on a project specific basis.
52	Any warranties to be given by the Authority must be justified on a project specific basis (it is expected that such circumstances will be limited for example, where the Authority is the only source of the information and the SPV has no means of obtaining or verifying that information itself). Increasingly the private sector is requiring warranties as to the accuracy of certificates of title. These are not considered to be necessary in transactions such as these if there is no security being granted over the property. To the extent that a problem with title arises then the SPV’s remedy is either through a Delay/Compensation Event or an Excusing Cause (on the basis that it will constitute a breach of Clause 9). If a warranty is required then the Authority should consider qualifying it to the best of the Authority’s knowledge, belief and information. Authorities should note that the Standard Project Agreements assume that the Authority will not warrant information disclosed to the SPV (referred to as Disclosed Data) and expressly excludes liability in this regard. A breach of warranty should give rise to a claim for damages or a price variation mechanism could be introduced to the Agreement. Breach should not give rise to a right for the SPV to terminate.
53	Insurance premiums are generally a pass-through cost and there are no provisions for sharing premium risk, save that the contractor is responsible for increases that are due to its claims record or other factors for which it is primarily

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Clause	Comment
	<p>responsible. The drafting concerning this is in Section 6 of Schedule Part 14 (<i>Payment Mechanism</i>).</p> <p>In an endeavour to ensure that the contractor seeks to obtain the best possible terms for the project insurances drafting has been provided in Section 4 of Schedule Part 15 (<i>Project Insurances</i>)</p>
53.6.1	If insurers are unwilling to waive subrogation rights against unnamed Authority Parties, the Authority should consider including specified named Authority Parties (especially sub-contractors). The Authority should, however, resist a suggestion that third parties should automatically be carved out from this Clause.
53.6.2	<p>This Clause may not be amended but an obligation may be put in Schedule Part 15 (<i>Insurance Requirements</i>) as follows:-</p> <p>The Insurers hereby waive all rights of subrogation however arising which they may have or acquire against the Authority, Authority Parties and its or their respective parents, affiliates, directors, officers employees and assigns arising out of any occurrence in respect of which any claim is admitted under this Policy except where the rights of subrogation or recourse are acquired in consequence of a Vitiating Act in which circumstance insurers may enforce such rights against the vitiating party notwithstanding the continuing or former status of the vitiating party as an Insured.</p>
53.14.4	Given that insurance premiums are generally a pass-through cost to the Authority during the Operational Term, it is appropriate for the Authority to have the right to trigger the Uninsurability provisions if it considers that the premiums have reached such a level that the risk is not generally being insured against.
53.15.4	Given that insurance premiums are generally a pass-through cost to the Authority during the Operational Term, it is appropriate for the Authority to have the right to trigger the Unavailability provisions if it considers that the premium for insuring with a particular term or condition has reached such a level that the term or condition is not generally being incorporated in insurance.
53.18	This Clause must refer to only such insurances, the proceeds of which are to be paid into the Insurance Proceeds Account i.e. physical damage insurance policies.
53.22.1	This will not include, for example, third party liability, employers' liability, business interruption or advance loss of profits insurance.
53.23 to 53.26	The application of these Clauses to be considered on a project specific basis. This does not relieve the SPV of its obligation to reinstate damage to the Facilities in terms of Clause 53.22 ( <i>Reinstatement</i> ). Failure to do so will be a breach of the SPV's obligations and the Authority will have the remedies specified in the Agreement including termination.
53.23	<p>The "other funds" could, for example, include sums made available to the Contractor by the Authority to ensure that the test in Clause 53.23 is passed and that as a result reinstatement occurs in accordance with Clause 53.22 (<i>Reinstatement</i>).</p> <p>The loan life cover ratio calculation will be controlled by the Senior Lenders in the Funding Agreements, and checks will need to be made by the Authority that this</p>

Clause	Comment
	<p>calculation allows reinstatement. Since the Senior Lenders are those whose interests are being protected, the formulae set out in the banking financial model should be used, having agreed exactly how the formulae will work and enshrine this in the Contract. For the definition of loan life cover ratio refer to the Senior Funding Agreements.</p> <p>If there is more than one Facility involved in the Project the economic test should not apply at less than 50% of the capital value of the Assets. The insurance policies will need to cover payment of insurance proceeds if any of the Facilities will not be reinstated.</p>
53.25	<p>Excluded from the Senior Debt Termination Amount will be amounts standing to the credit of the account into which the insurance proceeds are paid.</p> <p>This Clause will mean the amounts are released to the accounts secured to Senior Lenders and the Senior Lenders will apply such amounts as a prepayment against Senior Debt.</p>
54.1	<p>As a matter of good practice, the Authority should review the relevant subcontracts to ensure that they contain mirror provisions excluding the right to claim Indirect Losses.</p>
54.3	<p>The Authority should note that the effect of the sole remedy provisions contained in the Standard Project Agreements is that, to the extent the Payment Mechanism does not take account of a particular service failure, the Authority will not be able to recover any loss or damages from the SPV. The SPV's lenders will be unwilling to accept a general right to sue for breach of contract if a service failure is not caught. Schedule Part 14 (<i>Payment Mechanism</i>) and the Service Level Specification developed by the SFT are designed to be as all encompassing as possible, but the Authority will need to ensure that this remains the case in the final version of the contract. See also footnote to Clause 24.6.2.</p>
55.3.& 55.4	<p>If either party is to be given access to any of the other party's computer systems, as a matter of good practice and also to clarify potential liability for unauthorised access to those systems under the Computer Misuse Act 1990, the scope of each party's authorisation to access each other's computer systems will need to be defined clearly. The terms of such authorisation will be project specific.</p>
57.1	<p>The inclusion of the words in square brackets should be considered on a project specific basis.</p>
57.4	<p>Alternative drafting for non-NHS bodies is provided in Form 10 in Appendix 2</p>
57.9 & 57.10	<p>Clauses have been added providing a wipe-clean of Deductions and Warning Notices for the purposes of Clauses 40.1.9 and 40.1.10 in the event that the Service Provider is replaced, on a maximum of two occasions during the life of the project, in order to incentivise the SPV to replace an under-performing service provider and to facilitate it in so doing.</p>
60	<p>The Authority should review the scope of this provision in the light of project specific data processing requirements.</p>
61	<p>In line with the general approach taken by the Scottish Information Commissioner, these Clauses support a general openness in regard to the project contracts and</p>

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Clause	Comment
	associated documentation. The SFT considers that there are only a very few parts of the project data that can be properly regarded as falling under any of the exemptions in the freedom of information regime. These have been identified in Schedule Part 26 ( <i>Commercially Sensitive Information</i> ) with what are thought to be reasonable periods when the protection of confidentiality may be claimed. The Authority should be wary of attempts to widen the scope or extend the duration of the limited contractual confidentiality arrangements in these Clauses and should consider these Clauses in light of any other guidance (e.g. SGHD guidance for NHS boards) with which it is required to comply.
61.1.4	This could be the Performance Monitoring Report or some other form of report that the SPV is required to produce on a regular basis a report detailing (a) the Monthly Service Payment Amounts (gross and net of Deductions), (b) a breakdown of Deductions incurred, (c) Warning Notices issued and (d) other payments included within the Monthly Invoices for the quarter (e.g. in respect of changes, compensation, indemnities etc).
61.1.6	Any other information to be listed on a project by project basis.
62.2	This should enable the Authority to comply with its obligations under the FOI(S)A. If the Authority wished to go beyond this, for instance by referring in addition to other information or to information held by first tier subcontractors on behalf of the SPV, this can be specified – but this may have cost/value for money implications.
62.4	The Authority should ensure that the appropriate policy is in place.
62.7	It is up to the parties to decide whether costs associated with any future change in the Authority's FOI(S)A cost recovery policy should go through Schedule Part 16 ( <i>Change Protocol</i> ).  If the Environmental Information (Scotland) Regulations are relevant to the project, the parties may include broadly equivalent provisions in the Agreement dealing with costs and based upon the Authority's policy towards reimbursement of such costs under section 8 of the Environmental Information (Scotland) Regulations.
64.1 & 64.2	The Authority may wish to consider, on a project specific basis, whether there are certain notices that should only be capable of being validly served by first class post or hand delivery.
70	Where the SPV is leasing the Facilities to the Authority, the drafting will require to be extended to cover any conflicts between this Agreement and such a lease.
74	Where the Authority is a local authority the Clause in Form 11 of Appendix 2 containing the consent to certification of the Project Agreement and incorporation of relevant discharge terms in Schedule Part 27 should be included.
75	Where the Authority is a local authority the Clause in Form 12 of Appendix 2 containing obligations in relation to the local authority's best value duties should be included.
76	Investment in NPD and hub DBFM projects presents an opportunity to deliver benefits for local communities and, ultimately, the Scottish economy. Authorities are encouraged to consider on a project-specific basis the wider benefits that could flow from their projects such as, for example, training and recruitment

Clause	Comment
	<p>opportunities and supply chain opportunities for SMEs.</p> <p>As well as referring to any internal community benefits policies that they may have, Authorities should refer to appropriate guidance (e.g. ConstructionSkills guidance).</p> <p>Community benefits are already a key focus in the hub partnerships, embedded in the hub contract structure through KPIs in the Territory Partnering Agreement. On hub projects, the parties will need to agree how the community benefits (contracted for in the TPA) will be delivered through each individual project.</p> <p>For stand-alone NPD projects Authorities will need to consider whether and how to incorporate the private sector's proposals for delivery of community benefits into the Project Agreement. A suggested form of drafting is set out at Form 5 of Appendix 2 although Authorities must determine the extent to which this drafting is appropriate / relevant in the context of their specific requirements. It will be important to ensure that the Project Agreement clearly defines the requirements and clearly identifies the method of monitoring and measuring Project Co's compliance with them.</p>
77	<p>Authorities to consider whether additional contract provisions are appropriate / necessary to enable it to discharge its duties under The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.</p>

Schedule Part	Comment
1	<b>Definitions and Interpretation</b>
1	<p><b>Ancillary Documents</b></p> <p>The Authority should consider if there are any other project significant documents. See also note above on Clause 4.1.</p>
1	<p><b>Associated Companies</b></p> <p>If a fund or limited partnership or "50:50" owned vehicle (which is not a "subsidiary") or similar is in the relevant ownership chain of the SPV, this definition will need to be expanded to cover it. If any of the holders of equity in the SPV are limited partnerships or other funds, particular attention will need to be given to the Change of Ownership provisions during any lock-in period.</p>
1	<p><b>Authority Assets</b></p> <p>This definition (which is only used in the indemnity to the Authority in Clause 49.1.3) is intended to cover those parts of the Authority site that are not the subject of the sole remedy payment mechanism. In practice that means those parts of the site to which the SPV does not provide any service or, where the SPV does provide services to a facility, those parts over which the SPV does not take any element of availability risk. The Authority should also consider how equipment is treated – if the SPV is not responsible for maintenance and lifecycle of any</p>



Schedule Part	Comment
	items of equipment then such items should be included within the definition.
<b>1</b>	<p><b>Authority Policies</b></p> <p>The relevant policies will vary on a project specific basis but an Authority should consider including Scottish Procurement Policy Note SPPN 0/2009 as the same may be updated or superseded from time to time.</p>
<b>1</b>	<p><b>Authority Services (NPD only)</b></p> <p>The Authority should complete on a project specific basis to reflect services (whether public facing or administrative or support services) being provided at the Facilities.</p>
<b>1</b>	<p><b>Certificate of Commencement</b></p> <p>This is only required if financial close does not coincide with contract signature, in which case suitable drafting to deal with conditions precedent will be required at Clause 2.</p>
<b>1</b>	<p><b>Collateral Agreements</b></p> <p>The Authority should specify on a project specific basis what professional team collateral warranties and key subcontractor (i.e. with design responsibility) collateral warranties are required.</p>
<b>1</b>	<p><b>Community Services (hub only)</b></p> <p>The Authority should complete on a project specific basis to reflect services (whether public facing or administrative or support services) being provided at the Facilities.</p>
<b>1</b>	<p><b>Completion Criteria</b></p> <p>Additional definitions consequent upon multiple phases drafting appear in square brackets.</p>
<b>1</b>	<p><b>Completion Date</b></p> <p>Insert agreed date on which completion is scheduled to occur.</p>
<b>1</b>	<p><b>Confidential Information</b></p> <p>Any information or classes of information that the parties agree should be treated as Commercially Sensitive Information should be included in Schedule Part 26 (<i>Commercially Sensitive Information</i>). Standard provisions are included in Schedule Part 26 (<i>Commercially Sensitive Information</i>).</p>
<b>1</b>	<p><b>Contract Year</b></p> <p>This definition is relevant to the timing of annual reviews of Annual Service Payments (see Section 2 (<i>Interpretation</i>) of Schedule Part 1 (<i>Definitions and Interpretation</i>) paragraph 15). The Authority may prefer to amend the definition</p>

Schedule Part	Comment
	such that the timing of reviews occurs at the commencement of the Authority's financial year on 1 April. This may assist the Authority in setting annual expenditure budgets, although in many cases it will accelerate the timing of the annual review.
<b>1</b>	<p><b>Contracting Associate</b></p> <p>This provision should be drafted on a project-specific basis to encompass any principal sub-contractors to the SPV.</p>
<b>1</b>	<p><b>Discriminatory Change in Law</b></p> <p>Definition to be completed on a project specific basis and will vary depending on the nature of the Facilities.</p>
<b>1</b>	<p><b>Equipment</b></p> <p>To be drafted on a project-specific basis linked as appropriate to Clause 16 and the Service Level Specification.</p>
<b>1</b>	<p><b>Funding Default</b></p> <p>See note on Clause 4.7 (4.8 in the NPD version).</p>
<b>1</b>	<p><b>Interim Project Report</b></p> <p>See note on Clause 4.8 (4.9 in the NPD version).</p>
<b>1</b>	<p><b>Initial Funding Agreements</b></p> <p>List those Funding Agreements put in place at Financial Close.</p>
<b>1</b>	<p><b>Liquid Market</b></p> <p>Unless agreed by the parties, a novation to a vehicle controlled by the Senior Funders under the Funders' Direct Agreement should not on its own be sufficient to constitute a Liquid Market.</p>
<b>1</b>	<p><b>NPD Mandatory Provisions</b></p> <p>Cross refer to the Mandatory NPD Articles of Association.</p>
<b>1</b>	<p><b>NPD Requirements</b></p> <p>The NPD Requirements reflect the fundamental principles of the NPD model. Note that the restriction on payments to shareholders does not extend to the SPV's share of any Refinancing Gain or savings generated by an SPV Change (which are payable directly to the investors and not caught by the Surplus payment provisions) and it is envisaged that these payments will be made under the terms of the Subordinated Funding Agreements.</p> <p>Failure by the SPV to comply with the NPD Requirements may lead to termination of the Project Agreement. Termination in this scenario will give rise to</p>

Schedule Part	Comment
	compensation equivalent to that paid in the event of termination for breach of the refinancing or corrupt gifts provisions.
<b>1</b>	<p><b>Original Senior Commitment</b></p> <p>Adjust for a bond transaction to refer to (a) the gross bond proceeds to be raised; and (b) the amount committed under the Senior Funding Agreements other than such bond proceeds in each case as at Financial Close (as adjusted to take into account any Qualifying Change).</p>
<b>1</b>	<p><b>Permitted Borrowing</b></p> <p>The "Committed Standby Facility", if used, will be any standby facility that is committed by the Senior Funders at Financial Close for the purposes of funding any unforeseen cost overruns, increased expenses or loss of revenues incurred by the SPV. If there is no such facility limb (c) of the definition of "Permitted Borrowing" will not be required.</p>
<b>1</b>	<p><b>Phase, Phase 1, Phase 1 Actual Completion Date etc</b></p> <p>Cross-refer to description of Phases, if relevant, or delete.</p>
<b>1</b>	<p><b>Senior Funding Agreements</b></p> <p>These are all documents relating to the Senior Debt and may include:</p> <ul style="list-style-type: none"> <li>• a credit agreement;</li> <li>• interest rate hedging agreements; and</li> <li>• security documents.</li> </ul> <p>Alternatively, bond documentation may be included, in which case the definition will include the bond trust deed, the terms and conditions of the bond, as well as security documents. A monoline insured deal will also include reference to the monoline's Policy and Endorsement and its insurance and Indemnity Agreement (each of which will be defined in the Agreement). Other financing structures will mean referring to other documents.</p> <p>The Authority should place limits on hedging agreements to allow only those agreements that comply with an agreed hedging policy and details of which have been notified to and acknowledged by the Authority to be included in the definitions of Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount (as appropriate). The hedging policy may, of course, change over time, which will require agreement at the time.</p> <p>Where referred to in the Agreement, Senior Funding Agreements should mean those agreements as at the date of the Agreement as may be amended with the approval of the Authority pursuant to Clause 4.3. This is particularly important if Senior Debt is paid on early termination of the Agreement. On signature of the Agreement, the Authority has an assumed profile of its termination liabilities (based on the financing structure in place at financial close); the Authority should therefore generally have the right to approve any amendments to the financing</p>

# SCOTTISH FUTURES TRUST

Schedule Part	Comment
	agreements that would have the effect of changing the Authority's liability profile. If the SPV makes changes to the Senior Funding Agreements which have not been approved by the Authority for the purposes of Clause 4.3 they will be disregarded for the purposes of calculating termination sums unless they qualify as Additional Permitted Borrowing.
1	<b>Whitley Agreements</b>
	Include only where the incumbent employer of transferring staff is a health board or subcontractor of a health board or delete if no employee transfers.
1 & 14	<b>Indexation</b>
	The drafting assumes RPI as the index for both general indexation of amounts that are to be maintained through the life of the project at broadly day 1 levels and for indexation of the service payments in the Payment Mechanism. Authorities will wish to consider and seek advice on the appropriateness of other indices (including potentially a basket of indices) as alternatives to RPI. It is not essential that the same index is used for the purpose of "index linked" in Schedule Part 1 and indexing the service payment in Schedule Part 14 ( <i>Payment Mechanism</i> ).
2	<b>Completion Documents</b>
2	<b>Section 1</b>
	Because the premiums for the Operational Insurances are a pass-through cost, the Authority will need an estimate of the likely costs of the first year Operational Term policies for its final business case. Provision has been made for the SPV to provide that estimate at Financial Close.
3	<b>Key Works Personnel</b>
3	Include details required in accordance with Clause 8.9.
4	<b>Funders' Direct Agreement</b>
4	<p>The purpose of the Funders Direct Agreement is to provide rights for the Funders to step-in and manage the project where otherwise the right and obligation of the SPV to perform the project would terminate. The Funders require this right because their preferred approach will generally be to keep the project alive and preserve the project's income stream, rather than allowing the Agreement to terminate, as this represents the Funders' best chance of being fully repaid.</p> <p>The Funders Direct Agreement sets out arrangements whereby the effect of any notice of termination issued by the Authority will be suspended and the Funders will have a specified period to put into place alternative contractors to perform the project. Key issues will include the length of the suspensory period and the liability (if any) the Funders will incur while trying to save the project.</p>
5	<b>Land Matters</b>
5	<b>Section 1</b>

Schedule Part	Comment
	This should include any restrictions on the use of any part of the Site.
5	<p><b>Section 2</b></p> <p>This should include any rights over any part of the Site which have been or are being reserved for the Authority and/or any third party e.g. rights of access, wayleaves.</p>
5	<p><b>Section 3</b></p> <p>This should include any areas and periods within which the Contractor should have exclusive possession to parts of the Site.</p>
6	<b>Construction Matters</b>
6	<p><b>Section 3</b></p> <p>This section will usually include the following:</p> <ul style="list-style-type: none"> <li>• Introduction to what is comprised within the Facilities</li> <li>• Architectural performance specification</li> <li>• Civil/Structural performance specification</li> <li>• Mechanical and Electrical performance specification</li> <li>• Thermal and energy efficiency requirements</li> <li>• Area Schedule</li> <li>• Drawings</li> </ul> <p>The Authority should also ensure that it includes the wording provided by WRAP to the SFT, details of which can be found at [<a href="http://www.scottishfuturestrust.org.uk">http://www.scottishfuturestrust.org.uk</a>]</p> <p>Any design requirements in relation to thermal and energy efficiency (such as those formerly in Clause 12 (<i>Design Responsibility</i>) of the DBFM template project agreement) should be included here. Authorities should also seek advice from technical advisors on design review, construction monitoring and tests on completion to give a high degree of assurance that the design requirements have been achieved before the services commence. These are all matters that Authorities also require to address for capital funded assets and a generally similar approach should be adopted.</p>
6	<p><b>Section 4</b></p> <p>This section will usually include the following:</p> <ul style="list-style-type: none"> <li>• Introduction</li> </ul>

Schedule Part	Comment
	<ul style="list-style-type: none"> <li>• Architectural proposals</li> <li>• Civil/Structural engineering proposals</li> <li>• Mechanical and Electrical engineering proposals</li> <li>• Thermal and energy efficiency proposals</li> <li>• Construction Methodology</li> <li>• Drawings (full design to be developed at least to 1:200 level, with a sample drawing of each key area of the Facility developed to 1:50 level)</li> <li>• Management proposals.</li> </ul>
<b>6</b>	<p><b>Section 5</b></p> <p>This section should include the design that is to be developed in accordance with principles set out in the Review Procedure e.g. 1:200 drawings of site plans, 1:50 drawings of room layouts, etc.</p>
<b>6</b>	<p><b>Section 6</b></p> <p>This section should include a room by room design and contents schedule.</p>
<b>6</b>	<p><b>Section 7</b></p> <p>This section should provisions relating to the monitoring (through design and construction) and testing (on completion) of the Authority's thermal and energy efficiency requirements.</p>
<b>6</b>	<p><b>Section 8</b></p> <p>This section should contain Design and Construction Quality Plans.</p>
<b>8</b>	<p><b>Review Procedure</b></p>
<b>8</b>	<p><b>Paragraph 1.2.1</b></p> <p>The Authority should include any other items which are relevant on a project specific basis.</p> <p><b>Paragraph 1.2.3 (Table of Finishes)</b></p> <p>This is project specific. This table is intended to be for guidance only.</p> <p><b>Paragraph 1.4</b></p> <p>The Authority should refer to any other items which are relevant on a project specific basis.</p>

Schedule Part	Comment
	<p><b>Paragraph 3</b></p> <p>This drafting has been included as a framework for guidance and should be amended as appropriate on a project specific basis, including, in particular, to take account of how commissioning of the Facilities is to be carried out and any other matters that are to be left to be agreed pursuant to the Review Procedure (such as proposals for self-monitoring systems etc).</p> <p><b>Paragraph 3.3.3(b)</b></p> <p>Reference to NHS Requirements is relevant only where the Authority is a health board. Other authorities should consider whether there are other requirements which are relevant here.</p> <p><b>Paragraph 3.9.3</b></p> <p>The Authority should consider (as a technical matter) the extent to which the terms of the Service Level Specification are sufficient to ensure that the Facilities will be maintained sensibly (for example, that material maintenance work is not being back-ended, with items of plant and equipment being made to operate beyond the design/programmed life expectancy).</p> <p><b>Paragraph 5</b></p> <p>This paragraph is intended as a framework only and should be developed in a project specific basis.</p> <p><b>Appendix 2</b></p> <p>To be completed by the Authority on a project-specific basis.</p>
<b>10</b>	<b>Outline Commissioning Programme</b>
<b>10</b>	<p>To be considered in light of Clauses 17 (<i>Pre-Completion Commissioning</i>) and 18 (<i>Post Completion Commissioning</i>) and the commissioning activities/start up of services to be carried out during those periods. This should outline who is responsible for what (and when) and set out the principles for all completion tests and inspections. For many projects there is likely to be no requirement for commissioning either before or after the Facilities are otherwise complete. In those cases this Schedule Part may become no more than the Completion Criteria against which to test completion of the Facilities.</p> <p>In any event, the completion criteria should be limited to matters for which the construction sub-contractor will be solely responsible as senior funders will want to be certain that the construction sub-contractor is liable for liquidated damages if the Payment Commencement Date is delayed for any reason other than a Compensation Event. Authorities should also beware of including requirements in the Completion Criteria, such as decanting Authority equipment from existing premises, that risk leaving the Authority with no option but to accept service commencement despite not all the Completion Criteria having been met.</p>
<b>11</b>	<b>Equipment</b>

Schedule Part	Comment
11	This should include a list of the equipment that the SPV is required to procure and install and any other items that are relevant to equipment on a project specific basis.
12	<b>Service Requirements</b>
12	<p>This comprises three sections:</p> <ul style="list-style-type: none"> <li>• the Authority's Service Level Specification, setting out its service requirements (which will have formed part of the tender documentation or, in the case of a hub project, New Project Request),</li> <li>• the Method Statements, being the SPV's statement of the methods it will use to satisfy those requirements (which will have been bid or, in the case of a hub project, developed from the relevant Stage 2 Submission) and</li> <li>• the Services Quality Plan.</li> </ul> <p>Authorities should refer to the SFT's template Service Level Specification in preparing their Service Level Specification (and requirements for development of Method Statements) at an early stage of the procurement process (or, in the case of a hub project, New Project Approval Process).</p>
12	<p><b>Section 1</b></p> <p>The Service Level Specification is a basic template for the minimum level of Services. Service aspects that have previously often been regarded as part of hard FM services that have been excluded are:</p> <ul style="list-style-type: none"> <li>• Window cleaning</li> <li>• Internal decoration (which may also include cleaning and replacement of carpets and other floor coverings)</li> <li>• Maintenance of soft landscaped areas</li> <li>• Cutting and marking of natural sports pitches</li> </ul> <p>More extensive service requirements are not precluded, where they can be shown to demonstrate value for money, but the general expectation is that the Authority will arrange for the provision of these at revenue funded facilities on the same basis as it uses for their existing and capital funded facilities. Consideration will need to be given to practical interface with the Authority and any other soft service providers at the Facilities (e.g. in relation to access arrangements).</p> <p>The Authority will need to consider carefully the interface between the design and specification of the Facilities and the risks that the Authority is retaining in relation to the Facilities (e.g. utilities consumption, security, internal redecoration) in the same way that it would need to on a capially funded project.</p> <p>Note that the basic helpdesk service is restricted to dealing with Services related events. If an Authority wishes a more broadly based helpdesk that handles a broader scope of service requests, it should consider carefully whether this is best</p>



Schedule Part	Comment
	<p>provided under the project or separately. In the latter case, the broad-based helpdesk must be one of the parties able to make reports to the project helpdesk.</p> <p>The overall number of service standards has been reduced. It is considered that these had tended to become over elaborate and detailed and that the requisite levels of service can be incentivised using a smaller number of carefully targeted standards. This should in turn lead to simpler contract monitoring and performance measuring requirements for the Authority. Standards have been included to ensure that those aspects of service that have a material ability to influence efficient use of energy in the Facilities are properly measured.</p> <p>One matter that may require particular consideration by Authorities is the issue of site-based staff for the Facilities, such as school janitors. Where it is normal to have one or more persons based at the Facilities providing a range of services that includes aspects of the hard FM service (such as operating the building management system and providing a first line of reactive maintenance response), but also include roles such a opening and closing the Facilities, materials handling and laying out flexible spaces such as halls for particular uses (which do not form part of the hard FM service), there can be compelling arguments both ways on whether such staff should remain employed by the Authority (or the school) or be transferred to the private sector service provider. There are examples of both solutions and also of hybrid arrangements hereby the employee concerned performs roles for both parties. Anecdotal evidence is that experience of hybrid arrangements is mixed and depends largely on how well both parties plan and manage the arrangement. The Authority needs to recognise that, if it retains site staff who currently perform reactive maintenance (which will become the responsibility of the private sector), there may be implications for response times and/or costs of service compared with what might be agreed if those site staff were available to the private sector service provider. SFT does not consider that there is a right solution for all circumstances and recommends that the Authority approach this on a case by case basis.</p> <p>The Performance and Availability Standards provide for Response Times. The aim is to ensure that irrespective of the Rectification Period, the Authority is told what steps will be taken to rectify the service event and when. In addition, if the nature of the event is such that there are health and safety or security implications the Service Provider must attend the Facilities and make them safe. The specific requirements in terms of response are project specific according to the nature and location of the Facilities and what it is reasonable and cost effective to require the Service Provider to achieve.</p>
12	<p><b>Section 2</b></p> <p>The Method Statements will be project specific. The Authority should ensure that the Method Statements capture all the service provision descriptions that were included in the preferred bidder's bid and which formed part of the offer that was evaluated in reaching the decision to select the preferred bidder.</p>
12	<p><b>Section 3</b></p> <p>The Services Quality Plan will be project specific and developed during or out of documents produced by the preferred bidder during the bidding process.</p>

Schedule Part	Comment
14	<b>Payment Mechanism</b>
14	<p>This is an amalgam of the NHS payment mechanism and some aspects of the SSSC payment mechanism and will require to be tailored to each specific project (including to take account of phased completion where applicable). It includes the following principal features:</p> <ul style="list-style-type: none"> <li>• It operates Deductions on the basis of whole days rather than several sessions within a day. This can be adapted to suit the circumstances.</li> <li>• There are minimum Deductions for Performance Failures and for Availability Failures.</li> <li>• Whole Facility unavailability remains an option for Facilities where loss of key areas or more than a specific percentage of the areas in the facility renders the whole of the Facilities unusable by the Authority. The relevant criteria will be project specific.</li> <li>• The concept of Unavailable but Used is retained where the Authority elects to continue to occupy areas despite them not meeting the Availability Standards and the Deduction will be at 50% of the rate for Unavailability.</li> <li>• Deductions for Performance Failures are fixed monetary amounts at one of three levels according to the severity of the failure.</li> <li>• Repeated failures will incur increased Deductions</li> <li>• Reporting failures incur Deductions in addition to any Deduction for the original failure.</li> <li>• Operational Insurance premiums, energy (NHS bodies only), rates and water charges are pass-through costs.</li> <li>• Temporary rectification is potentially acceptable to rectify Service failures.</li> </ul> <p><b>Authorities must contact SFT for further guidance in calibrating the Payment Mechanism / Service Level Specification.</b></p>
14	<p><b>Section 1</b></p> <p><b>Core Times</b></p> <p>These should be the times during which the Facilities are generally expected to be in use. It may be that different Core Times apply to different Functional Areas within the Facilities (e.g. limited to sports facilities at a school at weekends). See comments below for the implications this will have in relation to the Gross Monthly Availability Deduction and the Service Unit Rate.</p> <p><b>External Utility Failure</b></p> <p>No relief for External Utility Failure should be required where the SPV is required</p>

Schedule Part	Comment
	<p>to provide back-up arrangements and so this definition may require amendment on a project by project basis.</p> <p><b>Gross Monthly Availability Deduction</b></p> <p>The monthly cap on Deductions operates so as to ensure that, over the course of a year, the total Deductions will be capped at an amount equal to the Annual Service Payment. In any Contract Month that the monthly cap exceeds the Monthly Service Payment, the drafting provides for the excess to be carried forward and set-off against future Monthly Service Payments (rather than being an amount payable by the SPV to the Authority). If different Core Times apply to different Functional Areas within the Facilities, then the drafting that defines the Gross Monthly Availability Deduction by reference to the "Daily SUF" should be selected.</p> <p><b>Minimum Availability Deduction</b></p> <p>The drafting of this definition has been updated in Version 2, the intention being that the Minimum Availability Deduction indexes in line with the Annual Service Payment.</p> <p><b>Logged Rectification Time &amp; Logged Report Time</b></p> <p>The drafting in these definitions should be aligned with the Service Level Specification requirements for record keeping in the event of Helpdesk system failure.</p> <p><b>Rectification Period</b></p> <p>The drafting assumes that Service Events reported outside Core Times will be relatively rare and will generally be of a type that requires the SPV to Respond by attending and making safe. Rectification Periods will, therefore, only begin at the start of the next Core Time. If an Authority wishes a higher level of service so that Rectification Periods are the same irrespective of when the Logged Report Time it should evaluate the costs and benefits of that requirement.</p> <p><b>Service Unit Rate</b></p> <p>If a single set of Core Times applies to the whole of the Facilities, then the SUR for a Contract Year is the Annual Service Payment for that Contract Year divided by the product of multiplying the Service Units for the Facilities and the number of Days in the relevant Contract Year. If on some days only some Functional Areas have Core Times (such as sports facilities at a school at weekends) the SUR should be calculated using TAGSUF. The SFT can supply a simple model to assist with this calculation. It must be remembered that SUR will need to be recalculated if there is a change to Core Times that affects the number of days on which only some Functional Areas have Core Times or the total GSUs of the Functional Areas on such days changes.</p>
14	<p><b>Section 2</b></p> <p><b>IF</b></p>

Schedule Part	Comment
	<p>The indexation factor should reflect the proportion of the Annual Service Payment that represents the indexing SPV costs.</p> <p><b>RPI<sub>o</sub> and RPI<sub>n</sub></b></p> <p>The Authority should consider whether RPI is the most appropriate index to use.</p> <p>Authorities may wish to consider the application of multipliers to Deductions affecting certain Functional Areas at certain times (e.g. school halls during exam periods) in which case the standard drafting will require to be amended.</p>
14	<p><b>Section 4</b></p> <p>The former NHS drafting on Temporary Alternative Accommodation has been omitted as unnecessary on the basis that any such arrangement is likely to be achieved through pragmatic negotiation at the time, especially given the economic test in the Business Interruption insurance.</p>
14	<p><b>Section 6</b></p> <p><b>Paragraph 1</b></p> <p>Delete this paragraph if the Authority procures Energy, water and telecoms services in its own name.</p> <p><b>Paragraph 2</b></p> <p>To be decided by the Authority on a project by project basis whether it wants to make the SPV responsible for paying Rates, and reimburse these as a Pass Through Cost or pay Rates itself</p>
15	<p><b>Insurance Requirements</b></p>
15	<p><b>Sections 1 and 2</b></p> <p>Authorities should seek independent advice on the scope and terms of the project insurances.</p> <p>In relation to Business Interruption cover the Authority should be named as a co-insured party to the extent that it has a demonstrable insurable interest. This will be in connection with any additional cost of working insured against under the terms of the policy, and not with respect to any loss of anticipated revenue.</p>
15	<p><b>Section 3</b></p> <p>The endorsements are recommended drafting. Whilst the parties should endeavour to obtain cover in accordance with these wordings, if these are not in practice available, the parties should obtain the best terms reasonably available in the market at the time.</p>

Schedule Part	Comment
15	<b>Section 4</b>
	This contains provisions to oblige the contractor to take steps to procure the project insurances on terms that represent best value for money to the Authority.
15	<b>Section 5</b>
	This is recommended drafting. If agreement to this wording is not in practice achievable, then the parties should agree the best terms reasonably available in the market at the time. The SPV's broker may wish to limit its liability and include additional liability wording in the Broker's Letter of Undertaking. Whilst this is in principle acceptable, the Authority will need to check that (i) the scope of such additional wording is appropriate (e.g. does not extend to a limitation of liability for fraudulent acts), and (ii) the capped amount is set at a sufficiently high level.
16	<b>Change Protocol</b>
16	<p>The Authority must consider whether it wishes to have the right to carry out Derogated Low Value Changes and should delete the defined term in Section 1 and paragraphs 1.2 and 1.3 in Section 2, if not required.</p> <p>The Authority should consider the suitability of the thresholds between the three categories of Authority Changes (see the individual definitions), but should not propose changes without prior approval from SFT.</p> <p>The Authority should consider the limit on senior funders due diligence costs (paragraph 12 in Section 3 and paragraph 13 in Section 4) but should not propose changes without prior approval from SFT.</p> <p>The Change Protocol envisages that the parties agree a Catalogue that will govern the pricing of low value changes. Including a well-developed Catalogue in the Agreement from day 1 will be in both parties' interests as it will create a clear and practical framework (with greater price certainty) for agreeing day-to-day low value changes.</p>
17	<b>Compensation on Termination</b>
17	<p><b>Section 1</b></p> <p><b>Paragraph 1.1</b></p> <p>Consistency of approach to compensation on Authority Default and Authority Voluntary termination avoids any incentive on the part of the Authority to default.</p> <p><b>Paragraph 1.2.3 (hub projects only)</b></p> <p>The SPV should be required to state its preferred method of calculation of equity return in its bid (for NPD projects this will have been agreed in the Territory Partnering Agreement). It should choose between the level set out in the original base case, the market value at the time of termination and the original base case return from the Termination Date.</p>

Schedule Part	Comment
	<p><b>Paragraph 1.2.3 (NPD projects only)</b></p> <p>This assumes that the SPV share capital and subordinated debt are stapled.</p> <p><b>Paragraph 2</b></p> <p>In addition to a general right to terminate at any time, the Authority may consider it would be beneficial to have the option to terminate the Agreement on specified dates ("Authority Break Point Dates") for a specified compensation amount for equity and Subordinated or Debt. Any Authority wishing to include this drafting must consult the SFT.</p>
17	<p><b>Section 2</b></p> <p><b>Paragraph 2.1.2</b></p> <p>Unless agreed by the parties, a novation to a vehicle controlled by the Senior Funders under the Funders' Direct Agreement should not on its own be sufficient to constitute a Liquid Market</p> <p><b>Paragraph 3.8</b></p> <p>Negative Post Termination Service Amounts will always be taken into account in reducing the Adjusted Highest Compliant Tender Price irrespective of whether or not they have been set off against Positive Termination Service Amount. The effect of setting off is merely to reduce the sums payable by the Authority during the re-tendering period.</p> <p><b>Paragraph 4.3.3(a)</b></p> <p>A methodology can be agreed in advance for agreeing what constitutes a reasonable risk assessment.</p> <p><b>Paragraph 4.3.3(b)</b></p> <p>This includes both the everyday running costs and the costs of the service and life cycle maintenance costs. Forecasts are determined by agreement or, in the event of disputes, by an expert.</p>
17	<p><b>Section 3</b></p> <p><b>Paragraph 1.2.3</b></p> <p>This excludes interest accrued but unpaid but the Subordinated Debt documentation should, of course, be checked to ensure this is the way it works. Repayment of principal is caught through the definition of Subordinated Debt.</p>
17	<p><b>Section 5</b></p> <p>This Section 5 replicates (with some minor amendments) the standard form approach taken to payment of compensation on health projects to date. Authorities may wish to use the alternative drafting set out in Form 13 in Appendix</p>

Schedule Part	Comment
	<p>2 in relation to the arrangements for paying compensation on termination.</p> <p><b>Paragraph 1.3</b></p> <p>Where the Authority elects to pay in instalments interest shall be calculated on outstanding amounts at a rate between the gilt rate and the senior debt rate</p> <p><b>Paragraph 1.5</b></p> <p>The Authority should review the tax implications of the payment passing through Authority's' control and grossing up provisions may be required as appropriate.</p> <p><b>Paragraph 1.8</b></p> <p>This right is granted to give the Authority a claim as an unsecured creditor of the SPV and is not likely to result in any significant recovery for the Authority</p> <p>Where the Authority elects to pay in instalments interest shall be calculated on outstanding amounts at a rate between the gilt rate and the senior debt rate</p>
17	<p><b>Section 6</b></p> <p><b>Adjusted Estimated Fair Value of the Agreement</b></p> <p>There will only be any Post Termination Service Amounts here to the extent that the Authority starts the retendering process, but then decides to follow the non retendering approach. These amounts are not deducted to the extent paragraph (c) of the definition of "New Agreement" is a period from the date of the New Contract to the original Expiry Date (rather than the Termination Date to the original Expiry Date).</p> <p><b>Adjusted Highest Compliant Tender Price</b></p> <p>Negative Post Termination Service Amounts ("PTSA") represent an out of pocket cost to the Authority and will therefore need to be deducted from any payment of compensation due to the SPV. Positive PTSA, on the other hand, are regarded as a form of prepayment – the benefit of reduced service costs is also reflected in the tender price, which is likely to be higher. To avoid double counting, any PTSA actually paid to the SPV need to be deducted from the tender price. The effect of set-off of negative PTSA under paragraph 3.8 of Section 2 (<i>Compensation for the SPV Default</i>) of Schedule Part 17 (<i>Compensation on Termination</i>) simply reduces the amount of any prepayment and is therefore neutral. In reality on the SPV Default (d) and (e) are likely to be the same amounts.</p> <p><b>Base Senior Debt Termination Amount</b></p> <p>This definition assumes debt finance. In practice the definition is project specific and, in the case of bond finance will need to refer to the principal outstanding amount (indexed or otherwise and/or the early redemption price mechanism by reference to the terms and conditions of the bonds and will need to be approved by SFT. Spens will be payable only on Authority Default, as will the Spens calculation methodology. For the sake of simplicity, consider including a separate definition of Base Authority Default Senior Debt Amount which is identical save for</p>

Schedule Part	Comment
	<p>the inclusion of Spens. Authorities may consider whether they should exclude any future profit element from the calculation of costs of early termination of interest hedging arrangements where the termination is for force majeure, breach of refinancing, corrupt gifts and uninsurability</p> <p><b>Contingent Funding Liabilities</b></p> <p>This is intended to be an exhaustive list of all such arrangements put in place at financial close</p> <p><b>Deemed New Agreement</b></p> <p>The Termination Date here is the relevant date as no new contract is actually being entered into</p> <p><b>Maximum Termination Amount (NPD projects only)</b></p> <p>In line with NPD principles, this ensures that Project Co does not make any windfall gain from compensation on termination for Project Co default.</p> <p><b>New Agreement</b></p> <p>This should also include other documents entered into between the parties, where appropriate. In projects in which the Service ceases to be required on or shortly after the original expiry Date, then the term of the New Contract will be reduced and so Post Termination Service Amounts will not be deducted (or added back).</p> <p><b>Post Termination Service Amount</b></p> <p>This payment is made both to ensure that the Authority is incentivised to expedite the retender and that any value received by the Authority is reflected post termination. Usage based payments will need to be addressed specifically. It is recommended that their effects are, where possible, stripped out. A positive Post Termination Service Amount will occur where the cost incurred by the Authority in procuring the Service itself (including rectification costs) is less than the Monthly Service Payment. A negative Post Termination Service Amount will arise if the costs incurred in procuring the Service (including rectification costs) are greater than the Annual Service Payment.</p> <p><b>Qualification Criteria</b></p> <p>If tenderers are not required to bid on the basis of a single capital payment then the Authority would have to fund the delay in payment of the compensation amount which is not recommended.</p> <p><b>Revised Senior Debt Termination Amount</b></p> <p>This definition assumes debt finance. In practice the definition is project specific and, in the case of bond finance will need to refer to the principal outstanding amount (indexed or otherwise) and/or the early redemption price mechanism by reference to the terms and conditions of the bonds and will need to be approved by the SFT. Spens will be payable only on Authority Default and Authority Termination, as will the Spens calculation methodology. Authorities may consider</p>



Schedule Part	Comment
	<p>whether they should exclude any future profit element from the calculation of costs of early termination of interest hedging arrangements where the termination is for force majeure, breach of refinancing, corrupt gifts and uninsurability.</p> <p><b>Senior Debt Amount</b></p> <p>This definition assumes debt finance. In practice the definition is project specific and, in the case of bond finance will need to refer to the principal outstanding amount (indexed or otherwise) and/or the early redemption price mechanism by reference to the terms and conditions of the bonds and will need to be approved by the SFT.</p> <p><b>Sub-Contractor Losses</b></p> <p>The Authority must review sub-contracts to ensure that payments due on early termination are not excessive e.g. operational subcontracts where operational phase has not yet started.</p>
18	<b>Handback Procedure</b>
18	<p><b>Paragraph 2.1</b></p> <p>The Authority should ensure that its handback requirements are clearly set out in the Authority's Construction Requirements, or alternatively in this Schedule Part 18. For NHS bodies, as well as complying with the residual design life requirement, as a minimum, all components of the Physical Facet (as described in Estatecode (ISBN 0-11-322549-0)) should (subject to the point made below) meet Condition B (i.e. be sound, operationally safe and exhibit only minor deterioration (as is more fully described in Estatecode Section 4 "Facet 1: Physical condition")). Condition B will not be the appropriate standard for some other facets of the Facilities (e.g. components relating to fire protection, health and safety, statutory requirements etc.). The Authority should ensure that such requirements are also dealt with. The Authority should ensure that, where any component falls short of Condition B rectification work should be planned to bring such component up to Condition B (or equivalent) within 6 months of the time at which the component is surveyed in this situation, that the SPV is obliged to carry out such work and that the Authority has adequate remedy where the SPV fails to do this.</p> <p>Non-NHS bodies should seek advice on suitable alternative standards.</p>
19	<b>Record Provisions</b>
19	<p>Section 1 has been included for the purpose of providing a general framework and should be amended to reflect project specifics. The records to be kept by the SPV are to be determined on a project specific basis, but should as a minimum include those items listed in Section 2.</p>
21	<b>Sub-hubco/Project Co Information</b>
21	<p>This has been included as an example only and the Authority should amend as appropriate to its individual project.</p>

Schedule Part	Comment
23	<b>Refinancing</b>
23	<p>On NPD projects, Schedule Part 23 should be read in conjunction with the Mandatory NPD Articles of Association which set out the Public Interest Director's rights in relation to instigating Refinancing (which in turn mirror the rights that sit with the Authority under SoPC4 guidance).</p> <p><b>Paragraph 5</b></p> <p>The Authority should take into account UK Accounting Standards when deciding how to take any share in refinancing out of the project. Under current (March 2011) Accounting Standards the Authority will be required to take the benefit by way of a reduction in Annual Service Payments under paragraph 5.2 to ensure that benefits from the Project are seen to be applied to the Project.</p> <p><b>Paragraph 5 (NPD projects only)</b></p> <p>Mirror provisions to be included in the Subordinated Funding Agreements to allow the subordinated lenders to receive payment of Project Co's share of the Refinancing Gain. The parties ought to be entitled to receive their share of the Refinancing Gain in a lump sum to the extent that the Refinancing creates an amount capable of immediate payment subject to accounting and tax considerations in respect of which Authorities should take advice. To the extent that the Authority elects and/or the Refinancing Gain arises throughout the life of the project (e.g. where there is a change in senior debt margin) it will be payable (or, as the case may be, taken as a unitary charge reduction) throughout the remainder of the project</p> <p><b>Exempt Refinancing</b></p> <p>The defined terms referred to in limb (c)(vi) should follow those contained in the Senior Funding Agreements – the Initial Availability Period being the construction phase drawdown period. These will need to be checked.</p> <p><b>Qualifying Institutions</b></p> <p>If there are particular institutions which, for particular reasons, do not come within the other heads of Qualify Bank Transaction the SPV may propose to the Authority that such institutions be included as Qualifying Institutions. In the light of the broad drafting of the other provisions in the definition of Qualifying Bank Transaction, the Authority would expect any such proposal to be specific and limited. Broad group definitions will not be entertained.</p> <p><b>Refinancing Gain (NPD projects only)</b></p> <p>The commercial position is that Project Co's share of the Refinancing Gain is paid to the subordinated lenders rather than directed to the Surplus Account. Provision therefore needs to be made in the Subordinated Funding Agreements for that payment to be made. To avoid circularity, the overall Refinancing Gain needs to be calculated on the basis of arrangements before that payment is made.</p> <p><b>Threshold Equity IRR</b></p>

# SCOTTISH FUTURES TRUST

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Schedule Part	Comment
	This is the nominal post tax (i.e. post tax with respect to the SPV, pre-tax with respect to the shareholders in the SPV) Equity IRR set out in the Base Case, which excludes the effects of any anticipated refinancing.
27	<b>Relevant Discharge Terms</b>
27	Relevant Discharge Terms for use where the Authority is a local authority are provided in Form 11 in Appendix 2.

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## APPENDIX 2 – Alternative/Recommended Drafting

Form No.	Title
1.	School representative
2.	Asbestos
3.	Planning Challenge
4.	Unavailability of existing facilities
5.	Community Benefits
6.	Use of the Facilities
7.	TUPE and employment matters (no staff transfers)
8.	LGPS Pension provisions
9.	Authority Events of Default (for non-NHS bodies)
10.	Authority rights to assign (for non-NHS bodies)
11.	Local Government (Contracts) Act 1997 and relevant discharge terms
12.	Best Value
13.	Payment of compensation on termination

## Form 1 – School Representative

- #.1 The head teacher of [each] School or such other member of staff of a School as the head teacher may notify in advance to [Sub-hubco/Project Co] from time to time, shall undertake the role of a school representative (the “**School Representative**”), which School Representative shall provide a day to day contact with [Sub-hubco/Project Co] for the routine operation of this Agreement.
- #.2 Unless pursuant to a specific delegation under Clause #.3 or otherwise specifically provided for in terms of this Agreement, the School Representative shall have no power or authority to bind the Authority or vary the terms of this Agreement in any way and [Sub-hubco/Project Co] acknowledges that it shall not act on the instructions of or as a consequence of or otherwise rely upon any act or omission of a School Representative for the purposes of this Agreement unless under a specific delegation issued pursuant to Clause #.3 or otherwise specifically provided for in this Agreement.
- #.3 The Authority’s Representative may from time to time by notice to [Sub-hubco/Project Co] delegate any of his powers, duties or responsibilities under this Agreement to a School Representative, subject to such terms and conditions, and for such duration as may be specified by the Authority’s Representative.

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## Form 2 – Asbestos

- 10.5 Subject to Clauses 10.6 to 10.13 below [Sub-hubco/Project Co] shall be responsible for and shall hold the Authority harmless from the removal of any Asbestos at the Site(s) and the Authority shall have no liability in respect of the removal of any Asbestos at the Site(s) other than as set out in Clauses 10.6 to 10.13.
- 10.6 <sup>1</sup>Prior to the commencement of the Works at a Demolition Site, [Sub-hubco/Project Co] shall procure:
- [10.6.1 the appointment of an Asbestos Surveyor in accordance with Clause 10.7 and 10.9; and]
- 10.6.2 that the Asbestos Surveyor [appointed in accordance with Clause 10.7 and 10.9] carries out an Asbestos Survey and submits an Asbestos Survey Report in respect of the relevant Demolition Site.
- 10.7 [[Sub-hubco/Project Co] shall seek competitive tenders from a minimum of [3] persons competent to carry out Asbestos Surveys on the basis that the successful tenderer shall provide:
- 10.7.1 Asbestos Surveys in respect of all of the Demolition Sites; and
- 10.7.2 for each Demolition Site, as soon as reasonably practicable after the relevant Asbestos Survey has been carried out, an Asbestos Survey Report in a format suitable for pricing by a Licensed Contractor tendering for the Asbestos Works.]
- 10.8 [In parallel with the process referred to in Clause 10.7 above, [Sub-hubco/Project Co] shall procure competitive tenders from a minimum of [3] Licensed Contractors, based on the Type 2 Asbestos Surveys and including a schedule of rates to assist in the pricing of the Asbestos Works.]
- 10.9 [As soon as reasonably practicable following receipt of the tenders referred to in Clauses 10.7 and 10.8, [Sub-hubco/Project Co] shall submit copies of such tenders to the Authority together with [Sub-hubco's/Project Co's] recommendation as to which tenders should be accepted. Within 5 Business Days of having received copies of all of the tenders referred to in Clauses 10.7 and 10.8, the Authority shall notify [Sub-hubco/Project Co] which tenders to accept, provided that failing such notification [Sub-hubco/Project Co] shall be entitled to accept the tenders it had recommended to the Authority.]
- 10.10 [Sub-hubco/Project Co] shall procure that a copy of each Asbestos Survey Report issued by the Asbestos Surveyor is submitted to the Authority within 7 Business Days of receipt of the same by the Building Contractor.

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<sup>1</sup> The drafting assumes that the SPV has not appointed an Asbestos Surveyor and Licensed Contractor before financial close. On the basis that the Additional Asbestos is an Authority risk the drafting allows for the Authority to select the Asbestos Surveyor and Licensed Contractor (with an opportunity for Project Co to make its recommendations). Compensation payable to the SPV in relation to the removal of Additional Asbestos will be calculated on the basis of the Licensed Contractor's tender. If an Asbestos Surveyor and Licensed Contractor are appointed before financial close the drafting in Clauses 10.6 to 10.9 and 10.11 will need to be revised accordingly and the Licensed Contractor's schedule of rates should be set out in the Schedule to the Project Agreement and used for calculating compensation payable to the SPV under Clauses 10.12 and 10.13).

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- 10.11 [Following the issue of each Asbestos Survey Report [Sub-hubco/Project Co] shall procure that [the Licensed Contractor appointed pursuant to Clause 10.9 provides a revised tender, clearly setting out its assumptions, resources analysis and all costs for carrying out the Asbestos Works at the relevant Demolition Site on the basis of the Asbestos Survey Report to enable robust and transparent verification of all allowances within the tender, and shall procure that] the Asbestos Works are completed by the Licensed Contractor in accordance with the requirements of Clause 6.2.
- 10.12 To the extent that, only as a result of the nature and/or extent and/or location of the Additional Asbestos, the period of time taken to complete the Asbestos Works at a Demolition Site is longer than the relevant Asbestos Works Period (“**Additional Asbestos Delay**”), [Sub-hubco/Project Co] will be entitled to apply for relief from its obligations and/or compensation in accordance with Clause 30 (*Delay Events*)<sup>2</sup> provided that compensation for any additional direct costs and associated expenditure incurred by [Sub-hubco/Project Co] for the removal and disposal of the Additional Asbestos shall be calculated on the basis of the schedule of rates set out in [the Licensed Contractor’s tender] [Part [ ] of the Schedule] and paid as provided for in Clause 10.13 below and Clause 30 (*Delay Events*) shall be construed accordingly.
- 10.13 In respect of any additional direct costs and associated expenditure incurred by [Sub-hubco/Project Co] as a result of the nature and/or extent and/or location of the Additional Asbestos at a Demolition Site (whether or not there has been an Additional Asbestos Delay):
- 10.13.1 [Sub-hubco/Project Co] shall deliver to the Authority a VAT invoice for such additional direct costs and associated expenditure, calculated on the basis of the schedule of rates set out in [the Licensed Contractor’s tender] [Part [ ] of the Schedule], in each month in which they are incurred together with copies of the records maintained by the Building Contractor and the Licensed Contractor to show the amount of Additional Asbestos removed from the relevant Demolition Site and the associated expenditure during such month and such additional supporting information as the Authority may reasonably request; and
- 10.13.2 the Authority shall pay to [Sub-hubco/Project Co] the amount of each such invoice (provided that it reflects the records and schedule of rates referred to in Clause 10.13.1 above) within 20 Business Days of receipt of the same.
- 10.14 Unless the exposure arises directly or indirectly as a result of any act or omission of [Sub-hubco/Project Co] or any [Sub-hubco/Project Co] Party, the Authority accepts full responsibility (including any financial and other consequences which result (whether directly or indirectly) for death and personal injury in respect of exposure to Asbestos on the Site, where the exposure takes place prior to the date on which [Sub-hubco/Project Co] Is given possession of the Site for the purposes of carrying out the Works.

**Where Clauses 10.5 to 10.14 are used, the following definitions should be added to Schedule Part 1:**

**“Additional Asbestos”** means Asbestos discovered at a Demolition Site to the extent only that it differs in nature

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<sup>2</sup> Add Additional Asbestos Delay to the list of Delay Events in Clause 29.3 and Compensation Events in Clause 29.10.

	and/or extent and/or location from the Asbestos identified in the relevant Management Survey
<b>“Asbestos”</b>	has the meaning given to it in the Control of Asbestos Regulations 2006
<b>“Asbestos Survey”</b>	means a Refurbishment/Demolition Survey as described in Guidance Note HSG264 (Asbestos: The Survey Guide) published by the Health & Safety Executive
<b>“Asbestos Survey Report”</b>	means a detailed report prepared by the Asbestos Surveyor on the results of an Asbestos Survey, which report shall include the Asbestos Surveyor’s detailed recommendations as to the nature and scope of the Asbestos Works required at the relevant Demolition Site
<b>“Asbestos Surveyor”</b>	means [a licensed asbestos surveyor appointed in accordance with Clauses 10.7 and 10.9]
<b>“Asbestos Works”</b>	means, in relation to a Demolition Site, the removal and disposal of all Asbestos
<b>“Asbestos Works Period”</b>	means, in relation to a Demolition Site, the period of time programmed for the carrying out of Asbestos Works as identified in [ ] of the Schedule
<b>“Demolition Site”</b>	means [ ]
<b>“Management Survey”</b>	means, in relation to a Demolition Site, the relevant survey contained [ ]



### Form 3 – Planning Challenge

11.3 Either party shall, on becoming aware of a Planning Challenge, notify the other party and the parties shall consult and generally co-operate with each other in good faith with a view to mitigating the effects of the Planning Challenge. Such consultation shall include discussion as to the likelihood of the Planning Challenge being successfully defended, whether either party or both parties should take any action to seek to resist the Planning Challenge and/or whether an application for a new Planning Permission should be submitted (in which case Clause 11.8 shall apply). Without prejudice to the foregoing generality, [Sub-hubco/Project Co] shall, within 10 Business Days of receipt of a written request, provide the Authority with an estimate of:

11.3.1 the costs and liabilities and other consequences that [Sub-hubco/Project Co] considers are likely to arise if the Works are suspended and recommenced following determination of the Planning Challenge; and/or

11.3.2 the costs that [Sub-hubco/Project Co] considers are likely to be incurred in respect of an application for a new Planning Permission.

The Authority shall reimburse [Sub-hubco/Project Co] for any costs reasonably and properly incurred by it in complying with this Clause 11.3 (including taking such action as the Authority may direct it to take to seek to resist the Planning Challenge) within 20 Business Days of receipt of a valid invoice therefor. The Authority shall be entitled, at any time, to request a breakdown of costs incurred and/or an estimate of costs likely to be incurred by [Sub-hubco/Project Co] in complying with this Clause 11.3.

11.4 The parties shall each:

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

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

11.5 [Sub-hubco/Project Co] shall continue to discharge its obligations under this Agreement save to the extent that:

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

11.5.2 [Sub-hubco/Project Co] is instructed by the Authority pursuant to Clause 11.7 to suspend the carrying out of the Works.

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- 11.6 To the extent that [Sub-hubco/Project Co] is prevented from progressing the Works as a consequence of an event listed in Clause 11.5, such event shall be deemed to be a Delay Event and a Compensation Event.<sup>3</sup>
- 11.7 Without prejudice to Clause 29.10, the Authority shall be entitled at any time following a Planning Challenge to instruct [Sub-hubco/Project Co], in writing, to suspend the carrying out of any of the Works to which the relevant Planning Approval relates. Such instruction shall cease to have effect upon a Planning Challenge Dismissal being notified by the Authority to [Sub-hubco/Project Co].
- 11.8 The Authority shall be entitled at any time following a Planning Challenge to instruct [Sub-hubco/Project Co] to apply for a new Planning Permission for the Works and the Authority may, without prejudice to Clause 11.9, issue an Authority Change Notice varying this Agreement, the Authority's Construction Requirements and the Service Level Specification if and to the extent necessary to allow [Sub-hubco/Project Co] to proceed with the Works in accordance with the requirements of the new Planning Permission.
- 11.9 In the event that a Planning Challenge results in an Adverse Planning Decision, the Authority shall as soon as reasonably practicable either:
- 11.9.1 serve a notice under Clause 42.1 requiring termination of this Agreement; or
  - [11.9.1 issue an Authority Change Notice removing the affected Facilities from the scope of this Agreement and varying the Authority's Construction Requirements to remove those requirements relating to the affected Facilities to which the Adverse Planning Decision relates; or]<sup>4</sup>
  - 11.9.2 issue an Authority Change Notice instructing [Sub-hubco/Project Co] to proceed with an application for a new Planning Permission [in respect of the Facilities affected] and (if and to the extent necessary) varying the Authority's Construction Requirements and/or [Sub-hubco's/Project Co's] Proposals in a manner that satisfies the grounds on which the Planning Challenge was successful; or
  - 11.9.3 issue an Authority Change Notice varying this Agreement, the Authority's Construction Requirements and Service Level Specification if and to the extent necessary to allow [Sub-hubco/Project Co] to proceed with the Works in accordance with the requirements of a new Planning Permission obtained prior to the Adverse Planning Decision as referred to in Clause 11.8 above.
- 11.10 If a new Planning Permission is obtained pursuant to an instruction issued under Clause 11.9.2 the Authority shall issue an Authority Change Notice varying this Agreement, the Authority's Construction Requirements and the Service Level Specification if and to the extent necessary to allow [Sub-hubco/Project Co] to proceed with the Works in accordance with the requirements of the new Planning Permission.
- 11.11 The Authority shall not be entitled to withdraw an Authority Change Notice issued under Clause 11.8, Clause 11.9 or Clause 11.10.

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<sup>3</sup> Add "the occurrence of circumstances deemed to be a Delay Event pursuant to Clause 11.6" to the list of Delay Events in Clause 29.3 and "the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 11.6" to the list of Compensation Events in Clause 29.10

<sup>4</sup> Alternative Clause 11.9.1 drafting for multi-site projects

Where Clauses 11.3 to 11.11 are used, the following definitions should be added to Schedule Part 1:

**“Adverse Planning Decision”**

means a decision by a Relevant Authority pursuant to which the Planning Approval is amended, revoked, quashed or otherwise rendered ineffective

**“Planning Challenge”**

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

- (a) an application for judicial review under Chapter 58 of the Rules of the Court of Session (or any statutory challenge or appeal which proceeds on principles similar to judicial review); or
- (b) a statutory challenge under section 239 of the Town and Country Planning (Scotland) Act 1997

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

**“Planning Challenge Dismissal”**

means, in relation to a Planning Challenge:

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

## Form 4 – Unavailability of Existing Facilities

### 13.7 Unavailability of Existing Facilities

If any area of the Existing Facilities (in the reasonable opinion of the Authority) cannot continue to be used for the provision of the [Authority/Community] Services prior to the Actual Completion Date [Phase Actual Completion Date] through a failure by [Sub-hubco/Project Co] to carry out the Works in accordance with Clause 12 (*The Design, Construction and Commissioning Process*) and Clause 14 (*Programme*), then at the option of the Authority, [Sub-hubco/Project Co] shall either:

- 13.7.1 reimburse to the Authority the proper costs reasonably incurred by the Authority in providing alternative accommodation and associated arrangements; or
- 13.7.2 provide at [Sub-hubco's/Project Co's] expense, equivalent alternative accommodation in a location within the town boundaries of where the Existing Facilities are situated and provide such additional or alternative ancillary services as may be required to enable that accommodation to be used for the provision of the [Authority/Community] Services.

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## Form 5 – Community Benefits

### COMMUNITY BENEFITS

1. Project Co shall comply with the Authority's Community Benefits Requirements set out in [ ] in accordance with Project Co's Community Benefits Method Statements set out in [ ].
2. If, in relation to the Works, Project Co does not:
  - 2.1 [insert target]  
then Project Co shall pay to the Authority the sum of [insert amount] (indexed);
  - 2.2 [insert target]  
then Project Co shall pay to the Authority the sum of [insert amount] (indexed);
  - 2.3 [insert target]  
then Project Co shall pay to the Authority the sum of [insert amount] (indexed);
  - 2.4 provide the [quarterly / annual] information in accordance with [ ]  
  
then on the occurrence of each such failure Project Co shall pay to the Authority the sum of [insert amount] (indexed);

provided that in each case the Authority has first served notice on Project Co notifying it of its non-compliance and Project Co has failed to rectify such non-compliance within [twenty] Business Days of such notice.
3. The Authority's sole and exclusive remedy in respect of a breach of Clause [2] above shall be the payments provided for in Clause [2] [and Project Co's maximum liability in this respect shall be [insert amount] (indexed)].
4. If, in relation to the Services, Project Co does not:
  - 4.1 [insert target]  
then Project Co shall pay to the Authority the sum of [insert amount] (indexed);
  - 4.2 [insert target]  
then Project Co shall pay to the Authority the sum of [insert amount] (indexed);
  - 4.3 [insert target]  
then Project Co shall pay to the Authority the sum of [insert amount] (indexed);
  - 4.4 provide the [quarterly / annual] information in accordance with [ ]  
  
then on the occurrence of each such failure Project Co shall pay to the Authority the sum of [insert amount] (indexed);

provided that in each case the Authority has first served notice on Project Co notifying it of its non-compliance and Project Co has failed to rectify such non-compliance within [twenty] Business Days of such notice.

5. The Authority's sole and exclusive remedy in respect of a breach of Clause [4] shall be the payments provided for in Clause [4] [and Project Co's maximum liability in this respect shall be [*insert amount*] (indexed)].
6. All payments due by Project Co to the Authority under this Clause shall be payable within [ ] Business Days of written demand.

**Where this drafting is used, the following definitions should be added to Schedule Part 1:**

**“Authority’s Community Benefits Requirements”** means those requirements set out in [ ];

**“Project Co’s Community Benefits Method Statements”** means those method statements set out in [ ];

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## Form 6 – Use of the Facilities

### Priority

- 22.7 The Facilities must be made available for use in the following order of priority:
- 22.7.1 the provision by the Authority of [Authority/Community] Services during the School Day; and
  - 22.7.2 Community Use.
- 22.8 Subject to Clauses 22.9 and 22.12, the Authority is entitled to use the Facilities during Core Times to the extent defined therein and during Additional Hours pursuant to Clause 22.13.
- 22.9 The Authority must notify [Sub-hubco/Project Co] of any planned periods of Community Use and the [Functional Area] required for such use not less than [one month before the commencement of each term].

### Notification of terms

- 22.10 The terms for [first] Academic Year are [ ].
- 22.11 No later than [31<sup>st</sup> December] in each year the Authority must notify [Sub-hubco/Project Co] of the dates for terms (including any half-term holidays) in the period [1<sup>st</sup> August] to [31<sup>st</sup> July] following that notice.
- 22.12 Without prejudice to Clause 22.13, in the event that the Authority wishes either:
- 24A.6.1 terms to have an aggregate yearly duration in excess of the number of School Days detailed in the Academic Year, or
  - 24A.6.2 to make a change to Core Times
- it must propose a change to the Service Level Specification in accordance with Schedule Part 16 (*Change Protocol*). The Authority is entitled, without proposing a change to the Services Specification in accordance with Schedule Part 16 (*Change Protocol*), to make de minimis changes to the Core Times provided the total number of hours falling within Core Times remains the same, unless [Sub-hubco/Project Co] can demonstrate to the Authority that such change will not have a de minimis impact on the cost of and/or the delivery of the Services.

### Additional Hours

- 22.13 Subject to the Authority giving [Sub-hubco/Project Co] reasonable prior notice, having regard to the nature and extent of the use required, the Authority may require that:
- 22.13.1 any Functional Area be used by the Authority or for Community Use outside Core Times; or

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22.13.2 any Functional Area in excess of the Functional Areas detailed in the definition of Core Times be used by the Authority or for Community Use during Core Times.

The Authority must reimburse [Sub-hubco/Project Co] for any additional costs and expenses (including overhead, administration costs and profit incurred by [Sub-hubco/Project Co] and any Service Provider, which all taken together must not exceed [•%] of the direct costs of providing the Services), reasonably, properly and demonstrably incurred by [Sub-hubco/Project Co] as a result of the use by the Authority or the Community Use of that Functional Area, the additional use of which has been requested by the Authority in terms of this Clause 22.13.<sup>5</sup>

**Where this drafting is used, the following definitions should be added to Schedule Part 1:**

<b>“Academic Year”</b>	means the period from the first day of the Authority’s school year until the last day of the Authority’s school year (excluding holiday periods) (as published from time to time prior to the commencement of each Academic Year), [such year to be divided into three terms each containing a half-term holiday, and in any event] such period not to include more than [200] <sup>6</sup> School Days;
<b>“Additional Hours”</b>	means times when a Functional Area is being used pursuant to a request by the Authority pursuant to Clause [22.13]
<b>“Community Use”</b>	means use of the Facilities by or at the invitation of the Authority outside School Hours by the Authority or an Authority Party;
<b>“School Day”</b>	means each day that the Authority requires the use of the Facilities for the delivery of Authority Services in any Academic Year;
<b>“School Hours”</b>	means [ ] each School Day;

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<sup>5</sup> Authority to consider the relevance of this Clause in the context of the level of service being provided by [Sub-hubco/Project Co] and the direct costs (if any) that [Sub-hubco/Project Co] will incur as a result of a request for Additional Hours.

<sup>6</sup> An Authority should verify the number of School Days against their curriculum requirements.



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## Form 7 – TUPE and Employment Matters (No Staff Transfers)

### No Employee Transfer

- 25.1 The Authority and [Sub-hubco/Project Co] agree that there are no individuals presently employed by the Authority [or any other sub-contractor of the Authority]<sup>7</sup> whose contracts of employment will, by virtue of the transfer to [Sub-hubco/Project Co] of responsibility for provision of (or procuring the provision by Service Providers of) any of the Services in accordance with this Agreement and in accordance with the Transfer Regulations, have effect after the date or dates of such transfer as agreed by the parties (each a "**Relevant Service Transfer Date**") (or at any other time) as if originally made between those persons and the relevant Service Provider.
- 25.2 If it is subsequently agreed or determined that there are persons presently employed by the Authority [or any other sub-contractor of the Authority]<sup>8</sup> whose contracts of employment do have effect after the Relevant Service Transfer Date as if originally made between those persons and the relevant Service Provider ("**Transferring Staff**") then:
- 25.2.1 the Authority shall within ten (10) Business Days of the date on which it was so agreed or determined have the opportunity to offer or procure the offer of a position as an employee of the Authority to some or all of the Transferring Staff;
- 25.2.2 [Sub-hubco/Project Co] shall procure that no person to whom the Authority has offered a position in accordance with Clause 25.2.1 shall be dismissed by reason of redundancy until the period<sup>9</sup> for acceptance of such offer has expired and the person in question has not accepted such offer; and
- 25.2.3 subject to Clauses 25.2.1 and 25.2.2, [Sub-hubco/Project Co] or any Service Provider shall be entitled to dismiss any or all of the Transferring Staff by reason of redundancy provided that [Sub-hubco/Project Co] shall use and shall procure that any Service Provider shall carry out in the required manner any obligation to consult with the Transferring Staff or any of them, or their respective representatives, and shall use all reasonable endeavours to mitigate the amount of any costs payable in respect of the Transferring Staff or their dismissal.

The Authority shall indemnify [Sub-hubco/Project Co] against any costs referred to in Clause 25.2.3 reasonably incurred by [Sub-hubco/Project Co] (or by a relevant Service Provider and for which [Sub-hubco/Project Co] is responsible) and shall reimburse any costs reasonably and properly incurred by [Sub-hubco/Project Co] or the Service Provider in employing any Transferring Staff prior to the expiry of the period referred to in Clause 25.2.2.

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<sup>7</sup> Applicable where the Authority is a local authority.

<sup>8</sup> Applicable where the Authority is a local authority.

<sup>9</sup> Time period to be agreed on a project by project basis.

### **Compliance with Legislation and Authority Policies**

- 25.3 [Sub-hubco/Project Co] shall comply and shall procure that each Service Provider and all persons employed or engaged by a Service Provider in connection with the provision of any Service shall comply at all times with the Law on health and safety at work and on anti-discrimination and equal opportunities.
- 25.4 [Sub-hubco/Project Co] shall procure that each Service Provider takes all reasonable steps to procure that all persons including any employed or engaged by a Service Provider in connection with the provision of any Service shall, so far as applicable, comply with the Authority Policies as regards health and safety at work (including the Authority Policy regarding smoking) and with those relating to anti-discrimination and equal opportunities (including those relating to harassment). [Sub-hubco/Project Co] also shall take and shall procure that every Service Provider shall take all such steps as the Authority may reasonably require, which shall include co-operation with action proposed or taken by the Authority, to ensure that the Authority complies with its duty under Section 3(1) Health and Safety at Work Act 1974 regarding the conduct of the undertaking of the Authority.

### **[Sub-hubco/Project Co] Indemnities**

- 25.5 [Sub-hubco/Project Co] shall indemnify and keep indemnified in full the Authority and, at the Authority's request, each and every service provider who has or shall provide any service equivalent to any of the Services against:
- 25.5.1 claims in respect of all emoluments and all other contractual or statutory payments unpaid by [Sub-hubco/Project Co] or a Service Provider to any person entitled to such payments from [Sub-hubco/Project Co] or a Service Provider who is or has been employed or engaged by Project Co or any Service Provider on or after the Relevant Service Transfer Date but prior to the date of expiry or termination of this Agreement, and all income tax and pension and national insurance contributions payable thereon; and
- 25.5.2 insofar as Clause 25.5.1 does not apply, all Direct Losses incurred by the Authority as a result of any claim against the Authority in respect of any liability to any person who is or has been employed or engaged (whether as a consequence of the Transfer Regulations or of the provisions of this Clause 25) by [Sub-hubco/Project Co] or any Service Provider in connection with the provision of any of the Services, where such claim arises as a result of any act or omission of [Sub-hubco/Project Co] or the Service Provider occurring after the Relevant Service Transfer Date and before the expiry or termination of this Agreement;
- BUT the indemnities in Clauses 25.5.1 and 25.5.2 shall not apply to the extent that the claim arises from a wrongful act or omission of the Authority or is in respect of sums for which the Authority is liable pursuant to Clause 25.2.
- 25.6 Clause 49.3 (*Conduct of Claims*) of this Agreement shall apply where any claim is made in respect of the indemnities given by [Sub-hubco/Project Co] under Clause 25.5 (*Project Co Indemnities*).

### **Position on expiry or earlier termination of this Agreement**

- 25.7 On the expiry or earlier termination of this Agreement, the Authority and [Sub-hubco/Project Co] agree that it is their intention that the Transfer Regulations shall apply in respect of the

provision thereafter of any service equivalent to a Service but the position shall be determined in accordance with the Law at the date of expiry or termination as the case may be and this Clause is without prejudice to such determination.

25.8 [Sub-hubco/Project Co] shall not and shall procure that no Service Provider shall make any material change to the terms and conditions of employment of any person employed in the provision of any Service, transfer any person employed in the provision of any Service to another part of its business, or materially increase or decrease the number of such persons:

25.8.1 within the period of twelve months immediately preceding the expiry of this Agreement, or

25.8.2 within the period of twelve months before the termination of this Agreement or, if shorter, during the period of notice of termination

without the Authority's consent (which shall not be unreasonably withheld), except if such change is required by Law.

25.9 If the Transfer Regulations do not apply on the expiry or earlier termination of this Agreement, the Authority shall ensure that each new provider of a service equivalent to a Service on or after the expiry or earlier termination of this Agreement (including the Authority) shall offer employment to the persons employed by [Sub-hubco/Project Co] or a Service Provider in the provision of the Service immediately before the expiry or earlier termination of this Agreement and shall indemnify [Sub-hubco/Project Co] or a Service Provider for Direct Losses any of them may suffer or incur as a result of its failure to do so, and for any costs, claims or liabilities for redundancy payments (whether statutory or contractual).

25.10 If an offer of employment is made in accordance with Clause 25.9 the employment shall be on the same terms and conditions as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the Authority or other new service provider may at its absolute discretion not offer such terms and conditions if there has been any change to the terms and conditions of the persons concerned in breach of Clause 25.8.

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## Form 8 – LGPS Pension Provisions

### **[Sub-hubco/Project Co] to become an Admission Body**

Where [Sub-hubco/Project Co] (or any relevant Service Provider) employs any Pensionable Authority Employees from a Relevant Service Transfer Date it shall offer those Pensionable Authority Employees membership of the LGPS, and [Sub-hubco/Project Co] shall procure that it (and/or any relevant Service Provider) shall become an Admission Body. [Sub-hubco/Project Co] shall before the Relevant Service Transfer Date execute (and procure that any relevant Service Provider executes) an Admission Agreement which will have effect from and including the Relevant Service Transfer Date.

### **Liability for underfunding prior to Relevant Service Transfer Date**

- 26.2 Where [Sub-hubco/Project Co] (and/or any relevant Service Provider) becomes an Admission Body, the parties agree that:
- 26.2.1 [Sub-hubco/Project Co] (and/or any relevant Service Provider) shall not be responsible for any underfunding in the LGPS which relates to (and is calculated by reference to) service of any Pensionable Authority Employee prior to a Relevant Service Transfer Date;
  - 26.2.2 subject to the provisions of Clause 26.2.3 and Clause 26.2.4 below, [Sub-hubco/Project Co] (and/or any relevant Service Provider) shall pay to the Administering Authority, for the credit of the LGPS, the Actual Contribution Amount;
  - 26.2.3 in the event that the Actual Contribution Amount is greater than the Fixed Amount, liability for the Actual Contribution Amount shall be apportioned as follows:-
    - 26.2.4
      - (a) [Sub-hubco/Project Co] (and/or any relevant Service Provider) shall be liable for the Fixed Amount; and
      - (b) the Authority shall be liable for the difference between the Actual Contribution Amount and the Fixed Amount.
  - 26.2.5 in the event that the Actual Contribution Amount is less than the Fixed Amount, [Sub-hubco/Project Co] shall pay to the Authority the difference between the Fixed Amount and the Actual Contribution Amount;
  - 26.2.6 the Authority shall indemnify [Sub-hubco/Project Co] (and/or any relevant Service Provider) from and against any costs, charges, and losses suffered by it or them which arise under Clause 26.2.3(b); and
  - 26.2.7 Project Co shall indemnify the Authority from and against any costs, charges and losses suffered by the Authority which arise under Clause 26.2.4.

### Admission Agreement

26.3 The Authority shall before the Relevant Service Transfer Date execute each of the Admission Agreements referred to in Clause 26.1 ([Sub-hubco/Project Co] to become an Admission Body) [and shall use reasonable endeavours to ensure that the Administering Authority executes each such Admission Agreement before the Relevant Service Transfer Date<sup>10</sup>].

### Indemnity for a breach of the Admission Agreement

26.4 [Sub-hubco/Project Co] hereby indemnifies the Authority and/or any future Service Provider and, in each case, their sub-contractors on demand from and against all Direct Losses suffered or incurred by it or them which arise from any breach by [Sub-hubco/Project Co] (or any relevant Service Provider) of the terms of the Admission Agreement to the extent that such liability arises before or as a result of the termination (howsoever caused), suspension or expiry of this Agreement.

### Indemnity or bond

26.5 [Sub-hubco/Project Co] shall procure that it (and any relevant Service Provider) shall as soon as reasonably practicable obtain the indemnity or bond required in accordance with the Admission Agreement.<sup>11</sup>

### Right of Set Off

26.6 The Authority shall have a right to set off against any payments due to [Sub-hubco/Project Co] under this Agreement an amount equal to any overdue employer and employee contributions and other payments (and interest payable under the LGPS (Administration) Regulations) due from [Sub-hubco/Project Co] (or from any relevant Service Provider (as applicable)) under the Admission Agreement.<sup>12</sup>

### Liabilities of the Parties and Payments relating to Pensions

26.7 The following provisions shall apply in relation to liability and payments as between the parties in relation to the provisions of this Clause 26 (*Pension Matters*):

26.7.1 immediately on a liability to contribute under a rates and adjustments certificate under Regulations 32 or 34 of the LGPS (Administration) Regulations arising on [Sub-hubco/Project Co] (and/or any relevant Service Provider), [Sub-hubco/Project Co] (and/or any relevant Service Provider) shall notify the Authority in writing of the Actual Contribution Amount set out in that rates and adjustments certificate and either: (i) the amount (if any) by which the Actual Contribution Amount exceeds the Fixed Amount (the "**Authority Top-up Amount**"); or (ii) the amount (if any) by which the Actual Contribution Amount is less than the Fixed Amount (the "**[Sub-hubco/Project Co] Top-up Amount**"); and

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<sup>10</sup> The Authority may also be the Administering Authority.

<sup>11</sup> Under Regulation 5(5)(a) of the LGPS (Administration) Regulations, the Local Authority (in the majority of cases) must carry out an assessment, taking account of actuarial advice, of the level of financial risk arising on premature termination of the provision of the service or assets by reason of the insolvency, winding up or liquidation of the transferee admission body and that where the level of risk identified by the assessment is such as to require it, the transferee admission body must provide an indemnity or bond to meet the level of risk identified.

<sup>12</sup> This clause seeks to mirror the right of set off which must be included in the Admission Agreement under regulation 5(7) of the LGPS (Administration) Regulations.

26.7.2 following such written notification to the Authority by [Sub-hubco/Project Co] pursuant to Clause 26.7.1 above, the Annual Service Payments shall be adjusted by operation of Clause 34.2.1(c) to reflect the Authority Top-up Amount or the [Sub-hubco/Project Co]Top-up Amount.

#### **Debt arising as a result of cessation of participation in the LGPS**

26.8 Where an Admission Agreement is terminated or otherwise ceases to have effect and [Sub-hubco/Project Co] (and/or any relevant Service Provider) is required to pay an additional contribution to the LGPS pursuant to a rates and adjustments certificate issued under Regulation 34 of the LGPS (Administration) Regulations or otherwise (the "**Exit Contribution**"), [Sub-hubco/Project Co] (and/or any relevant Service Provider) shall pass the account or invoice in relation to the Exit Contribution to the Authority within 20 Business Days of receipt of such account or invoice. The Authority shall be responsible for paying an amount equal to the Exit Contribution to the Administering Authority for immediate credit to the LGPS.

26.9 [Sub-hubco/Project Co] (and/or any relevant Service Provider) shall be responsible for any part of any Exit Contribution arising on termination of the Admission Agreement which relates to any unpaid contributions due under the Admission Agreement up to the date of termination of the Admission Agreement in so far as those unpaid contributions related to any amount payable under Clause 26.2.3(a).

#### **Project Co ceases to be an Admission Body**

26.10 If [Sub-hubco/Project Co]and/or any relevant Service Provider employs any Pensionable Authority Employees from a Relevant Service Transfer Date and:

26.10.1 the Authority, [Sub-hubco/Project Co]and/or any relevant Service Provider are all of the opinion that it is not possible to operate the provisions of Clause 26.1 (*[Sub-hubco/Project Co]to become an Admission Body*) to Clause 26.9 inclusive; or

26.10.2 for any reason after the Relevant Service Transfer Date [Sub-hubco/Project Co]and/or any relevant Service Provider ceases to be an Admission Body other than on the date of termination or expiry of this Agreement or because it ceases to employ any Pensionable Authority Employees,

then the provisions of Clauses 26.1 (*[Sub-hubco/Project Co]to become an Admission Body*) to 26.9 shall not apply (without prejudice to any rights of the Authority under those clauses) and the relevant provisions of Clause 26.11 (Membership of a Broadly Comparable Scheme for Pensionable Authority Employees) shall apply in respect of the Pensionable Authority Employees.

#### **Membership of a Broadly Comparable Scheme for Pensionable Authority Employees**

26.11 Where this Clause 26.11 (*Membership of a Broadly Comparable Scheme for Pensionable Authority Employees*) applies:

26.11.1 Project Co shall procure that each Pensionable Authority Employee shall on the Relevant Service Transfer Date or the Cessation Date (as applicable) be offered membership of a pension scheme for future service operated by [Sub-hubco/Project Co] (or the relevant Service Provider) which must be:

- (a) established within three (3) months of the Relevant Service Transfer Date or the Cessation Date (as the case may be) and maintained until any payment to be made under Section 4 (*LGPS Bulk Transfer Terms*) of Schedule Part 24 (*Employment and Pensions*) is made;
- (b) reasonably acceptable to the Authority (such acceptance not to be unreasonably withheld or delayed);
- (c) a registered pension scheme for the purposes of Part 4 of the Finance Act 2004;
- (d) has in place a relevant contracting-out certificate in accordance with Part III of the Pension Schemes Act 1993; and
- (e) certified by the Government Actuary's Department as broadly comparable to the LGPS, assessed following the principles set out in the Statement of Practice issued by the Government Actuary's Department as current at the time.

26.11.2 [Sub-hubco/Project Co] shall ensure that a certificate from the Government Actuary's Department referred to in Clause 26.11.1(e) for the Broadly Comparable Scheme shall be delivered to the Authority on or before signature of this Agreement (or on or before the Cessation Date as applicable) and shall provide confirmation that the certificate(s) remain in force [three (3)] months before each Relevant Service Transfer Date or Cessation Date (as the case may be) in respect of each Pensionable Authority Employee who is to be offered membership of the pension scheme to which the certificate relates.

#### **GAD Certificate**

26.12 The Authority shall provide [Sub-hubco/Project Co] with such information as it (or any Service Provider) may reasonably require in relation to the LGPS to enable [Sub-hubco/Project Co] (or any relevant Service Provider) to submit a proposal to the Government Actuary's Department to assess the comparability of the Broadly Comparable Scheme. The Authority may (at its option) provide such information directly to the Government Actuary's Department. [Sub-hubco/Project Co] shall (and it shall procure that any relevant Service Provider shall) provide such documentation as is required to enable the Government Actuary's Department to consider the question of comparability including, but not necessarily limited to, the Trust Deed and Rules of the Broadly Comparable Scheme, the latest actuarial valuation report, the latest trustees' report and accounts together with a statement giving details of the increases in pensions in payment and deferred pensions in each of the last ten years and details of any area where the trustees will operate discretion to improve benefits.

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### Liability for Costs

- 26.13 All costs incurred in connection with the Admission Agreement and/or obtaining a certificate of broad comparability from the Government Actuary's Department shall be borne by [Sub-hubco/Project Co].

### Bulk Transfers

- 26.14 [Sub-hubco/Project Co] shall procure that each Broadly Comparable Scheme shall be able to accept bulk transfers from the LGPS. [Sub-hubco/Project Co] shall comply with (and shall procure that each relevant Service Provider shall comply with) the provisions of Section 4 (*LGPS Bulk Transfer Terms*) of Schedule Part 24 (*Employment and Pensions*) in respect of transfers from the LGPS following the Relevant Service Transfer Date and any subsequent bulk transfers on termination or expiry of this Agreement.

### [Sub-hubco/Project Co] Undertaking

- 26.15 [Sub-hubco/Project Co] undertakes to the Authority (for the benefit of the Authority and for the Authority as agent and trustee for the benefit of the Pensionable Authority Employees) that it shall (and shall procure that any relevant Service Provider shall) procure that:
- 26.15.1 the Pensionable Authority Employees shall by three (3) months before the Relevant Service Transfer Date or the Cessation Date (as the case may be) be offered membership of the Broadly Comparable Scheme with effect from and including the Relevant Service Transfer Date (or Cessation Date (as the case may be));
  - 26.15.2 the Broadly Comparable Scheme shall provide benefits in respect of the Pensionable Authority Employees' periods of service on and after the Relevant Service Transfer Date (or Cessation Date (as the case may be)) which the Government Actuary's Department shall certify to be the same as, broadly comparable to, or better than the benefits which the Pensionable Authority Employees were entitled to under the LGPS at the Relevant Service Transfer Date (or the Cessation Date (as the case may be));
  - 26.15.3 if the Broadly Comparable Scheme is terminated, a replacement pension scheme shall be provided with immediate effect for those Pensionable Authority Employees who are still employed by Project Co or a relevant Service Provider. The replacement scheme must comply with this Clause 26.15 ([*Sub-hubco/Project Co*] Undertaking) as if it were the Broadly Comparably Scheme; and
  - 26.15.4 where the Broadly Comparable Scheme has not been established by the Relevant Service Transfer Date (or Cessation Date (as the case may be)) the Pensionable Authority Employees shall be provided with benefits in respect of death-in-service which are no less favourable than the death-in-service benefits provided by the LGPS before the Relevant Service Transfer Date (or Cessation Date (as the case may be)). Such benefits shall continue to be provided until death-in-service benefits are provided by the Broadly Comparable Scheme.

### Subsequent Transfers

- 26.16 Where during the term of this Agreement the employment of any Pensionable Authority Employee is transferred on a second and/or subsequent occasion as a result of a change of



service provider, [Sub-hubco/Project Co] shall procure that each Pensionable Authority Employee who is a member of, or eligible for membership of, the outgoing employer's pension scheme shall be offered membership of a pension scheme operated by the new employer which, as a minimum:

26.16.1 for future service offers the benefits which enabled the outgoing employer's pension scheme to be certified as being broadly comparable in accordance with the provisions of Clause 26.11 (*Membership of Broadly Comparable Scheme for Pensionable Authority Employees*); and

26.16.2 must be able to accept bulk transfers from the outgoing employer's pension scheme (where the pension schemes are different) in respect of benefits which the Pensionable Authority Employee had accrued or been credited in the outgoing employer's pension scheme,

and [Sub-hubco/Project Co] shall (and shall procure that any relevant Service Provider) shall consult with and inform those employees of the pension provisions relating to the transfer.

The Authority shall have the right, but not the obligation, on any second or subsequent transfer, to request the Government Actuary's Department to certify, in respect of any new employer's pension scheme, that the requirements of Clause 26.11.1(c) to 26.11.1(e) (inclusive) have been met. [Sub-hubco/Project Co] shall procure that any new employer shall provide all such documentation as is required to enable the Government Actuary's Department to make the necessary assessment.

#### **Pension issues on Expiry or Termination**

26.17 [Sub-hubco/Project Co] shall (and shall procure that any relevant Service Provider shall):

26.17.1 maintain such documents and information as will be reasonably required to manage the pension aspects of any onward transfer of any person engaged or employed by [Sub-hubco/Project Co] (or any relevant Service Provider) in the provision of the Services on the expiry or termination of this Agreement (including without limitation identification of the Pensionable Authority Employees);

26.17.2 provide to the Authority such documents and information mentioned in Clause 26.17.1 which the Authority may reasonably request in advance of the expiry or termination of this Agreement; and

26.17.3 fully co-operate (and procure that the trustees of the Broadly Comparably Scheme shall fully co-operate) with the reasonable requests of the Authority relating to any administrative tasks necessary to deal with the pension aspects of any onward transfer of any person engaged or employed by [Sub-hubco/Project Co] (or any relevant Service Provider) in the provision of the Services on the expiry or termination of this Agreement.

#### **Discretionary Benefits**

26.18 Where [Sub-hubco/Project Co] (or a relevant Service Provider) is an Admission Body, Project Co shall (and/or shall procure that any relevant Service Provider shall) award benefits (where permitted) to the Pensionable Authority Employees under the LGPS (Compensation) Regulations and/or the LGPS in circumstances where the Pensionable

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Authority Employees would have received such benefits had they still been employed by the Authority.

- 26.19 Where the award of benefits in Clause 26.18 is not permitted under the LGPS (Compensation) Regulations and/or the LGPS or where [Sub-hubco/Project Co] (and/or a relevant Service Provider) is not an Admission Body, [Sub-hubco/Project Co] shall (and/or shall procure that any relevant Service Provider shall) award benefits to the Pensionable Authority Employees which are no less favourable than the benefits the Pensionable Authority Employees would have received under the LGPS (Compensation) Regulations and/or the LGPS in circumstances where the Pensionable Authority Employees would have received such benefits had they still been employed by the Authority.
- 26.20 Where under Clauses 26.18 and 26.19 such benefits are of a discretionary nature, they shall be awarded on the basis of the Authority's written policy in relation to such benefits at the time of the Relevant Service Transfer Date (which the Authority shall provide upon request). Where the payment of such benefits is not, for whatever reason, possible, [Sub-hubco/Project Co] shall (and/or shall procure that any relevant Service Provider shall) compensate the Pensionable Authority Employees in a manner which is broadly comparable or equivalent in cash terms.<sup>13</sup>

**Where this alternative Clause 26 drafting is used, the following definitions should be added to Schedule Part 1:**

- "Actual Contribution Amount"** means the contribution set out in a rates and adjustments certificate issued to [Sub-hubco/Project Co] (and/or any relevant Service Provider pursuant to either Regulation 32 or 34 of the LGPS (Administration) Regulations
- "Additional Costs"** means an increase in any liability to contribute to the LGPS imposed on Project Co (or any relevant Service Provider) as a consequence of:
- (a) the exercise by [Sub-hubco/Project Co] of any discretion under the LGPS Regulations to permit any of the Pensionable Authority Employees to retire before such Pensionable Authority Employees' normal pension age (as defined in regulation 16 of the LGPS (Administration) Regulations);
  - (b) any augmentation of benefits under the LGPS for any of the Eligible Employees;
  - (c) any redundancy of any of the Pensionable Authority Employees which gives such employee the right to bring benefits into
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payment under the LGPS in accordance with regulation 19 of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008;

- (d) any increases in the pay (as defined in the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008) of Pensionable Authority Employees in excess of the rate of increases in pay assumed in the actuarial valuation prepared by the actuary in accordance with regulation 32 of the LGPS (Administration) Regulations immediately preceding such actual increases;
- (e) any benefits which come into payment pursuant to regulation 20 (ill-health) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008; and
- (f) any waiver of the requirement for any of the Pensionable Authority Employees to contribute to the LGPS,

provided always that should any of the events set out in the limbs (a) to (f) above be at the instigation of the Authority then that event shall not constitute an Additional Cost.

**"Adjustment Factor"**

means any increase or decrease in [Sub-hubco's/Project Co's] (or any relevant Service Provider's) liability to contribute to the LGPS to a maximum increase or decrease over [ ]% of or below [ ]% of Pensionable Authority Employees' pay (as defined in regulation 5 of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

**"Administering Authority"**

means [ ]

**"Admission Agreement"**

means an admission agreement entered into in accordance with regulation 5 of the LGPS (Administration) Regulations by the Administering Authority and Project Co or any relevant Service Provider (as appropriate) and a template for which is set out at Schedule Part [ ] (*Admission Agreement*)

**"Admission Body"**

means a transferee admission body for the purposes of regulation 5 of the LGPS (Administration) Regulations]

<b>"Broadly Comparable Scheme"</b>	means the pension scheme or schemes nominated by [Sub-hubco/Project Co] (or any relevant Service Provider) in accordance with paragraph Clause 26.11 ( <i>Membership of a Broadly Comparable Scheme for Pensionable Authority Employees</i> )
<b>"Fixed Amount"</b>	means [ ]% of Pensionable Authority Employees' pay (as defined in regulation 5 of the Local Government Pension Scheme Benefits, Membership and Contributions) (Scotland) Regulations 2008 adjusted in accordance with the Adjustment Factor plus any Additional Costs
<b>"LGPS"</b>	means the Local Government Pension Scheme (Scotland) established pursuant to regulations made in exercise of powers under sections 7 and 12 and Schedule 3 of the Superannuation Act 1972 (as amended from time to time)
<b>"LGPS (Administration) Regulations"</b>	means the Local Government Pension Scheme (Administration) (Scotland) Regulations 2008
<b>"LGPS (Compensation) Regulations"</b>	means the Local Government (Discretionary Payments and Injury Benefits) (Scotland) Regulations 2008
<b>"LGPS Regulations"</b>	means the LGPS (Administration) Regulations, the LGPS (Compensation) Regulations and the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008
<b>"Pensionable Authority Employee"</b>	means an Authority Employee who is a member of or is entitled to be a member of the LGPS on or immediately prior to the Relevant Service Transfer Date

**Where this alternative Clause 26 drafting is used, the following provisions should be added to Schedule Part 24:**

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**SECTION 4**

**LGPS BULK TRANSFER TERMS**

The provisions of this Section 4 (i) of Schedule Part 24 (i) shall apply in relation to each Employee Transfer during the term of this Agreement which affects Pensionable Authority Employees. In relation to each such Employee Transfer the provisions of this Section 4 (LGPS Bulk Transfer Terms) of Schedule Part 24 (*Employment and Pensions*) shall apply save that [Sub-hubco/Project Co] and the Authority (both acting reasonably) shall agree such amendments to the provisions of this Section 4 (*LGPS Bulk Transfer Terms*) of Schedule Part 24 (*Employment and Pensions*) as are required to reflect the specifics of the transfer in terms of details of the Administering Authority's Actuary, the Funds, the Due Date and Actuary's Letter, the matters identified herein and any comments from the Administering Authority.

**Definitions**

In this Section 4 (*LGPS Bulk Transfer Terms*) of Schedule Part 24 (*Employment and Pensions*) the following expressions shall, unless the context otherwise requires, have the following meanings:

<b>"Actuary's Letter"</b>	means, in respect of each Fund, the letter from the Administering Authority's Actuary, stating the methods and assumptions to be used for the purposes of this Section 4 ( <i>LGPS Bulk Transfer Terms</i> ) of Schedule Part 24 ( <i>Employment and Pensions</i> ), a copy of which is set out as Appendix 1 ( <i>Actuary's Letter</i> ) to this Section 4 ( <i>LGPS Bulk Transfer Terms</i> ) of Schedule Part 24 ( <i>Employment and Pensions</i> )
<b>"Administering Authority's Actuary"</b>	means [name of actuary] of [name of firm], or another actuary appointed by the relevant Administering Authority for the purposes of this Section 4 ( <i>LGPS Bulk Transfer Terms</i> ) of Schedule Part 24 ( <i>Employment and Pensions</i> )
<b>"AVCs"</b>	means AVCs or SCAVCs as defined in the LGPS (Administration) Regulations
<b>"Due Date"</b>	means the date [ ] days after the last of the conditions in paragraph 3.6 has been satisfied
<b>"Employer"</b>	means [Sub-hubco/Project Co] and/or any relevant Service Provider who employs a Pensionable Authority Employee from the Relevant Service Transfer Date
<b>"Employer's Actuary"</b>	means [name of actuary] of [name of firm], or another actuary appointed by the Employer for the purposes of this Section 4 ( <i>LGPS Bulk Transfer Terms</i> ) of Schedule Part 24 ( <i>Employment and Pensions</i> )
<b>"Fund"</b>	means the [ ] Fund within the LGPS
<b>"Transfer Amount"</b>	means the amount or amounts referred to in paragraph 3.1

**"Transferring Member"** means an Pensionable Authority Employee who agrees to a transfer of benefits being made for him or her from the relevant Fund to the Broadly Comparable Scheme under paragraph 2

In this Section 4 (*LGPS Bulk Transfer Terms*) of Schedule Part 24 (*Employment and Pensions*) other defined terms shall, unless the context otherwise requires, have the meanings given to them in Schedule Part 1 (*Definitions and Interpretation*).

## **1. The Broadly Comparable Scheme**

[Sub-hubco/Project Co] shall procure that the Employer shall invite each Pensionable Authority Employee who joins the Broadly Comparable Scheme in accordance with Clause 26.11.1 to consent to a transfer of benefits being made for him from the relevant Fund to the Broadly Comparable Scheme. The Employer must issue this invitation no later than [one] month after the Relevant Service Transfer Date. The invitation must be in a form that is acceptable to the Authority and the Administering Authority (such acceptance not to be unreasonably withheld or delayed by the Authority) and that complies with any requirements of the LGPS (Administration) Regulations. Any Pensionable Authority Employee wishing to consent to a transfer of benefits must notify the Employer of this consent in writing no later than [three] months after the date of the invitation. The Employer shall provide the Authority and the Administering Authority with the names of the Transferring Members no later than [four] months after the Relevant Service Transfer Date.

## **2. Transfer Payment from Fund**

2.1 In respect of the Pensionable Authority Employees, the Authority shall use reasonable endeavours to ensure that the relevant Administering Authority transfers from the Fund to the Broadly Comparable Scheme on the Due Date an amount in respect of the Employee Transferring Members' service in the Fund before the Relevant Service Transfer Date calculated in accordance with the Actuary's Letter and Part 9 of the LGPS (Administration) Regulations.

2.2 As soon as reasonably practicable following the Relevant Service Transfer Date, [Sub-hubco/Project Co] shall procure that the Employer shall promptly provide all data within its possession or under its control which the Administering Authority and the Administering Authority's Actuary may require for the calculation of the Transfer Amount and shall warrant that this data is in all material respects true, complete and accurate.

2.3 As soon as reasonably practicable following the Relevant Service Transfer Date, the Authority shall promptly provide all data within its possession or under its control which the Administering Authority and the Administering Authority's Actuary may require for the calculation of the Transfer Amount In respect of its own Transferring Members, and shall warrant that this data is in all material respects true, complete and accurate.

2.4 The Authority shall use its reasonable endeavours to procure that:

2.4.1 as soon as reasonably practicable after the Administering Authority's Actuary has been provided with the necessary data and information, the

Administering Authority's Actuary shall calculate the Transfer Amount in respect of its own Transferring Members, in accordance with the Actuary's Letter and the LGPS (Administration) Regulations; and

2.1.2 within [one week] of completing this calculation, the Administering Authority's Actuary shall notify the Employer's Actuary in writing of the particulars of the calculation and the data on which the calculation is based.

The Employer's Actuary will then have [one month] (or such longer period as the parties may agree) from the date on which those particulars and data have been supplied to him in which to object in writing that the calculation is incorrect or not in accordance with the Actuary's Letter. The calculation shall be final and binding on the parties if the Employer's Actuary raises no objection within this stated period.

2.5 If the Employer's Actuary objects in writing under paragraph 3.4 and the Administering Authority's Actuary and the Employer's Actuary cannot subsequently agree the Employee Transfer Amount within [one] month (or such longer period as shall be agreed between the parties) of the objection, then the amount shall be determined by an independent actuary to be nominated by the relevant Administering Authority and the Employer jointly or, if they cannot agree, by the President of the Faculty of Actuaries on application by either party. The independent actuary shall act as an expert and not as an arbitrator, and his decision shall be final and binding on the parties. The independent actuary's costs shall be payable equally by the Administering Authority and the Employer.

2.6 Payment to the Broadly Comparable Scheme of the Transfer Amount shall only be made on the following conditions:

2.6.1 the Transfer Amount has been agreed or determined under paragraph 3.4 or 3.5 and in accordance with the LGPS (Administration) Regulations;

2.6.2 the Employer has complied with all its obligations under this Section 4 (LGPS Bulk Transfer Terms) of Schedule Part 24 (Employment and Pensions); and

2.6.3 the trustees of the Broadly Comparable Scheme have confirmed in writing that:

(a) a payment should be made in accordance with the LGPS (Administration) Regulations and that they shall accept payment on the terms set out in paragraph 4;

(b) they shall accept liability for each Transferring Member's accrued contracted out rights under the Fund; and

(c) they shall accept the Transfer Amount in full and final settlement of all claims against the Fund in respect of each Transferring Member.

2.7 [The payment of the Transfer Amount shall be satisfied by the transfer of readily marketable stocks and shares of the relevant Fund as agreed by the relevant

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Administering Authority and the trustees of the Broadly Comparable Scheme having a mid-market value on the day before the Due Date equal to the Transfer Amount. If the relevant Administering Authority and the trustees of the Broadly Comparable Scheme are not able to agree some or all of the particular assets to be transferred, or the mid-market value of any such assets, the payment of the Transfer Amount (or the appropriate part of it) shall be satisfied by the relevant Fund transferring cash equal to [ ]% of that part of the Transfer Amount in respect of which there has been no agreement as to the assets to be transferred.]<sup>14</sup>

### 3. Past Service Benefits

- 3.1 [Sub-hubco/Project Co] shall procure that the Employer shall ensure that:
- 3.1.1 the Broadly Comparable Scheme provides in respect of each Transferring Member such benefits as the Administering Authority's Actuary certifies to be of actuarially equivalent value [(in accordance with the Actuary's Letter)]<sup>15</sup> to the benefits which would have been payable under the LGPS in respect of the Transferring Member's service before the Relevant Service Transfer Date if he had remained a member of the LGPS; [and
  - 3.1.2 the Transfer Amount will, subject only to any HM Revenue & Customs limits that may still apply, be wholly applied in the Broadly Comparable Scheme for the provision of the benefits mentioned in this paragraph 4.116] and
  - 3.1.3 the Broadly Comparable Scheme provides in respect of each Transferring Member such benefits as the Administering Authority's Actuary certifies to be of actuarially equivalent value [(in accordance with the Actuary's Letter)]<sup>17</sup> to the benefits which would have been payable under the LGPS in respect of the Transferring Member's service before the Relevant Service Transfer Date if he had remained a member of the LGPS.

### 4. Additional Voluntary Contributions

Nothing in this Section 4 (*LGPS Bulk Transfer Terms*) of Schedule Part 24 (*Employment and Pensions*) shall apply to AVCs or to benefits secured by them. However, the Authority shall use reasonable endeavours to ensure that the assets representing each Transferring Member's AVCs in the Fund (if any) shall be transferred to the Broadly Comparable Scheme. Project Co shall procure that the Employer shall ensure that the Broadly Comparable Scheme provides benefits for each Employee Transferring Member which are equivalent to the assets transferred.

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<sup>14</sup> The form of payment and discount for cash needs to be discussed with the Administering Authority. If this is to be covered in the Actuary's Letter, this clause can be deleted.

<sup>15</sup> It may be necessary to refer to the Actuary's Letter to determine what 'actuarially equivalent value' means. 'Actuarially equivalent value' is the term used in the HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues'.

<sup>16</sup> The Local Authority may wish to consider whether it wants to seek to ring-fence any Transfer Amount within the Broadly Comparable Scheme. The Local Authority should consult with its professional advisers regarding this option.

<sup>17</sup> It may be necessary to refer to the Actuary's Letter to determine what 'actuarially equivalent value' means. 'Actuarially equivalent value' is the term used in the HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues'.



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**5. No Assistance**

[Sub-hubco/Project Co] shall procure that the Employer shall not encourage or initiate or assist or facilitate any action or provide any financial assistance for the purpose of requiring the relevant Fund to pay an amount larger than the Transfer Amount to the Broadly Comparable Scheme in respect of the Transferring Members.

**6. [Exit Provisions]<sup>18</sup>**

6.1 [Sub-hubco/Project Co] undertakes on its own behalf and on behalf of the Employer to the Authority (for the benefit of the Authority itself and for the Authority as agent and trustee for the benefit of its Pensionable Authority Employees)<sup>19</sup> that on:

6.1.1 the expiry or termination of this Agreement (or of the relevant Sub-Contract); or

6.1.2 the employment of any Pensionable Authority Employee transferring to a new employer in accordance with the provisions of Clause 25 (*TUPE and Employment Matters*) (or otherwise),

[Sub-hubco/Project Co] shall procure that the Employer shall procure that the trustees of the Broadly Comparable Scheme offer bulk transfer terms in respect of the relevant Pensionable Authority Employees' service in the Broadly Comparable Scheme to the pension scheme of the Authority or any future Service Provider (or their sub-contractors) which are no less favourable (in the opinion of the Administering Authority's Actuary or an actuary appointed by the Authority) than the bulk transfer terms set out in the Actuary's Letter, subject to a reasonable adjustment in respect of market fluctuations since the date of the Actuary's Letter.

6.2 If the transfer payment paid by the trustees of the Broadly Comparable Scheme is less (in the opinion of the Administering Authority's Actuary or an actuary appointed by the Authority) than the transfer payment which would have been paid had paragraph 7.1 been complied with, the Employer shall pay to the Authority or any future Service Provider (or their sub-contractor) (as appropriate) (or as such person shall direct) the amount of the difference.<sup>20]</sup>

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<sup>18</sup> The exit provisions aim to reflect as far as possible the exit requirements of HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues'. The Local Authority could consult with its professional advisers regarding these provisions and the Guidance and the requirements it wishes to impose.

<sup>19</sup> HM Treasury have indicated that the exit provisions in HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues' may cover not only Transferring Members but also Pensionable Authority Employees who did not transfer their benefits from the LGPS under the initial bulk transfer but did join the Broadly Comparable Scheme for future service only. The Local Authority should consult with its professional advisers regarding the scope of the employees it wishes to protect under this paragraph.

<sup>20</sup> HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues' provides that onward bulk transfer requirements can be imposed on the pension scheme and/or the sponsoring employer. The Local Authority will need to consider whether it wants to include a shortfall obligation of this type on the Employer.

**APPENDIX 1 - ACTUARY'S LETTER**

*[To be inserted on a case by case basis for each Employee Transfer to which Section 4 (LGPS Bulk Transfer Terms) of Schedule Part 24 (Employment and Pensions) applies]*

**Form 9 – Authority Events of Default (for non-NHS bodies)**

- 39.1.5 an expropriation, sequestration or requisition of a material part of the Assets and/or shares of [Sub-hubco/Project Co] or [Hubco/Hold Co] by [the Authority or] any Relevant Authority; or
- 39.1.6 the Authority is sequestrated under the Bankruptcy (Scotland) Act 1985 or otherwise becomes insolvent and its obligations are not otherwise transferred to another party such as is referred to in Clause 57.4

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## Form 10 – Authority rights to assign (non-NHS bodies)

57.4 The Authority shall be entitled to assign, transfer or dispose of the whole of this Agreement and/or of any agreement entered into in connection with this Agreement to which the Authority and [Sub-hubco/Project Co] are both party:

57.4.1 a Minister of the Crown (including for the avoidance of doubt the Scottish Ministers);

57.4.2 a [local authority (as defined in the Local Government Etc (Scotland) Act 1994)]<sup>21</sup> which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Agreement and any other agreements to which such assignation, transfer or disposal relates; or

57.4.3 any other public body whose obligations under this Agreement and any other agreements to which such assignation, transfer or disposal relates are unconditionally and irrevocably guaranteed by the Authority or a Minister of the Crown (including for the avoidance of doubt the Scottish Ministers) having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Agreement and any other agreements to which such assignation, transfer or disposal relates to;

57.4.4 [any other Participant which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Agreement and any other agreements to which such assignation, transfer or disposal relates]<sup>22</sup>,

without the consent of [Sub-hubco/Project Co]. The prior written consent of [Sub-hubco/Project Co] (not to be unreasonably withheld or delayed) shall be required for any other assignation, transfer or disposal by the Authority of the whole or any part of this Agreement or of any agreement entered into in connection with this Agreement to which the Authority and [Sub-hubco/Project Co] are both party, provided that nothing in this Clause shall restrict the rights of the Scottish Ministers to effect a statutory transfer.

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<sup>21</sup> Insert a description of the category of public body that the procuring authority falls within (if not a local authority)

<sup>22</sup> For hub projects only

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## Form 11 – Local Government (Contracts) Act 1997 and Relevant Discharge Terms

### 74. Local Government (Contracts) Act 1997

- 74.1 [Sub-hubco/Project Co] hereby consents to the issue by the Authority of certificates<sup>23</sup> under section 3 of the Local Government (Contracts) Act 1997 in respect of this Agreement and the Funders' Direct Agreement.
- 74.2 The relevant discharge terms within the meaning of section 6 of the Local Government (Contracts) Act 1997 are set out in Schedule Part 27 (*Relevant Discharge Terms*).

**Where Clause 74 applies, the following drafting must be included in the Schedule to the Agreement:**

#### SCHEDULE PART 27

#### RELEVANT DISCHARGE TERMS

1. The Parties hereby acknowledge and agree that:
- 1.1 where following an application for judicial review or an audit review (within the meaning of the Local Government (Contracts) Act 1997), a court determines that the Authority did not have power to enter into this Agreement or to enter into this Agreement and the Funders' Direct Agreement and that this Agreement or that this Agreement and the Funders' Direct Agreement are unenforceable:
- 1.1.1 [Sub-hubco/Project Co] shall be entitled to be paid by the Authority a sum equivalent to the amount calculated in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule Part 17 (*Compensation on Termination*); and
- 1.1.2 the relevant provisions of Clause 46 (*Compensation on Termination*) and Section 5 (*General*) of Schedule Part 17 (*Compensation on Termination*) shall apply mutatis mutandis, subject to compensation being deemed to be payable in a lump sum within 6 months of the order of the court; and
- 1.2 where following an application for judicial review or an audit review (within the meaning of the Local Government (Contracts) Act 1997) a court determines that the Authority did not have power to enter into the Funders' Direct Agreement and the Funders' Direct Agreement is unenforceable but this Agreement remains in full force and effect then, without prejudice to the application of paragraph 1.1.1 of this Schedule Part 27 (*Relevant Discharge Terms*) at any time thereafter:
- 1.2.1 the Monthly Service Payment shall be reduced by the amount payable by [Sub-hubco/Project Co] in respect of the Senior Debt; and

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<sup>23</sup> Drafting assumes that such certificates will be provided at Financial Close.

1.2.2 the Authority shall pay [Sub-hubco/Project Co] a sum equal to the Revised Senior Debt Termination Amount (excluding, provided that the Senior Funders do not enforce any security over credit balances on any bank accounts held by or on behalf of [Sub-hubco/Project Co], limb (b)(i) of the definition set out in Section 6 (*Definitions*) of Schedule Part 17 (*Compensation on Termination*)) and the relevant provisions of Clause 46 (*Compensation on Termination*) and Section 5 (*General*) of Schedule Part 17 (*Compensation on Termination*) shall apply mutatis mutandis subject to any reference to the Termination Date in this Agreement shall be deemed to be the date on which the Funders' Direct Agreement was declared unenforceable in accordance with the provisions of this paragraph 1; and,

the Parties agree that such provisions shall be deemed to be relevant discharge terms for the purposes of section 6(2) of the Local Government (Contracts) Act 1997 (the "Relevant Discharge Terms").

2. The parties acknowledge and agree that in the event that the circumstances envisaged by paragraph 1.2 occur prior to the circumstances envisaged by paragraph 1.1 then the amount calculated in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule Part 17 (*Compensation on Termination*) shall be calculated to ensure no double counting between that amount and any sums paid to [Sub-hubco/Project Co] pursuant to paragraph 1.2.2.

## Form 12 – Best Value

### 75. Best Value

- 75.1 [Sub-hubco/Project Co] shall take all reasonable steps necessary to facilitate, support and assist the Authority in complying with Sections 1 and 2 of the Local Government in Scotland Act 2003.
- 75.2 Subject to Clause 75.1, [Sub-hubco/Project Co] shall comply with the guidance referred to in Section 2 of the Local Government in Scotland Act 2003 as directed by the Authority from time to time.

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## Form 13 – Payment of Compensation on Termination

### SECTION 5: GENERAL

#### 1. PAYMENT AND INTEREST

##### **Following termination for Authority Default, Force Majeure or Corrupt Gifts or Fraud or following No Retendering**

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

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

1.2.1 in instalments as follows:

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

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

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



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

1.2.2 as the parties may otherwise agree.

1.3 From the Notice Date until the date of payment, interest shall accrue on any unpaid element of the Termination Sum at the No Default Interest Rate and be payable on the next occurring Instalment Date.

1.4 If the Authority has elected to pay in accordance with paragraph 1.2 above, it may (on 28 days' prior written notice to [Sub-hubco/Project Co]) elect to pay the outstanding part of the Adjusted Estimated Fair Value of the Agreement or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in full on any Instalment Date. If the Authority:

1.4.1 fails to make a payment [Sub-hubco/Project Co] in accordance with paragraphs 1.1 or 1.2 or 1.3 above; or

1.4.2 breaches Clause 57.4,

[Sub-hubco/Project Co] may issue a notice to the Authority declaring any unpaid and outstanding element of (as applicable) the Adjusted Estimated Fair Value of the Agreement or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum and any accrued but unpaid interest to be immediately due and payable.

1.5 To the extent that the Adjusted Estimated Fair Value of the Agreement is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Agreement shall be due and payable by [Sub-hubco/Project Co] to the Authority on the Compensation Date.

#### **Following Retendering**

1.6 Subject to paragraphs 1.8 and 1.10, following a retendering exercise under Section 2 (*Compensation for [Sub-hubco/Project Co] Default*) of this Schedule Part 17 the Authority shall pay to [Sub-hubco/Project Co] an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling twenty (20) Business Days after the later of:

1.6.1 the date of the New Agreement; and

1.6.2 if [Sub-hubco/Project Co] has referred a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution pursuant to paragraph 3.11 of Section 2 (*Compensation for Sub-hubco Default*) of this Schedule Part 17, the date on which the dispute is finally determined in accordance with Clause 56 (*Dispute Resolution*),

provided that, to avoid doubt, if the dispute referred by [Sub-hubco/Project Co] to dispute resolution (pursuant to paragraph 1.7.2 above) concerns only a proportion of the Adjusted Highest Compliant Tender Price then the Authority shall pay the undisputed proportion of such sum no later than 20 Business Days after the date referred to in paragraph 1.7.1 above (the "**Undisputed Payment Date**")<sup>24</sup> and the Authority shall pay interest to [Sub-hubco/Project Co] on any amount of the Adjusted Highest Compliant Tender Price which has been withheld, from the Undisputed Payment Date until the date on which payment is due under paragraph 1.7.2 above at the No Default Interest Rate.

- 1.7 If the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify [Sub-hubco/Project Co] of this decision and (if the Adjusted Highest Compliant Tender Price is a positive number) pay to [Sub-hubco/Project Co] an amount equal to the Adjusted Highest Compliant Tender Price within [20] Business Days of such notification.
- 1.8 If the Authority fails to pay the Adjusted Highest Compliant Tender Price (or any proportion thereof) by the date on which payment is due in accordance with paragraph 1.7 or paragraph 1.8 above, the Authority shall pay to [Sub-hubco/Project Co] interest on such unpaid amount, which shall accrue on such amount at the Default Interest Rate from (but not including) the date on which payment is due in accordance with paragraph 1.7 or paragraph 1.8 above until such amount is paid.
- 1.9 If the Adjusted Highest Compliant Tender Price is zero or a negative number then, on entering into the New Agreement with the New [Sub-hubco/Project Co], the Authority shall have no obligation to make any payment to [Sub-hubco/Project Co] and (if a negative number) an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by [Sub-hubco/Project Co] to the Authority on the date of the New Agreement or (where paragraph 1.8 applies) within [20] Business Days of notification from the Authority pursuant to that paragraph.<sup>25</sup>

## 2. Full and Final Settlement

- 2.1 Any and all sums irrevocably paid by the Authority to Sub-hubco under this Schedule Part 17 (*Compensation on Termination*) will be in full and final settlement of each party's rights and claims against the other for breaches and/or termination of this Agreement and any other Project Document whether under contract, delict, restitution or otherwise but without prejudice to:
- 2.1.1 any antecedent liability of [Sub-hubco/Project Co] to the Authority which the Authority has been unable to set off pursuant to Clause 46.13 of this Agreement;
- 2.1.2 any antecedent liability of either party to the other that arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining or

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<sup>24</sup> Authorities should review the tax implications of the payment passing through Authority's' control and grossing up provisions may be required as appropriate.

<sup>25</sup> This right is granted to give the Authority a claim as an unsecured creditor of the SPV and is not likely to result in any significant recovery for the Authority.

agreeing the Authority Default Termination Sum, Adjusted Highest Compliant Tender Price, or Adjusted Estimated Fair Value of the Agreement, the Force Majeure Termination Sum or the Corrupt Gifts Termination Sum as the case may be; and

2.1.3 any liabilities arising in respect of any breach by either party of their obligations under Clause 47.6 of this Agreement which arises or continues after the Termination Date.

2.2 If either the Adjusted Highest Compliant Tender Price or (as the case may be) the Adjusted Estimated Fair Value of the Agreement is zero or a negative number the Authority shall be released from all liability to [Sub-hubco/Project Co] for breaches and/or termination of this Agreement and any other Project Document whether under contract, delict, restitution or otherwise save for:

2.2.1 any antecedent liability of the Authority which arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining the Adjusted Highest Compliant Tender Price or the Adjusted Estimated Fair Value of the Agreement (as the case may be); and

2.2.2 any liabilities arising in respect of any breach by either party of their obligations under Clause 47.6 of the Agreement which continues after the Termination Date.

### **3. Costs**

The costs and/or expenses to be taken into account in the calculation of all termination sums due pursuant to this Schedule Part 17 (*Compensation on Termination*) shall only be such costs and/or expenses to the extent that they are reasonable and proper in quantum and shall have been or will be reasonably and properly incurred and shall only be counted once.

### **4. Undisputed Amounts**

If the calculation of any termination amount is disputed then any undisputed element of that amount shall be paid in accordance with this Section 5 (*General*) of this Schedule Part 17 (*Compensation on Termination*) and the disputed element shall be dealt with in accordance with Schedule Part 20 (*Dispute Resolution Procedure*).

### **5. Outstanding Senior Debt Amount**

5.1 The Authority shall be entitled to rely on the certificate of the [Senior Funders' Agent] as conclusive as to the amount of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount (as the case may be) outstanding at any relevant time.

5.2 The receipt by the [Senior Funders' Agent] of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount or elements thereof (as appropriate) (as the case may be) (and where appropriate any accrued interest or breakage costs as certified in accordance with paragraph 5.1 above) shall discharge the Authority's obligations to pay such sums to *Sub-hubco*.

Where this alternative drafting is used in Section 5 of Schedule Part 23, the following definitions should be added to Section 6 of Schedule Part 23:

<b>“Credit Agreement”</b>	means [ ] as at the date of this Agreement or as amended as permitted pursuant to Clause 4 ( <i>Project Documents</i> );
<b>“Notice Date”</b>	means the later of the Termination Date and (if paragraph 4 ( <i>No Retendering Procedure</i> ) of Section 2 ( <i>Compensation for Sub-hubco Default</i> ) of this Schedule Part 17 ( <i>Compensation on Termination</i> ) applies) the date that the Adjusted Estimated Fair Value of the Agreement has been agreed or determined;
<b>“Outstanding Principal”</b>	means the principal amount outstanding at the Termination Date of each borrowing (other than any borrowing under any equity bridge facility) under the [Credit Agreement]
<b>“Termination Sum”</b>	means any compensation payable by the Authority to [Sub-hubco/Project Co] pursuant to this Schedule Part 17 ( <i>Compensation on Termination</i> ) (excluding the Adjusted Highest Compliant Tender Price)