

- (1) Rushmoor Borough Council**
- (2) [Operator Partner]**

Leisure Operating Contract

In respect of the management and operation of Farnborough Leisure Centre and
Aldershot Pools and Lido

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THIS AGREEMENT is made on

2020

BETWEEN:

- (1) **Rushmoor Borough Council** of Council Offices, Farnborough Road, Farnborough, Hampshire GU14 7JU; and
- (2) **[Operator Partner] Limited** (company registration number []) whose registered office is at [] (**Operator Partner**)¹.

(each a "**party**" and together the "**parties**")

BACKGROUND

- (A) By an advertisement dated [] in the Supplement to the Official Journal of the European Union, the Authority sought proposals for the provision of leisure and associated services at the Facilities.
- (B) On the basis of the Operator Partner's response to the advertisement and a subsequent tender process, the Authority selected the Operator Partner as its preferred supplier. The parties have agreed to contract with each other in accordance with the terms and conditions set out below.
- (C) The Authority is a Best Value Authority under the Local Government Act 1999 and the functions in respect of which the Authority wishes to procure the delivery of the Services are Best Value functions.

PART 1 - PRELIMINARY

1. DEFINITIONS AND INTERPRETATION

1.1 DEFINITIONS

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

1999 Act the Local Government Act 1999

Adjudicator has the meaning given to it in Clause 70 (Dispute Resolution)

Adjusted Amount is an amount equal to one twelfth of the amount paid for the relevant Insurance Term in respect of the Contract Year preceding the Contract Year in which such Insurance Term is first unavailable (using a reasonable estimate of such amount where a precise figure is not available), (Indexed from the first day of such preceding Contract Year) less any annual amount paid or payable

¹ This Agreement has been drafted on the basis of a structure with the Operator Partner contracting with the Authority and then passing on its obligations to an FM Contractor and Leisure Operator. If a different structure is used the drafting will need to be updated accordingly.

	by the Operator Partner to maintain and/or procure the maintenance of any (whether full or partial) alternative or replacement insurance in respect of such term or condition pursuant to Clause 35.8
Admission Body	an admission body for the purposes of paragraph 1 of Part 3 of Schedule 2 of the LGPS Regulations
Administering Authority	Hampshire County Council of The Castle, Winchester SO23 8UJ, acting in its capacity as the administering authority of the Hampshire Pension Fund for the purposes of the LGPS Regulations
Adverse Rights	any interests, rights, covenants, restrictions, stipulations, easements, customary or public rights, local land charges, mining or mineral rights, franchise, manorial rights and any other rights or interests in or over land, in each case whether or not registered that would, if exercised, prevent or disrupt the provision of the Services
Affected Party	has the meaning given to it in the definition of Force Majeure Event in this Clause 1 (Definitions and Interpretation)
Affiliate	in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company, and " holding company " and " subsidiary " shall have the meaning given to them in Section 1159 of the Companies Act 2006
Agreed Form	in relation to any document, the form of the document agreed between the parties and initialled by or on behalf of the parties for the purpose of identification
Agreement	this agreement (including its Schedules)
Ancillary Documents	the documents listed in Part 2 of Schedule 11 (Project Documents and Ancillary Documents)
Annual Payment	the fee payable under this Agreement calculated in accordance with Schedule 5 (PPM)
Annual Service Plan	has the meaning given to it in Clause 23 (Annual Service Report and Service Plan)
Annual Service Report	has the meaning given to it in Clause 23 (Annual Service Report and Annual Service Plan)
Annual Service Report	the date on which the Annual Service Report is required

Date	to be submitted pursuant to the Services Specification
Approved Purposes	has the meaning given to it in Clause 54.1
Asbestos	has the meaning given to it in the Control of Asbestos Regulations 2012
Asbestos Surveys	the surveys referred to as such in the Services Specification
As-built Drawings	drawings, technical information, models, operation and maintenance manuals and technical information of a like nature to encompass the method of construction, manufacture, operation and maintenance of each element of each Facility in sufficient detail to allow a competent person to understand all material elements of the construction of each Facility and to maintain, dismantle, reassemble, adjust and operate all plant, equipment, fixtures, structures and construction elements thereof
Assets	<p>all assets and rights to enable the Authority or a successor contractor to own, operate and maintain each Facility in accordance with this Agreement including:</p> <ul style="list-style-type: none"> (a) any land or buildings; (b) any equipment; (c) any books and records (including operating and maintenance manuals, health and safety manuals and other know how); (d) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred); (e) any revenues and any other contractual rights; (f) any Intellectual Property Rights subject to and in accordance with Clause 54 (Intellectual Property); and (g) maintenance records, membership details/bulk transfer of direct debit details, <p>but excluding any assets and rights in respect of which the Authority is full legal and beneficial owner</p>
Authority Change	has the meaning given to it in the Change Protocol

Authority Default

one of the following events:

- (a) a failure by the Authority to make payment(s) of an amount of money exceeding (in aggregate) one month's Management Fee (from time to time) that is due and payable by the Authority under this Agreement within twenty (20) Business Days of service of a formal written demand by the Operator Partner, where the amount fell due and payable one (1) (or more) months prior to the date of service of the written demand;
- (b) a breach by the Authority of its obligations under this Agreement which substantially frustrates or renders it impossible for the Operator Partner to perform its obligations under this Agreement for a continuous period of two (2) months; or
- (c) a breach by the Authority of Clause 61.1

Authority Insurances

the insurances described at Part 1 of Schedule 13 (Insurances)

Authority Lifecycle Items

those Lifecycle Assets at the Facilities which are shown as the Authority's responsibility at Appendix 10 (Lifecycle Replacement Responsibility Matrix) of the Services Specification

Authority Lifecycle Item Instruction

has the meaning given to it in Clause 14.28

Authority Lifecycle Item Notice

has the meaning given to it in Clause 14.25

Authority Notice of Change

has the meaning given to it in the Change Protocol

Authority Pricing Requirements

the Authority's pricing requirements, as set out in paragraph 3.21 of the Services Specification

Authority Related Party

- (a) an officer, agent, contractor, employee or subcontractor (of any tier) of the Authority acting in the course of his office or employment; and
- (b) any person visiting a Facility at the invitation (express or implied) of the Authority,

but excluding in each case the Users, the Operator Partner and any Operator Partner Related Parties

Authority Policies	the policies of the Authority in place from time to time including, without limitation, those referred to in Schedule 14 (Authority Policies)
Authority's Representative	the representative appointed by the Authority pursuant to Clause 16.1
Base Surplus Amount	the Annual Payment as shown in [Base Case/LOBTA] (in the form of the LOBTA included at the Commencement Date without any adjustment) for a Contract Year (Indexed)
BI Proceeds	Business Interruption Insurance proceeds
"Bond"	[]
"Building"	any building or other erection at any of the Sites
"Buildings Surveys"	the surveys referred to as such in the Services Specification
"Business Day"	a day (other than a Saturday or Sunday) on which banks are open for domestic business in the City of London
Business Interruption Insurance	has the meaning given to it in paragraph 2 of Part 2 of Schedule 13 (Insurances)
Capital Expenditure	any expenditure which falls to be treated as capital expenditure in accordance with generally accepted accounting principles in the United Kingdom from time to time, International Financial Reporting Standards from time to time, or proper accounting practices for local authorities as defined by section 21(2) of the Local Government Act 2003 and Regulation 31 of the Local Authorities (Capital Finance and Accounting) (England) Regulations 2003
CDM Regulations	the Construction (Design and Management) Regulations 2015
Cessation Date	any date on which the Operator Partner or the relevant Sub-Contractor ceases to be an Admission Body other than as a result of the termination of this Agreement or because it ceases to employ any Eligible Employees
Change	has the meaning given to it in Part 1 of Schedule 22 (Change Protocol)

Change in Costs

in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated costs, losses or liabilities of the Operator Partner and/or any Sub-Contractors (without double counting), including, as relevant, the following:

- (a) the reasonable costs of complying with the requirements of Clauses 28 (Compensation Events), 27 (Change in Law), 18.5, 37 (Financial Adjustments) and the Change Protocol, including the reasonable costs of preparation of design and estimates;
- (b) the costs of continued employment of, or making redundant, staff who are no longer required;
- (c) the costs of employing additional staff;
- (d) reasonable professional fees;
- (e) the costs to the Operator Partner of financing any Relevant Event (and the consequences thereof) including commitment fees and capital costs interest and hedging costs, lost interest on any of the Operator Partner's own capital employed and any finance required pending receipt of a lump sum payment or adjustments to the Annual Payment;
- (f) the effects of costs on implementation of any insurance reinstatement in accordance with this Agreement, including any adverse effect on the insurance proceeds payable to the Operator Partner (whether arising from physical damage insurance or business interruption insurance (or their equivalent)) in respect of that insurance reinstatement and any extension of the period of implementation of the insurance reinstatement;
- (g) operating costs, lifecycle costs, maintenance costs or replacement costs;
- (h) Capital Expenditure (or, in the case of a Relevant Event which is a Qualifying Change in Law, Capital Expenditure for which the Authority is responsible);

- (i) any deductible or increase in the level of deductible, or any increase in premium under or in respect of any insurance policy; and
 - (j) Direct Losses or Indirect Losses, including reasonable legal expenses on an indemnity basis
- Change in Law** the coming into effect after the Commencement Date of:
- (a) Legislation, other than any Legislation which on the Commencement Date has been published:
 - (i) in a draft Bill as part of a Government Departmental Consultation Paper;
 - (ii) in a Bill;
 - (iii) in a draft statutory instrument; or
 - (iv) as a proposal in the Official Journal of the European Communities;
 - (b) any Guidance; or
 - (c) any applicable judgment of a relevant court of law which changes a binding precedent
- Change in Ownership**
- (a) any sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the shares in the Operator Partner [and/or Holdco] [and/or []] (including the control over the exercise of voting rights conferred on those shares, control over the right to appoint or remove directors or the rights to dividends); or
 - (b) any other arrangements that have or may have or which result in the same effect as paragraph (a)
- Change in Revenue** in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated income of the Operator Partner and/or any Sub-Contractor save that any Loss of Revenue shall be calculated in accordance with Schedule 21 (Loss of Revenue)
- Change Protocol** the procedure set out in Schedule 22 (Change Protocol)

Collateral Warranty	a collateral warranty executed as a deed between the Authority and (as the case may be) the [Leisure Operator or the FM Contractor] in the relevant form as set out in Schedule 6 (Collateral Warranties)
Commencement Date	the date of this Agreement
Commercially Sensitive Information	the subset of Confidential Information listed in column 1 of Part 1 (Commercially Sensitive Contractual Provisions) and column 1 of Part 2 (Commercially Sensitive Material) of Schedule 20 (Confidential Information) in each case for the period specified in the respective columns 2 of Parts 1 and 2 of Schedule 20
Compensation Event	<p>(a) the occurrence of a breach by the Authority of the following provisions:</p> <ul style="list-style-type: none"> (i) Clause 7.8; (ii) Clause 10.7; (iii) Clause 14.4; (iv) Clause 36 (Payment); (v) Clause 52.2; (vi) Clause 32.2; or (vii) Schedule 7 (Review Procedure); and <p>(b) any other event or circumstance identified as a Compensation Event in this Agreement</p>
Confidential Information	<p>(a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and includes information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all Personal Data (including special categories of personal data and personal data relating to actual or potential criminal offences and convictions) within the meaning of the Data Protection Legislation; and</p> <p>(b) Commercially Sensitive Information</p>

Contamination	all or any pollutants or contaminants, including any chemical or industrial, radioactive, dangerous, toxic or hazardous substance, waste or residue (whether in solid, semi-solid or liquid form or a gas or vapour)
Continuation Notice	has the meaning given to it in Clause 30.5
Continuous Improvement Duty	the duty imposed on the Authority to secure continuous improvement in the exercise of the Authority's functions, having regard to a combination of economy, efficiency and effectiveness in relation to, inter alia, the Services, pursuant to the 1999 Act
Continuous Improvement Service Change Notice	has the meaning given to it in Clause 23.3
Contract Month	any month in a Contract Year provided that: <ul style="list-style-type: none"> (a) the first Contract Month shall commence on the Service Commencement Date and end on the last day of the month in which the Service Commencement Date occurs; and (b) the last Contract Month shall begin on the first day of the month in which the last day of the Contract Period occurs and end on that day
Contract Period	the period from and including the Commencement Date to the Expiry Date, or if earlier, the Termination Date
Contract Year	a period of twelve (12) months commencing on 1 April, provided that: <ul style="list-style-type: none"> (a) the first Contract Year shall be the period commencing on the Service Commencement Date and ending on the immediately following 31 March; and (b) the final Contract Year shall be the period commencing on 1 April immediately preceding the last day of the Contract Period, and ending on the last day of the Contract Period
Controller	has the meaning given in, and shall be interpreted in accordance with, the Data Protection Legislation
COSHH	the Control of Substances Hazardous to Health Regulations 2002

CPI

the index published in Table 1 of the monthly Statistical Bulletin "Consumer price indices" published by the Office for National Statistics or failing such publication or in the event of a fundamental change to the index, such other index as the parties may agree, or such adjustments to the index as the parties may agree (in each case with the intention of putting the parties in no better nor worse position than they would have been in had the index not ceased to be published or the relevant fundamental change not been made) or, in the event that no such agreement is reached, as may be determined in accordance with Clause 70 (Dispute Resolution)

Current Annual Payment

the Annual Payment that would have been payable had this Agreement not terminated as a result of Operator Partner Default

Data Protection Legislation

means:

- (a) any law, statute, declaration, decree, directive, legislative enactment, order, ordinance, regulation, rule or other binding restriction (as amended, consolidated or re-enacted from time to time) which relates to the protection of individuals with regards to the Processing of Personal Data or marketing activities to which a party is subject, including the EU General Data Protection Regulation 2016/679 (GDPR), the Data Protection Act 2018 and the Privacy and Electronic Communications (EC Directive) Regulations 2003; and
- (b) any code of practice or guidance published by a competent supervisory authority from time to time

Data Subject

has the meaning in, and shall be interpreted in accordance with, the Data Protection Legislation

Defects

any defect in any of the Buildings, or any part of them, or anything installed in the Buildings attributable to:

- (a) defective design;
- (b) defective workmanship or defective materials (which shall exclude Asbestos), plant or machinery used in such construction having regard to Good Industry Practice and to appropriate British standards and codes of practice current at the date of construction of the Building;

- (c) the use of materials in the construction of any Building which (whether or not defective in themselves) prove to be defective in the use to which they are put in the construction of any such Building;
- (d) defective installation of anything in or on the Buildings;
- (e) defective preparation of the site on which the Building is constructed; or
- (f) defects brought about by adverse ground conditions or by reason of subsidence, water table change or any other change to ground conditions

the Annual Payment where it is a negative number

Deficit Annual Payment

Design Data

all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the Facilities in each case that is used by or on behalf of the Operator Partner and/or its sub-contractors in connection with the provision of the Services or the performance of the Operator Partner's obligations under this Agreement

Directive

the EC Transfers of Undertakings Directive 2001/23 as amended

Direct Losses

all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an indemnity basis), proceedings, demands and charges whether arising under statute, contract or at common law but excluding Indirect Losses

Disclosed Data

information relating to the Services disclosed to the Operator Partner and its Shareholders and advisers before the Commencement Date including (without limitation):

- (a) [];²
- (b) the data room located at <https://sebp.duenorth.com/>, and holding the documents issued as part of the procurement process; and
- (c) [others]

Disclosed Searches

the searches listed in Part 4 of Schedule 12 (Title Matters)

Disclosed Title Matters

the matters set out in Part 2 of Schedule 12 (Title Matters)

Discriminatory Change in Law

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

- (a) the Services and not to similar projects;
- (b) the Operator Partner and not to other persons; and/or
- (c) persons who have contracted with the Government, a Local Authority or other public or statutory body to provide services under a public private partnership arrangement and not to other persons

Disputed Amount

has the meaning given to it in Clause 36.11

Dispute Resolution Procedure

the procedure for the resolution of disputes set out in Clause 70 (Dispute Resolution)

² Include details of the procurement documents issued.

DOTAS

the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HMRC of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to national insurance contributions by the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868) made under section 132A of the Social Security Administration Act 1992

Elections

such local, regional or national elections or referenda that the Authority or its returning office is statutorily required to administer

Eligible Employees

means:

- (a) those employees whose contracts of employment transfer to the Operator Partner or a Sub-Contractor from the Authority on a Service Transfer Date who are active members of or have the right to acquire benefits under the LGPS immediately prior to such Service Transfer Date; and
- (b) Transferring Original Employees who are active members of or have the right to acquire benefits under the LGPS, or a broadly comparable occupational pension scheme, provided by their existing employer on a Service Transfer Date,

for so long as they are employed in connection with the provision of the Services

Emergency

an event causing or, in the reasonable opinion of a party, threatening to cause death or injury to any individual, or serious disruption to the lives of a number of people or extensive damage to property, or contamination of the environment in each case on a scale beyond the capacity of the emergency services, or preventing the Services operating under normal circumstances and requiring the mobilisation and organisation of the emergency services

Employee Costs	all pay, benefits, PAYE payments/ contributions, national insurance contributions, pension contributions and other amounts (including, without limitation, all wages, holiday pay, bonuses, commission, premiums, and subscriptions) payable to or in respect of the employment or engagement of any person
Employee List	has the meaning given to it in Clause 59.5
Employment Liabilities	all liabilities including, but not limited to, claims for redundancy payments, Beckmann Rights, pay including holiday pay, unlawful deductions from wages, unfair, wrongful or constructive dismissal compensation, compensation for discrimination or claims for equal pay, and any other claims whether in tort (including negligence), contract or statute or otherwise, and any demands, actions, proceedings and any award, compensation, damages, tribunal awards, fine, loss, order, penalty, disbursement, payment made by way of settlement and costs and expenses reasonably incurred in connection with a claim or investigation, and any expenses and legal costs on an indemnity basis
Environmental Information Regulations	the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such regulations
Equalities Legislation	the Racial and Religious Hatred Act 2006, the Civil Partnership Act 2004, the Sex Discrimination (Gender Reassignment) Regulations 1999 the Gender Recognition Act 2004 the Employment Equality (Sex Discrimination) Regulations 2005 the Employment Equality (Age) Regulations 2006 (Amendment) Regulations 2008, the Equality Act 2006 and the Equality Act 2010
Equality Requirements	the requirements set out in Schedule 19 (Equality Requirements)
European Economic Area	from time to time the European Economic Area as created by The Agreement on the European Economic Area 1992 or any successor or replacement body, association, entity or organisation which has assumed either or both the function and responsibilities of the European Economic Area
Expiry Date	14 August 2031, or such later date to which the Expiry Date is extended pursuant to clause 2.2

Existing Operator Partner	the contractor of the Authority which, prior to the Commencement Date, performs services which are the same as, or similar to, some or all of the Services
Exit Plan	the exit plan as developed between the parties in accordance with Clause 51 (Exit Management)
Facility	the facilities listed in Schedule 3 (Facilities) being the buildings and other facilities to be provided, maintained and serviced in accordance with this Agreement located on and consisting of the Sites
Fees Regulations	the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004
Final Warning Notice	has the meaning given to it in Clause 41.2
First Operator Partner	the person with whom the Authority initially contracted for the provision of services which are similar to the Services
Five Year Maintenance Plan	the five year maintenance plan provided by the Operator Partner to the Authority in accordance with Clause 14.15
FM Agreement	subject to Clause 6 (Documents) the agreement in the Agreed Form between the Operator Partner and the FM Contractor relating to the Maintenance Services
FM Agreement Dispute	has the meaning given to it in Clause 70.16.1
[FM Contractor	[INSERT NAME AND COMPANY NUMBER], or such other facilities management contractor as the Operator Partner may, subject to Clauses 6 (Documents) and 61 (Assignment and sub-contracting), appoint to provide the Maintenance Services]
FOIA	the Freedom of Information Act 2000 and any subordinate legislation (as defined in Section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such Act
FOIA Code	has the meaning given to it in Clause 57.8

Force Majeure Event	<p>the occurrence after the Commencement Date of:</p> <ul style="list-style-type: none"> (a) war, civil war, armed conflict or terrorism; (b) nuclear, chemical or biological contamination unless the source or cause of the contamination is as a result of any act by the Operator Partner or its sub-contractors or any breach by the Operator Partner of the terms of this Agreement; or (c) pressure waves caused by devices travelling at supersonic speeds, <p>which directly causes either party (Affected Party) to be unable to comply with all or a material part of its obligations under this Agreement</p>
Fund	the Hampshire County Council Pension Fund
Future Operator Partner	a provider of services which are the same as, or similar to the Services, following the termination or expiry of this Agreement
General Change in Law	a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law
Goods	all goods or equipment (recycled or otherwise) used in the provision of the Services
Good Industry Practice	that degree of skill, care, prudence and foresight and operating practice which would reasonably and ordinarily be expected from time to time of a skilled and experienced operator (engaged in the same type of undertaking as that of the Operator Partner) or facilities management contractor or leisure operator or any subcontractor under the same or similar circumstances
Guidance	any applicable guidance or directions with which the Operator Partner is bound to comply
Handback Requirements	the requirements relating to the condition of the Facilities set out in section 4.2.4 of the Services Specification
Head Leases	the leases relating to the Sites to be granted by the Authority to the Operator Partner in the Agreed Form as set out at Schedule 16 (Head Leases)
Health and Safety File	has the meaning given to it in the CDM Regulations

Health and Safety Regime	the Food Safety Act 1990 (and associated regulations), the Health & Safety at Work etc Act 1974 (and associated regulations), the Regulatory Reform (Fire Safety) Order 2005, the Environmental Protection Act 1990, the Water Industry Act 1991, the Environment Act 1995, the Pollution Prevention and Control Act 1999 and any similar or analogous health, safety or environmental legislation in force from time to time
["Holdco"]	[insert details of the Operator Partner's one hundred per cent (100%) holding company if any]
Holding Company	has the meaning given to it in Section 1159 of the Companies Act 2006
Home Office Guidance	guidance issued by the Home Office relating to the level and nature of Criminal Records Bureau checks or the Disclosure and Barring Scheme (as appropriate at that time) that should be undertaken with respect to staff employed at the Facilities
Improvement Plan	has the meaning given to it in paragraph 10 of schedule 5
Indemnified Party	has the meaning given to it in Clause 31.5
Indemnifying Party	has the meaning given to it in Clause 31.5
Index	means CPI
Indirect Losses	loss of profits, loss of use, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature but excluding any of the same that relate to Loss of Revenue
Information	has the meaning given to it under Section 76 of the FOIA
Initial Contribution Amount	zero
Instalment Dates	has the meaning given to it in Clause 50.3
Insurance Term	any terms and/or conditions required to be in a policy of insurance by Clause 32 (Operator Partner Insurances) and/or Schedule 13 (Insurances) but excluding any risk

Intellectual Property Rights

any and all patents, trade marks, service marks, copyright, database rights, moral rights, rights in a design, know-how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attached thereto which is created, brought into existence, acquired, used or intended to be used by the Operator Partner or any Operator Partner Related Party for the purposes of providing the Services and/or otherwise for the purposes of this Agreement

Irrecoverable VAT Legislation

has the meaning given to it in Clause 27.7

any one or more of the following:

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

in each case in the United Kingdom

Leisure Contract

subject to Clause 6 (Documents), the agreement in the Agreed Form between the Operator Partner and the Leisure Operator relating to the Leisure Services

**Leisure Contract Dispute
Leisure Operator**

has the meaning given to it in Clause 70.16.2

[INSERT NAME AND COMPANY NUMBER] or such other leisure operator as the Operator Partner may, subject to the terms of this Agreement appoint to provide the Leisure Services

Leisure Operator's Base Trading Account or LOBTA

the financial model included at Schedule 23 (LOBTA) and agreed between the parties prior to the Commencement Date (as updated from time to time in accordance with this Agreement) for the purpose of, amongst other things, calculating the Annual Payment

Leisure Services

the services set out in the Services Specification other than the Maintenance Services

LGPS	the Local Government Pension Scheme
LGPS Regulations	the Local Government Pension Scheme Regulations 2013; The Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014; The Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 (as amended); and The Local Government (Discretionary Payments) (Injury Allowances) Regulations 2011 (where appropriate)
Lifecycle Assets	each item of building fabric, plant and machinery, furniture, fittings and equipment to be renewed or replaced during the Contract Period as identified in the Lifecycle Schedule within the Schedule of Programmed Maintenance or as may be identified by the parties applying Good Industry Practice, comprising the Authority Lifecycle Items and the Operator Partner Lifecycle Items
Lifecycle Profile	the amounts profiled to be spent by the Operator Partner on the replacement or renewal of Operator Partner Lifecycle Items at each Facility as shown in the LOBTA [in row []] as at the Commencement Date as may be adjusted from time to time in accordance with this Agreement
Lifecycle Schedule	the detailed annual lifecycle schedule showing when the Lifecycle Assets will be renewed or replaced, and forming part of the Schedule of Programmed Maintenance
Local Authority	a principal council (as defined in Section 270 of the Local Government Act 1972) or any body of government in England established as a successor to principal councils in relation to leisure services
Losses	all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses) and charges whether arising under statute, contract or at common law, or in connection with judgments, proceedings, internal costs or demands
Loss of Revenue	the decrease in Revenue (whether of a one-off or recurring nature) arising as a direct result of a Loss of Revenue Event or Relevant Event calculated and paid in accordance with Schedule 21 (Loss of Revenue)

Loss of Revenue Event	an event occurring pursuant to one or more of the following: <ul style="list-style-type: none"> (a) Clause 14.9; (b) Clause 17 (Emergencies); (c) Clause 30.5.1; or (d) Clause 18.5
Maintenance Services	those services set out in paragraphs 4.1 to 4.5 of the Services Specification
Maintenance Works	any works of maintenance or repair of the Facilities that are necessary to ensure that the Facilities are maintained in accordance with the Services Specification and Service Delivery Proposals (including, without limitation, the renewal or replacement of any plant and equipment) throughout the Contract Period
Medium Value Change	has the meaning given to it in the Change Protocol
Method Statement	the Operator Partner's method statements in relation to the Services as included in the Service Delivery Proposals
Minimum Opening Hours	the hours of required opening of the Facilities to Users as set out in paragraph 2.3.10 (table 2.4) of the Services Specification
Monthly Payment	an amount calculated in accordance with Part 1 of the PPM, and which is payable in respect of each Contract Month
Necessary Consents	all permits, licences, permissions, consents, approvals, certificates and authorisations (whether statutory or otherwise) which are required for the performance of any of the Operator Partner's obligations under this Agreement, whether required in order to comply with Legislation or as a result of the rights of any third party
New Operator Partner	the person who has entered or who will enter into the Retendered Contract with the Authority following termination of this Agreement or the person who has entered or will enter into a new contract with the Authority following the expiry of this Agreement
Notice of Adjudication	has the meaning given to it in Clause 70.3

Occasion of Tax NonCompliance

- (a) any tax return of the Operator submitted to a Relevant Tax Authority on or after 1 October 2012 is found on or after 1 April 2013 to be incorrect as a result of:
 - (i) a Relevant Tax Authority successfully challenging the Operator under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle; or
 - (ii) the failure of an avoidance scheme which the Operator was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or
- (b) any tax return of the Operator submitted to a Relevant Tax Authority on or after 1 October 2012 gives rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax related offences which is not spent at the Commencement Date or to a civil penalty for fraud or evasion

Operating Manual

has the meaning given to it in Clause 15.3.1

Operator Partner Change

has the meaning given in the Change Protocol

Operator Partner Damage

any damage to any Facility or Site caused by any omission, default or negligent act by the Operator Partner or an Operator Partner Related Party

Operator Partner Default

any one or more of the following:

- (a) a breach by the Operator Partner of any of its obligations under this Agreement which materially and adversely affects the performance of the Services;
- (b) a Persistent Breach occurs;
- (c) a court makes an order that the Operator

Partner [or Holdco] be wound up or a resolution for a voluntary winding-up of the Operator Partner [or Holdco] is passed;

- (d) any receiver or receiver manager in respect of the Operator Partner [or Holdco] is appointed or possession is taken by or on behalf of any creditor of any property of the Operator Partner [or Holdco] that is the subject of a charge;
- (e) any voluntary arrangement is made for a composition of debts or a scheme of arrangement is approved under the Insolvency Act 1986 or the Companies Act 2006 in respect of the Operator Partner [or Holdco];
- (f) an administration order is made or an administrator is appointed in respect of the Operator Partner [or Holdco];
- (g) failure to comply with Clauses 61.2 and 61.3 or Clause 0 (Change in Ownership);
- (h) the criterion set out at paragraph 10 of the PPM is met;
- (i) in any three (3) month rolling retrospective period five or more Performance Failures occur;;
- (j) in each and every month of any six (6) month rolling period, one or more Performance Failures occur;
- (k) subject to Clause 35 (Risks that become Uninsurable) a breach by the Operator Partner of its obligations to take out and maintain any of the Operator Partner Insurances;
- (l) the Operator Partner committing a material breach of its obligations under this Agreement (other than as a consequence of a breach by the Authority of its obligations under this Agreement) which results in the criminal investigation, prosecution and conviction of the Operator Partner or any Operator Partner Related Party or the Authority under the Health and Safety Regime (an H&S Conviction) provided that an H&S Conviction of an Operator

Partner Related Party or the Authority shall not constitute an Operator Partner Default if, within ninety (90) Business Days from the date of the H&S Conviction (whether or not the H&S Conviction is subject to an appeal or any further judicial process), the involvement in the Services of each relevant Operator Partner Related Party (which in the case of an individual director, officer or employee shall be deemed to include the Operator Partner Related Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by the Operator Partner in accordance with Clauses 61.2 and 61.3 provided always that in determining whether to exercise any right of termination or right to require the termination of the engagement of an Operator Partner Related Party under this limb (k), the Authority shall:

- (i) act in a reasonable and proportionate manner having regard to such matters as the gravity of any offence and the identity of the person committing it; and
- (ii) give all due consideration, where appropriate, to action other than termination of this Agreement; or
- (m) the warranty set out at clause 4.1.8 is not accurate or an incident of Tax Non-Compliance occurs;
- (n) this Agreement has been subject to a substantial variation which would have required a new procurement procedure in accordance with regulation 72(9) of the PCR (provided that, where this variation was at the request of the Authority, this will not be deemed to be an Operator Partner Default);
- (o) the Operator Partner was, at the time when this Agreement was awarded, in one of the situations referred to in regulation 57(1) of the PCR, including as a result of the application of regulation 57(2), and therefore should not have been awarded this Agreement

Operator Partner Insurances

the insurances set out at Part 2 of Schedule 13 (Insurances) and any insurances required by law

Operator Partner IPR

any Intellectual Property Rights created by or on behalf of the Operator Partner, the Leisure Operator or the FM Contractor in respect of, in each case, their:

- (a) brand names, trademarks, trade names, designs, logos, domain names and name;
- (b) know-how and business systems;
- (c) quality management procedures and customer care programme;
- (d) sales and customer retention products and processes;
- (e) corporate policies and training documentation;
- (f) intranet, integrated management system and supporting documentation; and
- (g) Service Delivery Proposals, but excluding:
 - (i) the Operating Manual;
 - (ii) any User or member database relevant Facilities; and
 - (iii) any booking system used at and in respect of the Facilities

Operator Partner Lifecycle Items

those Lifecycle Assets at the Facilities which are shown as the Operator Partner's responsibility at Appendix 7 (Lifecycle Replacement Responsibility Matrix) of the Services Specification and any other Lifecycle Assets at the Facilities which are not Authority Lifecycle Items

Operator Partner Notice of Change

has the meaning given in the Change Protocol

Operator Partner Physical Damage Policies

has the meaning given to it in Clause 34.1

Operator Partner Related Party	<p>(a) an officer, servant or agent of the Operator Partner, or any Affiliate of the Operator Partner and any officer, servant or agent of such a person;</p> <p>(b) any Sub-Contractor or other sub-contractor of the Operator Partner of any tier and any of their officers, servants or agents; and</p> <p>(c) any person on or at any of the Facilities at the express or implied invitation of the Operator Partner (other than an Authority Related Party or a User)</p>
Operator Partner Warranted Data	the information relating to the Operator Partner and its Affiliates contained in Schedule 10 (Warranted Data)
Operator Partner's Holding Company	[] or such other person as shall guarantee the obligations of the Operator Partner under this Agreement
Operator Partner's Representative	the person to be appointed by the Operator Partner pursuant to Clause 16.6
Performance Adjustments	payments due, in respect of Performance Failures, from the Operator Partner to the Authority pursuant to Schedule 5
Performance Failure	has the meaning given to it in paragraph 1 of Schedule 5
Persistent Breach	a breach for which a Final Warning Notice has been issued which has continued for more than fourteen (14) days or recurred in three (3) or more months within the six (6) month period following the date on which such Final Warning Notice is served on the Operator Partner
Personal Data	personal data as defined in the Data Protection Legislation which is supplied to the Operator Partner by (or on behalf of) the Authority or obtained or otherwise Processed by (or on behalf of) the Operator Partner in the course of performing or providing the Services and includes an special categories of personal data and personal data relating to actual or potential criminal offences
PPM	the payment and performance mechanism set out at Schedule 6
Prescribed Rate	two per cent (2%) above the base rate of the bankers of the Authority from time to time

Processor	has the definition in, and shall be interpreted in accordance with, the Data Protection Legislation
Processing	has the definition in, and shall be interpreted in accordance with, the Data Protection Legislation, and the term "Process" and shall be construed accordingly
Profit Payment	the loss of profit suffered by the Operator Partner as a result of termination of this Agreement pursuant to Clause 39 (Voluntary termination by the Authority) or Clause 43 (Termination on Authority Default) for the period of 12 months from the date of termination or the period to the Expiry Date (whichever is shorter) (as shown at Schedule 23 (LOBTA)), subject to a cap of £300,000
Programmed Maintenance	the maintenance work and lifecycle replacement which the Operator Partner is to carry out in accordance with the Schedule of Programmed Maintenance
Programmed Maintenance Information	has the meaning given to it in Clause 14.11
Prohibited Act	<p>(a) to directly or indirectly offer, promise or give any person working for or engaged by the Authority a financial or other advantage to:</p> <ul style="list-style-type: none"> (i) induce that person to perform improperly a relevant function or activity; or (ii) reward that person for improper performance of a relevant function or activity; <p>(b) to directly or indirectly request, agree to receive or accept any financial or other advantage as an inducement or a reward for improper performance of a relevant function or activity in connection with this Agreement; (c) an offence:</p> <ul style="list-style-type: none"> (i) under the Bribery Act 2010 (or any legislation repealed or revoked by such Act); (ii) under legislation or common law concerning fraudulent acts; or

	(iii) defrauding, attempting to defraud or conspiring to defraud the Authority; or
	(d) any activity, practice or conduct which would constitute one of the offences listed under (c) above if such activity, practice or conduct had been carried out in the UK
Project Data	(a) all Design Data; and
	(b) any other materials, documents or data acquired, brought into existence or used in relation to the Services or this Agreement,
	in each case that is used by or on behalf of the Operator Partner and/or its sub-contractors in connection with the provision of the Services or the performance of the Operator Partner's obligations under this Agreement
Project Documents	the documents listed in Part 1 of Schedule 11 (Project Documents and Ancillary Documents)
Proposed Workforce	has the meaning given to in in Clause 59.7
Protected Characteristics	has the meaning given to it in Part 2, Chapter 1 of the Equality Act 2010
PCR	the Public Contracts Regulations 2015
Qualification Criteria	the criteria that the Authority requires tenderers to meet as part of the Retendering Process, which (subject to compliance with the procurement regulations) shall be:
	(a) the Retendered Contract terms;
	(b) tenderers should have the financial ability to deliver the Services for the price tendered;
	(c) tenderer is experienced in providing the Services or similar services;
	(d) the technical solution proposed by the tenderers is capable of delivery and the tenderer is technically capable of delivery of the Services; and
	(e) any other tender criteria agreed by the Authority and the Operator Partner

Qualifying Change in Law	means: <ul style="list-style-type: none"> (a) a Discriminatory Change in Law; (b) a Specific Change in Law; (c) a General Change in Law, which involves Capital Expenditure; and (d) which was not foreseeable at the Commencement Date
Quest	the UK Quality Scheme for Sport and Leisure of the same name (supported by, inter alia, Sport England) or any successor scheme thereto that is supported by Sport England (or its successors)
Recipient	has the meaning given to it in Clause 36.19
Redundancy Costs	those amounts owed and payable to an employee by a statutory and/or contractual entitlement as a result of a redundancy situation
Referral Notice	has the meaning given to it in Clause 70.5
Referring Party	has the meaning given to it in Clause 70.3
Relevant Authority	any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom or of the European Union
Relevant Employees	the employees who are the subject of a Relevant Transfer, which may include Transferring Employees
Relevant Event	an Authority Change, Qualifying Change in Law, Compensation Event, step-in without Operator Partner breach pursuant to Clause 18.5 or other matter as a result of which there may be an adjustment to the Annual Payment in accordance with Clause 37 (Financial Adjustments)
Relevant Payment	has the meaning given to it in Clause 35.4
Relevant Requirements	all applicable Law relating to bribery, corruption and fraud, including the Bribery Act 2010 and any guidance issued by the Secretary of State for Justice pursuant to section 9 of the Bribery Act 2010
Relevant Tax	HMRC, or, if applicable, a tax authority in the

Authority	jurisdiction in which the Operator is established
Relevant Transfer	a relevant transfer for the purposes of TUPE
Relief Event	<p>any of the following:</p> <ul style="list-style-type: none"> (a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, riot and civil commotion; (b) failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services; (c) any accidental loss or damage to the Sites or any roads servicing them; (d) any failure or shortage of power, fuel or transport; (e) any blockade or embargo which does not constitute a Force Majeure Event; (f) any: <ul style="list-style-type: none"> (i) official or unofficial strike; (ii) lockout; (iii) go-slow; or (iv) other dispute, generally affecting the facilities management industry or a significant sector of the local authority leisure management industry in the United Kingdom but not including industrial action specific to the Sites or industrial action which affects only the employees of the Operator Partner or its Sub-Contractors, <p>unless any of the events listed above arises (directly or indirectly) as a result of any wilful default or wilful act of the Operator Partner or any of its Sub-Contractors</p>
Replies to Enquiries	the matters set out in Part 3 of Schedule 12 (Title Matters)
Representative	the Authority's Representative or the Operator Partner's Representative (as appropriate)

Request for Information	shall have the meaning set out in the FOIA or the Environmental Information Regulations as relevant (where the meaning set out for the term "request" shall apply)
Required Action	has the meaning given to it in Clause 18.3
Required Standard	has the meaning given to it in Clause 52.3.1
Responding Party	has the meaning given to it in Clause 70.5
Response	has the meaning given to it in Clause 70.6
Retendered Annual Payment	has the meaning given to it in Clause 46.1.7
Retendered Contract	<p>an agreement entered into following the Retendering Process with a replacement contractor on substantially similar terms and conditions as and which are no more onerous as regards the Operator Partner than this Agreement and the Head Leases at the Termination Date, but with the following amendments:</p> <ul style="list-style-type: none"> (a) any accrued Performance Failures and/or Performance Adjustments and/or warning notices issued pursuant to Clause 41 (Termination for Persistent Breach by the Operator Partner) shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial adjustments, be cancelled; (b) the term of such agreements shall be equal to the term from the Termination Date to the Expiry Date; and (c) any other amendments which do not adversely affect the Operator Partner
Retendering Costs	the reasonable and proper costs of the Authority incurred in carrying out the Retendering Process
Retendering Process	shall have the meaning given in Clause 46 (Retendering Process)
Retention Fund Account	has the meaning given to it in Clause 52.5
Returning Employees	those employees wholly or mainly engaged in the provision of the Services as the case may be as

	immediately before the Return Date(s) whose employment transfers to the Authority or a Future Operator Partner pursuant to TUPE
Revenue	the revenue or income received by the Operator Partner, [the Leisure Operator] (or where relevant would have been received but for the occurrence of a Relevant Event or Loss of Revenue Event) from Users of the relevant Facility for the provision of the Leisure Services at the relevant Facility
Review Procedure	the procedure set out in Schedule 7 (Review Procedure)
Schedule of Programmed Maintenance	the Operator Partner's annual programme for the maintenance of each Facility to satisfy the Services Specification which includes the Lifecycle Schedule
Serious Performance Failure	any Performance Failure which, in the reasonable opinion of the Council results, or may result, in: <ul style="list-style-type: none"> (a) any health and safety or similar risk to any person; (b) damage to the reputation of the Council; or (c) the investment of management time by the Council in seeking to resolve the issue including (but not limited to) where the Performance Failure has generated complaints from any stakeholder
Service Commencement Date	1 April 2021
Service Delivery Proposals	the proposals for the method of providing the Services to satisfy the Services Specification set out in Schedule 2 (Service Delivery Proposals)
Service Standards	the standards required by the Authority in relation to the Operator Partner's performance of the Services as set out in Schedule 5 Payment & Performance Monitoring System
Service Transfer Date	the transfer on a date agreed by the parties to the Operator Partner of responsibility for provision of (or procuring the provision by Sub-Contractors of) the Services in accordance with this Agreement
Services	the services required to satisfy the Services Specification

Services Media	all pipes, sewers, drains, mains, ducts, conduits, gutters, water courses, wires, cables, meters, switches, channels, flues and all other conducting media, appliances and apparatus including any fixtures, louvres, cowls and other ancillary apparatus
Services Specification	the specification contained in Schedule 1 (Services Specification)
Shareholder	any person from time to time holding share capital in the Operator Partner [or Holdco]
Site Conditions	the conditions of the Sites including (but not limited to) climatic, hydrological, hydrogeological, ecological, environmental, geotechnical and archaeological conditions
Site Plans	the plans of the Sites set out in Schedule 4 (Site Plans)
Sites	the area edged red on the relevant Site Plan for each Facility together with the Buildings and the service ducts and media for all utilities and services serving the Buildings
Specific Change in Law	any Change in Law which specifically refers to the operation and maintenance of premises for the provision of a service the same as or similar to the Services or to the holding of shares in companies whose main business is the operation and maintenance of premises for the provision of services the same as or similar to the Services
Sport England	Sport England (or its successors) of First Floor, 21 Bloomsbury Street, London WC1B 3HF
Sport England Guidance	the guidance adopted and published by Sport England at the Commencement Date together with any changes in such guidance which were reasonably foreseeable at the Commencement Date
Sub-Contractor	each of [the FM Contractor and the Leisure Operator] or any other person engaged by the Operator Partner from time to time as may be permitted by this Agreement to procure the provision of the Services (or any of them). References to sub-contractors means sub-contractors (of any tier) of the Operator Partner
Sub-Contractor Breakage Costs	Losses that have been or will be reasonably and properly incurred by the Operator Partner as a direct result of the termination of this Agreement, but only to the extent that:

- (a) the Losses are incurred in connection with the provision of Services, including:
 - (i) any materials or goods ordered or subcontracts placed that cannot be cancelled without such Losses being incurred;
 - (ii) expenditure incurred in anticipation of the provision of Services in the future;
 - (iii) the cost of demobilisation including the cost of any relocation of equipment used in connection with the Services; and
 - (iv) redundancy payments
- (b) the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms;
- (c) the Operator Partner and the relevant SubContractor has each used its reasonable endeavours to mitigate the Losses; and
- (d) the Losses do not include any element of Profit Payment

Sub-Contracts	the contracts entered into between the Operator Partner and the Sub-Contractors
Submitted Item	has the meaning given to it in paragraph 1.2 of Schedule 7 (Review Procedure)
Subsidiary	has the meaning given to it in Section 1159 of the Companies Act 2006
Suitable Third Party	any person who is not an Unsuitable Third Party
Supplier	has the meaning given to it in Clause 36.19
Surplus Annual Payment	the Annual Payment where it is a positive number
Tax	any kind of tax, duty, levy or other charge (other than VAT) whether or not similar to any in force at the Commencement Date and whether imposed by a local, governmental or other Relevant Authority in the United Kingdom or elsewhere

Termination Date	the date of early termination of this Agreement in accordance with its terms
Termination Notice	a written notice of termination given by one party to the other, notifying the party receiving the notice of the intention of the party giving notice to terminate this Agreement on a specified date and setting out the grounds for termination
Termination Sum	any compensation payable by the Authority to the Operator Partner or the Operator Partner to the Authority on an early termination of this Agreement under Clauses 44 (Compensation on Termination for Authority Default/Voluntary Termination), 45 (Compensation on Termination for Operator Partner Default and Corrupt Gifts and Fraud) and 47 (Compensation on Termination for Force Majeure)
Third Party Claim	has the meaning given to it in Clause 31.5
Transferring Employees	those employees of the Existing Operator Partner that are likely to, or will, be subject to a Relevant Transfer to the Operator Partner on the Service Transfer Date by way of TUPE
Transferring Original Employee	<p>a former employee of the Authority who was employed in connection with the provision of the Services:</p> <ul style="list-style-type: none"> (a) who became an employee of someone other than the Authority pursuant to an agreement, to which the TUPE applied; between the Authority and a service provider in respect of the provision of the Services; (b) whose contract of employment on each occasion when an intervening contract was carried out in respect of the provision of the Services, transferred to another third party service provider; and (c) whose contract of employment transfers under this Agreement to the Operator Partner or a Sub-Contractor
TUPE	the Transfer of Undertaking (Protection of Employment) Regulations 2006 (246/2006) as amended and/or any other Regulations enacted for the purpose of implementing the Directive into English law
[Underlease	the underleases relating to the Sites to be granted by the Operator Partner to the Leisure Operator in the Agreed Form]

Uninsurable

in relation to a risk, either that:

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

Uninsured Losses

losses arising from any risks against which the Operator Partner or any Operator Partner Related Party does not maintain insurance (where not required to maintain insurance for such risk under this Agreement or by law), provided that neither:

- (d) the amount of any losses that would otherwise be recoverable under any Operator Partner Insurance but for the applicable uninsured deductible in respect of such insurance; nor
- (e) any exclusion of loss of insurance proceeds caused by or contributed to by any act or omission of the Operator Partner or any Operator Partner Related Party

shall be treated as Uninsured Loss

Unsuitable Third Party

any person:

- (a) who has a material interest in the production, distribution or sale of tobacco products, alcoholic drinks and/or pornography;
- (b) whose activities are, in the reasonable opinion of the Authority, incompatible with the provision of leisure services in the area; or
- (c) whose activities, in the reasonable opinion of the Authority, pose or could pose a threat to national security

Users

those persons who use, or are entitled to use (whether they have done so or not) the Facilities and/or any or all of the Services from time to time

Utilities	each of natural gas, fuel oil, electricity, water and other utilities that may be required in order to provide the Services at the Facilities
VAT	value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994
Warranted Data	the information relating to the Operator Partner and its Affiliates contained in Schedule 10 (Warranted Data)
Zone	has the meaning set out in Schedule 5 (PPM).

1.2 INTERPRETATION

In this Agreement except where the context otherwise requires:

- 1.2.1 masculine includes the feminine and vice-versa;
- 1.2.2 the singular includes the plural and vice versa;
- 1.2.3 a reference to any Clause, sub-Clause, paragraph, Schedule, recital or annex is, except where expressly stated to the contrary, a reference to such Clause, sub-Clause, paragraph, Schedule, recital or annex of and to this Agreement;
- 1.2.4 save where stated to the contrary, any reference to this Agreement or to any other document shall include any permitted variation, amendment or supplement to such document;
- 1.2.5 any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument as amended, replaced, consolidated or reenacted;
- 1.2.6 a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
- 1.2.7 headings are for convenience of reference only;
- 1.2.8 words preceding "include", "includes", "including" and "included" shall be construed without limitation by the words which follow those words; and
- 1.2.9 unless expressly stated to the contractor, obligations of either Party under this Agreement, or actions taken by the Parties pursuant to this Agreement, shall be performed at that Party's own cost.

Schedules

- 1.3 The Schedules to this Agreement form part of this Agreement.

Indexation

- 1.4 Unless expressly stated otherwise, references to amounts or sums expressed to be “indexed” are references to amounts or sums in August 2021 (**Base Date**) prices which will be adjusted whenever the provision containing the amount or sum is given effect in accordance with this Agreement to reflect the effects of inflation after that date. The adjustment shall be measured on the relevant calculation date (which unless expressly provided to the contrary shall be 1 April 2022 and each anniversary thereof) by changes in the Index from the Base Date as calculated in accordance with the following formula:

$$\text{Amount or sum in Base Date prices} \times \frac{\text{Index}_d}{\text{Index}_0}$$

Where Index_d is the value of the Index published or determined with respect to the month falling two months prior to the relevant calculation date and Index_0 is the value of the Index on the Base Date.

Precedence of Documentation

- 1.5 In the event of any inconsistency between the provisions of the body of this Agreement and the Schedules, or between the Schedules, the inconsistency shall be resolved according to the following descending order of priority:
- 1.5.1 the Clauses of this Agreement and Schedule 5 (PPM), Schedule 7 (Review Procedure), Schedule 15 (NNDR), Schedule 17 (Benchmarking), Schedule 17 (Surplus Share), and Schedule 22 (Change Protocol);
 - 1.5.2 Schedule 1 (Services Specification);
 - 1.5.3 the Schedules (excluding the Schedules referred to above and Schedule 2 (Service Delivery Proposals); and
 - 1.5.4 Schedule 2 (Service Delivery Proposals).

Responsibility for Related Parties

- 1.6 Subject to the provisions of this Agreement, the Operator Partner shall be responsible as against the Authority for the acts and omissions of the Operator Partner Related Parties as if they were the acts and omissions of the Operator Partner and the Authority shall be responsible as against the Operator Partner for the acts and omissions of the Authority Related Parties as if they were the acts and omissions of the Authority. The Operator Partner shall, as between itself and the Authority, be responsible for the selection of and pricing by all Operator Partner Related Parties.

Approval

- 1.7 Neither the giving of any approval, consent, examination, acknowledgement, knowledge of the terms of any agreement or document nor the review of any document or course of action by or on behalf of the Authority, nor the failure of the same, shall unless otherwise expressly stated in this Agreement, relieve the Operator Partner of any of its obligations under the Project Documents or of any

duty which it may have hereunder to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the approval, consent, examination, acknowledgement or knowledge.

Succession

- 1.8 References to a public organisation (other than the Authority) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation. References to other persons (other than the Authority) shall include their successors and assignees.

2. COMMENCEMENT AND DURATION

2.1 Subject to Clause 2.2, this Agreement and the rights and obligations of the parties shall come into force on the date of this Agreement and (subject to the provisions for early termination set out in this Agreement) shall continue until the Expiry Date.

2.2 The Expiry Date may be extended by a single period of five years by agreement between the parties.

3. COLLATERAL WARRANTIES, SURVEYS AND GUARANTEES

3.1 The Operator Partner shall:

3.1.1 on or before the Commencement Date deliver to the Authority:

- (a) the Collateral Warranties from the Leisure Operator and the FM Contractor to the Authority;
- (b) certified copies of the Ancillary Documents; and
- (c) [deliver to the Authority the Parent Company Guarantee/Bond on or before the Commencement Date]; and

3.1.2 not engage any new Leisure Operator or FM Contractor in connection with this Agreement unless such person has delivered to the Authority a duly executed agreement substantially in the Agreed Form of the relevant Collateral Warranty and in each case such Collateral Warranties must be delivered to the Authority before such entity enters onto any Site.

4. GENERAL WARRANTIES

Operator Partner Warranties

4.1 The Operator Partner warrants and represents to the Authority that on the date hereof:

4.1.1 it is properly constituted and incorporated under the laws of England and Wales and has the corporate power to own its assets and to carry on its business as it is now being conducted;

- 4.1.2 it has full capacity and authority to enter into and perform this Agreement;
- 4.1.3 this Agreement is executed by its duly authorised representative;
- 4.1.4 it has all necessary consents and regulatory approvals to enter into this Agreement;
- 4.1.5 the execution, delivery and performance of its obligations under this Agreement does not contravene any provision of:
- (a) any existing Legislation either in force, or enacted but not yet in force binding on the Operator Partner;
 - (b) the Memorandum and Articles of Association of the Operator Partner;
 - (c) any order or decree of any court or arbitrator which is binding on the Operator Partner; or
 - (d) any obligation which is binding upon the Operator Partner or upon any of its assets or revenues;
- 4.1.6 the Warranted Data is true and accurate in all respects;
- 4.1.7 there are no actions, suits or proceedings or regulatory investigations before any court or administrative body or arbitration tribunal pending or, to its knowledge, threatened against it that might affect its ability to perform its obligations under this Agreement;
- 4.1.8 it has notified the Authority in writing of any Occasions of Tax NonCompliance and any litigation in which it is involved that is in connection with any Occasion of Tax Non-Compliance;
- 4.1.9 it is not the subject of any other obligation, compliance with which will or is likely to have a material adverse effect on the ability of the Operator Partner to perform its obligations under this Agreement;
- 4.1.10 no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Operator Partner, threatened) for its winding-up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator, trustee or similar officer in relation to any of its assets or revenues;
- 4.1.11 each of the Ancillary Documents is or, when executed, will be in full force and effect and constitutes or, when executed, will to the extent permitted by law constitute the valid, binding and enforceable obligations of the parties thereto; and
- 4.1.12 the copies of the Project Documents which the Operator Partner has delivered or, when executed, will deliver to the Authority are or, as the case may be, will be true and complete copies of such documents and there are

not in existence any other agreements or documents replacing or relating to any of the Project Documents which would materially affect the interpretation or application of any of the Project Documents,

and the Authority relies upon such warranties and representations.

Operator Partner Undertakings

4.2 The Operator Partner undertakes with the Authority that for so long as this Agreement remains in full force:

4.2.1 it will upon becoming aware that any litigation, arbitration, administrative or adjudication or mediation proceedings before or of any court, arbitrator or Relevant Authority may be threatened or pending and immediately after the commencement thereof (or within twenty (20) Business Days of becoming aware the same may be threatened or pending or within twenty (20) Business Days after the commencement thereof where the litigation or arbitration or administrative or adjudication or mediation proceedings is against a Sub-Contractor) give the Authority notice of all such litigation, arbitration, administrative or adjudication or mediation proceedings which would adversely affect, to an extent which is material in the context of this Agreement, the Operator Partner's ability to perform its obligations under this Agreement;

4.2.2 it will not without the prior written consent of the Authority (and whether by a single transaction or by a series of transactions whether related or not) sell, transfer, lend or otherwise dispose of (other than by way of security) the whole or any part of its business or assets which would materially affect the ability of the Operator Partner to perform its obligations under this Agreement;

4.2.3 it will not cease to be resident in the United Kingdom or transfer in whole or in part its undertaking, business or trade outside the United Kingdom; and

4.2.4 it will not undertake the performance of its obligations under this Agreement for the provision of the Services otherwise than through itself or a Sub-Contractor.

Status of Warranties

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

5. AUTHORITY WARRANTIES

No Warranty by Authority

5.1 Subject to Clause 5.3, Clause 5.4 the Authority does not give any warranty or undertaking as to the relevance, completeness, accuracy or fitness for any purpose of any of the Disclosed Data.

No Liability to Operator Partner

5.2 Subject to Clause 5.3 and Clause 5.4 neither the Authority nor any of its agents or employees shall be liable to the Operator Partner in contract, tort (including negligence or breach of statutory duty), statute or otherwise as a result of:

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

5.2.2 any failure to make available to the Operator Partner any materials, documents, drawings, plans or other information relating to this Agreement.

Fraudulent Statements

5.3 Nothing in this Clause 5 (Authority Warranties) shall exclude any liability which the Authority or any of its agents or employees would otherwise have to the Operator Partner in respect of any statements made fraudulently prior to the Commencement Date.

Authority Title Warranty

5.4 The Authority warrants to the Operator Partner on the terms set out in Part 1 of Schedule 12 (Title Matters), provided that no inaccuracies or omissions in such information shall be capable of giving rise to an Authority Default.

Operator Partner's Due Diligence

5.5 The Operator Partner shall, subject to the terms of this Agreement, be deemed to have:

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

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

- (a) information as to the nature, location and condition of the Facilities;
- (b) information relating to areas of natural interest, local conditions and facilities in the Facilities and the quality of existing structures forming part of each Facility;
- (c) any other risk or contingency that affects the performance of the Services and/or affects the performance of the Operator Partner's obligations under this Agreement; and (d) [other relevant information].

No Relief

- 5.6 Subject to Clause 5.3 and Clause 5.4 the Operator Partner shall not in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against the Authority on grounds that any information, whether obtained from the Authority or otherwise (including information made available by the Authority), is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.

Operator Partner acknowledgement

- 5.7 The Operator Partner hereby acknowledges and agrees that it has been provided with copies of all of the Disclosed Title Matters, Replies to Enquiries and Disclosed Searches listed in Part 2, Part 3 and Part 4 of Schedule 12 (Title Matters) and that all such matters that are disclosed within the Disclosed Title Matters, Replies to Enquiries and Disclosed Searches are disclosed against the warranties set out in Part 1 of Schedule 12 (Title Matters).

6. DOCUMENTS

Ancillary Documents

- 6.1 The Operator Partner shall perform its obligations under, and observe all of the provisions of, the Ancillary Documents and shall not:

6.1.1 terminate or agree to the termination of all or part of any Ancillary Document;

6.1.2 make or agree to any material variation of any Ancillary Document;

6.1.3 in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Ancillary Document;
or

6.1.4 enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Ancillary Document,

unless the proposed course of action (and any relevant documentation) has been submitted to the Authority's Representative for review under the Review Procedure and there has been no objection in accordance with paragraph 3 of the Review Procedure within twenty (20) Business Days of receipt by the Authority's Representative of the submission of the proposed course of action (and any relevant documentation), or such shorter period as may be agreed by the parties, and, in the circumstances specified in Clause 6.1.1, the Operator Partner has complied with Clauses 61 (Assignment and Sub-Contracting) and 0 (Change in Ownership).

Delivery of Changed Ancillary Documents

- 6.2 Without prejudice to the provisions of Clause 6.1, if at any time an amendment is made to any Ancillary Document, or the Operator Partner enters into a new Ancillary Document (or any agreement which affects the interpretation or application of any

Ancillary Document), the Operator Partner shall deliver to the Authority a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation (as the case may be), certified as a true copy by an officer of the Operator Partner.

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PART 2 - LAND AND SITE MATTERS

7. NATURE OF LAND INTERESTS

Grant of the Head Lease

7.1 On or before the Commencement Date the Authority shall grant to the Operator Partner, and the Operator Partner shall accept, the Head Lease for the Sites.

Exclusion of Security of Tenure for the Head Lease

7.2 The Operator Partner hereby confirms that before it became contractually bound to enter into the tenancy created by the Head Lease pursuant to this Agreement:

7.2.1 [] the Authority served on the Operator Partner a notice dated [] day of [] in relation to the tenancy created by the Head Lease (**Head Lease Notice**) in a form complying with the requirements of Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (**Order**);

7.2.2 the Operator Partner, or a person duly authorised by the Operator Partner, in relation to the Head Lease Notice made a statutory declaration (Head Lease Declaration) dated [] day of [] in a form complying with the requirements of Schedule 2 of the Order;

7.2.3 the Operator Partner further confirms that, where the Head Lease Declaration was made by a person other than the Operator Partner, the declarant was duly authorised by the Operator Partner to make the Head Lease Declaration on the Operator Partner's behalf; and

7.2.4 the Authority and the Operator Partner agree to exclude the provisions of sections 24 to 28 (inclusive) of the Landlord and Tenant Act 1954 in relation to the tenancy created by the Head Lease.

Grant of the Head Lease

7.3 The grant of the Head Leases shall take place at the offices of the Authority's solicitors [DETAILS TO BE INSERTED]. The term of the Head Lease relating to the Facilities shall commence on the Commencement Date.

Registration

7.4 The Operator Partner shall apply for, and procure, registration of the Head Leases at the Land Registry as soon as reasonably practicable after the relevant Head Lease is completed. The Authority shall use all reasonable endeavours to assist the Operator Partner in responding to any proper requisitions raised by the Land Registry of such documents that are in the Authority's possession relating to the freehold reversion as the Land Registry may request.

Early Termination

7.5 If this Agreement is terminated for any reason prior to the Expiry Date, the Head Leases shall automatically cease and determine with effect from the date of termination of this Agreement (or, if not granted at the time, the obligation to grant the Head Leases shall automatically cease to apply). Where the Head Leases have been entered into, the Operator Partner shall forthwith deliver to the Authority the Head Leases together with all relevant title deeds, releases from any charge and a direction to the Chief Land Registrar to cancel the registered titles relating to the Head Leases. The Operator Partner shall take all steps as may be proper and reasonable to cancel or assist in the cancellation of all entries at the Land Registry and the Land Charges Registry in relation to the Head Leases.

No Compensation

7.6 The Operator Partner shall not be entitled to any compensation in respect of any variation of the terms of the Head Leases or the unexpired part of its interest as tenant under the Head Leases on assignment or surrender or automatic determination in accordance with this Clause.

Compliance with Disclosed Title Matters

7.7 The Operator Partner shall without prejudice to Clause 5.4 procure that:

7.7.1 the provision of the Services at the Sites by or on behalf of the Operator Partner shall be carried out in a manner which does not breach any provisions of the Disclosed Title Matters relating to the Sites or the Facilities; and

7.7.2 in providing the Services at the Sites, there shall be no action, or omission to act by the Operator Partner or any Operator Partner Related Party, which shall give rise to a right for any person to obtain title to or any right or interest over the Sites or any part of them (save in accordance with the terms of this Agreement).

Compliance with Head Lease

7.8 The Authority and the Operator Partner shall comply with their respective obligations in the Head Leases.

[Grant of Underlease[s]]

7.9 The Authority hereby agrees to the grant by the Operator Partner to the Leisure Operator of the Underlease[s]].

8. THE SITES

Access

8.1 Subject to the other terms of this Agreement if at any time the Operator Partner requires access to the Sites or any interest in any land which does not form part of the Sites or any additional rights beyond those which the Operator Partner has in

relation to any part of the Sites, the responsibility and cost of securing or acquiring such access or interest shall be entirely the responsibility of the Operator Partner.

Site Matters

8.2 Subject to the other terms of this Agreement, the Site Conditions shall be the sole responsibility of the Operator Partner and accordingly (but without prejudice to any other obligation of the Operator Partner under this Agreement) the Operator Partner shall be deemed to have:

8.2.1 inspected and examined the Sites and their surroundings and (where applicable) any existing structures on the Sites;

8.2.2 satisfied itself as to the nature of the Site Conditions, the form and nature of the Sites, the risk of injury or damage to property affecting the Sites, and the nature of the works, labour and materials necessary for the execution of the Services;

8.2.3 satisfied itself as to the adequacy of the means and rights of access to and through the Sites and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Sites);

8.2.4 satisfied itself as to the possibility of interference by persons of any description whatsoever (other than the Authority) with access to or use of, or rights in respect of, the Sites with particular regard to the owners of any land adjacent to the Sites; and

8.2.5 satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to third parties.

8.3 Subject to the other terms of this Agreement, the Operator Partner accepts full responsibility for all matters referred to in Clause 8.2.

8.4 Subject to Clause 8.6, the Authority shall be responsible for unforeseen ground conditions and/or Contamination existing in any parts of the Sites.

8.5 Where pursuant to Clauses 8.4 the Authority is responsible for any of the matters referred to in that clause the following provisions shall apply:

8.5.1 such matter shall be deemed to be a Relief Event and no Performance will accrue and no Performance Adjustments may be made in respect of the relevant Zone pursuant to Schedule 5 (PPM) and any work or change to the Services or to the operation of the affected Facility or part thereof as a result or which is required or instructed to be done in consequence of it, shall be deemed to be an Authority Change; and

8.5.2 where any such matter is Contamination the Authority shall further hold the Operator Partner harmless from cleaning up and otherwise dealing with such Contamination and shall indemnify the Operator Partner in

respect of all Direct Losses incurred by the Operator Partner resulting from such Contamination,

and the Operator Partner shall in carrying out any works referred to in Clause 8.5.2 do so in accordance with and so that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with Good Industry Practice, any applicable Legislation and any Necessary Consents, orders, notices or directions of any regulatory body (whether made against the Authority or the Operator Partner).

8.6 Subject to Clause 8.7, to the extent that any part(s) of the Sites suffer from or are affected by Contamination arising from a source off Site (whether or not on adjacent land) the Operator Partner shall be responsible for cleaning up or otherwise dealing with such Contamination and for preventing the reoccurrence of such Contamination on the Site and then the following provisions shall apply:

8.6.1 such matter shall be deemed to be a Relief Event and no Performance Failures will be deemed to occur and no Performance Adjustments may be made in respect of the relevant Zone pursuant to Schedule 5 (PPM) for a reasonable period (to be agreed between the parties acting reasonably) and any work or change to the Services required or instructed to be done in consequence of it, shall be the Operator Partner's responsibility and shall not constitute an Authority Change;

8.6.2 the Operator Partner shall:

- (a) clean up, or otherwise deal with, such Contamination, and take steps reasonably necessary to prevent the recurrence of the same, all in accordance with Good Industry Practice, all relevant Necessary Consents and Legislation; and
- (b) other than where Clause 8.6.3(b) applies and subject to Clause 8.7 hold the Authority harmless from, and indemnify the Authority in respect of, all Direct Losses incurred by the Authority resulting from such Contamination; and

8.6.3 the Authority shall, but only to the extent that the Operator Partner is able to demonstrate to the Authority that it does not have the right to take action against third parties in its own name to recover the losses suffered or incurred by the Operator Partner in cleaning up or otherwise dealing with such Contamination, at the Authority's option either:

- (a) take such action against third parties in its own name as the Operator Partner may (acting reasonably) direct; or
- (b) permit the Operator Partner to take such action in the name of the Authority at the Operator Partner's own expense in which case the provisions of Clauses 31.6 and 31.7 shall apply as if the Operator Partner were the Indemnifying Party and the Authority were the

Indemnified Party, except that the Operator Partner shall not pay or settle such claims without the prior consent of the Authority,

subject to the Operator Partner indemnifying the Authority in respect of all costs properly and reasonably incurred by the Authority in respect of such action. Where the Authority takes action under Clause 8.6.3(b) or 8.6.3(b) (or where it is otherwise obliged to take action against third parties in respect of such losses), the Authority shall be liable to the Operator Partner for all losses suffered or incurred by the Operator Partner as a result of its obligations under this Clause 8 (Site Matters) provided that the Operator Partner's entitlement in respect of any matter to which this Clause 8.6 applies shall be limited to the amount recovered by or in the name of the Authority from the relevant third party in respect of the losses referred to in this Clause 8.6.

- 8.7 The Operator Partner's responsibility and liability under Clause 8.6 shall be limited to the amount recovered by the Operator Partner from the third party responsible for the Contamination arising from the source off the Site subject to the Operator Partner having taken all reasonable steps (including as applicable the operation of Clause 8.6.3) to recover the losses suffered or incurred.

No Warranty

- 8.8 Except as otherwise expressly provided in this Agreement the Operator Partner shall take the Sites in their state and condition in all respects as at the Commencement Date and nothing in this Agreement or otherwise shall constitute or imply a warranty by or on the part of the Authority as to the fitness and suitability of the Sites or any part thereof for the Services or for any other purpose.

Third Party Rights

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

9. DEFECTS AND ASBESTOS

Surveys

- 9.1 The Authority shall provide to the Operator Partner on or before the Commencement Date:

9.1.1 the Buildings Surveys; and

9.1.2 the Asbestos Surveys.

Defects

9.2 The Operator Partner accepts, in relation to the Buildings, entire responsibility (including any financial and other consequences which result whether directly or indirectly) for:

9.2.1 any Defects identified in the Buildings Surveys; and

9.2.2 any Defects caused by the Operator Partner.

9.3 The Authority accepts, in relation to the Buildings, entire responsibility for Defects which have not been identified in the Buildings Surveys (other than those referred to in Clause 9.2) and the discovery of any such Defects shall be deemed to be a Relief Event and no Performance Failures will be deemed to occur and no Performance Adjustments may be made in respect of the relevant Zone pursuant to Clause Schedule 5 (PPM) for the period during which the Defect subsists and/or in respect of which remedial works are being carried out and any work or change to the Services or to the operation of the affected Facility or part thereof as a result or which is required or instructed to be done in consequence of it, shall constitute an Authority Change.

Asbestos Liability

9.4 Subject to Clause 9.5 the Operator Partner accepts, in relation to the Buildings, full responsibility (including any financial and other consequences which result whether directly or indirectly) for any Asbestos identified in the Asbestos Surveys.

9.5 The Authority accepts, in relation to the Buildings, full responsibility for Asbestos which has not been identified in the Asbestos Surveys and the discovery of any such Asbestos shall be deemed to be a Relief Event and no Performance Failures will accrue and no Performance Adjustments may be made in respect of any relevant Zone during which such Asbestos is subsisting and in respect of which removal or remedial works are being carried out and any work or change to the Services or to the operation of the affected Facility or part thereof as a result or which is required or instructed to be done in consequence of it, shall constitute an Authority Change.

9.6 Unless the exposure arises directly or indirectly as a result of any negligent act or omission of the Operator Partner or any Operator Partner Related Party, the Authority accepts, in relation to the Buildings, 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 in such Buildings.

10. FOSSILS AND ANTIQUITIES

10.1 As between the parties, all fossils, antiquities and other objects having artistic, historic or monetary value and human remains which may be found on or at the Sites are or shall become, upon discovery, the absolute property of the Authority.

10.2 Upon the discovery of such item during the course of the Services, the Operator Partner shall:

10.2.1 immediately inform the Authority's Representative of such discovery;

10.2.2 take all steps not to disturb the object and, if necessary, cease any Services insofar as the carrying out of such Services would endanger the object or prevent or impede its excavation; and

10.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.

10.3 The Authority shall procure that the Authority's Representative promptly, and in any event within ten (10) Business Days, issues an instruction to the Operator Partner specifying what action the Authority's Representative requires to be taken in relation to such discovery provided that if no such instruction is forthcoming within such period the Operator Partner may continue to carry out the Services.

10.4 The Operator Partner shall promptly and diligently comply with any instruction issued by the Authority's Representative referred to in Clause 10.3 at its own cost (except and to the extent that such instruction constitutes an Authority Change pursuant to Clause 10.6 in which case the provisions of the Change Protocol shall apply).

10.5 If directed by the Authority's Representative, the Operator Partner shall allow representatives of the Authority to enter the Sites for the purposes of removal or disposal of such discovery, provided that such entry shall be subject to the Authority complying with all relevant safety procedures, which shall include any relevant health and safety plans for the construction of the Facility from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Operator Partner's Representative from time to time.

10.6 If any instruction referred to in Clause 10.3 includes a requirement for the Operator Partner to suspend the carrying out of the Services and/or to carry out works (being any work of alteration, addition, demolition or extension or variation in any Facility) which are not works which would be strictly necessary for the purpose of compliance with Legislation or any Necessary Consents, such works or instruction to suspend shall be deemed to be an Authority Change and the provisions of the Change Protocol shall apply.

10.7 The Authority shall act promptly and diligently in dealing with its obligations in this Clause 10 (Fossils and Antiquities) in relation to any find so as to mitigate any effect on the Operator Partner and the Services.

11. **SERVICES**

11.1 The Operator Partner shall provide the Services for the Contract Period.

Standard of Services

11.2 Subject to Clause 11.5, the Operator Partner shall provide the Services in accordance with (and so as to comply with):

11.2.1 the terms of this Agreement;

11.2.2 the Services Specification;

- 11.2.3 the Service Delivery Proposals;
- 11.2.4 Good Industry Practice;
- 11.2.5 Quest;
- 11.2.6 TrackMark (and the Operating Partner will successfully obtain certification from UK Athletics every three years, starting on the Commencement Date);
- 11.2.7 FIFA Quality artificial pitch testing and certification (and the Operating Partner will successfully obtain certification from FIFA for all artificial pitches on an annual basis);
- 11.2.8 Sport England Guidance; and
- 11.2.9 all applicable Authority Policies and Legislation.

Operator Partner covenants

- 11.3 In performing its obligations under this Agreement, the Operator Partner shall:
 - 11.3.1 apply such time, attention, resources, trained and qualified personnel and skill as may be necessary for the due and proper performance of the Services;
 - 11.3.2 ensure that all written information and material given to the Authority by the Operator Partner is accurate when given, and remains accurate and comprehensive in all respects;
 - 11.3.3 deliver the Services using efficient business processes and ways of working having regard to the Authority's obligation to ensure value for money;
 - 11.3.4 provide the Authority with such assistance as the Authority may reasonably require during the Term in respect of the supply of the Services;
 - 11.3.5 gather, collate and provide such information and co-operation as the Authority may reasonably request for the purposes of ascertaining the Operator Partner's compliance with its obligations under this Agreement;
 - 11.3.6 ensure that neither it, nor any Operator Partner Related Party, embarrasses the Authority or otherwise brings the Authority into disrepute by engaging in any act or omission which is reasonably likely to diminish the trust that the public places in the Authority, regardless of whether or not such act or omission is related to the Operator Partner's obligations under this Agreement; and
 - 11.3.7 ensure, and shall procure that any Operator Partner Related Party shall ensure, that the Services are carried out in compliance with the Equality Requirements.

11.4 The Operator Partner shall ensure that (unless otherwise agreed in writing or the contrary is set out in the Services Specification) Goods do not contain any of the products or materials listed in Schedule 8 (Prohibited Materials);

Discrepancies

11.5 Subject to Clause 11.6, in the event of a conflict or potential conflict between the standards listed in Clause 11.2, the Operator Partner shall, as soon as reasonably practicable, notify the Authority in writing of the same and the Operator Partner shall submit proposals to the Authority for review through Schedule 7 (Review Procedure) as to how it proposes to deal with such inconsistency or conflict and, after such review, the standards shall be amended accordingly and any amendment shall be made without adjustment to the Annual Payment. The Authority may not withhold its approval (or impose conditions in giving its approval) where the purpose of such withholding or such conditions is to deal with matters other than the correcting of any such inconsistency or conflict.

11.6 The Services Specification shall at all times have priority over the Service Delivery Proposals. Any changes to the Service Delivery Proposals may only be made in accordance with the Review Procedure.

Ordering of Goods and Services

11.7 Neither party shall place or cause to be placed any orders with suppliers or otherwise incur liabilities in the name of the other party or any representative of the other party.

12. CONSENTS

12.1 The Operator Partner shall:

12.1.1 obtain and maintain all Necessary Consents which may be required for the performance of the Services;

12.1.2 be responsible for implementing each Necessary Consent within the period of its validity in accordance with its terms;

12.1.3 supply free of charge to the Authority's Representative a copy of any application for a Necessary Consent (with a copy of all accompanying drawings and other documents) and a copy of any Necessary Consent obtained;

12.1.4 comply with the conditions attached to any Necessary Consents and procure that no such Necessary Consent is breached by it or any person under its control and use all reasonable endeavours to procure that no Necessary Consent is revoked and that all Necessary Consents continue in full force and effect for such time as is necessary for the Operator Partner to carry out the Services; and

12.1.5 not (and shall use all reasonable endeavours to procure that any other person over whom it has control shall not) without the prior consent of the Authority under this Agreement (which consent shall not be unreasonably

withheld or delayed) apply for or agree to any change, relaxation or waiver of any Necessary Consent (whether obtained before or after the Commencement Date) or of any condition attached to it but, subject to the compliance by the Operator Partner with its obligations under this Clause 12.1, references in this Agreement to Necessary Consents shall be construed as referring to the Necessary Consents as from time to time varied, relaxed or waived.

13. USE OF THE FACILITIES

Priority

13.1 The Facilities shall be made available for use in the provision of the Services during the Contract Period as set out in the Services Specification.

Use of the Facilities

13.2 The Operator Partner may enter into arrangements for use of the Facilities provided that:

13.2.1 any such use is in accordance with Legislation;

13.2.2 the use cannot reasonably be expected to impair the provision of the Services or such use is not incompatible with the use of the Facilities as community leisure centre facilities;

13.2.3 the use is not one which the Authority (acting reasonably) has objected to;

13.2.4 the use does not involve sponsorship, advertisement or other direct involvement by any organisation, entity or person engaged, or with substantial interest in the production or sale of products containing or derived from tobacco or the manufacture or sale of arms and weapons;
or

13.2.5 the use is not one which could be expected to involve undue violence (provided that the provision of organised sport shall not be considered undue violence) or otherwise be incompatible with the ethos of the Authority.

Third Party Use

13.3 Subject to the Authority's Pricing Requirements and the Services Specification, the Operator Partner shall be entitled to charge for, and be paid by, each User, a fee determined by the Operator Partner for the use made of the Facilities.

Elections

13.4 The Operator Partner will allow the Authority to use the Facilities for the purpose of Elections provided reasonable prior notice has been given to the Operator Partner and the Authority agrees to pay for the use of the relevant parts of the Facilities for

such purposes, with terms to be agreed between the parties acting reasonably. In exercising its right to use the Facilities pursuant to this Clause only the Authority shall be regarded as a User.

14. CONDITION OF THE FACILITIES

Maintenance

14.1 The Operator Partner shall ensure on a continuing basis that at all times its maintenance and operating procedures set out in the Service Delivery Proposals are and remain sufficient to ensure that:

14.1.1 the Facilities meet the requirements of this Agreement and the Services Specification;

14.1.2 the Facilities are kept in good structural and decorative order (subject to fair wear and tear) in accordance with this Agreement, the Services Specification and the Service Delivery Proposals;

14.1.3 the Operator Partner can deliver the Services in accordance with this Agreement and the Services Specification; and

14.1.4 the Facilities are handed back to the Authority on the Expiry Date in a condition complying with Handback Requirements.

Surveys

14.2 If the Authority reasonably believes that the Operator Partner is in breach of its obligations under Clause 14.1 then it may carry out or procure the carrying out of a survey of the Facilities to assess whether the Facilities have been and are being maintained by the Operator Partner in accordance with its obligations under Clause 14.1. This right may not be exercised more than once a year.

14.3 The Authority shall notify the Operator Partner in writing a minimum of ten (10) Business Days in advance of the date it wishes to carry out the survey. The Authority shall consider in good faith any reasonable request by the Operator Partner for the survey to be carried out on a different date if such request is made at least five (5) Business Days prior to the notified date and the Operator Partner (acting reasonably) is able to demonstrate that carrying out the survey on the notified date would materially prejudice the Operator Partner's ability to provide the Services.

14.4 When carrying out any survey, the Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the Services by the Operator Partner. The cost of the survey, except where Clause 14.5 applies, shall be borne by the Authority. The Operator Partner shall give the Authority (free of charge) any reasonable assistance required by the Authority from time to time during the carrying out of any survey.

14.5 If a survey shows that the Operator Partner has not complied or is not complying with its obligations under Clause 14.1, the Authority shall:

14.5.1 notify the Operator Partner of the standard that the condition of the Facilities should be in to comply with its obligations under Clause 14.1 and this Agreement generally;

14.5.2 specify a reasonable period within which the Operator Partner must carry out such rectification and/or maintenance work; and

14.5.3 if the survey shows a material non-compliance by the Operator Partner with its obligations under Clause 14, be entitled to be reimbursed by the Operator Partner for the cost of the survey and any administrative costs incurred by the Authority in relation to the survey other than where the costs of the rectification and/or maintenance work are less than the costs of the survey in which case the cost of the survey shall be shared equally between the Authority and the Operator Partner.

14.6 The Operator Partner shall carry out such rectification and/or maintenance work within the period specified by the Authority and any costs it incurs in carrying out such rectification and/or maintenance work shall be at its own expense.

14.7 In the event of any failure by the Operator Partner to comply with Clause 14.6 or if the Authority is or becomes aware of a breach by the Operator Partner of its obligations under Clause 14.6 then the Authority shall be entitled to exercise its right of access and remedy such breach in accordance with Good Industry Practice and shall be entitled to recover any costs or expenses incurred in so doing from the Operator Partner as a debt.

Programmed Maintenance

14.8 The Operator Partner shall undertake Programmed Maintenance of the Facilities in accordance with a Schedule of Programmed Maintenance which has been approved or not commented on by the Authority under the Review Procedure.

Schedule of Programmed Maintenance

14.9 The Operator Partner shall implement the initial Schedule of Programmed Maintenance for each Facility in the Agreed Form for the period from the Commencement Date to the expiry of the first Contract Year.

14.10 Not later than two (2) months prior to the commencement of each subsequent Contract Year the Operator Partner shall submit to the Authority's Representative in accordance with Schedule 7 (Review Procedure) a Schedule of Programmed Maintenance for that Contract Year.

14.11 Each Schedule of Programmed Maintenance shall contain the following information (**Programmed Maintenance Information**):

14.11.1 details of the proposed start and end dates for each period of Programmed Maintenance, the works to be carried out and the proposed hours of work (including any proposed closures of the Facilities or any element therein);

14.11.2 details of any effect of the Programmed Maintenance on the delivery of any of the Services; and

14.11.3 a proposed Lifecycle Schedule, including details of when Operator Partner Lifecycle Items and Authority Lifecycle Items are proposed to be replaced (including the proposed costs of the replacement of the Authority Lifecycle Items).

14.12 Not later than twenty (20) Business Days prior to the commencement of any Contract Month, the Operator Partner may submit to the Authority's Representative in accordance with Schedule 7 (Review Procedure) a revision to the Schedule of Programmed Maintenance for the Contract Year in which the relevant Contract Month falls showing the effect of the proposed changes to the Programmed Maintenance Information. If the Authority's Representative does not raise comments on such proposed revision in accordance with Schedule 7 (Review Procedure), the Schedule of Programmed Maintenance as revised shall become the Schedule of Programmed Maintenance in respect of that Contract Year.

14.13 Where the Authority's Representative raises comments in respect of any Programmed Maintenance periods and/or hours of work shown in a Schedule of Programmed Maintenance in accordance with Schedule 7 (Review Procedure), he shall indicate whether, and if so when, the Programmed Maintenance can be rescheduled and the Operator Partner shall amend the relevant Schedule of Programmed Maintenance accordingly.

14.14 The Operator Partner shall not carry out any Programmed Maintenance save in accordance with a Schedule of Programmed Maintenance to which no objection has been made under Schedule 7 (Review Procedure) or, where comment has been raised in respect of the Programmed Maintenance periods and/or time, the Schedule of Programme Maintenance has been amended pursuant to this Clause 14 (Condition of the Facilities).

14.15 The Operator Partner shall deliver to the Authority's Representative not less than two (2) months prior to the Commencement Date and two (2) months prior to the commencement of each subsequent Contract Year the latest version of the Five Year Maintenance Plan.

Unprogrammed Maintenance Works

14.16 If during the Minimum Opening Hours, the need arises for Maintenance Works which are not scheduled to be carried out as part of Programmed Maintenance (Unprogrammed Maintenance Works) but will or may lead to either closure of part of a Facility, or a material impact on Users, the Operator Partner may carry out such Unprogrammed Maintenance Works provided that the Operator Partner shall notify the Authority's Representative as soon as reasonably possible (and in any event, within two (2) Business Days of the occurrence) of the extent of the necessary Unprogrammed Maintenance Works and the reasons for them. The Operator Partner shall take all reasonable steps to minimise the duration of such Unprogrammed Maintenance Works.

- 14.17 There shall be no restrictions on the performance of Unprogrammed Maintenance Works carried out outside of the Minimum Opening Hours.
- 14.18 Nothing in Clause 14.16 or 14.17 shall prevent the allocation of Failure Points and/or Performance Adjustments in accordance with this Agreement.

Programmed Replacement – Operator Partner Lifecycle Items

- 14.19 The Operator Partner shall or shall procure the replacement of Operator Partner Lifecycle Items in accordance with the Lifecycle Profile, the Five Year Maintenance Plan and the relevant Schedule of Programmed Maintenance (or if Operator Partner Lifecycle Items require replacing earlier than anticipated in the Lifecycle Profile, the Five Year Maintenance Plan or relevant Schedule of Programmed Maintenance, at the time required by applying Good Industry Practice).
- 14.20 No later than forty (40) Business Days before each occasion on which any of the Operator Partner Lifecycle Items are due for replacement (as identified in the Lifecycle Schedule), where the Operator Partner does not believe it is necessary to undertake such replacement, the Operator Partner shall submit to the Authority (under the Review Procedure) a written statement detailing:
- 14.20.1 the replacement(s) which the Lifecycle Schedule records as being due; and
 - 14.20.2 why the Operator Partner does not believe it is necessary to undertake such replacement having regard to the condition of the relevant part and the Operator Partner's obligations under this Agreement.
- 14.21 If the Authority approves in accordance with the Review Procedure (or it is determined in accordance with the Dispute Resolution Procedure) that the replacement should be deferred, the Operator Partner shall amend the Lifecycle Schedule to reflect such deferral.
- 14.22 Without prejudice to Clause 14.21 the Operator Partner shall replace any items listed in the Lifecycle Schedule (both Operator Partner Lifecycle Items and Authority Lifecycle Items) with parts of at least equivalent standard to those at the Commencement Date so that as a minimum any replacement part should have an equivalent or greater anticipated lifespan at the same quality as the original part.
- 14.23 In the event that the Operator Partner fails to either:
- 14.23.1 replace any Operator Partner Lifecycle Item by the date that it is due for replacement (as identified in the Lifecycle Schedule, or earlier, applying Good Industry Practice); or
 - 14.23.2 comply with Clause 14.22,
- and such failure is not remedied within one (1) month of receipt of written notice of such failure from the Authority, the Authority may remedy such failure itself and recover the cost from the Operator Partner.

14.24 The Operator Partner is responsible for all costs of replacing the Operator Partner Lifecycle Items.

Authority Lifecycle Items

14.25 The Operator Partner shall notify the Authority in writing as and when any Authority Lifecycle Items listed in the Lifecycle Schedule become due for replacement:

14.25.1 giving at least forty (40) Business Days' notice of any Authority Lifecycle Items due for replacement pursuant to the Lifecycle Schedule; and

14.25.2 giving as much notice as is reasonably possible of any Authority Lifecycle Items listed in the Lifecycle Schedule which the Operator Partner considers are due for replacement earlier than shown in the Lifecycle Schedule applying Good Industry Practice, (**Authority Lifecycle Item Notice**).

14.26 The Operator Partner shall include in any Authority Lifecycle Item Notice the following details:

14.26.1 details of the Authority Lifecycle Item;

14.26.2 evidence and confirmation that the Authority Lifecycle Item has been maintained by the Operator Partner in accordance with its obligations under this Agreement;

14.26.3 when the Authority Lifecycle Item is due for replacement (and whether this is assessed based on the Lifecycle Schedule or earlier than listed in the Lifecycle Schedule, with the Operator Partner applying Good Industry Practice); and

14.26.4 if the Authority Lifecycle Item is due for replacement pursuant to the Lifecycle Schedule, a confirmation of the costs for replacement of the Authority Lifecycle Item and a confirmation that these are the same as those set out in the relevant Lifecycle Schedule, and an Estimate (as defined in the Change Protocol) showing the consequences of the item not being replaced;

(a) if an Authority Lifecycle Item is due for replacement according to the Lifecycle Schedule, whether the Operator Partner, applying Good Industry Practice, considers that such replacement can be deferred with no adverse consequences for the Services; and

(b) if the Authority Lifecycle Item is due for replacement earlier than listed in the Lifecycle Schedule based upon the Operator Partner's application of Good Industry Practice, two Estimates (as defined in the Change Protocol): one showing the consequences of the Operator Partner replacing the item and one showing the consequences of the item not being replaced.

- 14.27 The Authority shall, within ten (10) Business Days of receipt of an Authority Lifecycle Item Notice confirm to the Operator Partner whether it requires any further information in order to assess the Authority Lifecycle Item Notice and/or for the parties to meet to discuss the content of the Authority Lifecycle Item Notice.
- 14.28 Within twenty (20) Business Days of receipt of the Authority Lifecycle Item Notice and the information referred to in Clause 14.27 and the meeting referred to in Clause 14.27 (whichever is the later), the Authority shall confirm in writing to the Operator Partner whether the Operator Partner should proceed to replace the Authority Lifecycle Item, or whether the replacement should be deferred, and the basis of such instruction (for instance, confirming the details in the Authority Lifecycle Item Notice or if the parties have agreed different terms to those included in the Authority Lifecycle Item Notice, confirming such details) (**Authority Lifecycle Item Instruction**).
- 14.29 If the Authority does not give an Authority Lifecycle Item Instruction, the Operator Partner shall not proceed with the replacement of the relevant Authority Lifecycle Item.
- 14.30 If the Authority Lifecycle Item was one which was due for replacement according to the Lifecycle Schedule and the Authority, gives an Authority Lifecycle Item Instruction to proceed to replace the item, the Operator Partner shall proceed on the basis of the Authority Lifecycle Item Instruction, and when the Authority is satisfied (acting reasonably) that the item has been replaced in accordance with the Operator Partner's obligations under this agreement, the Operator Partner may issue an invoice to the Authority for its costs of such replacement (as confirmed in the Authority Lifecycle Item Instruction) and the Authority shall pay such invoice within twenty (20) Business Days of receipt of a valid VAT invoice.
- 14.31 If the Authority Lifecycle Item was one which was due for replacement according to the Lifecycle Schedule and the Authority gives an Authority Lifecycle Item Instruction not to proceed with the replacement, the parties shall process the instruction as a Medium Value Change, with the Estimate being the Estimate the Operator Partner provided to the Authority in the Authority Lifecycle Item Notice.
- 14.32 If the Authority Lifecycle Item was one which was due for replacement earlier than listed in the Lifecycle Schedule applying Good Industry Practice and the Authority gives an Authority Lifecycle Item Instruction to proceed or not to proceed, the parties shall process the instruction as a Medium Value Change, with the Estimate being the relevant Estimate the Operator Partner provided to the Authority in the Authority Lifecycle Item Notice.
- 14.33 When preparing any quote, proposal, Estimate, Schedule of Programmed Maintenance or Five Year Maintenance Plan which includes the costs of replacement for an Authority Lifecycle Item, the Operator Partner shall use all reasonable endeavours to obtain a competitive price, in particular by obtaining at least three (3) quotes for such costs and the Authority shall be entitled to require the Operator Partner to obtain a quotes from particular contractors.

14.34 The Authority shall have the right (acting reasonably) to defer the replacement of an Authority Lifecycle Item if such non-replacement will not have an adverse impact on the Services.

14.35 In the event that the Operator Partner fails to either:

14.35.1 replace any Authority Lifecycle Item by the date that it is due for replacement (as approved by the Authority); or

14.35.2 comply with Clause 14.22,

and such failure is not remedied within one (1) month of receipt of written notice of such failure from the Authority, the Authority may remedy such failure itself and recover the cost from the Operator Partner.

14.36 If the Operator Partner is unable to demonstrate to the Authority (acting reasonably) that the Operator Partner has maintained an Authority Lifecycle Item to the standard required by this Agreement, then, when such item is due for replacement, the Operator Partner shall be responsible for the costs of such replacement.

Lifecycle Records

14.37 Without prejudice to paragraphs 4.2.35 or 4.2.51 of the Services Specification, the Operator Partner shall upon written request permit the Authority access to all the Operator Partner's records, receipts, invoices, reports, drawings, technical specifications and performance logs relating to any Lifecycle Asset, so as to enable the Authority to obtain an accurate assessment of the figures quoted and Programmed Maintenance undertaken. The Operator Partner shall provide all reasonable co-operation and assistance to the Authority to allow it access to such documents and information and shall in a bona fide manner respond promptly to all reasonable requests for further documents and information made by the Authority in respect of any Lifecycle Asset and the condition of the same, provided always that such access shall not in any way obstruct, hinder or prevent the Operator Partner in the provision of the Services. The Operator Partner shall maintain all documents and information relating to any Lifecycle Asset.

15. FURTHER REQUIREMENTS

Utilities

15.1 The Operator Partner shall:

15.1.1 procure [or shall ensure that the Leisure Operator procures] all Utilities required for the Facilities;

15.1.2 ensure that it [or the Leisure Operator] is the counterparty to the relevant Utility supply contracts;

15.1.3 pay [or procure payment to] the relevant Utility suppliers directly for all Utilities supplied; and

15.1.4 pay [or procure payment of] all present and future rates, taxes, levies, costs, charges and other impositions (of whatever nature) payable in respect of the supply of Utilities to the Facilities.

15.2 **Fire Folder**

The parties shall each act reasonably and in good faith to procure that an up-to-date fire folder is maintained for each Facility in accordance with government guidance referring to the Regulatory Reform (Fire Safety) Order 2005. In particular the Operator Partner shall:

15.2.1 provide information relating to the operation of the fire alarm system and emergency lighting;

15.2.2 maintain maintenance/test records for the fire alarm systems and emergency lighting;

15.2.3 prepare risk assessments for emergency events including fires;

15.2.4 prepare and communicate the evacuation procedures including instruction to staff and visitors at the Facilities on the correct action when discovering a fire and on the correct action when the fire alarm is sounded;

15.2.5 prepare notices/signs reinforcing the evacuation procedures; and

15.2.6 take all reasonable steps to ensure and maintain discipline of the occupants of the Facilities to prevent fires and deliberate and/or accidental activation of the system.

15.3 **Operating Manual**

15.3.1 The Operator Partner shall throughout the Contract Period maintain and update an operating and maintenance manual setting out the procedures for providing the Services (Operating Manual).

15.3.2 The Operator Partner shall at the request of the Authority provide the Authority with access to the Operating Manual in order to demonstrate that the Operator Partner has complied with its obligation to maintain and update the Operating Manual under Clause 15.3.1.

15.3.3 Each party agrees to co-operate (but without being compelled to incur material expenditure) with the other party in the fulfilment of the purposes and intent of this Agreement. Neither party shall be under any obligation to perform any of the other's obligations under this Agreement.

15.4 **Hazardous Substances**

15.4.1 The Operator Partner shall ensure that any hazardous materials or equipment used or intended to be used in the provision of the Services are kept under control and in safe keeping in accordance with all

relevant Legislation and Good Industry Practice, and shall ensure that all such materials are properly and clearly labelled on their containers, and shall promptly inform the Authority of all such materials being used or stored at the Sites and shall comply with any other reasonable requirement of the Authority in respect of such materials and equipment.

15.4.2 The Operator Partner shall maintain a COSHH register in relation to each Facility and shall ensure that a copy of each register is held at the relevant Facility, at the Operator Partner's registered office and that a copy is given to the Authority. The Authority shall notify the Operator Partner of any items which it or any Authority Related Party is using or storing at any of the Sites and which requires to be included in such register.

15.5 CDM Regulations Responsibility

for Design

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

The Operator Partner as Client

15.5.2 In accordance with the CDM Regulations, the Authority and the Operator Partner have elected that the Operator Partner shall be, and shall be treated as the only client in respect of the Services pursuant to Regulation 4(8) of the CDM Regulations. The Operator Partner shall not, prior to the completion of the Services, seek in any way to withdraw, terminate or derogate from such election.

Duties under the CDM Regulations

15.5.3 The Operator Partner shall observe, perform and discharge and/or shall procure the observance, performance and discharge of the obligations requirements and duties arising under the CDM Regulations in connection with the Services (other than those that remain with the Authority pursuant to Regulation 4(8) of the CDM Regulations). The Operator Partner shall ensure that any Health and Safety File is revised as often as may be appropriate to incorporate any relevant new information in relation to the Services during the Contract Period.

Authority to Co-operate and Provide Information

15.5.4 Upon the Operator Partner's reasonable request the Authority shall provide to the Operator Partner such information and documents as may be in the Authority's possession or which the Authority may reasonably obtain which may be required by the Operator Partner to fulfil its duties as client for the purposes of the CDM Regulations.

15.5.5 Notwithstanding the election made under Clause 15.5.2 the Authority shall observe and continue to observe the duties that are, pursuant to Regulation 4(8) of the CDM Regulations, to remain with the Authority, notably those duties under Regulations 4(4), 8(4) and 8(6).

16. REPRESENTATIVES

Representatives of the Authority

- 16.1 The Authority's Representative shall be the Leisure Facilities Manager of the Authority from time to time, or such other person appointed pursuant to this Clause 16. The Authority's Representative shall exercise the functions and powers of the Authority in relation to this Agreement which are identified in this Agreement as functions or powers to be carried out by the Authority's Representative. The Authority's Representative shall also exercise such other functions and powers of the Authority under this Agreement as may be notified to the Operator Partner from time to time.
- 16.2 The Authority's Representative shall be entitled at any time, by notice to the Operator Partner, to authorise any other person to exercise the functions and powers of the Authority delegated to him pursuant to this Clause, either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Authority's Representative and all references to the **Authority's Representative** in this Agreement (apart from this Clause) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.
- 16.3 The Authority may by notice to the Operator Partner change the Authority's Representative. The Authority shall (as far as practicable) consult with the Operator Partner prior to the appointment of any replacement for the Authority's Representative, taking account of the need for liaison and continuity in respect of this Agreement. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to the Operator Partner in the execution of its obligations under this Agreement).
- 16.4 During any period when no Authority's Representative has been appointed (or when the Authority's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Authority shall carry out the functions which would otherwise be performed by the Authority's Representative.
- 16.5 Save where notified in writing by the Authority before such act or instruction, the Operator Partner and Operator Partner's Representative shall be entitled to treat any act or instruction of the Authority's Representative in connection with this Agreement as being expressly authorised by the Authority and the Operator Partner and the Operator Partner's Representative shall not be required to determine whether authority has in fact been given.

Representative of the Operator Partner

16.6 The Operator Partner's Representative shall be [] or such other person appointed pursuant to this Clause 16. The Operator Partner's Representative shall have full authority to act on behalf of the Operator Partner for all purposes of this Agreement. Except as previously notified in writing before such act by the Operator Partner to the Authority, the Authority and the Authority's Representative shall be entitled to treat any act of the Operator Partner's Representative in connection with this Agreement as being expressly authorised by the Operator Partner and the Authority and the Authority's Representative shall not be required to determine whether any express authority has in fact been given.

16.7 The Operator Partner may by notice to the Authority, change the Operator Partner's Representative. Where the Operator Partner wishes to do so it shall by written notice to the Authority propose a substitute for approval, taking account of the need for liaison and continuity in respect of this Agreement. Such appointment shall be subject to the approval of the Authority (not to be unreasonably withheld or delayed).

Appointment of Representatives

16.8 At any time the Authority may appoint more than one Authority's Representative and the Operator Partner may appoint more than one Operator Partner's Representative provided in each case the appointor provides written confirmation to the Operator Partner or Authority as appropriate of the extent of its Representative's authority.

17. EMERGENCIES

17.1 If an Emergency arises which cannot be dealt with by performance of the Services, the Authority may instruct the Operator Partner to use its best endeavours to procure that such additional or alternative services are undertaken by the Operator Partner as and when required by the Authority to ensure that the Emergency is dealt with and normal operation of the relevant Facility resumes as soon as is reasonably practicable provided that the Operator Partner shall not be obliged to provide any service which it is neither qualified nor competent to provide.

17.2 The properly incurred costs of the Operator Partner of any additional or alternative services provided to the Authority under Clause 17.1 and/or any Loss of Revenue (if any) arising as a direct result of the Operator Partner providing any additional or alternative services shall be borne by the Authority (unless the Emergency was caused by the Operator Partner, in which case such costs and/or Loss of Revenue shall be borne by the Operator Partner). In respect of any such properly incurred costs and/or Loss of Revenue, these shall be paid against the Operator Partner's invoice in accordance with Clause 36 (Payment). If such costs and/or Loss of Revenue are not agreed, the matter shall be referred to the Dispute Resolution Procedure.

18. AUTHORITY STEP-IN

Right to Step-In

18.1 If the Authority reasonably believes that it needs to take action in connection with the Services:

18.1.1 because a serious risk exists to the health or safety of persons or property or to the environment;

18.1.2 to discharge a statutory duty; and/or

18.1.3 because an Emergency has arisen,

then the Authority shall be entitled to take action in accordance with Clauses 18.2 to 18.6.

Notice to the Operator Partner

18.2 If Clause 18.1 applies and the Authority wishes to take action, the Authority shall notify the Operator Partner in writing of the following:

18.2.1 the action it wishes to take;

18.2.2 the reason for such action;

18.2.3 the date it wishes to commence such action;

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

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

Action by Authority

18.3 Following service of such notice, the Authority shall take such action as notified under Clause 18.2 and any consequential additional action as it reasonably believes is necessary (together, the Required Action) and the Operator Partner shall give all reasonable assistance to the Authority while it is taking the Required Action. The Authority shall provide the Operator Partner with notice of completion of the Required Action and shall use reasonable endeavours to provide such advance notice as is reasonably practicable of its anticipated completion.

18.4 Where the Required Action has been taken otherwise than as a result of a breach by the Operator Partner, the Authority shall undertake the Required Action in accordance with Good Industry Practice and shall indemnify the Operator Partner against all Direct Losses where it fails to do so.

Step-In without Operator Partner Breach

18.5 If the Operator Partner is not in breach of its obligations under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Operator Partner from providing any part of the Services:

18.5.1 the Operator Partner shall be relieved from its obligations to provide such part of the Services; and

18.5.2 in respect of the period in which the Authority is taking the Required Action and provided that the Operator Partner provides the Authority with

reasonable assistance (such assistance to be at the expense of the Authority to the extent that incremental costs are incurred) the Annual Payment, where it is a Deficit Annual Payment due from the Authority to the Operator Partner shall equal the amount the Operator Partner would receive if it were satisfying all its obligations and providing the Services affected by the Required Action in full, together with any Loss of Revenue (but only to the extent that such Loss of Revenue arises as a direct result of the Authority taking the Required Action) over that period; or

18.5.3 where the Annual Payment is a Surplus Annual Payment due from the Operator Partner to the Authority it shall be suspended and the Authority shall account to the Operator Partner for all revenue received by the Authority in respect of the Services affected by the Required Action in full, together with any Loss of Revenue (but only to the extent that such Loss of Revenue arises as a direct result of the Authority taking the Required Action) over that period less such amount of the Surplus Annual Payment that would have been payable over that period had the Required Action not been taken subject to the Operator Partner being in a no worse position in respect of the amount of revenue and Loss of Revenue received or paid.

Step-In on Operator Partner Breach

18.6 If the Required Action is taken as a result of a breach of the obligations of the Operator Partner under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Operator Partner from providing any part of the Services:

18.6.1 the Operator Partner shall be relieved of its obligations to provide such part of the Services; and

18.6.2 in respect of the period in which the Authority is taking the Required Action, the Annual Payment, where it is a Deficit Annual Payment due from the Authority to the Operator Partner shall equal the amount the Operator Partner would receive if it were satisfying all its obligations and providing the Services affected by the Required Action in full over that period, less an amount equal to all the Authority's costs of operation in taking the Required Action having deducted any revenue received by the Authority and which is due to the Operator Partner; or

18.6.3 where the Annual Payment is a Surplus Annual Payment due from the Operator Partner to the Authority it shall be suspended and the Authority shall account to the Operator Partner for all revenue received by the Authority in respect of the Services affected by the Required Action in full over that period, less:

(a) an amount equal to all the Authority's costs of operation in taking the Required Action; and

(b) the Surplus Annual Payment adjusted pro-rata for that period.³

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PART 3 - PERFORMANCE, REPORTING AND RECORDS

19. PERFORMANCE MONITORING

Operator Partner Monitoring

³ This drafting assumes that the revenue that the Authority receives is likely to be greater than the Authority's costs of operation and the Surplus Annual Payment for the step in period. If this is not the case, the drafting may need to be amended to place an obligation on the Operator Partner to pay the Authority the Surplus Annual Payment for the step in period less the revenue received by the Authority and the Authority's costs of operation.

19.1 The Operator Partner shall monitor its performance in the delivery of the Services in accordance with the provisions of Schedule 5 (PPM).

Authority Monitoring

19.2 The Authority may elect to undertake its own performance monitoring at any stage during the Contract Period for any purpose, in order to ensure that the Services are being provided in accordance with this Agreement. The Operator Partner will use its reasonable endeavours to assist the Authority in such an exercise. The Authority shall be entitled to notify the Operator Partner of the outcome of the performance monitoring exercise, and the Operator Partner shall have due regard to the Authority's comments in relation to the future provision of the Services.

19.3 Without prejudice to the Authority's rights under Clause 40 (Termination on Operator Partner Default) and to any other express rights under this Agreement, where the Operator Partner has been found to:

19.3.1 be fraudulent in the submission of monitoring reports or claims for payment under Clause 36 (Payment); or

19.3.2 have submitted at least two (2) materially erroneous monitoring reports, within a three (3) month period,

the Authority may by notice to the Operator Partner increase the level of its monitoring of the Operator Partner, and/or (at the Authority's option), of the Operator Partner's monitoring of its own performance of its obligations under this Agreement in respect of the relevant Service or Services the subject of such fraudulent or erroneous reporting until such time as the Operator Partner shall have demonstrated to the reasonable satisfaction of the Authority that it will perform (and is capable of performing) its obligations under this Agreement.

19.4 For the purposes of Clause 19.3, the Authority acknowledges that if the Operator Partner has otherwise failed to have demonstrated to the reasonable satisfaction of the Authority as required by Clause 19.3 but:

19.4.1 if the Operator Partner has removed the person or persons responsible for the fraudulent reporting; or

19.4.2 (under Clause 19.3.2), if in the following three (3) month period following the Authority notice (if it has not already been established) there have been no further erroneous reports of any kind,

this shall be regarded as sufficient demonstration that the Operator Partner will perform and is capable of performing its obligations.

19.5 If the Authority issues a notice under Clause 19.3, the Operator Partner shall bear its own costs and indemnify and keep the Authority indemnified at all times from and against all reasonable costs and expenses incurred by or on behalf of the Authority in relation to such increased level of monitoring arising due to circumstances under Clause 19.3.2.

20. CONTINUOUS IMPROVEMENT

Authority's Continuous Improvement Duty

20.1 The Operator Partner acknowledges that:

20.1.1 the Authority is subject to the Continuous Improvement Duty;

20.1.2 the provisions of this Clause 20 (Continuous Improvement) are intended to assist the Authority in discharging its Continuous Improvement Duty in relation to the Services; and

20.1.3 the provisions of this Clause 20 (Continuous Improvement) shall apply in respect of the obligations of the Operator Partner and the Authority concerning the Continuous Improvement Duty and the 1999 Act generally.

20.2 The Operator Partner shall, throughout the Contract Period, but only to the extent of its obligations in this Agreement, make arrangements to secure continuous improvement in the way in which the Services are provided, having regard to a combination of economy, efficiency and effectiveness.

20.3 The Operator Partner shall use reasonable endeavours to assist the Authority in demonstrating that the Authority is meeting its Continuous Improvement Duty in respect of this Agreement including:

20.3.1 complying with requests for information, data or other assistance made by the Authority in pursuance of its Continuous Improvement Duty in order to:

- (a) facilitate any inspection or audit undertaken by any Relevant Authority in connection with the Continuous Improvement Duty in respect of the Services, including any inspection undertaken with a view to verifying the Authority's compliance with its Continuous Improvement Duty;
- (b) assist the Authority in relation to any action taken by the Secretary of State;
- (c) enable the Authority to comply with any Government departmental direction; and
- (d) enable the Authority to report on its performance to Relevant Authorities;

20.3.2 complying with all requests by the Authority to procure the attendance of specific officers or employees of the Operator Partner or any SubContractor (or to procure the attendance of any of its or their subcontractors) at any meetings of the Authority at which the Services are to be discussed (but not, otherwise than in exceptional circumstances, more than twice in any one year); and

20.3.3 co-operating in audits and/or other inspections by Relevant Authorities.

21. **QUALITY ASSURANCE**

21.1 The Operator Partner shall appoint (or shall procure the appointment of) as soon as reasonably practicable following the Commencement Date a quality manager, who may be directly involved in the day-to-day performance of the Services and who shall, in respect of the Services:

21.1.1 implement and monitor a quality assurance system; and

21.1.2 liaise with the Authority on all matters relating to quality assurance.

21.2 The Authority may carry out periodic audits of the aforementioned quality assurance system (and Quest, UK Athletics TrackMark accreditation scheme) at approximate intervals of three (3) months and may carry out other periodic monitoring, spot checks and auditing of the Operator Partner's quality system. The Operator Partner shall procure that the Authority shall have a like right in respect of any relevant sub-contractors. The Operator Partner shall co-operate and shall procure that any relevant sub-contractor co-operates with the Authority including providing it with all information and documentation which it reasonably requires in connection with its right under this Clause 21 (Quality Assurance).

22. **OPERATOR PARTNER'S RECORDS**

Records and Open Book Accounting

22.1 The Operator Partner shall (and shall procure that each sub-contractor shall):

22.1.1 at all times maintain a full record of particulars of the costs of performing the Services;

22.1.2 upon request by the Authority, provide a written summary of any of the costs referred to in Clause 22.1.1, including details of any funds held by the Operator Partner specifically to cover such costs, in such form and detail as the Authority may reasonably require to enable the Authority to monitor the performance by the Operator Partner of its obligations under this Agreement;

22.1.3 provide such facilities as the Authority may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Clause 22.1; and

22.1.4 provide to the Authority copies of its annual report and accounts within twenty (20) Business Days of publication.

Books of Account

22.2 Compliance with Clause 22.1 shall require the Operator Partner to keep (and where appropriate to procure that each sub-contractor shall keep) books of account in

accordance with best accountancy practices with respect to this Agreement, showing in detail:

22.2.1 administrative overheads;

22.2.2 payments made to the Sub-Contractors and from the Sub-Contractors to their sub-contractors;

22.2.3 capital and revenue expenditure; and

22.2.4 such other items as the Authority may reasonably require from time to time to conduct costs audits for verification of cost expenditure or estimated expenditure, for the purpose of this Agreement,

and the Operator Partner shall have (and procure that its sub-contractors shall have) the books of account evidencing the items listed in sub-Clauses 22.2.1 to 22.2.4 inclusive, available for inspection by the Authority (and its advisers) upon reasonable notice, and shall provide a copy of these to the Authority as and when requested from time to time.

Maintenance of Records

22.3 The Operator Partner shall maintain or procure that detailed records relating to the performance of the Services, in each case in accordance with Good Industry Practice, the requirements of Clause 21 (Quality Assurance) and any applicable Legislation, are maintained.

22.4 Without prejudice to Clause 22.3, the Operator Partner shall maintain or shall procure that the following are maintained:

22.4.1 a full record of all incidents relating to health, safety and security which occur during the term of this Agreement;

22.4.2 full records of all maintenance procedures carried out during the term of this Agreement; and

22.4.3 full records of all staff matters including turnover, pay and disciplinary matters,

and the Operator Partner shall have the items referred to in Clauses 22.4.1 to 22.4.3 available for inspection by the Authority (and its advisers) upon reasonable notice, and shall provide copies of these to the Authority as and when requested from time to time.

Termination or Expiry

22.5 Upon termination or expiry of this Agreement, and in the event that the Authority wishes to enter into another agreement for the operation and management of a

Facility or Facilities the same as or similar to Services provided under this Agreement, the Operator Partner shall (and shall ensure that the sub-contractors

will) comply with all reasonable requests of the Authority to provide information relating to the Operator Partner's costs of delivering the Services.

Provision of Information

22.6 The Operator Partner shall use all reasonable endeavours to assist the Authority in its preparation of any report required by the Department of Culture, Media and Sports or HM Treasury, from time to time.

Confidentiality

22.7 All information referred to in this Clause 22 (Operator Partner's Records) is subject to the obligations set out in Clause 56 (Confidentiality).

23. REPORTING

Annual Service Report and Annual Service Plan

23.1 Without prejudice to any other provision in this Agreement the Operator Partner shall on the Annual Service Report Date provide to the Authority a written report (**Annual Service Report**) in accordance with the requirements of the Services Specification.

23.2 The Operator Partner shall upon a written request from the Authority promptly provide such written evidence or other supporting information as the Authority may reasonably require in order to verify and audit the information and other material contained in the Annual Service Report.

23.3 If, in the Authority's reasonable opinion, the provision, performance or delivery of the Services (or any part) may be more effective, efficient and economic having regard to the Annual Service Report and the Continuous Improvement Duty, then the Authority may serve a written notice upon the Operator Partner (**Continuous Improvement Service Change Notice**) stating the nature and timing of the changes to the provision, performance or delivery of the Services (or the relevant part) which the Authority desires.

23.4 The Operator Partner shall, within twenty (20) Business Days of the date of receipt of the Continuous Improvement Service Change Notice, provide the Authority with a written statement (**Annual Service Plan**) containing the Operator Partner's proposals to achieve the change to the Services (or the relevant part) in accordance with the Continuous Improvement Service Change Notice.

23.5 As soon as practicable after the Authority receives the Annual Service Plan, the parties shall discuss and agree the issues set out in the Annual Service Plan. In such discussions the Authority may modify the Continuous Improvement Service Change Notice, in which case the Operator Partner shall, as soon as practicable, and in any event not more than twenty (20) Business Days after the receipt of such modification, notify the Authority of any consequential changes to the Annual Service Plan.

23.6 If the parties cannot agree on the contents of the Annual Service Plan then the dispute will be determined in accordance with the Dispute Resolution Procedure.

23.7 As soon as practicable after the content of the Annual Service Plan has been agreed or otherwise determined in accordance with the Dispute Resolution Procedure the Authority shall:

23.7.1 confirm in writing the Annual Service Plan; or

23.7.2 withdraw the Continuous Improvement Service Change Notice.

23.8 If the Authority either withdraws the Continuous Improvement Service Change Notice or does not confirm the Annual Service Plan within twenty (20) Business Days of the Annual Service Plan having been agreed or determined under the Dispute Resolution Procedure then the Annual Service Plan and the Continuous Improvement Service Change Notice shall be deemed to have been withdrawn.

23.9 If the Authority confirms the Annual Service Plan then the Authority shall in accordance with the Change Protocol issue an Authority Notice of Change (which shall include all the information set out in the Continuous Improvement Service Change Notice).

23.10 The Operator Partner shall take all reasonable steps to mitigate any costs and maximise any savings arising as a consequence of a Continuous Improvement Service Change Notice and an Authority Notice of Change served under Clause 23.9.

24. **CO-OPERATION FOR INVESTIGATION AND SECURITY**

24.1 The Operator Partner shall co-operate with any investigation relating to a breach of security relating to this Agreement which is carried out by or on behalf of the Authority and:

24.1.1 shall use its reasonable endeavours to make its employees (and other Operator Partner Related Parties) identified by the Authority available to be interviewed by the Authority for the purposes of the investigation; and

24.1.2 shall, subject to any legal restriction on their disclosure, provide all copies of documents, records or other material of any kind which may reasonably be required by the Authority for the purposes of the investigation. The Authority shall have the right to retain copies of any such material for use in connection with the investigation.

24.2 The Authority shall, insofar as is practical, inform the Operator Partner of any specific or general security information which would reasonably be expected to affect the security of the Operator Partner or any Operator Partner Related Party or their property.

24.3 The Operator Partner shall comply with the Authority's reasonable reporting requirements relating to infectious and notifiable diseases to the extent made known to the Operator Partner.

25. AUDIT

25.1 The Operator Partner shall keep and maintain until twelve (12) years after the end of the Contract Period full and accurate records of this Agreement including the Services supplied under it, and specifically those records detailed at Clause 22. The Operator Partner shall on request afford the Authority or the Authority's Representative such access to those records as may be requested by the Authority in connection with this Agreement.

25.2 Except where an audit is imposed on the Authority by a Relevant Authority, the Authority may at any time during the Contract Period and for a period of twelve (12) Months after the Contract Period, conduct an audit for the following purposes:

25.2.1 to verify the accuracy of the Annual Management Payments in respect of the Services (and proposed or actual Changes to this in accordance with the Agreement) or the costs of all suppliers (including SubContractors) of the Services;

25.2.2 to review the integrity, confidentiality and security practices in relation to the Processing of Personal Data;

25.2.3 to review the Operator Partner's compliance with the Data Protection Legislation, FOIA and other Legislation applicable to the Services;

25.2.4 to review the Operator Partner's compliance with its obligations under the Agreement;

25.2.5 to review any records created during the provision of the Services;

25.2.6 to review any books of account kept by the Operator Partner in connection with the provisions of the Services;

25.2.7 to carry out the audit and certification of the Authority's accounts;

25.2.8 to carry out an examination pursuant to section 6 (1) of the National Audit Act 1983 of the economy efficiency and effectiveness with which the Authority has used its resources; and

25.2.9 to verify the accuracy and completeness of any management information delivered or required by this Agreement.

25.3 The Authority shall use its reasonable endeavours to ensure that the conduct of each audit does not unreasonably disrupt the Operator Partner or delay the provision of the Services.

25.4 Subject to the Authority's obligation of confidentiality, the Operator Partner shall on demand provide the Authority and any other Relevant Authority (and/or their agents or representatives) with all reasonable co-operation, access and assistance in relation to each audit, including:

25.4.1 all Information requested within the permitted scope of the audit;

25.4.2 reasonable access to any premises or sites controlled by the Operator Partner and to any Assets used (whether exclusively or non-exclusively) in the performance of the Services;

25.4.3 access to the Staff;

25.4.4 access to software owned or licenced to the Operator Partner including software which is or will be used by the Operator Partner for the purposes of providing the Services; and

25.4.5 accommodation (including desks) at the Operator Partner's premises as reasonably required to conduct the audit.

25.5 The Authority shall endeavour to (but shall not be obliged to) provide at least fourteen (14) calendar days' notice of its intention to conduct an audit.

25.6 If an audit identifies that:

25.6.1 the Operator Partner has committed an Operator Partner Default which is capable of remedy, the Operator Partner shall correct such Operator Partner Default as soon as reasonably practicable and implement a Remediation Plan in accordance with the Remediation Plan Process; and

25.6.2 the Authority has not been paid such charges which have are properly due in respect of any Performance Failure,

then the Operator Partner shall pay to the Authority the amount outstanding, plus the cost of the audit incurred by the Authority if this underpayment was due to an Operator Partner Default, within twenty (20) Business Days.

Exceptional Audit

25.7 The Operator Partner shall permit the Authority and/or its appointed representatives access to conduct an audit (**Exceptional Audit**) of the Operator Partner in any of the following circumstances:

25.7.1 actual or suspected impropriety or fraud

25.7.2 there are reasonable grounds to suspect that:

(a) the Operator Partner has committed an Operator Partner Default;
or

(b) the Operator Partner is in financial distress or at risk of insolvency or bankruptcy, or any fact, circumstance or matter which is reasonably likely to cause the Operator Partner financial distress and result in a risk of the Operator Partner becoming insolvent or bankrupt.

25.8 If the Authority notifies the Operator Partner of an Exceptional Circumstance and that it wishes to conduct an Exceptional Audit, the Operator Partner shall provide

access in accordance with Clause 25.1 as soon as reasonably practicable after such request and in any event within forty eight (48) hours of the request having been made.

Audit Costs

25.9 The parties agree that they shall each bear their own respective costs and expenses incurred in respect of compliance with their obligations under Clauses 25.2 to 25.6 unless an audit identifies an Operator Partner Default by the Operator Partner in which case the Operator Partner shall reimburse:

25.9.1 the Authority for all the Authority's identifiable, reasonable costs and expenses properly incurred in the course of the audit; and

25.9.2 where the Authority, a Relevant Authority and Auditor General appoint another contracting body to conduct an audit, the Authority shall be able to recover on demand from the Operator Partner the identifiable, reasonable and properly incurred costs and expenses of the relevant contracting body.

Exploitation of Information

25.10 The Operator Partner shall not make use of this Agreement or any information issued or provided by or on behalf of the Authority in connection with this Agreement otherwise than for the purposes of this Agreement, except with the written consent of the Authority.

Information about Users and Authority Related Parties

25.11 Where the Operator Partner, in carrying out its obligations under this Agreement, is provided with information relating to Users and Authority Related Parties, the Operator Partner shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Operator Partner has sought the prior written consent of that User or Authority Related Party and has obtained the prior written consent of the Authority.

Disclosure by Audit Commission

25.12 The parties acknowledge that the Audit Commission has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.

25.13 The provisions of this Clause 25 are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

PART 4 - SUPERVENING EVENTS

26. CHANGE CONTROL PROCEDURE

26.1 The provisions of Schedule 22 (Change Protocol) shall have effect in respect of Changes except as otherwise expressly provided in this Agreement.

27. CHANGE IN LAW

27.1 The Operator Partner shall take all steps necessary to ensure that the Services are performed in accordance with the terms of this Agreement following any Change in Law.

Qualifying Change in Law

27.2 If a Qualifying Change in Law occurs or is shortly to occur, then either party may write to the other to express an opinion on its likely effects, giving details of its opinion of:

27.2.1 any necessary change to the Services;

27.2.2 whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law;

27.2.3 whether relief from compliance with obligations is required, including the obligation of the Operator Partner to meet the Services Specification and/or the Service Delivery Proposals during the implementation of any relevant Qualifying Change in Law;

27.2.4 any Change in Revenue that will result from the relevant Qualifying Change in Law;

27.2.5 any estimated Change in Costs that directly result from the Qualifying Change in Law; and

27.2.6 any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law,

in each case giving in full detail the procedure for implementing the change in the Services. Responsibility for the costs of implementation (and any resulting variation to the Annual Payment) shall be dealt with in accordance with Clauses 27.3 to 27.6.

Parties to Discuss

27.3 As soon as practicable after receipt of any notice from either party under Clause 27.2, the parties shall discuss and agree the issues referred to in Clause 27.2 and any ways in which the Operator Partner can mitigate the effect of the Qualifying Change in Law, including:

27.3.1 providing evidence that the Operator Partner has used reasonable endeavours (including (where practicable) the use of competitive

quotes) to oblige its sub-contractors to minimise any increase in costs or decrease in Revenue and maximise any reduction in costs or increase in Revenue;

27.3.2 demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Operator Partner;

27.3.3 giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses, including similar businesses in which the shareholders or their Affiliates carry on business; and

27.3.4 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clauses 27.2.5 and/or 27.2.6.

Change Agreed

27.4 If the parties agree or it is determined under the Dispute Resolution Procedure that the Operator Partner is required to incur additional Capital Expenditure due to a Qualifying Change in Law, then the Operator Partner shall use its reasonable endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to it.

Financing

27.5 If the Operator Partner has used reasonable endeavours to obtain funding for the Capital Expenditure referred to in Clause 27.4, but has been unable to do so within forty (40) Business Days of the date that agreement or determination pursuant to Clause 27.4 occurred, then the Authority shall pay to the Operator Partner an amount equal to that Capital Expenditure on or before the date falling twenty (20) Business Days after the Capital Expenditure has been incurred or, at the Authority's option, in instalments to be paid on the value of works carried out on a monthly basis.

Adjustment to Annual Payment

27.6 Any compensation payable under this Clause 27 (Change in Law) by means of an adjustment to or reduction in the Annual Payment shall be determined and made in accordance with Clause 37 (Financial Adjustments).

Payment of Irrecoverable VAT

27.7 The Authority shall pay to the Operator Partner from time to time as the same is incurred by the Operator Partner sums equal to any Irrecoverable VAT but only to the extent that it arises as a result of a Change in Law. Any such payment shall be made within

twenty (20) Business Days of the delivery by the Operator Partner to the Authority of written details of the amount involved accompanied by details as

to the grounds for and computation of the amount claimed. For the purposes of this Clause 27.7, **Irrecoverable VAT** means input VAT incurred by the Operator Partner on any supply which is made to it which is used or to be used exclusively in performing the Services or any of the obligations or provisions under this Agreement (together with input VAT incurred as part of its overhead in relation to such activities) to the extent that the Operator Partner is not entitled to repayment or credit from HM Revenue & Customs in respect of such input VAT.

28. **COMPENSATION EVENTS**

Effect of a Compensation Event

28.1 If, for any Facility, as a direct result of the occurrence of a Compensation Event the Operator Partner will:

28.1.1 be unable to comply with its obligations under this Agreement; and/or

28.1.2 incur costs or lose Revenue,

then the Operator Partner is entitled to apply for relief from its obligations and/or to claim compensation under this Agreement.

Procedure for Relief and Compensation

28.2 Subject to Clause 32.4, to obtain relief and/or claim compensation the Operator Partner must:

28.2.1 as soon as practicable, and in any event within twenty (20) Business Days after it became aware that the Compensation Event has caused or is likely to cause breach of an obligation under this Agreement and/or the Operator Partner to incur costs or lose Revenue, give to the Authority a notice of its claim for payment of compensation and/or relief from its obligations under this Agreement;

28.2.2 within ten (10) Business Days of receipt by the Authority of the notice referred to in Clause 28.2.1, give full details of the Compensation Event and the relief from its obligations under this Agreement and/or any estimated Change in Costs and/or any estimated Change in Revenue claimed; and

28.2.3 demonstrate to the reasonable satisfaction of the Authority that:

(a) the Compensation Event was the direct cause of:

(i) the estimated Change in Costs;

(ii) the estimated Change in Revenue; and

- (iii) breach of the Operator Partner's obligations under this Agreement; and
- (b) the estimated Change in Costs, estimated Change in Revenue and/or relief from the obligations under this Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Operator Partner acting in accordance with Good Industry Practice.

Giving of Relief and Compensation

28.3 In the event that the Operator Partner has complied with its obligations under Clause 28.2, then:

- 28.3.1 in the case of an additional cost being incurred or Change in Revenue, the Authority shall compensate the Operator Partner for the estimated Change in Costs as adjusted to reflect the actual Change in Costs reasonably incurred and/or, without double counting, for any Change in Revenue (to the extent it could not reasonably have been mitigated) in accordance with Clause 28.6 by an adjustment to the Annual Payment in accordance with Clause 37 (Financial Adjustments); and/or
- 28.3.2 the Authority shall give the Operator Partner such relief from its obligations under this Agreement as is reasonable for such a Compensation Event.

Late Provision of Notice or Information

28.4 In the event that information is provided after the dates referred to in Clause 28.2, then the Operator Partner shall not be entitled to any compensation or relief from its obligations under this Agreement in respect of the period for which the relevant information is delayed.

Failure to Agree

28.5 If the parties cannot agree the extent of any compensation, relief from the Operator Partner's obligations under this Agreement, or the Authority disagrees that a Compensation Event has occurred (or as to its consequences), or that the Operator Partner is entitled to relief under this Clause 28 (Compensation Events), the parties shall resolve the matter in accordance with the Dispute Resolution Procedure.

Method of Calculating Compensation

28.6 Any payment of compensation referred to in Clause 28.3.1 shall be calculated in accordance with Clause 37 (Financial Adjustments), other than any Loss of Revenue which shall be calculated in accordance with Schedule 21 (Loss of Revenue) and compensated in accordance with Clause 37 (Financial Adjustments).

29. RELIEF EVENTS

Occurrence

29.1 If and to the extent that a Relief Event adversely affects the ability of the Operator Partner to perform any of its obligations under this Agreement, then the Operator Partner shall be entitled to apply for relief from any rights of the Authority arising under Clause 40 (Termination on Operator Partner Default) and its obligations under this Agreement.

Relief

29.2 To obtain relief, the Operator Partner must:

29.2.1 as soon as practicable, and in any event within twenty (20) Business Days after it becomes aware that the Relief Event is likely to adversely affect the ability of the Operator Partner to perform its obligations give to the Authority a notice of its claim for relief from its obligations under this Agreement, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;

29.2.2 within five (5) Business Days of receipt by the Authority of the notice referred to in Clause 29.2.1, give full details of the relief claimed; and

29.2.3 demonstrate to the reasonable satisfaction of the Authority that:

- (a) the Operator Partner and its Sub-Contractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;
- (b) the Relief Event directly caused the need for relief from obligations;
- (c) the relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or dealt with by the Operator Partner acting in accordance with Good Industry Practice, without incurring material expenditure; and
- (d) the Operator Partner is using reasonable endeavours to perform its obligations under this Agreement.

Consequences

29.3 In the event that the Operator Partner has complied with its obligations under Clause 29.2, then the Authority shall not be entitled to exercise its right to terminate this Agreement under Clause 40 (Termination on Operator Partner Default) and, subject to Clause 29.4, shall give such other relief as has been requested by the Operator Partner.

Performance Failure and Performance Adjustments⁴

⁴ For Surplus Annual Payment schemes, the Operator Partner should be entitled to apply for relief from having to pay Performance Adjustments as the Authority will continue to receive the Monthly Payment and it will reduce the cost of BII cover on the basis no

29.4 Nothing in this Clause 29 (Relief Events) shall, where the Annual Payment is a Deficit Annual Payment, affect any entitlement to apply Performance Failures and/or Performance Adjustments under Clause 36 (Payment) and Schedule 5 (PPM) during the period in which the Relief Event is subsisting provided that any such Performance Failures and Performance Adjustments shall be disregarded for the purposes of the Authority's right to terminate this Agreement for an Operator Partner Default.

Information

29.5 In the event that information required by Clause 29.2 is provided after the dates referred to in that Clause, then the Operator Partner shall not be entitled to any relief during the period for which the information is delayed.

Notice

29.6 The Operator Partner shall notify the Authority if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

Disputes

29.7 If the parties cannot agree the extent of the relief required, or the Authority disagrees that a Relief Event has occurred or that the Operator Partner is entitled to relief from obligations under this Agreement, the parties shall resolve the matter in accordance with the Dispute Resolution Procedure.

30. FORCE MAJEURE

Obligations

30.1 No party shall be entitled to bring a claim for a breach of obligations under this Agreement by the other party or incur any liability to the other party for any losses or damages incurred by that other party to the extent that a Force Majeure Event occurs and the Affected Party is prevented from carrying out obligations by that Force Majeure Event. The Authority shall not be entitled to terminate this Agreement for an Operator Partner Default if such Operator Partner Default arises from a Force Majeure Event.

Notification for Force Majeure

30.2 On the occurrence of a Force Majeure Event, the Affected Party shall notify the other party as soon as practicable. The notification shall include details of the

Performance Adjustments are payable. On Deficit Annual Payment schemes Payment Adjustments will continue to apply on the basis the Authority should not pay for a service it is not getting.

Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.

Consultation

30.3 As soon as practicable following such notification, the parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this Agreement.

Unable to Agree

30.4 If no such terms are agreed on or before the date falling eighty (80) Business Days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this Agreement for a period of more than one hundred and twenty (120) Business Days, then, either party may terminate this Agreement by giving twenty (20) Business Days' written notice to the other party.

Notice to Continue

30.5 If the Operator Partner gives notice to the Authority under Clause 30.4 that it wishes to terminate this Agreement, then the Authority has the option either to accept such notice or to respond in writing on or before the date falling ten (10) Business Days after the date of its receipt stating that it requires this Agreement to continue. If the Authority gives the Operator Partner such notice (**Continuation Notice**), then:

30.5.1 the Authority shall (where the Annual Payment is a Deficit Annual Payment) pay to the Operator Partner the Annual Payment and any Loss of Revenue (to the extent that such Loss of Revenue arises as a direct result of the Force Majeure Event) or, where the Annual Payment is a Surplus Annual Payment, the Operator Partner shall pay the Authority the Annual Payment less any Loss of Revenue arising as a direct result of the Force Majeure Event from the day after the date on which this Agreement would have terminated under Clause 30.4 as if the Services were being fully provided; and

30.5.2 this Agreement will not terminate until expiry of written notice (of at least twenty (20) Business Days) from the Authority to the Operator Partner that it wishes this Agreement to terminate.

Mitigation

30.6 The parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Operator Partner shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

Cessation of Force Majeure Event

30.7 The Affected Party shall notify the other party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement. Following such notification this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

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PART 5 - LIABILITY AND RISK MANAGEMENT

31. INDEMNITIES, GUARANTEES AND CONTRACTUAL CLAIMS

Operator Partner's Indemnity

31.1 The Operator Partner shall, subject to Clause 31.3 be responsible for, and shall release and indemnify the Authority on demand from and against all liability for Direct Losses arising from:

31.1.1 death or personal injury;

31.1.2 loss of or damage to property (including property belonging to the Authority or for which it is responsible) but excluding the land, buildings, plant, equipment and other assets which are the responsibility of the Operator Partner to provide under this Agreement and which form part of the Facilities; and

31.1.3 third party actions, claims and/or demands other than those which are the subject of the indemnity in Clause 31.2,

which may arise out of, or in consequence of, the operation or maintenance of the Sites and/or Facilities or the performance or non-performance by the Operator Partner of its obligations under this Agreement or the presence on the Authority's property of the Operator Partner or an Operator Partner Related Party or the presence on the land or buildings forming part of a Facility of any User.

31.2 The Operator Partner shall, subject to Clause 31.3, be responsible for, and shall release and indemnify the Authority or any Authority Related Party, on demand from and against all liability for Direct Losses and Indirect Losses arising from third party actions, claims or demands (as described in Clause 31.1.3) brought against the Authority or any Authority Related Party for breach of statutory duty which may arise out of, or in consequence of a breach by the Operator Partner of its obligations under this Agreement to the extent that there are no other remedies available to the Authority under this Agreement.

Operator Partner not Responsible

31.3 The Operator Partner shall not be responsible or be obliged to indemnify the Authority for:

31.3.1 any matter referred to in Clause 31.1 which arises as a direct result of the Operator Partner acting on a written notice issued by the Authority (and for the purposes of this Clause 31.3.1, Clause 1.6 shall not apply); or

31.3.2 any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Authority or any Authority Related Party (other than to the extent such negligence or wilful misconduct would not have occurred but for a breach by the Operator Partner of its obligations under this Agreement) or by the breach of the Authority of its obligations under this Agreement.

Limitation of Indemnity

31.4 An indemnity by either party under any provision of this Agreement shall be without limitation to any indemnity by that party under any other provision of this Agreement.

Notification of Claims

31.5 Where either party (**Indemnified Party**) wishes to make a claim under this Agreement against the other (**Indemnifying Party**) in relation to a claim made against it by a third party (**Third Party Claim**), the Indemnified Party shall give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim.

Conduct of Claims

31.6 Subject to the rights of the insurers under the Operator Partner Insurances and the Authority Insurances, the Indemnifying Party may, with the assistance and co-operation of the Indemnified Party, have conduct of the Third Party Claim including its settlement and the Indemnified Party shall not, unless the Indemnifying Party has failed to resolve the Third Party Claim within a reasonable period, take any action to settle or prosecute the Third Party Claim.

Costs of Claims

31.7 The Indemnifying Party shall, if it wishes to have conduct of any Third Party Claim, give reasonable security to the Indemnified Party for any cost or liability arising out of the conduct of the Third Party Claim by the Indemnifying Party.

Mitigation

31.8 The Indemnified Party shall at all times take all reasonable steps to minimise and mitigate any loss for which the Indemnified Party is entitled to bring a claim against the Indemnifying Party pursuant to this Agreement.

Sub-Contractor Losses

31.9 Where:

31.9.1 a Sub-Contractor is entitled to claim any compensation and/or relief from the Operator Partner under the Sub-Contracts; and

31.9.2 the Operator Partner subsequently makes a claim against the Authority under this Agreement in relation to such compensation and/or relief,

the Authority waives any right to defend the Operator Partner's claim on the ground that the Operator Partner is only required to pay compensation or grant relief to the Sub-Contractor under the Sub-Contracts to the extent that the same is recoverable from the Authority.

32. OPERATOR PARTNER INSURANCES

Requirement to Maintain

32.1 The Operator Partner shall, in relation to each Facility, during the Contract Period take out and maintain or procure the maintenance of the Operator Partner Insurances.

Obligation on Parties

32.2 Neither party to this Agreement shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that party is an insured, a co-insured or an additional insured person.

Evidence of Policies

32.3 The Operator Partner shall provide to the Authority:

32.3.1 copies on request of all insurance policies referred to in Clause 32.1 (together with any other information reasonably requested by the Authority relating to such insurance policies) and the Authority shall be entitled to inspect them during ordinary business hours; and

32.3.2 evidence that the premiums payable under all insurance policies have been paid and that the insurances are in full force and effect in accordance with the requirements of this Clause 32 and Schedule 13 (Insurances).

Renewal Certificates

32.4 Renewal certificates in relation to any of the Operator Partner Insurances shall be obtained by the Operator Partner as and when necessary and copies (certified in a manner acceptable to the Authority acting reasonably) shall be forwarded by the Operator Partner to the Authority as soon as possible but in any event on or before the renewal date.

Breach

32.5 If the Operator Partner is in breach of Clause 32.1, the Authority may pay any premiums required to keep such insurance in force or itself procure such insurance and may, in either case, recover such amounts from the Operator Partner on written demand.

Notification of Claims

32.6 The Operator Partner shall give the Authority notification within ten (10) Business Days after any claim in excess of twenty thousand pounds (£20,000) (Indexed) on any of the Operator Partner Insurances or which, but for the application of the applicable insurance policy excess, would be made on any of the Operator Partner Insurances and (if required by the Authority) give full details of the incident giving rise to the claim.

Limit of Liability

32.7 Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Operator Partner of its other liabilities and obligations under this Agreement.

Premia

32.8 Save where expressly set out in this Agreement, the insurance premia for the Operator Partner Insurances and the amount of any loss that would otherwise be recoverable under any of the Operator Partner Insurances but for the applicable uninsured deductible and limit of indemnity in respect of such insurance shall at all times be the responsibility of the Operator Partner.

Authority Approval

32.9 The Operator Partner Insurances shall be effected with insurers approved by the Authority, such approval not to be unreasonably withheld or delayed.

33. AUTHORITY INSURANCES

33.1 The Authority shall take out and maintain the Authority Insurances.

33.2 In relation to the Authority Insurances the Operator Partner shall:

33.2.1 comply with all reasonable requirements of the insurers;

33.2.2 comply with all requirements of the fire authority as to fire precautions relating to the Facilities or the Sites; and

33.2.3 give notice to the Authority of any requirements and recommendations of the fire authority as to fire precautions relating to the Facilities or the Sites or any requirements or recommendations of the insurers.

33.3 Claims under the Authority Insurances shall be pursued by the Authority at its discretion. Where the Authority pursues such claims, the Operator Partner shall give its full co-operation in assisting the Authority including providing all such documents, data and information as may be reasonably required by the Authority.

33.4 To the extent that the premium levels and/or deductible levels in respect of the Authority's Insurances have increased as a result of a change in the Authority's claims made under the Authority's Insurances caused by Operator Partner Damage then the Authority shall be entitled to claim:

33.4.1 the increased premia attributable to such Operator Partner Damage; and

33.4.2 in respect of each claim on the Authority's Insurances made by the Authority for which the Authority carries deductible risk, the amount by

which the deductible applying under the Authority's Insurances at the relevant time has increased as a result of Operator Partner Damage,

in each case as a debt due or exercise its rights of set off pursuant to Clause 36.16, provided always that in each case the Authority shall provide written confirmation from the insurance broker responsible for the Authority's Insurances that the increases in premia and/or deductibles (and the amount of such increases) have been caused by Operator Partner Damage claims in accordance with this Agreement.

34. REINSTATEMENT AND CHANGE OF REQUIREMENT AFTER INSURED EVENT

34.1 All insurance proceeds received under any policy referred to in paragraph 1 of Part 2 of Schedule 13 (Insurances) (**Operator Partner Physical Damage Policies**) shall be applied to repair, reinstate and replace each part or parts of the assets in respect of which such proceeds were received.

34.2 In the event of any damage to any Facility or Site which damage is covered or would be covered by the Authority Insurances, the Authority shall in consultation with the Operator Partner carry out or procure the carrying out of reinstatement works to repair or replace property or assets so damaged and the occurrence of such damage and any such reinstatement works carried out to the extent it affects the Services and/or the operation of the Facility shall be treated as an Authority Change.

35. RISKS THAT BECOME UNINSURABLE

Uninsurable Risks

35.1 Nothing in Clause 32 (Insurance) or this Clause 35 shall oblige the Operator Partner to take out insurance in respect of a risk which is Uninsurable save where the predominant cause of the risk being Uninsurable is an act or omission of the Operator Partner or an Operator Partner Related Party.

Risks Become Uninsurable

35.2 If a risk usually covered by property damage, third party liability, business interruption (but excluding loss of profits) or statutory insurances, in each case required under this Agreement, becomes Uninsurable then:

35.2.1 the Operator Partner shall notify the Authority within five (5) Business Days of the risk becoming Uninsurable; and

35.2.2 if both parties agree, or it is determined in accordance with the Dispute Resolution Procedure, that the risk is Uninsurable and that:

- (a) the risk being Uninsurable is not caused by the actions, breaches, omissions or defaults of the Operator Partner or a sub-contractor; and
- (b) the Operator Partner has demonstrated to the Authority that the Operator Partner and a prudent board of directors of a company operating the same or substantially similar businesses in the United Kingdom to that operated by the Operator Partner would in similar

circumstances (in the absence of the type of relief envisaged by this Clause 35) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the likelihood of the Uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such Uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company,

then the parties shall meet to discuss the means by which the risk should be managed or shared (including considering the issue of self-insurance by either party).

Consequences

35.3 If the requirements of Clause 35.2 are satisfied, but the parties cannot agree as to how to manage or share the risk, then:

35.3.1 in respect of such third party liability insurance only, the Authority shall (at the Authority's option) either pay to the Operator Partner an amount equal to the amount set out in Clause 47 (Compensation on Termination for Force Majeure) and this Agreement will terminate or elect to allow this Agreement to continue and Clause 35.3.2 shall thereafter apply in respect of such risk;

35.3.2 in respect of such property damage insurance or third party liability insurance (if the Authority elects to allow the Agreement to continue in accordance with Clause 35.3.1) business interruption (but not loss of profits), delay in start-up (but not loss of profits) or statutory insurances this Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to the Operator Partner an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and this Agreement will continue, or an amount equal to the amount calculated in accordance with Clause 47 (Compensation on Termination for Force Majeure) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon this Agreement will terminate;

(a) where pursuant to Clauses 35.3.1 and/or 35.3.2 this Agreement continues then the Annual Payment where it is a Deficit Annual Payment shall be reduced in each Contract Year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by the Operator Partner in respect of the relevant risk in the Contract Year prior to it becoming Uninsurable (Indexed from the first day of the Contract Year in which such risk became Uninsurable) from the date that the risk became Uninsurable provided that where in applying such

amount the Deficit Annual Payment is reduced to zero or would after such payment result in a Surplus Annual Payment any such excess amount shall be for the account of the Operator Partner;

- (b) where the risk is Uninsurable for part of a Contract Year only the reduction in the Annual Payment (where it is a Deficit Annual Payment) shall be pro-rated to the number of months for which the risk was Uninsurable; and
- (c) where pursuant to Clauses 35.3.1 and/or 35.3.2 this Agreement continues the Operator Partner shall approach the insurance market at least every four months to establish whether the risk remains Uninsurable. As soon as the Operator Partner is aware that the risk is no longer Uninsurable, the Operator Partner shall take out and maintain and procure the taking out and maintenance of insurance (to be incepted as soon as reasonably practicable) for such risk in accordance with this Agreement.

35.4 If, pursuant to Clause 35.3.2, the Authority elects to make payment to the Operator Partner (such that the Agreement will terminate) (**Relevant Payment**) the Operator Partner shall have the option (exercisable within twenty (20) Business Days of the date of such election by the Authority (**Option Period**)) to pay to the Authority on or before the end of the Option Period, an amount equal to the insurance proceeds that would have been payable had the risk not become Uninsurable, in which case this Agreement will continue (and the Relevant Payment will not be made by the Authority), and the Operator Partner's payment shall be applied for the same purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

Increase in Insured Amounts

35.5 The limit of indemnity and the maximum deductibles for each of the Operator Partner Insurances shall be Indexed, provided such limits of indemnity and maximum deductibles shall only be increased on each renewal date such that the limit that is Indexed becomes equal to or exceeds the next whole insurable amount or deductible (as the case may be) available in the insurance market.

Unavailability of Terms or Conditions

35.6 If, upon the renewal of any insurance which the Operator Partner is required to maintain or to procure the maintenance of pursuant to this Agreement:

35.6.1 any Insurance Term is not available to the Operator Partner in the worldwide insurance market with reputable insurers of good standing; and/or

35.6.2 the insurance premium payable for insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom,

(other than, in each case, by reason of one or more actions or omissions of the Operator Partner and/or any sub-contractors) then Clause 35.7 shall apply.

- 35.7 If it is agreed or determined that Clause 35.6 applies then the Authority shall waive the Operator Partner's obligations in Clause 32 (Operator Partner Insurances) and/or Schedule 13 (Insurances) in respect of that particular Insurance Term and the Operator Partner shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in Clause 35.6 continue to apply to such Insurance Term.
- 35.8 To the extent that the parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and/or condition of insurance is available to the Operator Partner in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address the Operator Partner's inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in the UK are (at such time) generally prepared to pay, the Operator Partner shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition. Notwithstanding any other provision of this Agreement whatsoever, the costs of such insurance shall be for the account of the Operator Partner.
- 35.9 Where the Authority has exercised the waiver pursuant to Clause 35.7, it shall where a Deficit Annual Payment applies, be entitled to deduct from the Monthly Payment, the Adjusted Amount.
- 35.10 While Clause 35.6 applies, the Annual Payment where a Deficit Annual Payment applies, shall be reduced each Contract Year by the aggregate Adjusted Amount for that Contract Year.
- 35.11 The Operator Partner shall notify the Authority as soon as reasonably practicable and in any event within five days of becoming aware that Clause 35.6.1 and/or 35.6.2 are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). The Operator Partner shall provide the Authority with such information as the Authority reasonably requests regarding the unavailability of the Insurance Term and the parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.
- 35.12 In the event that Clause 35.6.1 and/or 35.6.2 apply in respect of an Insurance Term (irrespective of the reasons for the same) the Operator Partner shall approach the insurance market at least every four months to establish whether Clause 35.6.1 and/or 35.6.2 remain applicable to the Insurance Term. As soon as the Operator Partner is aware that Clause 35.6.1 and/or 35.6.2 has ceased to

apply to the Insurance Term, the Operator Partner shall take out and maintain or procure the taking out and maintenance of the insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with

this Agreement and any amount of Annual Payment adjusted pursuant to Clause 35.9 or 35.10 shall cease to apply.

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PART 6 - PAYMENT AND SURPLUS SHARE

36. PAYMENT

Payment of the Monthly Payment

36.1 Following the Commencement Date, the Authority shall pay the Operator Partner the Monthly Payment in respect of each Contract Month where the Annual Payment is a Deficit Annual Payment, and the Operator Partner shall pay the Authority the Monthly Payment in respect of each Contract Month where the Annual Payment is a Surplus Annual Payment, in each case calculated in accordance with Schedule 5 (PPM).

36.2 Where the Annual Payment is a Deficit Annual Payment, the Monthly Payment shall be reduced in each Contract Month by any Performance Adjustments applicable in accordance with Schedule 5 (PPM).

36.3 Where the Annual Payment is a Surplus Annual Payment, the Operator Partner shall separately pay to the Authority in respect of a Contract Month any Performance Adjustments applicable in accordance with Schedule 5 (PPM).

Report and Invoice

36.4 On the first Business Day of each Contract Month the Operator Partner shall submit to the Authority:

36.4.1 a report showing the Monthly Payment and any Performance Adjustments for the previous Contract Month and, individually, each item taken into account in calculating such Monthly Payment and Performance Adjustments pursuant to Schedule 5 (PPM); and

36.4.2 in respect of a Deficit Annual Payment, an invoice for the amount (if any) shown by the report as owing by the Authority to the Operator Partner, taking into account the Monthly Payment and any Performance Adjustments applied in accordance with Clause 36.2 and for any VAT payable by the Authority in respect of that amount; or

36.4.3 in respect of a Surplus Annual Payment a statement showing the Monthly Payment payable by the Operator Partner to the Authority for the Authority to issue an invoice to the Operator Partner for such amount plus any VAT (if any) payable in respect of that amount. The Authority shall issue its invoice to the Operator Partner, taking account of the Operator Partner's statement (but not being bound by it).

Final Payment Period

36.5 Where the Annual Payment is a Deficit Annual Payment:

36.5.1 during the final two Contract Months, in addition to the amounts referred to in Clause 36.4.2 the Authority may withhold an amount equivalent to the average per Contract Month of the sum of the Performance

Adjustments applicable to the previous six (6) Contract Months until such time as the Operator Partner shall have provided a report to the Authority in respect of those Contract Months containing the information set out in Clause 36.4.1; and

36.5.2 on receipt of the reports from the Operator Partner in respect of the final two Contract Months the Authority may retain from the amounts withheld pursuant to Clause 36.5.1 a sum equivalent to the sum of the Performance Adjustments identified in the report or any other amount agreed by the parties or determined pursuant to Clause 70 (Dispute Resolution) as owing to the Authority. The Authority shall pay the balance of any monies withheld to the Operator Partner or if it is agreed or determined the Operator Partner owes monies to the Authority in excess of those sums withheld, the Operator Partner shall pay such additional amounts to the Authority, in each case with interest on that amount at the Prescribed Rate calculated on a daily basis and compounded quarterly from the date on which the payment was withheld by the Authority pursuant to Clause 36.5.1 or from the date on which over payment was made (in the case of excessive claims by the Operator Partner) until all relevant monies have been paid in full and whether before or after judgement.

Payment

36.6 Subject to the remaining provisions of this Clause, the Authority shall pay the amount stated in any invoice submitted under Clause 36.4.2 and the Operator Partner shall pay the amounts stated in any invoices submitted by the Authority pursuant to Clause 36.4.3 on the final Business Day of the Contract Month in question.

36.7 Where the Annual Payment is a Surplus Annual Payment, the amount of any Performance Adjustments calculated in accordance with Schedule 5 (PPM) shall be paid by the Operator Partner to the Authority at the same time as the Monthly Payment in respect of the relevant Contract Month is paid.

Disputed Amounts

36.8 If either party (Disputing Party) disputes the other Party's (Claiming Party) entitlement to any part of the amount claimed by the Operator Partner pursuant to Clause 36.4 in respect of any Contract Month the following provisions shall apply.

36.9 At least five (5) Business Days before the final date for payment due to the Claiming Party, the Disputing Party shall give notice to the Claiming Party of the following:

36.9.1 any amounts claimed by the Claiming Party that the Disputing Party objects to and is seeking to withhold; or

36.9.2 any amounts that the Disputing Party is owed by the Claiming Party (including any amounts previously overpaid to the Claiming Party) which the Disputing Party is seeking to withhold.

- 36.10 Any notice shall set out the sum or sums proposed to be withheld, grounds for withholding payment and the amount attributable to each ground.
- 36.11 The Disputing Party shall notify the Claiming Party in writing within ten (10) Business Days of receipt by the Disputing Party of the relevant invoice and supporting report of that part of the amount (insofar as at the time of such notice the Disputing Party is reasonably able to quantify it) which the Disputing Party (acting in good faith) disputes (**Disputed Amount**) and submit to the Claiming Party such supporting evidence as the Disputing Party may have.
- 36.12 The Authority may withhold payment of any Disputed Amount pending agreement or determination of the Operator Partner's entitlement in relation to the Disputed Amount but shall pay on the due date any undisputed amounts. The Operator Partner may, where there is a Surplus Annual Payment, withhold payment of any Disputed Amount pending agreement or determination of the Authority's entitlement in relation to the Disputed Amount but shall pay on the due date any undisputed amount.

Response to Disputing Party Notice

- 36.13 Within five (5) Business Days following receipt by the Claiming Party of any notice served by the Disputing Party pursuant to Clause 36.9, the Claiming Party shall respond by notifying the Disputing Party as to whether or not it agrees with the statements made in that notice. If the Claiming Party indicates that it does agree, or if the Claiming Party fails to make such a response within that time limit, the Disputing Party shall be entitled:
- 36.13.1 to retain on a permanent basis any amounts withheld pursuant to Clause 36.12; and
- 36.13.2 to reclaim from the Claiming Party the amount of any over-payment which may have been made to the Claiming Party together with interest on any such amount at the Prescribed Rate calculated on a daily basis and compounded quarterly from the date on which the over-payment was made until that amount has been paid in full and whether before or after judgment.

Dispute

- 36.14 If the Claiming Party responds (pursuant to Clause 36.13) that it does not agree with all or any of the statements made in any notice served by the Disputing Party pursuant to Clause 36.9, the matter or matters in question shall be determined under the Dispute Resolution Procedure.

Determination of Dispute

- 36.15 If the determination of any dispute conducted pursuant to Clause 36.14 shows that:
- 36.15.1 the Disputing Party has withheld any amount which the Claiming Party was entitled to be paid; or

36.15.2 the Claiming Party has claimed under Clause 36.4 any amount which it was not entitled to be paid,

the Disputing Party shall pay such amount to the Claiming Party or the Claiming Party shall repay such amount to the Disputing Party with interest in each case on that amount at the Prescribed Rate calculated on a daily basis and compounded quarterly from the date on which payment should have been made (in the case of failure to pay by the Disputing Party) or from the date on which over payment was made (in the case of excessive claims by the Claiming Party) until all relevant monies have been paid in full and whether before or after judgment.

Rights of Set Off

36.16 Each party shall be entitled to retain or set off any amount owed to it by the other party under this Agreement which has fallen due and payable against any amount due to the other party under this Agreement.

Set Off and Disputed Amounts

36.17 If the payment or deduction of any amount referred to in Clause 36.16 is disputed then any undisputed element of that amount shall be paid and the disputed element shall be dealt with in accordance with the Dispute Resolution Procedure.

VAT on Payments

36.18 All amounts due under this Agreement are exclusive of VAT.

36.19 If any supply made or referred to in this Agreement is or becomes chargeable to VAT then the person receiving the supply (**Recipient**) shall in addition pay the person making the supply (**Supplier**) the amount of that VAT against receipt by the Recipient from the Supplier of a proper VAT invoice in respect of that supply.

36.20 Where under this Agreement any amount is calculated by reference to any sum which has or may be incurred by any person, the amount shall include any VAT in respect of that amount only to the extent that such VAT is not recoverable as input tax by that person (or a member of the same VAT group), whether by set off or repayment.

36.21 The Operator Partner shall provide the Authority with any information reasonably requested by the Authority in relation to the amount of VAT chargeable in accordance with this Agreement and payable by the Authority to the Operator Partner.

Promoting Tax Compliance

36.22 If, at any point during the Contract Period, an Occasion of Tax Non-Compliance occurs, the Operator shall:

36.22.1 notify the Authority in writing of such fact within 5 Business Days of its occurrence; and

36.22.2 promptly provide to the Authority:

- (a) details of the steps which the Operator is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors that it considers relevant; and
- (b) such other information in relation to the Occasion of Tax NonCompliance as the Authority may reasonably require.

Indexation

36.23 The Annual Payment, and other amounts stated to be subject to indexation, shall be Indexed in accordance with clause 1.4 on 1 April 2022 and on each anniversary thereof.

NNDR

36.24 The parties shall comply with the provisions of Schedule 15 (NNDR).

Surplus Share

36.25 The Authority is entitled to share in the surpluses generated at the Facilities in accordance with the sharing mechanism set out in Schedule 17 (Surplus Share).

37. FINANCIAL ADJUSTMENTS

Updating the LOBTA

37.1 Whenever a Relevant Event or Loss of Revenue Event occurs, the financial consequence shall (save where otherwise provided in this Agreement or where the parties mutually agree otherwise) be determined in accordance with this Clause 37 (Financial Adjustments). Where for the purposes of this Clause 37 (Financial Adjustments) the LOBTA is to be adjusted by reference to a Relevant Event or Loss of Revenue Event, this shall be carried out by the Operator Partner, in consultation with the Authority, to reflect the cumulative impact of any prior Relevant Event or Loss of Revenue Event on the version of the LOBTA applicable immediately prior to the relevant adjustment and to reflect the impact of the Relevant Event or Loss of Revenue Event in respect of which such adjustment is being undertaken. In calculating the Change in Costs and Change in Revenue (in respect of Relevant Events) and in calculating the Loss of Revenue (in respect of Loss of Revenue Events) and in assessing other adjustments to be made to the LOBTA arising from a Relevant Event or Loss of Revenue Event, the Operator Partner shall be entitled to take into account, inter alia:

37.1.1 any Change in Costs and Change in Revenue in respect of a Relevant Event and any Loss of Revenue (only) in respect of a Loss of Revenue Event;

37.1.2 reasonable economic assumptions prevailing at the time; and

37.1.3 changes in the prospective technical performance of Services arising as a result of the Relevant Event or Loss of Revenue Event,

provided that the Authority shall not be required (and the Operator Partner shall not be entitled) to take into account the financial impact up to the date of the Relevant Event or Loss of Revenue Event of those risks which the Operator Partner bears under the terms of this Agreement, including (to the extent so borne by the Operator Partner under this Agreement) changes in VAT rates, taxation rates, CPI and the impact of Performance Adjustments.

Application to the LOBTA

37.2 Where, pursuant to this Agreement, either party is entitled to payment of any sum the assessment of which properly requires reference to the LOBTA, the adjustment to the Annual Payment due shall be that required to ensure that, by reference to the LOBTA adjusted under this Clause 37 (Financial Adjustments), the Operator Partner is left in a no better and no worse position than under the version of the LOBTA applicable immediately prior to the relevant adjustment, and shall be ascertained by determining the adjustment to the Annual Payment required to maintain the financial position of the Operator Partner with that in which it would have been under the version of the LOBTA applicable immediately prior to the relevant adjustment.

No Better and no Worse

37.3 Subject to Clause 37.4, any reference in this Agreement to no better and no worse or to leaving the Operator Partner in a no better and no worse position shall be construed by reference to the Operator Partner's:

37.3.1 rights, duties and liabilities under or arising pursuant to performance of this Agreement, the Leisure Contract and the FM Agreement; and

37.3.2 ability to perform its obligations and exercise its rights under this Agreement, the Leisure Contract and the FM Agreement,

so as to ensure that:

37.3.3 the Operator Partner is left in a position which is no better and no worse in relation to the Base Profit, Base Head Office Costs and Base Modelled Costs (as defined in Schedule 17 (Benchmarking)) by reference to the version of the LOBTA applicable immediately prior to the Relevant Event than had the Relevant Event not occurred; and

37.3.4 the ability of the Operator Partner to comply with this Agreement is not adversely affected or improved as a consequence of the Relevant Event.

37.4 In respect of any Loss of Revenue, the sum calculated pursuant to Schedule 21 (Loss of Revenue) and compensated by way of a lump sum payment, in instalments or by way of an adjustment to the Annual Payment shall be deemed to leave the Operator Partner in a "no better and no worse position".

37.5 Where in accordance with this Agreement any adjustment is to be made to the Annual Payment (where it is a Surplus Annual Payment) or where such adjustment would, when applied to the Annual Payment give rise to a Surplus

Annual Payment the amount of the adjustment shall in all respects be limited so that in no circumstances will the Annual Payment, where it is a Surplus Annual Payment following an adjustment to be applied to it, exceed the Base Surplus Amount.

Replacement of LOBTA and Loss of Revenue Schedule

37.6 Any LOBTA produced following adjustments in accordance with this Clause 37 (Financial Adjustments) shall, when it is approved by the Authority (such approval not to be unreasonably withheld), become the LOBTA for the purposes of this Agreement until its further amendment in accordance with this Agreement.

37.7 When an LOBTA is updated for the purposes of this Clause 37 (Financial Adjustments), an updated Schedule 21 (Loss of Revenue) shall also be prepared. When the updated Schedule 21 (Loss of Revenue) is approved by the Authority (such approval not to be unreasonably withheld), it shall become Schedule 21 (Loss of Revenue) for the purposes of this Agreement until its further amendment in accordance with this Agreement.

Amendments to Logic and/or Formulae

37.8 Where it is necessary to amend the logic or formulae incorporated in the LOBTA to permit adjustments to be made, this shall be done to the extent necessary and in accordance with generally accepted accounting principles.

37.9 Where any amendment is made to the logic or formulae incorporated in the LOBTA, the LOBTA, shall first be run as at the date immediately prior to amendment to ensure that the key ratios from the LOBTA are maintained at no lower or no higher levels than the key ratios immediately post the amendment.

Copies of the Revised LOBTA and Loss of Revenue Schedule

37.10 Following any change to the LOBTA and/or Schedule 21 (Loss of Revenue) under the provisions of this Clause 37 (Financial Adjustments), the Operator Partner shall promptly deliver a copy of the revised LOBTA and/or Schedule 21 (Loss of Revenue) to the Authority in the same form as is established at the Commencement Date or in such other form as may be agreed between the parties.

38. BENCHMARKING

The benchmarking exercises shall be carried out as required by and in accordance with Schedule 17 (Benchmarking).

PART 7 - TERMINATION AND CONSEQUENCES OF TERMINATION

39. VOLUNTARY TERMINATION BY THE AUTHORITY

39.1 The Authority may terminate this Agreement at any time on or before the Expiry Date by issuing a Termination Notice to the Operator Partner in accordance with this Clause 39.

- 39.2 A Termination Notice pursuant to this Clause 39 must state the following:
- 39.2.1 that the Authority is terminating this Agreement under this Clause 39 (Voluntary Termination by the Authority);
- 39.2.2 that this Agreement will terminate on the date specified in the notice, which must be a minimum of twenty (20) Business Days after the date of receipt of the notice; and
- 39.2.3 whether the Authority requires the Operator Partner to transfer its rights, title and interest in and to the Assets to the Authority or as directed by the Authority.
- 39.3 This Agreement will terminate on the date referred to in Clause 39.2.2.

40. **TERMINATION ON OPERATOR PARTNER DEFAULT**

40.1 The Authority shall be entitled to terminate this Agreement by notice in writing to the Operator Partner if an Operator Partner Default has occurred. Any such Termination Notice must specify:

40.1.1 the type and nature of Operator Partner Default that has occurred, giving reasonable details; and

40.1.2 that in the case of any Operator Partner Default falling within limbs (a) (material breach), (g) (assignment, subcontracting and change of control) and (k) (insurance) of the definition of Operator Partner Default this Agreement will terminate on the day falling forty (40) Business Days after the date the Operator Partner receives the Termination Notice, unless:

(a) in the case of a breach under limb (a) (material breach) of the definition of Operator Partner Default the Operator Partner puts forward an acceptable rectification programme within twenty (20) Business Days after the date the Operator Partner receives the Termination Notice (and implements such programme in accordance with its terms and rectifies the Operator Partner Default in accordance with the programme); and

(b) in the case of any Operator Partner Default falling within limbs (a) (material breach), (g) (assignment, sub-contracting and change of control), (k) (insurance) and (m) (tax non-compliance) of the definition of Operator Partner Default the Operator Partner rectifies the Operator Partner Default within forty (40) Business Days after the date the Operator Partner receives the Termination Notice; or

(c) that in the case of any other Operator Partner Default (not being limbs (a) (material breach), (g) (assignment, subcontracting and change of control) (k) (insurance) or (m) (tax) non-compliance), this Agreement will terminate on the date falling forty (40) Business

Days after the date the Operator Partner receives the Termination Notice.

- 40.2 If the Operator Partner either rectifies the Operator Partner Default within the time period specified in the Termination Notice, or implements the rectification programme, if applicable, in accordance with its terms, the Termination Notice will be deemed to be revoked and this Agreement will continue.
- 40.3 If either in the case of an Operator Partner Default within limb (a) (material breach) of the definition of that term where no acceptable rectification programme has been put forward pursuant to Clause 40.1.2(a) or in the case of an Operator Partner Default falling within limbs (g) (assignment, subcontracting and change of control) or (k) (insurance) of the definition of Operator Partner Default, the Operator Partner fails to rectify the Operator Partner Default within the time period specified in the Termination Notice, the Authority may give notice stating that this Agreement will terminate on the date falling five (5) Business Days after the date of receipt of such notice.
- 40.4 If the Operator Partner fails to implement any rectification programme in accordance with its terms, this Agreement will terminate on the date falling thirty (30) Business Days after the date of notification by the Authority to the Operator Partner of such failure to implement the rectification programme in accordance with its terms.
- 40.5 On termination the Authority may require the Operator Partner to transfer all of its rights, title and interest in and to the Assets to the Authority or as directed by the Authority.

41. **TERMINATION FOR PERSISTENT BREACH BY THE OPERATOR PARTNER**

Warning Notice

41.1 If a particular breach, other than any breach for which Performance Failures and/or Performance Adjustments could have been applied, has continued for more than fourteen (14) days or occurred more than three (3) times in any six (6) month period then the Authority may serve a notice on the Operator Partner:

41.1.1 specifying that it is a formal warning notice;

41.1.2 giving reasonable details of the breach; and

41.1.3 stating that the breach is a breach which, if it recurs frequently or continues, may result in a termination of this Agreement.

Final Notice

41.2 If, following service of a warning notice the breach specified has continued beyond thirty (30) days or recurred in three (3) or more months within the six (6) month period after the date of service, then the Authority may serve another notice (**Final Warning Notice**) on the Operator Partner:

41.2.1 specifying that it is a Final Warning Notice;

41.2.2 stating that the breach specified has been the subject of a warning notice served within the six (6) month period prior to the date of service of the Final Warning Notice; and

41.2.3 stating that if the breach continues for more than fourteen (14) days or recurs in three (3) or more months within the six (6) month period after the date of service of the Final Warning Notice, this Agreement may be terminated.

Currency of Warning Notices

41.3 A warning notice may not be served in respect of any incident of breach which has previously been counted in the award of a separate warning notice.

42. TERMINATION ON CORRUPT GIFTS AND FRAUD

42.1 The Operator Partner represents and warrants that neither it, nor to the best of its knowledge any Operator Partner Related Party, have at any time prior to the Commencement Date:

42.1.1 committed a Prohibited Act or been formally notified that it is subject to an investigation or prosecution which relates to an alleged Prohibited Act; or

42.1.2 been listed by any government department or agency as being disbarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in government procurement programmes or contracts on the grounds of a Prohibited Act.

42.2 The Operator Partner shall not during the term of this Agreement:

42.2.1 commit a Prohibited Act; or

42.2.2 do or suffer anything to be done which would cause the Authority or any Authority Related Party to contravene any of the Relevant Requirements or otherwise incur any liability in relation to the Relevant Requirements.

42.3 The Operator Partner shall during the term of this Agreement:

42.3.1 establish, maintain and enforce, and require that any Sub-Contractors establish, maintain and enforce, policies and procedures which are

adequate to ensure compliance with the Relevant Requirements and prevent the occurrence of a Prohibited Act; and

42.3.2 keep appropriate records of its compliance with its obligations under Clause 42.3.1 and make such records available to the Authority on request.

42.4 The Operator Partner shall immediately notify the Authority in writing if it becomes aware of any breach of Clause 42.1 and/or 42.2, or has reason to believe that it has or any Operator Partner Related Party have:

42.4.1 been subject to an investigation or prosecution which relates to an alleged Prohibited Act;

42.4.2 been listed by any government department or agency as being debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in government procurement programmes or contracts on the grounds of a Prohibited Act; or

42.4.3 received a request or demand for any undue financial or other advantage of any kind in connection with the performance of this Agreement or otherwise suspects that any person or party directly or indirectly connected with this Agreement has committed or attempted to commit a Prohibited Act.

42.5 If the Operator Partner makes a notification to the Authority pursuant to Clause 42.4, the Operator Partner shall respond promptly to the Authority's enquiries, cooperate with any investigation, and allow the Authority to audit books, records and any other relevant documentation. This obligation shall continue for twelve (12) calendar years following the expiry or termination of this Agreement.

42.6 If the Operator Partner is in breach of Clause 42.1 and/or 42.2, the Authority may by notice:

42.6.1 require the Operator Partner to remove from performance of this Agreement any Operator Partner Related Party whose acts or omissions have caused the breach; or

42.6.2 immediately terminate this Agreement.

42.7 Any notice served by the Authority under Clause 42.6 shall specify the nature of the Prohibited Act, the identity of the party who the Authority believes has committed the Prohibited Act and the action that the Authority has elected to take (including, where relevant, the date on which this Agreement shall terminate).

42.8 Where the Authority serves a notice under Clause 42.6.1, the Operator Partner shall comply with such notice within ten (10) Business Days, failing which the Authority shall be entitled to terminate this Agreement with immediate effect by serving written notice on the Operator Partner.

43. TERMINATION ON AUTHORITY DEFAULT

43.1 If an Authority Default has occurred and the Operator Partner wishes to terminate this Agreement, the Operator Partner must serve a Termination Notice on the Authority within thirty (30) Business Days of becoming aware of the Authority

Default.

43.2 Unless the Authority rectifies the Authority Default within twenty (20) Business Days of receipt of the Termination Notice, this Agreement will terminate on the day falling forty (40) Business Days after the date the Authority receives the Operator Partner Termination Notice.

44. COMPENSATION ON TERMINATION FOR AUTHORITY DEFAULT/VOLUNTARY TERMINATION

44.1 On termination of this Agreement pursuant to Clauses 39 (Voluntary Termination by the Authority) or 43 (Termination on Authority Default), the Authority shall pay the Operator Partner in accordance with Clauses 49 (Miscellaneous Compensation Provisions) and 50 (Method of Payment) an amount equal to the aggregate of (without double counting):

44.1.1 such amounts properly due to the Operator Partner and invoiced in accordance with Clause 36 (Payment) in respect of the period prior to such termination but which have not been previously paid;

44.1.2 where a Deficit Annual Payment applies such amount that can be reasonably and properly attributed to Services carried out following the most recent invoice issued pursuant to Clause 36 (Payment) and/or such other amounts properly due to the Operator Partner in accordance with this Agreement which, in each case remains due at the Termination Date, including any sum set off by the Operator Partner pursuant to Clause 36.16;

44.1.3 any Sub-Contractor Breakage Costs; and

44.1.4 the Profit Payment,

LESS to the extent it is a positive amount, the aggregate of (without double counting):

44.1.5 where a Surplus Annual Payment applies such amounts properly due to the Authority in accordance with Clause 36 (Payment) in respect of the period up to the Termination Date but which have not been previously paid;

44.1.6 amounts which the Authority is entitled to set off pursuant to Clause 36.16; and

44.1.7 BI Proceeds, to the extent that they compensate the Operator Partner in respect of any of the items listed at Clauses 44.1.1 to 44.1.6.

45. COMPENSATION ON TERMINATION FOR OPERATOR PARTNER DEFAULT AND CORRUPT GIFTS AND FRAUD

45.1 On termination of this Agreement in accordance with Clause 40 (Termination on Operator Partner Default) or 42 (Termination on Corrupt Gifts and Fraud), the Operator Partner shall be liable to and shall pay the Authority:

45.1.1 the reasonable costs incurred by the Authority in the rectification of any part of any Facility which is necessary due to any failure of the Operator Partner to comply with its obligations under this Agreement;

- 45.1.2 where the Authority carries out a Retendering Process, the Retendering Costs;
- 45.1.3 where the Authority carries out a Retendering Process, an amount equal to the aggregate of the Retendered Annual Payment less the Current Annual Payment where it is a positive number; and
- 45.1.4 all other Direct Losses which the Authority suffers or incurs arising out of any breach of this Agreement or as a result of the termination of this Agreement including (without limitation) any liability to any third party,

LESS, without double counting and subject to the Authority's right of set off under Clause 36.16:

- 45.1.5 such amounts properly due to the Operator Partner and invoiced in accordance with Clause 36 (Payment) in respect of the period prior to such termination but which have not been previously paid; and
- 45.1.6 where a Deficit Annual Payment applies, such amount that can be reasonably and properly attributed to Services carried out following the most recent invoice issued pursuant to Clause 36 (Payment) and/or such other amounts properly due to the Operator Partner in accordance with this Agreement which, in each case, remains due at the Termination Date including any sum set off by the Operator Partner pursuant to Clause 36.16.

46. RETENDERING PROCESS

46.1 If the Authority elects to retender the Services following termination under Clauses 40 (Termination on Operator Partner Default) or 42 (Termination on Corrupt Gifts and Fraud), then the following provisions shall apply (**Retendering Process**):

- 46.1.1 the objective of the retendering process shall be to retender the Services and enter into a Retendered Contract with a replacement contractor;
- 46.1.2 the Authority shall (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Retendering Process as soon as practicable;
- 46.1.3 the Authority shall notify the Operator Partner of the Qualification Criteria and the other requirements and terms of the Retendering Process, including the timing of the Retendering Process, and shall act reasonably in setting such requirements and terms;
- 46.1.4 the Operator Partner authorises the release of any information by the Authority under the Retendering Process which would otherwise be prevented under Clause 56 (Confidentiality) that is reasonably required as part of the Retendering Process provided that the Authority shall not release information which is commercially sensitive as described or referred to in Clause 51.5.3;

46.1.5 the Authority shall require bidders to bid on the basis that they will receive the benefit of any outstanding claims under any material damage insurance policies;

46.1.6 as soon as practicable after tenders have been received, the Authority shall (acting reasonably) determine which (if any) of the tenderers it wishes to enter into a Retendered Contract with;

46.1.7 the replacement contractor shall be required to set out in its tender submission the proposed annual payment amount (Retendered Annual Payment); and

46.1.8 the tenderers will be required to tender on the basis that the successful tenderer shall take the benefit of all existing bookings and any membership fees relating to each Facility.

47. COMPENSATION ON TERMINATION FOR FORCE MAJEURE

47.1 On termination of this Agreement under Clause 30 (Force Majeure), the Authority shall pay to the Operator Partner in accordance with Clauses 49 (Miscellaneous Compensation Provisions) and 50 (Method of Payment) an amount equal to the aggregate of (without double counting):

47.1.1 such amounts properly due to the Operator Partner and invoiced in accordance with Clause 36 (Payment) in respect of the period prior to such termination but which have not been previously paid;

47.1.2 where a Deficit Annual Payment applies such amount that can be reasonably and properly attributed to Services carried out following the most recent invoice issued pursuant to Clause 36 (Payment) and/or such other amounts properly due to the Operator Partner in accordance with this Agreement which, in each case remains due at the Termination Date including any sum set off by the Operator Partner pursuant to Clause 36.16; and

47.1.3 any Sub-Contractor Breakage Costs,

LESS to the extent it is a positive amount, the aggregate of (without double counting):

47.1.4 where a Surplus Annual Payment applies such amounts properly due to the Authority in accordance with Clause 36 (Payment) in respect of the period up to the Termination Date but which have not been previously paid;

47.1.5 amounts which the Authority is entitled to set off pursuant to Clause 36.16 (Rights of set off); and

47.1.6 BI Proceeds, to the extent that they compensate the Operator Partner in respect of any of the items listed at Clauses 47.1.1 to 47.1.3.

48. **ASSETS**

48.1 Subject to Clause 48.2 where this Agreement expires due to effluxion of time or terminates earlier, the Authority shall have the option to require the Operator Partner to transfer to the Authority its rights, title and interest in and to the Assets or as directed by the Authority at nil cost to the Authority.

48.2 Where the Authority exercises its right under Clause 48.1, then to the extent that the Assets to be transferred are neither already owned by the Authority nor have already been paid for through the Annual Payment or via another payment pursuant to this Agreement, the Authority shall pay to the Operator Partner an amount equal to the lesser of the market value and the written down value of such Assets.

48.3 **Transfer of Assets that are subject to an agreement of hire or hire purchase**

48.3.1 If this Agreement is terminated prior to the Expiry Date or expires due to the effluxion of time at the Expiry Date, the Authority is entitled to instruct the Operator Partner to assign or novate any agreement of hire or hire purchase which relates to Assets to the Authority (or as the Authority directs) and the Operator Partner shall forthwith deliver up to the Authority such Assets.

48.3.2 If the Authority elects to exercise its rights to transfer the benefits of any agreement of hire or hire purchase where termination has occurred as a result of Operator Partner Default, the Authority reserves its right to take action against the Operator Partner should the Authority be obliged to take on a hire/hire purchase agreement on terms that are unreasonably restrictive or expensive compared to normal market rates for agreements of that nature in order to maintain the Services.

49. **MISCELLANEOUS COMPENSATION PROVISIONS**

Gross Up of Termination Payments

49.1 If any amount of compensation payable by the Authority or the Operator Partner (whether payable as a lump sum or in instalments) under Clauses 44 (Compensation on Termination for Authority Default/Voluntary Termination), 45 (Compensation on Termination for Operator Partner Default and Corrupt Gifts and Fraud) or 47 (Compensation on Termination for Force Majeure) is subject to Tax payable to a Relevant Authority in the United Kingdom, then the Authority shall pay to the Operator Partner or the Operator Partner shall pay to the Authority (as appropriate) such additional amount as will put the receiving party in the same after Tax position as it would have been in had the payment not been subject to Tax taking account of any relief, allowances deduction, setting off or credit in respect of Tax (whether available by choice or not) which may be available to the Operator Partner or the Authority to reduce the Tax to which the payment is subject.

Exclusivity of Remedy

49.2 Any and all sums irrevocably paid by the Authority to the Operator Partner or the Operator Partner to the Authority under this Part 6 shall be in full and final settlement of each party's rights and claims against the other for breaches and/or termination of this Agreement or any Project Document whether under contract, tort, restitution or otherwise, but without prejudice to:

49.2.1 any antecedent liability of the Operator Partner to the Authority which the Authority has been unable to set off pursuant to this Agreement;

49.2.2 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 agreeing the Termination Sum; and

49.2.3 any liabilities arising in respect of any breach by either party of their obligations under Clause 53 (Continuing Obligations) which arises or continues after the Termination Date to the extent not taken into account in the calculation of any Termination Sum or other payment of compensation on termination pursuant to this Agreement.

50. **METHOD OF PAYMENT**

Termination Sum

50.1 All amounts payable by a party to the other party pursuant to Clauses 44 (Compensation on Termination for Authority Default/Voluntary Termination) to 47 (Compensation on Termination for Force Majeure) of this Agreement shall (save where the Authority elects to pay in instalments pursuant to Clause 50.3) be paid within forty (40) Business Days of receipt of an invoice demanding payment of the relevant amount. In the event of failure to make payment in accordance with this Clause interest shall accrue on any unpaid element of the Termination Sum at the Prescribed Rate from the Termination Date until the date payment is made and any unpaid amount of the Termination Sum and accrued interest thereon shall be recoverable as a debt from the party that is liable to make payment.

50.2 If the calculation of any Termination Sum produces a negative figure, then such sum shall not be paid by the party described as paying such sum pursuant to Clauses 44 to 47, but shall instead be paid by the party described as receiving such sum pursuant to Clauses 44 to 47 to the other party.

Instalments

50.3 The Authority may elect to pay the Termination Sum:

50.3.1 in pro-rated instalments for a period of up to two (2) years from the Termination Date, on the dates (Instalment Dates) that the Monthly Payment would have been paid had the Termination Date not occurred; or

50.3.2 as the parties may otherwise agree.

Interest

50.4 Where the Authority elects to pay the Termination Sum in instalments pursuant to Clause 50.3 from the Termination Date until the date of payment, interest shall accrue on any unpaid element of the Termination Sum at the Prescribed Rate and shall be payable on the next occurring Instalment Date.

Payment of outstanding element

50.5 If the Authority has elected to pay in accordance with Clause 50.3 it may (on twenty (20) Business Days' prior written notice to the Operator Partner) elect to pay any outstanding element of the Termination Sum in full on any Instalment Date.

Authority Default in payment

50.6 If the Authority:

50.6.1 fails to make a payment to the Operator Partner in accordance with Clauses 50.1 and/or 50.3 and/or 50.4; or

50.6.2 breaches Clause 61 (Assignment and sub-contracting),

the Operator Partner may issue a notice to the Authority declaring any unpaid and outstanding element of the Termination Sum together with any interest accrued pursuant to Clause 50.4 to be immediately due and payable.

51. EXIT MANAGEMENT

51.1 Upon expiry or termination of all or any part of this Agreement, the Operator Partner shall provide all reasonable assistance and information to the Authority and any New Operator Partner (including, without limitation, fulfilling its obligations under the Exit Plan), to the extent necessary to effect an orderly assumption of the Services by the Authority or a New Operator Partner. Any payment in respect of exit obligations shall be set out in the Exit Plan.

51.2 The Operator Partner shall, prior to the Commencement Date, produce an Exit Plan for the orderly transition of the Services from the Operator Partner to the Authority and/or any New Operator Partner in the event of termination or expiry of this Agreement. Any Exit Plan shall at a minimum comply with the provisions of this Clause 51 and the Exit Strategy Requirements detailed at Schedule 24. Within

twenty (20) Business Days after the submission of the Exit Plan, the parties shall meet and use all reasonable endeavours to agree the contents of that Exit Plan, based on the principles set out in Clause 51.5. If the parties are unable to agree the contents of the Exit Plan within that twenty (20) Business Day period, the principles set out in Clause 51.5 shall apply and either party may refer the dispute for resolution in accordance with the Dispute Resolution Procedure.

51.3 The Operator Partner shall be responsible for keeping the Exit Plan up to date and shall submit any updates to the Authority from time to time or on request from the Authority.

51.4 In addition to its obligations under Clauses 51.1 to 51.3, the Operator Partner shall, on receipt or service of a Termination Notice or six (6) months prior to expiry of this Agreement (whichever is the sooner):

51.4.1 appoint a transition manager to be the point of contact in relation to the Exit Plan and to manage the implementation of the provisions of the Exit Plan; and

51.4.2 update the Exit Plan taking into account the then current circumstances, any amendments to the Exit Plan shall be developed jointly by parties and any agreed changes to the Exit Plan will be incorporated into it. No amendment to the Exit Plan shall be effective until signed by the Authority.

51.5 Any Exit Plan provided under this Agreement shall, as a minimum include:

51.5.1 provisions to ensure the transfer of all Operator Partner rights, title and interest in and to the Assets to the New Operator Partner or Authority with effect on and from the Termination Date or Expiry Date (as applicable) at nil cost to the Authority;

51.5.2 provisions to ensure that the Authority and/or any New Operator Partner have the right to access (at reasonable times and on reasonable notice) the Facilities, but not so as to interfere with or impede the provision of the Services;

51.5.3 an option for the Authority and/or New Operator Partner to take an assignment or novation (to the extent reasonably required to ensure service continuity) or any sub-contracts with Sub-Contractors entered into by the Operator in connection with this Agreement without cost;

51.5.4 provisions to ensure that any consents and licences are provided to the Authority and/or New Operator Partner in a timely manner;

51.5.5 provisions ensuring that that the Authority and/or any New Operator Partner have the right to use any Intellectual Property Rights, Personal Data and Confidential Information in accordance with the terms of this Agreement; and

51.5.6 providing to the Authority and/or to any New Operator Partner all and any information concerning the Facilities and the Services which is reasonably required for the efficient transfer of responsibility for their performance, a copy of the Operating Manual, but information which is commercially sensitive to the Operator Partner shall not be provided (and for the purpose of this Clause 51.5.3, commercially sensitive shall mean Operator Partner IPR and information which would if disclosed to a competitor of the Operator Partner give that competitor a competitive advantage over the Operator Partner and thereby prejudice the business of the Operator Partner but shall not include any information referred to in Clause 59 (TUPE and Employees)).

51.6 The Operator Partner shall not knowingly do or omit to do anything which may adversely affect the Authority's ability or the cost to the Authority of ensuring an orderly transfer of responsibility for the provision of the Services (or services similar to the Services) on termination or expiry of this Agreement.

52. SURVEYS ON EXPIRY AND RETENTION FUND

52.1 Final Survey

52.1.1 No later than the date eighteen (18) months prior to the Expiry Date, the Authority shall be entitled to carry out or procure the carrying out of a final survey of the Sites to assess whether they have been and are being maintained by the Operator Partner in accordance with its obligations under Clause 14 (Maintenance).

52.1.2 The Authority shall notify the Operator Partner in writing a minimum of five (5) Business Days in advance of the date it wishes to carry out or procure the carrying out of the final survey. The Authority shall consider in good faith any reasonable request by the Operator Partner for the final survey to be carried out on a different date if such request is made at least two (2) Business Days prior to the notified date and the Operator Partner (acting reasonably) is able to demonstrate that carrying out the final survey on the notified date would materially prejudice the Operator Partner's ability to provide the Services.

52.2 Minimisation of Disruption

When carrying out the final survey, the Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the Services by the Operator Partner. The Operator Partner shall afford the Authority or any person carrying out the survey any reasonable assistance required by the Authority during the carrying out of the final survey. The cost of the final survey shall be borne by the Authority.

52.3 Results of Survey

If the final survey shows that the Operator Partner has not complied with or is not complying with its obligations under Clause 14 (Maintenance) the Authority shall:

52.3.1 notify the Operator Partner of the rectification and/or maintenance work which is required to bring the condition of the Facilities to the standard it would have been in if the Operator Partner had complied or was

complying with its obligations under Clause 14 (Maintenance) (Required Standard);

52.3.2 specify a reasonable period within which the Operator Partner must carry out such rectification and/or maintenance work; and

52.3.3 if the survey shows a material non-compliance by the Operator Partner with its obligations under Clause 14 (Maintenance), recover the cost of the survey from the Operator Partner by means of a withdrawal from the

Retention Fund Account or deduction from the next payment of the Monthly Payment.

52.4 **Maintenance Work**

The Operator Partner shall carry out such rectification and/or maintenance work notified pursuant to Clause 52.3.1 (**Outstanding Work**) in order to reach the Required Standard within the period specified.

52.5 **Retention Fund**

If the Operator Partner has been notified under Clause 52.3.1 that rectification and/or maintenance work is required, twelve (12) months prior to the Expiry Date (to the extent the Outstanding Works have not been carried out by the Operator Partner in the interim):

52.5.1 where the Annual Payment is a Deficit Annual Payment, the Authority shall deduct the costs of that work as quantified by the survey referred to in Clause 52.1 from the next following instalment (or, if the amount of such instalment is insufficient, the next instalments as necessary) of Monthly Payment; or

52.5.2 where the Annual Payment is a Surplus Annual Payment, the Operator Partner shall pay the costs of that work as quantified by the survey referred to in Clause 52.1,

and in either case, the relevant party shall pay such amount into an interest bearing escrow account (**Retention Fund Account**) (subject to Clause 52.6).

52.6 **Costs**

If and to the extent that the Operator Partner carries out the Outstanding Work, to the extent that then or subsequently there are funds standing to the credit of the Retention Fund Account, the Operator Partner shall be reimbursed its costs of so doing by withdrawing amounts from the Retention Fund Account. If the aggregate of the amounts from time to time paid into the Retention Fund Account are insufficient to cover the Operator Partner's costs the Operator Partner shall bear the balance of such costs itself.

52.7 **Failure to Carry Out Work**

If and to the extent that the Operator Partner fails to carry out the Outstanding Work within the period specified in Clause 52.3.2, the Authority shall be entitled to carry out itself, or procure, such rectification and/or maintenance work at the Operator Partner's expense and shall make withdrawals from the Retention Fund Account or, where there are insufficient funds in the Retention Fund Account, shall be entitled to recover such amounts from the Operator Partner as a debt payable on demand.

52.8 **Balance of Fund**

If:

52.8.1 all the rectification and/or maintenance work identified by the Authority or the person the Authority procures to carry out the final survey has been carried out to the Required Standard;

52.8.2 all such rectification and/or maintenance work has been paid for by the Operator Partner; and

52.8.3 no termination notice given in accordance with this Agreement is outstanding,

then the Authority shall pay any credit balance on the Retention Fund Account to the Operator Partner as soon as practicable.

53. CONTINUING OBLIGATIONS

53.1 Save as otherwise expressly provided in this Agreement or as already taken into account in the calculation of any Termination Sum or other payment of compensation on termination pursuant to this Agreement, and notwithstanding the provisions of Clause 49.2 and 71 (Sole Remedy):

53.1.1 termination of this Agreement shall be without prejudice to any accrued rights or obligations under this Agreement as at the date of termination; and

53.1.2 termination of this Agreement shall not affect the continuing rights and obligations of the Operator Partner and the Authority under Clause 7 (Nature of Land Interests), Clause 22 (Operator Partner's Records), Clause 59 (TUPE and Employees), Clause 55 (Data Protection) Clause 0 (Pensions), Clause 36 (Payment) Clause 51 (Exit Management), Clause 56 (Confidentiality), Clause 31 (Indemnities, Guarantees and Contractual Claims) in respect of any claim arising prior to the Termination Date, Clause 32 (Operator Partner Insurances), Clause 34 (Reinstatement and Change of Requirement after Insured Event), Clause 35 (Risks that Become Uninsurable), Clause 54 (Intellectual Property), Clause 69 (Notices), Clause 70 (Dispute Resolution), Clause 72 (No Double Recovery), Clause 74 (Capacity)] Clause 71 (Sole Remedy), Clause 75 (Interest on Late Payment), Clause 76 (Governing Law and Jurisdiction), or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

PART 8 - INTELLECTUAL PROPERTY, DATA AND CONFIDENTIALITY

54. INTELLECTUAL PROPERTY

Project Data

54.1 The Operator Partner shall make available to the Authority free of charge (and hereby irrevocably licences the Authority to use) all Project Data that might reasonably be

required by the Authority and the Operator Partner shall ensure that it obtains all necessary licences, permissions and consents to ensure that it can make the Project Data available to the Authority on these terms, for the purposes of:

54.1.1 the Authority providing the Facilities for leisure and ancillary purposes, its duties under this Agreement and/or any statutory duties which the Authority may have; and

54.1.2 following termination or expiry of this Agreement, the operation, maintenance or improvement of the Facilities and/or the provision of services the same as or similar to the Services (by the Authority or New Operator Partner),

(together, **Approved Purposes**), and in this Clause **use** shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.

Licence in respect of Intellectual Property Rights

54.2 The Operator Partner:

54.2.1 hereby grants to the Authority, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in the Operator Partner; and

54.2.2 shall, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in Clause 54.2.1 to the Authority,

in both cases, solely for the Approved Purposes.

Vesting of Intellectual Property Rights

54.3 The Operator Partner shall use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in the Operator Partner and the Operator Partner shall enter into appropriate agreements with any Operator Partner Related Party (or other third

parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

Maintenance of data

54.4 To the extent that any of the data, materials and documents referred to in this Clause are generated by or maintained on a computer or similar system, the Operator Partner shall:

54.4.1 use all reasonable endeavours to procure for the benefit of the Authority, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Authority or its nominee to access and otherwise use (subject to the payment by the Authority of the relevant fee, if any) such data for the Approved Purposes. As an alternative, the Operator Partner may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format; and

54.4.2 enter into the National Computing Centre's then current multi-licence escrow deposit agreement or standard single licence escrow deposit agreement as appropriate in each case.

54.5 The Operator Partner shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 54.4 in accordance with Good Industry Practice. Without prejudice to this obligation, the Operator Partner shall submit to the Authority's Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and the Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. The Operator Partner shall comply, and shall cause all Operator Partner Related Parties to comply, with all procedures to which the Authority's Representative has given its approval. The Operator Partner may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Authority's Representative, who shall be entitled to object on the basis set out above.

Indemnity

54.6 Where a claim or proceeding is made or brought against the Authority which arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Services infringes any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property by or on behalf of the Authority otherwise than in accordance with the terms of this Agreement, the Operator Partner shall indemnify the Authority at all times from and against all Direct Losses and Indirect Losses arising as a result of such claims and proceedings and the provisions of Clause 31 (Indemnities, Guarantees and Contractual Claims) shall apply.

54.7 Where a claim or proceeding is made or brought against the Operator Partner which arises out of the infringement of any Intellectual Property Rights or because

the use of any materials, plant, machinery or equipment in connection with the Services infringes any rights in or to any Intellectual Property Rights of a third party then, if such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority otherwise than in accordance with the terms of this Agreement and otherwise than as a result of a breach of this Clause 54 by the Operator Partner then the Authority shall indemnify the Operator Partner at all times from and against all Direct Losses and Indirect Losses arising as a result of such claims and proceedings.

Licence to Operator Partner

54.8 The Authority hereby grants to the Operator Partner a non-transferable, nonexclusive, royalty free licence (carrying the right to grant sub-licences) to use for the duration of this Agreement only and only for purposes directly relating to this Agreement any Intellectual Property Rights relating to the Services which are or become vested in the Authority.

Intellectual Property Rights on expiry or termination of this Agreement

54.9 The rights referred to in Clause 54.1 and Clause 54.2 shall not apply to the Operator Partner IPR upon or following termination or expiry of this Agreement provided that where a replacement item (for any item (or any Intellectual Property Rights in any item comprised in Operator Partner IPR)) is necessary for the operation and/or maintenance of the Facilities by the Authority and/or any New Operator Partner and is not available to the Authority and/or any New Operator Partner on reasonable commercial terms following such expiry or termination from any third party, then the Operator Partner may grant to the Authority, an irrevocable, non-exclusive and transferable licence (carrying the right to grant sublicences) to use the relevant elements of such Operator Partner IPR for the Approved Purposes on reasonable commercial terms and rates.

55. DATA PROTECTION

55.1 In relation to all Personal Data that is Processed in connection with the Services, the Operator Partner shall, and shall procure that any Sub-contractor that may Process Personal Data shall, at all times comply with the Data Protection Legislation and not by act or omission cause the Authority to breach the Data Protection Legislation.

55.2 The parties acknowledge that the factual arrangements between them dictate the role of each (or any) party in respect of the Data Protection Legislation. Notwithstanding the foregoing, the Authority and the Operator Partner shall act as Controllers individually (and in common from time to time) of any Personal Data Processed in connection with the Agreement.

55.3 The parties do not envisage that either party will Process any Personal Data for or on behalf of the other party as a Processor or as joint Controllers, under or in connection with this Agreement. Where and to the extent that in undertaking the obligations in connection with this Agreement, the Operator Partner anticipates that either party will Process the Personal Data for and on behalf of the other party as a Processor, or as joint Controller, it shall:

55.3.1 notify the Authority immediately; and

55.3.2 agree a Change to this Agreement to incorporate appropriate provisions in accordance with articles 28 or 26 of the GDPR as appropriate, or as otherwise required by the Data Protection Legislation.

55.4 The Operator Partner shall (and shall procure that any Sub-contractor shall) in connection with the Processing undertaken in connection with the Agreement:

- 55.4.1 only Process the Personal Data for the purposes set out in this Agreement and not for any incompatible purposes;
- 55.4.2 maintain valid and up to date records of Processing and records of consents (where consent is the relevant lawful processing ground, including suppression and consent withdrawal lists) which as a minimum meet the requirements of the Data Protection Legislation, including but not limited to articles 7 and 30 of the GDPR;
- 55.4.3 maintain valid and up to date registrations and notifications under the Data Protection Legislation with a competent supervisory authority;
- 55.4.4 ensure that it is not prevented or restricted from disclosing, permitting access or transferring any Personal Data to the Authority;
- 55.4.5 ensure appropriate fair processing notices have been provided to Data Subjects (and/or, as applicable, consents obtained), in relation to any Personal Data Processed ensuring they:
- (a) comply with the Data Protection Legislation; and
 - (b) are sufficient in scope to allow the Authority to lawfully Process the Personal Data for the purposes and rights envisaged by this Agreement including in relation to:
 - (i) any data sharing or access by the Authority from time-to-time; and
 - (ii) any exit or transition provisions under this Agreement, including the use of Personal Data for direct marketing by the Authority or any New Operator Partner;
- 55.4.6 provide copies of all fair processing notices and consents on demand and take such steps as the Authority reasonably instructs to ensure that the Authority is able to lawfully Process the Personal Data;
- 55.4.7 implement reasonable measures to ensure that any Personal Data made available to the Authority is accurate, adequate and not excessive, implementing procedures to ensure the principles of privacy by design and default under the GDPR are upheld;
- 55.4.8 ensure that appropriate operational and technical measures are in place and suitably maintained, reviewed and refreshed to safeguard against any accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, corruption or unavailability of the Personal Data Processed (Personal Data Breach Incident) including the measures as are set out in any of the relevant Authority Policies;
- 55.4.9 promptly and independently:

- (a) respond to any request to exercise any Data Subject rights, any correspondence or complaints from or on behalf of a Data Subject, third party or supervisory authority;
 - (b) and in any event within twenty-four (24) hours, notify the Authority upon becoming aware of any actual or suspected Personal Data Breach Incident and shall in particular:
 - (i) implement any measures necessary to restore the security of compromised Personal Data, investigate and mitigate the impacts of the incident and its cause(s);
 - (ii) if requested, promptly provide the Authority with a report containing details about the nature, extent and impact, of the Personal Data Breach Incident; and proposed mitigation steps; and
 - (iii) not refer to the Authority in any statement in relation to the Personal Data Breach Incident without the Authority's prior written consent;
- 55.4.10 take reasonable steps to ensure the reliability, integrity and appropriate training in the Data Protection Legislation and the terms of this Agreement of any personnel or approved Sub-contractor who have access to the Personal Data;
- 55.4.11 not transfer or permit the Processing of any Personal Data outside the United Kingdom except as approved by the Authority in writing (such approval shall not be unreasonably withheld, but may be subject to conditions to ensure compliance with Data Protection Legislation prior to the transfers and Processing taking place);
- 55.4.12 not transfer or permit the Processing of any Personal Data to or by a third party, unless expressly authorised by the Authority at its absolute discretion. Such authorisation may be subject to conditions imposed by the Authority including, but without prejudice to Clause 61 (Assignment and subcontracting):
- (a) due diligence being undertaken by the Operator Partner in respect of the proposed third party's data protection practices to the Authority's reasonable satisfaction;
 - (b) the Operator Partner ensuring that appropriate contractual terms which comply with the Data Protection Legislation shall be agreed with an approved third party; and
 - (c) the Operator Partner remaining liable to the Authority for any act or omission of the third party's Processing operations;

55.4.13 hold the Personal Data confidentially and separately from any other personal data Processed by the Operator Partner;

55.4.14 not do anything or omit to do anything in relation to the Personal Data which shall damage the reputation of the Authority with any party;

55.4.15 permit the Authority access free of charge during normal business hours on reasonable notice to conduct compliance monitoring of the Operator Partner of its obligations set out in this Clause 55; and

55.4.16 indemnify on demand and keep indemnified the Authority against any Direct and Indirect Losses incurred by, awarded against or agreed to be paid by the Authority to the extent arising from the Operator Partner's failure to comply with the Data Protection Legislation or this Clause 55.

55.5 Any material breach of this Clause 55 shall entitle the Authority to terminate this Agreement with immediate effect.

55.6 On termination of the Agreement, the Operator Partner shall ensure that any Personal Data is, at the Authority's discretion either provided to the Authority or a nominated replacement and any remaining copies are securely destroyed, unless the Operator Partner notifies the Authority of a legal or regulatory duty to retain the Personal Data, and the Authority provides written consent for the ongoing retention of the Personal Data.

56. **CONFIDENTIALITY**

Duty of Confidentiality

56.1 The parties agree that the terms of this Agreement and each Project Document shall, subject to Clause 56.2, not be treated as Confidential Information and may be disclosed without restriction.

56.2 Clause 56.1 shall not apply to terms of this Agreement or a Project Document designated as Commercially Sensitive Information and listed in Part 1 of Schedule 20 (Commercially Sensitive Contractual Provisions) to this Agreement, which shall, subject to Clause 56.4, be kept confidential for the relevant periods specified in that Part.

56.3 The parties shall keep confidential all Confidential Information received by one party from the other party relating to this Agreement and the Project Documents and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any Confidential Information.

Permitted Disclosure

56.4 Clauses 56.2 and 56.3 shall not apply to:

56.4.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the performance of those obligations;

- 56.4.2 any matter which a party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Agreement;
- 56.4.3 any disclosure to enable a determination to be made under the Dispute Resolution Procedure or in connection with a dispute between the Operator Partner or any of its Sub-Contractors;
- 56.4.4 any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 56.4.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 56.4.6 any provision of information to the parties' own professional advisers or insurance advisers or funders (or to their funder's professional advisers or insurance advisers) or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Operator Partner [and/or Holdco] to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in the Operator Partner [and/or Holdco] in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 56.4.7 any disclosure by the Authority of information relating this Agreement and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to any proposed new contractor, its advisers and lenders should the Authority decide to retender this Agreement;
- 56.4.8 any registration or recording of the Necessary Consents and property registration required;
- 56.4.9 any disclosure of information by the Authority to any other department, office or agency of the Government or their respective advisors or to any person engaged in providing services to the Authority for any purpose related to or ancillary to the Agreement; and
- 56.4.10 any disclosure for the purpose of:
- (a) the examination and certification of the Authority's or the Operator Partner's accounts;

- (b) any examination pursuant to the 1999 Act of the economy, efficiency and effectiveness with which the Authority has used its resources;
- (c) complying with a proper request from either party's insurance advisers or insurers on placing or renewing any insurance policies; or
- (d) (without prejudice to the generality of Clause 56.4.4) compliance with the FOIA and/or the Environmental Information Regulations,

provided that neither Clause 56.4.10(d) nor 56.4.4 shall permit disclosure of Confidential Information otherwise prohibited by Clause 56.3 where, in the opinion of the Authority, that information is exempt from disclosure under section 41 of the FOIA.

Obligations Preserved

56.5 Where disclosure is permitted under Clause 56.4 (other than Clauses 56.4.2, 56.4.4, 56.4.5, 56.4.8 and 56.4.10) the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

57. FREEDOM OF INFORMATION

57.1 The Operator Partner acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and co-operate with the Authority to enable the Authority to comply with its Information disclosure obligations.

57.2 Where the Authority receives a Request for Information in relation to Information that the Operator Partner is holding on its behalf the Authority shall transfer to the Operator Partner such Request for Information that it receives as soon as practicable and in any event within five (5) Business Days of receiving a Request for Information and the Operator Partner shall:

57.2.1 provide the Authority with a copy of all such Information in the form that the Authority requires as soon as practicable and in any event within ten (10) Business Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and

57.2.2 provide all necessary assistance as reasonably requested by the Authority in connection with any such Information, to enable the Authority to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Regulations.

57.3 Following notification under Clause 57.2 and up until such time as the Operator Partner has provided the Authority with all the Information specified in Clause 57.2.1, the Operator Partner may make representations to the Authority as to whether or not or on what basis Information requested should be disclosed, and whether further

Information should reasonably be provided in order to identify and locate the Information requested, provided always that the Authority shall be responsible for determining at its absolute discretion:

57.3.1 whether the Information is exempt from disclosure under the FOIA and the Environmental Information Regulations; and

57.3.2 whether the Information is to be disclosed in response to a Request for Information,

and in no event shall the Operator Partner respond directly, or allow its SubContractors to respond directly, to a Request for Information unless expressly authorised to do so by the Authority.

57.4 The Operator Partner shall ensure that all Information held on behalf of the Authority is retained for disclosure for at least six (6) years (from the date it is acquired) and shall permit the Authority to inspect such Information as requested from time to time.

57.5 The Operator Partner shall transfer to the Authority any Request for Information received by the Operator Partner as soon as practicable and in any event within two (2) Business Days of receiving it.

57.6 The Operator Partner acknowledges that any lists provided by him listing or outlining Confidential Information, are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information (including Commercially Sensitive Information) in accordance with the requirements of the FOIA and the Environmental Information Regulations.

57.7 In the event of a request from the Authority pursuant to Clause 57.2, the Operator Partner shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of the Operator Partner's estimated costs of complying with the request to the extent these would be recoverable if incurred by the Authority under section 12(1) of the FOIA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in Section 12(1) of the FOIA and as set out in the Fees Regulations the Authority shall inform the Operator Partner in writing whether or not it still requires the Operator Partner to comply with the request and where it does require the Operator Partner to comply with the request the ten (10) Business Days' period for compliance shall be extended by such number of additional days for compliance as the Authority is entitled to under Section 10 of the FOIA. In such case, the Authority shall notify the Operator Partner of such additional days as soon as practicable after becoming aware of them and shall reimburse the Operator Partner for such costs as the Operator Partner incurs in complying with the request to the extent the Authority is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.

57.8 The Operator Partner acknowledges that (notwithstanding the provisions of this Clause 57) the Authority may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under

Part I of the Freedom of Information Act 2000 (**FOIA Code**), be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning the Operator Partner or the Services:

57.8.1 in certain circumstances without consulting with the Operator Partner; or

57.8.2 following consultation with the Operator Partner and having taken their views into account,

provided always that where Clause 57.8.1 applies, the Authority shall, in accordance with the recommendations of the FOIA Code, draw this to the attention of the Operator Partner prior to any disclosure.

58. PUBLICITY AND BRANDING

58.1 The Operator Partner shall not by itself, its employees or agents, and shall procure that its Sub-Contractors shall not:

58.1.1 make any press announcements or publicise this Agreement or its contents in any way;

58.1.2 use the Authority's name or brand in any promotion or marketing or announcement; or

58.1.3 exhibit or attach to any part of the Sites any notice or advertisement, without the prior written approval of the Authority.

58.2 No permission to photograph or film in or upon any property used in relation to the Services shall be given unless the Authority has given its prior written approval (such approval not to be unreasonably withheld or delayed).

PART 9 - GENERAL

59. TUPE AND EMPLOYEES

Relevant Transfers

59.1 The parties agree that the following events:

59.1.1 the commencement of the Services on the Service Transfer Date; and

59.1.2 the commencement of the Services where the identity of a provider (including the Authority) of any service which constitutes or which will constitute one of the Services is changed whether in anticipation of changes pursuant to this Agreement or not,

shall constitute a Relevant Transfer and that the contracts of employment of any employees who are the subject of a Relevant Transfer and shall have effect (subject to Regulation 4(7) of TUPE) thereafter as if originally made between those employees and the new provider.

59.2 Notwithstanding the agreement in Clause 59.1, and in recognition of the possibility that the transaction contemplated by this Agreement may be determined not to be a Relevant Transfer by a court or tribunal, the Operator Partner shall with effect from the Service Transfer Date, offer to employ or shall procure that the relevant Sub-Contractor offers to employ each Relevant Employee on like terms to the terms on which they were employed prior to the Service Transfer Date.

Emoluments and Outgoings

59.3 The Authority shall be responsible for all Employee Costs in respect of any Relevant Employees employed by it, and which are attributable in whole or in part to the period up to the Service Transfer Date.

59.4 The Operator Partner shall be responsible for or shall procure that any relevant Sub-Contractor is responsible for all Employee Costs in respect of the Relevant Employees which are attributable in whole or in part to the period from and including the Service Transfer Date.

Employee List

59.5 The Authority has supplied to the Operator Partner the information, as at the Commencement Date, which is contained in Schedule 10 Part 1 (**Employee List**) affecting each of those Transferring Employees who it is expected, if they remain in the employment of the Existing Operator Partner until the date preceding the Service Transfer Date, would be Relevant Employees but the Authority gives no warranty as to the accuracy or completeness of this information.

Proposed Workforce Information

59.6 The Operator Partner has provided to the Authority, and the Authority has agreed, the details set out in Schedule 11 Part 3 (**Proposed Workforce Information**)

which show, in respect of each of the Services, the information detailed in Clauses 59.7 to 59.9.

59.7 The workforce which the Operator Partner proposes to establish to provide the Services (**Proposed Workforce**) classified by reference to grade, job description, hours worked, shift patterns, pay scales, rates of pay, terms and conditions and pension arrangements.

59.8 The monthly costs of employing the Relevant Employees who are expected to be engaged in the provision of the Services. These costs (**Remuneration Costs**) have been calculated on the basis of (amongst other things) the information contained in the Employee List.

59.9 The costs, including any lump sum payments, which have been agreed between the parties for the purposes of any reorganisation which may be required to establish the Proposed Workforce or a workforce which is as close as reasonably practicable to the Proposed Workforce. These costs (**Reorganisation Costs**) have been

calculated by the Operator Partner and the Sub-Contractors on the basis of (amongst other things) the information contained in the Employee List.

Price Adjustment Mechanism

- 59.10 No later than one month after the Service Transfer Date the Operator Partner shall provide to the Authority in writing details of any inaccuracies in or omissions from the Employee List that was supplied prior to the Service Transfer Date clearly identifying which information was inaccurate; what is the correct information; and the impact of the correct information on the Remuneration Costs and/or the Reorganisation Costs (**Revised Employment Information**).
- 59.11 The Operator Partner shall produce such evidence relating to the accuracy of the Revised Employment Information as the Authority may reasonably require and in any event no later than 21 days following the receipt of such a request.
- 59.12 The Operator Partner warrants and undertakes that the Revised Employment Information will be a fair and accurate representation and interpretation of the position in respect of the relevant employment and related costs as at the Service Transfer Date.
- 59.13 Where following the Service Transfer Date the Operator Partner provides reasonable evidence to the Authority that the Revised Employment Information is inaccurate and that any differences between the information in the Employee List and the position on the Service Transfer Date as reflected in the Revised Employment Information results in reasonable additional costs to the Operator Partner then a reasonable adjustment to the Annual Payment shall be made to meet such reasonable additional costs that the Operator Partner incurs as a result of such differences provided that such differences are not as a result of an act or omission of the Operator Partner and/or any Sub-Contractor and provided that the Operator Partner and any relevant Sub-Contractor shall take all reasonable steps to mitigate any such additional costs and any adjustment to the Annual Payment shall be calculated as if they had done so.
- 59.14 Where, following the Service Transfer Date, the Authority provides reasonable evidence to the Operator Partner that any differences between the information in the Employee List and the position on the Service Transfer Date as reflected in the Revised Employment Information results in a reasonable reduction in costs to the Operator Partner then a reasonable adjustment to the Annual Payment to reflect any reasonable reduction in costs that the Operator Partner incurs as a result of such differences shall be made.
- 59.15 To avoid double counting, no account shall be taken of any change to the Remuneration Costs or the Reorganisation Costs to the extent that the Operator Partner has been or will be compensated as a result of any Indexation of the Annual Payment under this Agreement or if any indemnity given by the Authority under any other provision of this Agreement would apply.

Union Recognition

59.16 The Authority shall and shall procure (to the extent that it has the contractual or legal powers to do so) and shall otherwise use reasonable endeavours to procure that Existing Operator Partner shall supply to the Operator Partner no later than five (5) Business Days prior to the Service Transfer Date true copies of its union recognition agreement(s) and the Operator Partner shall and shall procure that each and every Sub-Contractor shall in accordance with TUPE recognise the trade unions representing Relevant Employees (as relevant to each Sub-Contractor) after the transfer to the same extent as they were recognised by the Authority or the Existing Operator Partner before the Service Transfer Date.

59.17 The Operator Partner shall procure that, on each occasion on which the identity of a Sub-Contractor changes pursuant to this Agreement, in the event that there is a Relevant Transfer, the new Sub-Contractor shall in accordance with TUPE recognise the trade unions representing the employees whose contracts of employment transfer to the new Sub-Contractor to the same extent as they were recognised before the change of identity of the Sub-Contractor in respect of the provision of the Services at the Authority's premises. **Information and Consultation**

59.18 The Operator Partner shall comply (and shall procure that any Sub-Contractor complies) with its obligations under Regulation 13 of TUPE during the period prior to the Service Transfer Date.

59.19 The Authority shall comply with its obligations under Regulations 13 and 14 of TUPE during the period prior to the Service Transfer Date, save where the Authority is unable to do so as a result of the failure of the Operator Partner and/or any Sub-Contractor to comply with their duties under Regulation 13 of TUPE.

Authority Indemnity

59.20 The Authority shall indemnify the Operator Partner both for itself and any SubContractor against Employment Liabilities incurred by the Operator Partner and/or any Sub-Contractor in connection with or as a result of the following:

59.20.1 any direct act, fault or omission of the Authority in respect of any Relevant Employee in the period before the Service Transfer Date;

59.20.2 any failure by the Authority to comply with its obligations under Regulations 13 and 14 of TUPE before the Service Transfer Date, or any award of compensation under Regulation 15 of TUPE, save where such failure arises from the failure of the Operator Partner and/or any Sub-Contractor to comply with its or their duties under Regulation 13 of TUPE; and,

59.20.3 any claim (including any individual employee entitlement under or consequent on such a claim) by any trade union or other body or person representing the Relevant Employees arising from or connected with any failure by the Authority to comply with any legal obligation to such trade union, body or person before the Service Transfer Date.

Operator Partner Indemnity

- 59.21 The Operator Partner shall indemnify the Authority and, at the direction of the Authority, the Existing Operator Partner or any other relevant contractor of the Authority against Employment Liabilities incurred by the Authority in connection with or as a result of the following:
- 59.21.1 any failure by the Operator Partner or any Sub-Contractor to comply with its obligations under Clause 60 (Pensions) in respect of the Relevant Employees;
 - 59.21.2 any act, fault or omission (arising directly or indirectly) of the Operator Partner or any Sub-Contractor in respect of any Relevant Employee on or after the Service Transfer Date;
 - 59.21.3 any failure by the Operator Partner or any Sub-Contractor to comply with its obligations under TUPE;
 - 59.21.4 any failure by the Operator Partner or Sub-Contractor to meet the Employee Costs for the Relevant Employees on or after the Service Transfer Date;
 - 59.21.5 any claim (including any individual entitlement of a Relevant Employee under or consequent on such claim) by any trade union or other body or person representing the Relevant Employees arising from or connected with any failure by the Operator Partner or any Sub-Contractor to comply with any legal obligation to such trade union, body or person;
 - 59.21.6 any change or proposed change in the terms and conditions of employment or working conditions of the Relevant Employees on or after their transfer to the Operator Partner on the Service Transfer Date;
 - 59.21.7 any of the Transferring Employees informing the Authority they object to being employed by the Operator Partner or Sub-Contractor;
 - 59.21.8 any change of identity of employer occurring by virtue of TUPE and/or this Agreement being significant and detrimental to any of the Relevant Employees, or to any person who would have been a Relevant Employee but for their resignation or decision to treat their employment as terminated under Regulation 4(9) of TUPE on or before the Service Transfer Date as a result of the change in employer;
 - 59.21.9 any proposal by the Operator Partner and/or a Sub Operator Partner to change the terms and conditions of employment or working conditions or place of work of the Relevant Employees on or after the Service Transfer Date, or to change the terms and conditions of employment or working conditions or place of work of any person who would have been a Relevant Employee but for their resignation (or decision to treat their employment as terminated under Regulation 4(9) of TUPE) on or before the Service Transfer Date as a result of any such proposed changes;

- 59.21.10 any proposal or action taken by the Operator Partner and/or a Sub Operator Partner to make any of the Relevant Employees redundant on or after the Service Transfer Date or to make redundant any person who would have been a Relevant Employee but for their resignation (or decisions to treat their employment as terminated under Regulation 4(9) of TUPE) on or before the Service Transfer Date as a result of any such proposed redundancy; and
- 59.21.11 any proceeding claim or demand by HMRC or other statutory authority relating to the Operator Partner's or Sub-Contractor's financial obligations towards the Relevant Employees.

Retendering

- 59.22 The Operator Partner shall (and shall procure that any Sub-Contractor shall) within the period of twelve (12) months immediately preceding the Expiry Date, or as a consequence of the Authority notifying the Operator Partner of its intention to retender this Agreement, or as otherwise reasonably requested:
- 59.22.1 on receiving a request from the Authority provide in respect of any person engaged or employed by the Operator Partner or any SubContractor in the provision of the Services (Assigned Employees) full and accurate details regarding the identity, number, age, sex, length of service, job title, grade and terms and conditions of employment of and other matters affecting each of those Assigned Employees who it is expected, if they remain in the employment of the Operator Partner or of any Sub-Contractor as the case may be until immediately before the Termination Date or Expiry Date (as appropriate), would be Returning Employees (Retendering Information);
- 59.22.2 provide the Retendering Information promptly and at no cost to the Authority;
- 59.22.3 notify the Authority forthwith in writing of any material changes to the Retendering Information promptly as and when such changes arise;
- 59.22.4 be precluded from making any material increase or decrease in the numbers of Assigned Employees;
- 59.22.5 be precluded from making any increase in the remuneration or other change in the terms and conditions of the Assigned Employees other than in the ordinary course of business and with the Authority's prior written consent; and
- 59.22.6 be precluded from transferring any of the Assigned Employees to another part of its business or moving other employees from elsewhere in its or their business who have not previously been employed or engaged in providing the Services to provide the Services save with the Authority's prior written consent.

59.23 Without prejudice to Clauses 59.22 and 59.24 the Operator Partner shall provide and shall procure that any Sub-Contractor shall provide the Employee Liability Information to the Authority at such time or times as are required by TUPE, and shall warrant at the time of providing such Employee Liability Information, that such information will be updated to take account of any changes to such information as is required by TUPE.

59.24 The Operator Partner shall and shall keep indemnified in full the Authority and at the Authority's direction any Future Operator Partner against all Direct Losses arising from any claim by any party as a result of the Operator Partner or SubContractor failing to provide or promptly to provide the Authority and/or any Future Operator Partner where requested by the Authority with any Retendering Information and/or Employee Liability Information or to provide full Retendering Information and/or Employee Liability Information or as a result of any material inaccuracy in or omission from the Retendering Information and/or Employee Liability Information.

59.25 The Authority shall be permitted to disclose the Retendering Information to any Future Operator Partner.

Termination of Agreement

59.26 Upon all or part of the Services ceasing to be provided by the Operator Partner for any reason (such date(s) being termed "**Return Date(s)**"), the parties agree that it is their intention that TUPE shall apply in respect of the provision thereafter of any service equivalent to all or part of a Service but the position shall be determined in accordance with Legislation at the Expiry Date or Termination Date as the case may be and Clauses 59.26 to 59.30 is without prejudice to such determination.

59.27 Upon the Return Date(s), the provisions of Clauses 59.28 and 59.29 will apply.

59.28 The Operator Partner shall or shall procure that all Employee Costs of the Returning Employees and other employees or former employees of the Operator Partner or the Sub-Contractors (who had been engaged in the provision of the Services) up to the Return Date(s) are satisfied.

59.29 Without prejudice to Clause 59.28, the Operator Partner shall:

59.29.1 remain (and procure that Sub-Contractors shall remain) (as relevant) responsible for all the Operator Partner's or Sub-Contractor's employees (other than the Returning Employees) on or after the Return Date(s) and shall indemnify the Authority and any Future Operator Partner against all Direct Losses incurred by the Authority or any Future Operator Partner resulting from any claim whatsoever whether arising before on or after the Return Date(s) by or on behalf of any of the Operator Partner's or Sub-Contractor's employees who do not constitute the Returning Employees; and

59.29.2 in respect of the Returning Employees the Operator Partner shall indemnify the Authority and any Future Operator Partner against all Direct Losses (including, without limitation, all Employment Liabilities) incurred by the

Authority or any Future Operator Partner resulting from any claim whatsoever by or on behalf of any of the Returning Employees in respect of the period on or before the Return Date(s) (whether any such claim, attributable to the period up to and on the Return Date(s), arises before, on or after the Return Date(s)) including but not limited to any failure by the Operator Partner or any SubContractor to comply with its or their obligations under Regulations 13 and 14 of TUPE and any award of compensation under Regulation 15 of TUPE and/or Article 6 of the Directive as if such Legislation applied, even if it does not in fact apply save to the extent that any such failure to comply arises as a result of an act or omission of the Authority or any Future Operator Partner.

59.30 The Authority shall be entitled to assign the benefit of this indemnity to any Future Operator Partner.

Offer of Employment on Expiry or Termination

59.31 If TUPE does not apply on the expiry or earlier termination of this Agreement, the Authority shall use reasonable endeavours to ensure that the relevant Future Operator Partner or the Authority (as the case may be) shall offer employment to the persons employed by the Operator Partner or a Sub-Contractor who are wholly or mainly engaged in the provision of the relevant Services immediately before the Return Date(s).

59.32 If an offer of employment is made in accordance with Clause 59.31, the employment shall be on the same terms and conditions (except for entitlement to membership of an occupational pension scheme, which shall be dealt with in accordance with Clause 60 (Pensions) as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the Authority or Future Operator Partner 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 59.22 to 59.24.

59.33 Where any such offer as referred to in Clause 59.31 is accepted, the Operator Partner shall indemnify and keep indemnified in full the Authority and/or (at the direction of the Authority) any Future Operator Partner on the same terms and conditions as those set out in Clause 59.20 as if there had been a Relevant Transfer in respect of each and every employee who has accepted any such offer and for the purposes of this Clause 59 each and every such employee shall be treated as if they were a Returning Employee.

59.34 Where any such offer as referred to in Clause 59.31 is not accepted and TUPE does not apply, the employee shall remain an employee of the Operator Partner or Sub-Contractor as appropriate. The Authority and/or Future Operator Partner shall not be liable for any Employee Costs or Employment Liabilities incurred by the Operator Partner and/or Sub-contractor where an employee remains employed by the Operator Partner or Sub-Contractor as per this clause 59.34.

Redundancy on Expiry or Termination

59.35 If, on the expiry or earlier termination of this Agreement, all or any of the Services cease to be required by the Authority such that any person employed by the Operator Partner or Sub-Contractor who is wholly or mainly assigned to such Services is redundant, the Authority will bear Redundancy Costs associated with such person's redundancy subject to the Operator Partner or Sub-Contractor complying with the obligations described in Clause 59.36.

59.36 The Operator Partner shall, and shall procure that any Sub-Contractor shall, use all reasonable endeavours to redeploy any person who is redundant in circumstances described in Clause 59.35.

Sub-Contractors

59.37 In the event that the Operator Partner enters into any Sub-Contract in connection with this Agreement, it shall impose obligations on its Sub-Contractors in the same terms as those imposed on it pursuant to Clause 59 (TUPE and Employees), Clause 60 (Pensions) and shall procure that the Sub-Contractor complies with such terms. The Operator Partner shall indemnify and keep the Authority indemnified in full against all Direct Losses, incurred or by the Authority or any Future Operator Partner as a result of or in connection with any failure on the part of the Operator Partner to comply with this Clause 59.37 and/or the SubContractor's failure to comply with such terms.

60. PENSIONS

Operator Partner to become Admission Body

60.1 Where the Operator Partner or a Sub-Contractor employs any Eligible Employees from the Service Transfer Date it shall offer, and shall procure that any SubContractor shall offer, those Eligible Employees membership of the LGPS. The Operator Partner shall, and shall procure that any Sub-Contractor shall, become an Admission Body and shall execute a Partner Admission Agreement in respect of the Eligible Employees which will have effect from and including the Service Transfer Date.

Indemnity or Bond

60.2 Without prejudice to the generality of the requirements of this Clause 60, the Operator Partner shall, and shall procure that a Sub-Contractor shall, as soon as reasonably practicable obtain any indemnity or bond required in accordance with the Partner Admission Agreement.

Indemnity for a Breach of the Partner Admission Agreement

60.3 The Operator Partner will comply, and will procure that a Sub-Contractor complies with the terms of the Partner Admission Agreement and the LGPS Regulations. Without prejudice to the generality of this Clause 60, the Operator Partner hereby indemnifies the Authority and/or any Future Operator Partner from and against all Losses suffered or incurred by it or them which arise from any breach by the

Operator Partner or a Sub-Contractor of the terms of the Partner Admission Agreement to the extent that such liability arises before or as a result of the termination or expiry of this Agreement (howsoever caused).

Right of Set Off

60.4 The Authority shall have a right to set off against any payments due to the Operator Partner under this Agreement an amount equal to any overdue employer and employee contributions and other payments (and interest payable under the LGPS Regulations) due from the Operator Partner or a Sub-Contractor under the Partner Admission Agreement.

Funding

60.5 The Authority shall procure that when the Operator Partner becomes an Admission Body under the Fund then, in respect of those Eligible Employees who elect to aggregate their periods of LGPS membership, the Operator Partner shall be credited by the Administering Authority for the Fund with a notional fund within the Fund at the Service Transfer Date (which for the avoidance of doubt shall not constitute an admission agreement fund for the purposes of the LGPS Regulations) of such amount to meet the entire cost of providing the benefits of those Eligible Employees accrued in the LGPS before the Service Transfer Date on an ongoing basis, as determined by an actuary appointed by the Administering Authority using the ongoing actuarial methods and assumptions used in the actuarial valuation of the Fund (or revision thereto) preceding the Service Transfer Date, adjusted by the actuary to take account of market conditions at Transfer Date.

60.6 The Operator Partner shall, pursuant to the Partner Admission Agreement or the LGPS Regulations, pay to the Administering Authority for the credit of the LGPS such employer contributions or payments as are required under the Partner Admission Agreement or the LGPS Regulations.

60.7 Subject to Clause 60.10 if, at any time following the Service Transfer Date, the rate of employer contributions payable by the Operator Partner is more than the Initial Contribution Amount (**Increased Amount**), the Operator Partner shall be able to recover the Increased Amount from the Authority by means of an adjustment to the Annual Payment.

60.8 NOT USED.

60.9 Subject to Clause 60.10, where an actuarial valuation is obtained by the Administering Authority when the Operator Partner ceases to be an employer in the Fund for the purposes of the Eligible Employees, and the Operator Partner is required to pay an additional contribution to the Fund in respect of the Eligible Employees, the Authority will reimburse to the Operator Partner the amount payable by the Operator Partner to the Fund within 30 days of the payment being made.

60.10 The Operator Partner accepts responsibility for any increase in employer contributions or any additional contribution or payment to the Fund payable in accordance with Clauses 60.7 or 60.9 to the extent it results from one or more of the following issues:

- 60.10.1 awarding annual pay increases for the Eligible Employees which, in aggregate, exceed the percentage rate allowed for pay increases in the last valuation of the Fund prior to the award of the pay increase in question;
- 60.10.2 granting early retirement requests from Eligible Employees or deferred members of the LGPS;
- 60.10.3 augmentation of benefits in relation to an Eligible Employee;
- 60.10.4 reducing or waiving any contributions due from an Eligible Employee;
- 60.10.5 terminating the employment of an Eligible Employee aged 55 or over on the grounds of redundancy or efficiency of the service;
- 60.10.6 terminating the employment of an Eligible Employee on the grounds of ill-health;
- 60.10.7 bringing the deferred benefit of an Eligible Employee into payment on the grounds of ill-health; or
- 60.10.8 any liabilities in relation to new joiners who were not Eligible Employees.

Undertakings from the Operator Partner

- 60.11 The Operator Partner undertakes to the Authority and shall procure that any SubContractor undertakes to the Authority (for the benefit of the Authority itself and for the Authority as agent and trustee for the benefit of the Eligible Employees) that:
 - 60.11.1 all information which the Authority or the Administering Authority or their respective professional advisers may reasonably request from the Operator Partner or the Sub-Contractor for the administration of the LGPS or concerning any other matters raised in this Clause 60 (Pensions) shall be supplied to them as expeditiously as possible;
 - 60.11.2 it shall not, without the consent in writing of the Authority (which shall only be given subject to the payment by the Operator Partner or SubContractor of such reasonable costs as the Authority or the Administering Authority may require) consent to instigate, encourage or assist any event which could impose on the LGPS or on the Authority a cost in respect of any Eligible Employee greater than the cost which would have been payable in respect of that Eligible Employee had that consent, instigation, encouragement or assistance not been given; and
 - 60.11.3 until the Service Transfer Date, it shall not issue any announcements (whether in writing or not) to the Eligible Employees concerning the matters referred to in this Clause 60 (Pensions) without the consent in writing of the Authority and the Administering Authority (not to be unreasonably withheld or delayed); and

60.11.4 it shall not take or omit to take any action which would materially affect the benefits under the LGPS or under the Operator Partner Scheme of any Eligible Employees who are or will be employed wholly or partially in connection with the Services without the prior written agreement of the Authority (not to be unreasonably withheld or delayed) provided that the Operator Partner will be so entitled without the requirement of consent to give effect to any pre-existing contractual obligations to any Eligible Employees.

Discretionary Benefits

60.12 Where the Operator Partner or a Sub-Contractor is an Admission Body, the Operator Partner shall procure that benefits are awarded to the Eligible Employees (where permitted) under the LGPS Regulations in circumstances where the Eligible Employees would have received such benefits had they still been employed by the Authority.

60.13 Where the award of benefits in Clause 60.12 is not permitted under the LGPS Regulations or the Operator Partner or Sub-Contractor is not an Admission Body, the Operator Partner shall procure that benefits are awarded to the Eligible Employees which are identical to the benefits the Eligible Employees would have received under the LGPS Regulations in circumstances where the Eligible Employees would have received such benefits had they still been employed by the Authority.

60.14 Under Clauses 60.12 and 60.13, where 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 Service Transfer Date (which the Authority shall provide upon request). Where the payment of such benefits is not, for whatever reason, possible, the Operator Partner shall procure that the Eligible Employees are compensated in a manner which is broadly comparable or equivalent, as determined by the Authority.

Claims from Eligible Employees or Pensionable Employees or Trade Unions

60.15 The Operator Partner hereby indemnifies the Authority and/or any Future Operator Partner from and against all Losses suffered or incurred by it or them which arise from claims by Eligible Employees of the Operator Partner or by any trade unions, elected employee representatives or staff associations in respect of all or any such Eligible Employees which losses:

60.15.1 relate to pension rights in respect of periods of employment on and after the Service Transfer Date until the date of termination or expiry of this Agreement; or

60.15.2 arise out of the failure of the Operator Partner to comply with the provisions of this Clause 60 before the date of termination or expiry of this Agreement,

the Authority and the Operator Partner agree that the Contracts (Rights of Third Parties) Act 1999 shall apply to this provision to the extent necessary to enable a Future Operator Partner to enforce its rights.

Liability for Costs

60.16 The costs of the Authority necessarily and reasonably incurred in connection with the Partner Admission Agreement shall be borne by the Operator Partner.

Pensionable Employees

60.17 Where the Operator Partner employs any Relevant Employees from a Service Transfer Date, the Operator Partner shall comply with its obligations under sections 257 and 258 of the Pensions Act 2004, the Transfer of Employment (Pension Protection) Regulations 2005 and its duties under the Pensions Act 2008, with effect on and from the Service Transfer Date.

Transfer to another Employer

60.18 If the employment of any Eligible Employee transfers to another employer (by way of a Relevant Transfer) the Supplier shall:

60.18.1 consult with and inform those Eligible Employees of the pension provisions relating to that transfer; and

60.18.2 procure that the employer to which the Eligible Employees are transferred complies with the provisions of this Clause 60 (Pensions).

Pension Issues on Expiry or Termination

60.19 The Operator Partner shall, and shall procure that a Sub-Contractor shall:

60.19.1 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 the Operator Partner or Sub-Contractor in the provision of the Services on the expiry or termination of this Agreement (including, without limitation, identification of the Eligible Employees);

60.19.2 promptly provide to the Authority such documents and information mentioned in Clause 60.19.1 which the Authority may reasonably request in advance of the expiry or termination of this Agreement; and

60.19.3 fully co-operate (and, where relevant, procure that the trustees of the Operator Partner's 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 the Operator Partner or Sub-Contractor in the provision of the Services on the expiry or termination of this Agreement.

Direct Enforceability

60.20 The Operator Partner shall procure (and shall ensure that its Sub-Contractors procure) that the provisions of this Clause 60 (Pensions) shall be directly enforceable by the Eligible Employees against the Supplier or (where relevant) its Sub-Contractors. The Authority and the Operator Partner agree that the Contracts (Rights of Third Parties) Act 1999 shall apply to this provision to the extent necessary to enable an Eligible Employee to enforce these rights.

61. **ASSIGNMENT AND SUBCONTRACTING**

Restrictions on Authority

61.1 The rights and obligations of the Authority under this Agreement shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) to any person other than to any public body (being a single entity) acquiring the whole of the Agreement and having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Agreement being:

61.1.1 a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975;

61.1.2 any Local Authority which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Agreement; or

61.1.3 any other public body whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the Operator Partner) by the Authority or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Agreement.

Restrictions on Operator Partner

61.2 Subject to Clause 61.3, the Operator Partner shall not subcontract, assign, novate or otherwise dispose of or create any trust in relation to any or all of its rights, obligations or liabilities under this Agreement in whole or in part except with the prior written consent of the Authority.

61.3 Nothing in this Agreement shall prohibit the Operator Partner from providing or procuring the provision of the Services from a Sub-Contractor having the legal capacity, power and authority to become a party to and perform the obligations of the relevant Sub-Contract and employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it which are sufficient to enable it to perform the obligations of the SubContractor under the relevant Sub-Contract provided that:

61.3.1 such Sub-Contractor's identity has been notified to the Authority and the Authority has approved it in writing;

61.3.2 the Operator Partner has complied with its obligations under Clause 61.5 where applicable;

61.3.3 such Sub-Contractor's terms of Sub-Contract have been notified to the Authority by the Operator Partner and the Authority has approved them in writing;

61.3.4 the Operator Partner provides the Authority with a certified copy of the Sub-Contract within ten (10) Business Days of the Sub-Contract being completed;

61.3.5 if required by the Authority, the Operator Partner procures a parent company guarantee or bond from the Sub-Contractor; and

61.3.6 the Operator Partner shall remain primarily and directly liable for the Operator Partner's obligations under this Agreement.

61.4 By entering into this Agreement, the Authority approves the appointment of the [Leisure Operator and FM Contractor] under the [Leisure Contract and FM Agreement] in the Agreed Form, provided that the Operator Partner complies with its obligations under Clause 3.1 and the Operator Partner shall remain primarily and directly liable for the Operator Partner's obligations under this Agreement.

61.5 Notwithstanding any other provision of this Agreement, the Operator Partner shall not engage any new Leisure Operator or FM Contractor in connection with this Agreement unless such person has delivered to the Authority a duly executed agreement substantially in the Agreed Form of the relevant Collateral Warranty and in each case such Collateral Warranties must be delivered to the Authority before such entity enters onto any Site.

Operator Partner's Obligations

61.6 The Operator Partner shall perform its obligations under and observe all the terms of any Sub-Contract with a Sub-Contractor.

Sub-Contractors

61.7 Nothing in this Agreement shall prohibit or prevent any Sub-Contractor employed by the Operator Partner from being employed by the Authority at any establishments of the Authority.

Replacement of Sub-Contractors

61.8 The rights set out in Clause 61.9 may be exercised on no more than two (2) occasions during the Contract Period.

61.9 On the substitution or replacement of the defaulting Leisure Operator or FM Contractor or a defaulting sub-contractor to the Leisure Operator or the FM Contractor (in all cases provided that the Operator Partner is acting in compliance with Clause 6 (Ancillary Documents), the Operator Partner may elect that, for the purposes of Clause 40 (Termination on Operator Partner Default) only:

61.9.1 any accrued Performance Failures and/or Performance Adjustments; and/or

61.9.2 any warning notices or Final Warning Notices in respect of Clause 41 (Termination for Persistent Breach by the Operator Partner),

in each case relating to the relevant Services in respect of which the Leisure Operator or the FM Contractor (as the case may be) or any sub-contractor to the Leisure Operator or the FM Contractor (as the case may be) is being replaced, shall be cancelled. The Operator Partner shall notify the Authority on or before the appointment of any such substitute or replacement Leisure Operator or FM Contractor or sub-contractor (as the case may be) whether it elects for this Clause 61.9 to apply on that occasion.

61.10 Where an election is made pursuant to Clause 61.9 on the substitution or replacement of the defaulting Leisure Operator or FM Contractor (as the case may be) or a defaulting sub-contractor (as the case may be) to the Leisure Operator or the FM Contractor then, for the purposes of Clause 40 (Termination on Operator Partner Default) only, no:

61.10.1 Failure Points shall accrue for the purposes of sub-paragraph (h) of the definition of Operator Partner Default;

61.10.2 Performance Failures shall be deemed to occur for the purposes of subparagraph (i) of the definition of Operator Partner Default; and

61.10.3 warning notices or Final Warning Notices in respect of Clause 41 (Termination for Persistent Breach by the Operator Partner) shall accrue for the purposes of sub-paragraph (b) of the definition of Operator Partner Default,

in respect of a Service during a period of two (2) months from the date on which that Service is first provided by the replacement or substitute Leisure Operator or FM Contractor or sub-contractor as appropriate.

62. **CHANGE IN OWNERSHIP**

Restricted Share Transfer

62.1 A Change in Ownership may only occur to a Suitable Third Party.

Notification

62.2 The Operator Partner shall provide the Authority with at least ten (10) Business Days' prior written notice of any Change in Ownership contemplated by Clause 62.1.

62.3 The Authority may, not more than twice in any calendar year, or at any time when an Operator Partner Default is outstanding, request that the Operator Partner inform it as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of the Authority's request for details of any Change in Ownership.

- 62.4 The Operator Partner's obligation under Clause 62.2 shall, except where a legal transfer of shares is proposed, be limited to the extent of the Operator Partner's awareness.
- 62.5 The Operator Partner's obligation under Clause 62.3 shall, except where a legal transfer of shares has occurred, be limited to the extent of the Operator Partner's awareness having made all reasonable enquiry.
- 62.6 For the purposes of this Clause 0 any change in legal or beneficial ownership of any shares that are listed on a recognised investment exchange (as defined in Section 285 of the Financial Services and Markets Act 2000) shall be disregarded.

63. **WAIVER AND CUMULATIVE REMEDIES**

- 63.1 The rights and remedies under this Agreement may be waived only by notice and in a manner that expressly states that a waiver is intended. A failure or delay by a party in ascertaining or exercising a right or remedy provided under this Agreement or by law shall not constitute a waiver of that right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.
- 63.2 Unless otherwise provided in this Agreement, rights and remedies under this Agreement are cumulative and do not exclude any rights or remedies provided by law, in equity or otherwise.

64. **RELATIONSHIP OF THE PARTIES**

Except as expressly provided otherwise in this Agreement, nothing in this Agreement, nor any actions taken by the parties pursuant to this Agreement, shall create a partnership, joint venture or relationship of employer and employee or principal and agent between the parties, or authorise either party to make representations or enter into any commitments for or on behalf of any other party.

65. **SEVERANCE**

- 65.1 If any provision of this Agreement (or part of any provision) is held to be void or otherwise unenforceable by any court of competent jurisdiction, such provision (or part) shall to the extent necessary to ensure that the remaining provisions of this Agreement are not void or unenforceable be deemed to be deleted and the validity and/or enforceability of the remaining provisions of this Agreement shall not be affected.
- 65.2 In the event of a holding of invalidity so fundamental as to prevent the accomplishment of the purpose of this Agreement, the parties shall immediately commence negotiations in good faith to remedy this invalidity.

66. **FURTHER ASSURANCES**

Each party undertakes at the request of the other, and at the cost of the requesting party to do all acts and execute all documents which may be reasonably necessary to give effect to the meaning of this Agreement.

67. **ENTIRE AGREEMENT**

67.1 This Agreement constitutes the entire agreement between the Parties in respect of its subject matter and supersedes and extinguishes all prior negotiations, arrangements, understanding, course of dealings or agreements made between the Parties in relation to its subject matter, whether written or oral.

67.2 Neither Party has been given, nor entered into this Agreement in reliance on, any warranty, statement, promise or representation other than those expressly set out in this Agreement.

67.3 Nothing in this Clause 67 shall exclude any liability in respect of misrepresentations made fraudulently.

68. **THIRD PARTY RIGHTS**

No term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement.

69. **NOTICES**

Form and Service of Notices

69.1 All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class post:

Operator Partner	Authority
[INSERT NAME]	
[INSERT ADDRESS]	

Provision of Information to Representatives

69.2 Where any information or documentation is to be provided or submitted to the Authority's Representative or the Operator Partner's Representative it shall be provided or submitted by sending the same by first class post or by hand, or leaving the same at:

Operator Representative	Partner's	Authority's Representative
[INSERT NAME]		[INSERT NAME]

[INSERT ADDRESS]

[INSERT ADDRESS]

Change of Details

69.3 Either party to this Agreement (and either Representative) may change its nominated address or facsimile number by prior notice to the other party.

Effectiveness of Notices

69.4 Notices given by post shall be effective upon the earlier of actual receipt and five (5) Business Days after mailing. Notices delivered by hand shall be effective upon delivery. Notices given by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:

69.4.1 within two (2) hours after sending, if sent on a Business Day between the hours of 9am and 4pm; or

69.4.2 by 11am on the next following Business Day, if sent after 4pm on a Business Day but before 9am on that next following Business Day.

70. DISPUTE RESOLUTION

Disputes

70.1 Any dispute arising in relation to any aspect of this Agreement shall be resolved in accordance with this Clause 70.

Consultation

70.2 If a dispute arises in relation to any aspect of this Agreement, the Operator Partner and the Authority shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter and, if necessary, shall escalate the dispute for discussion between senior colleagues at the Authority and Operator Partner.

Adjudication

70.3 Without prejudice to Clause 70.2, either party may give the other notice of its intention to refer the dispute to adjudication (**Notice of Adjudication**). The Notice of Adjudication shall include a brief statement of the issue to be referred and the redress sought. The party giving the Notice of Adjudication (**Referring Party**) shall on the same day and by the same means of communication send a copy of

the Notice of Adjudication to an adjudicator selected in accordance with Clause 70.4.

Identity of Adjudicator

70.4 The Adjudicator nominated to consider a dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of experts selected in accordance with the following:

70.4.1 there shall be a panel of experts in respect of operational and maintenance matters. All the experts on the panel shall be wholly independent of the Operator Partner, the Authority, the relevant SubContractor and any of the major competitors of the Operator Partner or relevant Sub-Contractor;

70.4.2 the panel shall be comprised of three (3) experts who shall be selected jointly by the Operator Partner and the Authority. Such selection shall take place within twenty (20) Business Days of the Commencement Date or otherwise as agreed between the parties;

70.4.3 if any member of a panel resigns during the Contract Period, a replacement expert shall be selected by the Operator Partner and the Authority as soon as practicable;

70.4.4 in the event that the nominated Adjudicator is unable or unwilling to confirm acceptance of his appointment as Adjudicator within two (2) Business Days of receipt of the Notice of Adjudication, then the Referring Party shall invite the person next in line to act as the Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within two (2) days or if the parties disagree as to the relevant panel of experts to be used then the Referring Party may apply to the President for the time being of the Chartered Institute of Arbitrators who shall within three (3) Business Days of any such application nominate an Adjudicator to determine the issue set out in the Notice of Adjudication; and

70.4.5 if the Authority and the Operator Partner are unable to agree on the identity of the experts to be selected to the panels, the President for the time being of the Chartered Institute of Arbitrators shall appoint such expert(s) within thirty (30) days of any application for such appointment by either party.

Referral of the Dispute

70.5 Within seven (7) days of the service of the Notice of Adjudication, or as soon thereafter as the Adjudicator is appointed, the Referring Party shall serve its statement of case (**Referral Notice**) on the Adjudicator and the other party (**Responding Party**). The Referral Notice shall include a copy of this Agreement, details of the circumstances giving rise to the dispute as set out in the Notice of Adjudication, the reasons why the Referring Party is entitled to the redress sought, and the evidence upon which it relies.

Response to the Referral

70.6 The Responding Party shall serve its statement of case (**Response**) on the Adjudicator and the Referring Party within a period of time to be directed by the

Adjudicator. The Response shall include any arguments in response to the Referral Notice of the dispute set out in the Notice of Adjudication and any additional evidence on which the Responding Party relies.

Procedure

70.7 Subject to Clause 70.18.1, the Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Agreement. The parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.

Adjudicator's Decision

70.8 In any event, the Adjudicator shall provide to both parties his written decision on the dispute, within twenty eight (28) days after the date of receipt of the Referral Notice (or such other period as the parties may agree). The Adjudicator shall be entitled to extend the said period of twenty eight (28) days by up to fourteen (14) days with the consent of the Referring Party. The Adjudicator shall state any reasons for his decision. Unless and until revised, cancelled or varied by the English courts, the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.

Adjudicator's Costs

70.9 The Adjudicator's costs of any referral shall be borne as the Adjudicator shall specify or, in default, equally by the parties. Each party shall bear its own costs arising out of the referral, including legal costs and the costs and expenses of any witnesses.

Adjudicator as Expert

70.10 The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an expert, and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.

Adjudicator's Powers

70.11 The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement.

Confidentiality

70.12 All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 56 (Confidentiality), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the

same and all copies shall be returned to such party on completion of the Adjudicator's work.

Liability of Adjudicator

70.13 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.

Reference to the Courts

70.14 Either party may (within ninety (90) calendar days of receipt of the Adjudicator's decision or where the Adjudicator fails to give a decision pursuant to Clause 70.8) give notice to the other party of its intention to refer the dispute to the courts of England and Wales for final determination.

Parties' Obligations

70.15 The parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the dispute and notwithstanding the referral of the dispute for resolution under this Clause 70 and shall give effect forthwith to every decision of the Adjudicator and the courts delivered under this Clause 70.

Similar Disputes

70.16 If any dispute arising under this Agreement raises issues which relate to:

70.16.1 any dispute between the Operator Partner and the FM Contractor arising under the FM Agreement or otherwise affects the relationship or rights of the Operator Partner and/or the FM Contractor under the FM Agreement (FM Agreement Dispute); or

70.16.2 any dispute between the Operator Partner and the Leisure Operator arising under the Leisure Contract or otherwise affects the relationship or rights of the Operator Partner and/or the Leisure Operator under the Leisure Contract (Leisure Contract Dispute),

then the Operator Partner may include as part of its submissions made to the Adjudicator or to the courts submissions made by the FM Contractor or by the Leisure Operator as appropriate.

Jurisdiction over Sub-Contractors

70.17 The Adjudicator shall not have jurisdiction to determine the Leisure Contract Dispute or the FM Agreement Dispute but the decision of the Adjudicator and/or the courts shall, subject to Clause 70.14, be binding on the Operator Partner and the Leisure Operator insofar as it determines the issues relating to the Leisure Contract Dispute and on the Operator Partner and the FM Contractor insofar as it determines the issues relating to the FM Agreement Dispute.

Sub-Contractors' Submissions

70.18 Any submissions made by the Leisure Operator or the FM Contractor shall:

70.18.1 be made within the time limits applicable to the delivery of submissions by the Operator Partner; and

70.18.2 concern only those matters which relate to the dispute between the Authority and the Operator Partner under this Agreement.

Costs

70.19 Where the Leisure Operator or the FM Contractor makes submissions in any reference before:

70.19.1 the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third by the Authority and two-thirds (2/3) by the Operator Partner; and

70.19.2 the courts, the costs of the litigation shall be in the discretion of the court.

Authority's Liability

70.20 The Authority shall have no liability to the Leisure Operator or the FM Contractor arising out of or in connection with any decision of the Adjudicator or courts or in respect of the costs of the Leisure Operator or the FM Contractor in participating in the resolution of any dispute under this Agreement.

Access to Documents

70.21 The Operator Partner shall not allow the Leisure Operator or the FM Contractor access to any document relevant to issues in dispute between the Authority and the Operator Partner save where:

70.21.1 the document is relevant also to the issues relating to the Leisure Contract Dispute or the FM Agreement Dispute as the case may be; and

70.21.2 the Operator Partner has first delivered to the Authority a written undertaking from the Leisure Operator and/or the FM Contractor (as appropriate) addressed to the Authority that they shall not use any such document otherwise than for the purpose of the dispute resolution proceedings under this Agreement and that they shall not disclose such documents or any information contained therein to any third party other than the Adjudicator or the courts or any professional adviser engaged by the Leisure Operator or the FM Contractor (as appropriate) to advise in connection with the dispute.

71. SOLE REMEDY

Common Law Rights for the Operator Partner

71.1 Without prejudice to any entitlement of the Operator Partner:

71.1.1 to specific performance of any obligation under this Agreement; or

71.1.2 to injunctive relief,

the Operator Partner's sole remedy in relation to matters for which an express right or remedy is stated in this Agreement shall be that right or remedy and the Operator Partner shall have no additional right or remedy arising by common law, in equity, by statute or otherwise.

71.2 The Operator Partner's sole remedy in relation to any Compensation Event shall be the operation of Clause 28 (Compensation Events).

Common Law Rights of the Authority

71.3 Subject to:

71.3.1 any other express right of the Authority pursuant to this Agreement; and

71.3.2 the Authority's right to claim, on or after termination of this Agreement, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Agreement by the Operator Partner, save to the extent that the same has already been recovered by the Authority pursuant to this Agreement or has been taken into account to calculate any compensation payable pursuant to this Agreement,

the sole remedy of the Authority in respect of a failure to provide the Services in accordance with this Agreement shall be the operation of Schedule 5 (PPM

71.4 Nothing in Clause 71.3 shall prevent or restrict the right of the Authority to seek injunctive relief or a decree of specific performance or other discretionary remedies of the court.

No Breach

71.5 The Operator Partner shall not be held to be failing to comply with its obligations under this Agreement to the extent that such failure to comply is a result of the Authority's breach of its obligations hereunder.

Indirect Losses

71.6 Save where stated to the contrary, the indemnities under this Agreement shall not apply and (without prejudice to the Authority's rights under the PPM) there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever, to the extent that any loss claimed by either party is for Indirect Losses. The Authority agrees that, notwithstanding the foregoing, any Losses of

the Operator Partner arising under the Sub-Contracts as originally executed (or as amended in accordance with the terms of this Agreement) which are not of themselves Indirect Losses, shall not be excluded from such a claim solely by reason of this Clause 71.

72. NO DOUBLE RECOVERY

Notwithstanding any other provisions of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement in respect of any loss that it has incurred to the extent that it has already been compensated in respect of that loss pursuant to this Agreement or otherwise.

73. COUNTERPARTS

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

74. CAPACITY

Save as otherwise expressly provided, the obligations of the Authority under this Agreement are obligations of the Authority in its capacity as a contracting counterparty and nothing in this Agreement shall operate as an obligation upon, or in any other way fetter or constrain the Authority in any other statutory capacity as a Relevant Authority, nor shall the exercise by the Authority of its duties and powers in any other statutory capacity as a Relevant Authority lead to any liability under this Agreement (howsoever arising) on the part of the Authority to the Operator Partner.

75. INTEREST ON LATE PAYMENT

Save where otherwise specifically provided, where any payment or sum of money due from the Operator Partner to the Authority or from the Authority to the Operator Partner under any provision of this Agreement is not paid on the due date, it shall bear interest thereon at the Prescribed Rate from the due date (whether before or after any judgement) until actual payment and it is agreed between the parties that the Prescribed Rate and the provisions of this Agreement relating to the payment of compensation on termination of this Agreement following the occurrence of an Authority Default provide the Operator Partner with a substantial remedy pursuant to Sections 8 and 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

76. GOVERNING LAW AND JURISDICTION

The Agreement shall be governed by and construed in all respects in accordance with the laws of England and Wales. Subject to Clause 70 (Dispute Resolution), the English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement.

SCHEDULE 1 - SERVICES SPECIFICATION

[Note: to be included]

SCHEDULE 2 - SERVICE DELIVERY PROPOSALS

[Note: to be included]

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SCHEDULE 3 - FACILITIES

Facility (including address)
Farnborough Leisure Centre Westmead, Farnborough GU14 7LD
Aldershot Pools and Lido Guildford Rd, Aldershot GU12 4BP

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SCHEDULE 4 - SITE PLANS

[To be included]

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SCHEDULE 5 - PPM

[To be included]

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SCHEDULE 6 - COLLATERAL WARRANTIES

PART 1- WARRANTY FROM THE OPERATOR PARTNER'S FM CONTRACTOR

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- (3) [Operator Partner] (Company Number []) whose registered office at [] (Operator Partner).

WHEREAS:

- (A) By a leisure operating contract dated [] (**Agreement**) the Authority has appointed the Operator Partner to carry out, in relation to the Sites, the provision of serviced accommodation to the Authority at each and every Facility as contemplated by the Agreement including the provision of the Services.
- (B) The FM Contractor has been appointed by the Operator Partner under a contract dated [] (**FM Agreement**) to carry out the Maintenance Services.
- (C) The FM Contractor is obliged under the FM Agreement to give a warranty in this form in favour of the Authority.
- (D) The FM Contractor and the Operator Partner have agreed to execute this Deed in favour of the Authority.

IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

- 1.1 Unless expressly defined otherwise in this Deed any defined term in this Deed shall have the same meaning given to such term in the FM Agreement.

1.2 Intellectual Property Rights

Any and all patents, trade marks, service marks, copyright, database rights, moral rights, rights in design, know how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attaching thereto which is created, brought into existence, acquired, used or intended to be used by the FM Contractor for the purpose of carrying out the Maintenance Services.

1.3 Project Data

- 1.3.1 All drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the Facilities (as defined in the Agreement) in each case that is used by or on behalf of the FM Contractor in connection with the Maintenance Services or the performance of the FM Contractor Partner's obligations under the FM Agreement.

- 1.3.2 Any other materials, documents or data acquired or brought into existence or used in relation to the Maintenance Services or the FM Agreement by or on behalf of the FM Contractor in connection with the provision of the Maintenance Services or the performance of the FM Contractor Partner's obligations under the FM Agreement.

2. OPERATIVE PROVISIONS

In consideration of the payment of one pound (£1.00) by the Authority to the FM Contractor, receipt of which the FM Contractor acknowledges.

3. WARRANTY

- 3.1 The FM Contractor warrants to the Authority that it has carried out and will continue to carry out all its obligations and duties under the FM Agreement in accordance with and to the standard required by the FM Agreement, provided always that the FM Contractor has no liability hereunder which is greater or of a longer duration than that it owes to the Operator Partner under the FM Agreement.
- 3.2 The FM Contractor shall have no liability under Clauses 3.1 and 11 of this Deed that is greater or of longer duration than it would have had, and shall be entitled in any proceedings by the Authority to rely on any limitation in the FM Agreement and to raise equivalent rights in defence of liability as it would have against the Operator Partner under the FM Agreement.
- 3.3 Notwithstanding anything in this Deed and notwithstanding any payments which may be made by the Authority to the FM Contractor, the Authority and the FM Contractor will not be under any obligation to each other nor will any party have any claim or cause of action against the others unless and until the Authority has given written notice to the FM Contractor pursuant to Clause 7.1.1 or Clause 7.3.

4. INTELLECTUAL PROPERTY

- 4.1 The FM Contractor shall make available to the Authority free of charge (and hereby irrevocably licences the Authority to use) all Project Data that might reasonably be required by the Authority. The FM Contractor shall obtain all necessary licences, permissions and consents necessary for it to make the Project Data available to the Authority on these terms, for any purpose whatsoever connected with the Project and such other purposes as are reasonably foreseeable, (**Approved Purposes**), and in this Clause 4 "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly. The Authority will not hold the FM Contractor liable for any use it may make of the Project Data for any purpose other than the Approved Purposes unless the FM Contractor authorises such use and confirms that the Project Data is suitable for it.
- 4.2 The FM Contractor:
- 4.2.1 hereby grants to the Authority, free of charge, an irrevocable non-exclusive and transferable (subject to the restrictions continued in Clause 5 of this Deed) licence to use the Intellectual Property Rights that are or become vested in the FM Contractor for the Approved Purposes; and

4.2.2 shall (where any Intellectual Property Rights are or become vested in a third party) use all reasonable endeavours to procure the grant of a like licence to that referred to in Clause 4.2.1 to the Authority,

in both cases, solely for the Approved Purposes.

4.3 The FM Contractor agrees on reasonable request at any time and following reasonable written prior notice to give the Authority or those authorised by it access to the Project Data and to provide copies (including copy negatives and CAD disks) thereof at the Authority's expense.

4.4 The FM Contractor warrants to the Authority that the Project Data (save to the extent duly appointed sub-contractors have been used to prepare the same) is its own original work and that in any event their use in connection with the Services will not infringe the rights of any third party.

4.5 Where a claim or proceeding is made or brought against the Authority that arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Maintenance Services infringes any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority otherwise than in accordance with this Deed, the FM Contractor shall indemnify the Authority at all times from and against all Direct Losses and Indirect Losses (as defined in the Agreement) arising as a result of such claims and proceedings.

5. **ASSIGNMENT**

The benefit of and the rights of the Authority under this Deed may be assigned without the consent of the FM Contractor on two (2) occasions only and the Authority will notify the FM Contractor in writing following any such assignment specifying the name and address of the assignee and the date of the assignment. The FM Contractor will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original beneficiary hereunder or by reason that the original beneficiary or any intermediate beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Sites or that the original beneficiary or any intermediate beneficiary has not suffered any, or as much, loss.

6. **AUTHORITY'S REMEDIES**

The rights and benefits conferred upon the Authority by this Deed are in addition to any other rights and remedies it may have against the FM Contractor including without prejudice to the generality of the foregoing any remedies in negligence.

7. **STEP-IN RIGHTS IN FAVOUR OF THE AUTHORITY**

7.1 The FM Contractor will not exercise or seek to exercise any right which may be or becomes available to it to terminate or treat as terminated or repudiated the FM

Agreement or its employment under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to the Authority not less than thirty (30) Business Days' prior written notice specifying the FM Contractor Partner's ground for terminating or treating as terminated or repudiated the FM Agreement or its employment under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the FM Agreement. Within such period of notice:

7.1.1 the Authority may give written notice to the FM Contractor that the Authority will thenceforth become the client under the FM Agreement to the exclusion of the Operator Partner and thereupon the FM Contractor will admit that the Authority is its client under the FM Agreement and the FM Agreement will be and remain in full force and effect notwithstanding any of the said grounds;

7.1.2 if the Authority has given such notice as aforesaid or under Clause 7.3, the Authority shall accept liability for the Operator Partner's obligations under the FM Agreement and will as soon as practicable thereafter remedy any outstanding breach by the Operator Partner including any non-payment of sums due to the FM Contractor that properly has been included in the FM Contractor Partner's specified grounds pursuant to this Clause 7.1 (and which has been notified to the Authority) and which is capable of remedy; and

7.1.3 if the Authority has given such notice as aforesaid or under Clause 7.3, the Authority will from the service of such notice become responsible for all sums properly payable to the FM Contractor under the FM Agreement accruing due after the service of the FM Contractor Partner's notice but the Authority will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to the Operator Partner under the FM Agreement.

7.2 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Authority to the FM Contractor, the FM Contractor will not be under any duty to obey any direction or instruction from the Authority unless and until the Authority has given notice under Clauses 7.1.1 and 7.3.

7.3 The FM Contractor further covenants with the Authority that if the employment of the Operator Partner under the Agreement is terminated or if the Agreement is terminated by the Authority the FM Contractor, if requested by the Authority by notice in writing and subject to Clause 7.1.2 and Clause 7.1.3, will accept the instructions of the Authority to the exclusion of the Operator Partner in respect of the Maintenance Services upon the terms and conditions of the FM Agreement and will if so requested in writing enter into a novation agreement in the form set out in Appendix 1 to this Deed whereby the Authority is substituted for the Operator Partner under the FM Agreement.

- 7.4 If the FM Contractor is requested to enter into a novation agreement pursuant to Clause 7.3, the Operator Partner agrees to enter into the same at the request of the Authority.
- 7.5 The Operator Partner acknowledges that the FM Contractor will be entitled to rely on a notice given to the FM Contractor by the Authority under Clause 7.3 as conclusive evidence that the Operator Partner's employment under the Agreement has been terminated or that the Agreement has been terminated by the Authority.
- 7.6 The Authority may by notice in writing to the FM Contractor appoint another person to exercise its rights under this Clause 7 subject to the Authority remaining liable to the FM Contractor as guarantor for its appointee in respect of its obligations under this Deed.

8. **LIMITATION**

Without prejudice to the provisions of Clause 7.1, the Authority shall not be entitled to take any action or proceedings against the FM Contractor pursuant to this Deed unless and until the Agreement has been terminated.

9. **INDEPENDENT ENQUIRY CLAUSE**

The liability of the FM Contractor under this Deed shall not be modified released, diminished or in any way affected by any independent inspection investigation or enquiry into any relevant matter which may be made or carried out by or for the Authority nor by any failure or omission to carry out any such inspection, investigation or enquiry nor by the appointment by the Authority of any independent firm, company or party whatsoever to review the progress of or otherwise report to the Authority in respect of the Maintenance Services nor by any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to the Authority provided always that nothing in this Clause 9 shall modify or affect any rights which the FM Contractor might have but for the existence of this Clause 9 to claim contribution from any third party whether under statute or at common law.

10. **NO VARIATION TO FM AGREEMENT WITHOUT AUTHORITY'S CONSENT**

The Operator Partner and the FM Contractor undertake with the Authority not to vary or depart from the terms and conditions of the FM Agreement without the prior written consent of the Authority (such consent to be sought in accordance with the Review Procedure where that procedure applies to the variation or departure in question), and agree that no such variation or departure made without such consent shall be binding upon the Authority, or affect or prejudice the Authority's rights hereunder, or under the FM Agreement or in any other way.

11. **SEVERABILITY**

If any term, condition or provision of this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the

validity, legality and enforceability of the other provisions of or any other documents referred to in this Agreement.

12. WAIVER

12.1 No term or provision of this Deed shall be considered as waived by any party to this Deed unless a waiver is given in writing by that party.

12.2 No waiver under Clause 12.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Deed unless (and only to the extent) expressly stated in that waiver.

13. THE CONTRACTOR'S INCLUSION AS PARTY

The Operator Partner has agreed to be a party to this Deed for the purpose of Clause 8 and for acknowledging that the FM Contractor shall not be in breach of the FM Agreement by complying with the obligations imposed on it by this Deed.

14. COUNTERPARTS

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

15. GOVERNING LAW AND JURISDICTION

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

16. THIRD PARTY RIGHTS

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This Clause 16 does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

17. NOTICES

Any notice to be given by either party hereunder will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet, provided that if any notice sent by hand or facsimile is sent after 4:45 pm on any day it will be deemed to be served on the next Business Day. Any notice sent by post will be deemed to have been duly served at the expiration of forty-eight (48) hours after the time of posting if the end of that period falls before 4:45 pm on a Business Day and otherwise on the next Business Day.

IN WITNESS whereof this document is executed by the parties as a Deed and delivered on the date stated at the beginning of this Deed.

EXECUTED as a Deed by the **FM Contractor** acting by two of its directors or a director and its secretary:

.....
Director

.....
Director/Secretary

EXECUTED AS A DEED by the Authority acting by two authorised signatories:

.....
Authorised Signatory

.....
Authorised Signatory

EXECUTED as a Deed by **[Operator Partner]** acting by two of its directors or a director and its secretary:

.....
Director

.....
Director/Secretary

APPENDIX 1 - FORM OF DEED OF NOVATION

THIS DEED is made on **BETWEEN:**

- (1) **[CONTRACTOR'S FM Contractor]** (Company Number []) whose registered office at [] (**FM Contractor**);
- (2) **[AUTHORITY]** of [] (**Authority**), (which expression includes its permitted successors in title and assigns); and
- (3) **[Operator Partner]** (Company Number []) whose registered office at [] (**Operator Partner**).

WHEREAS:

- (A) By a leisure operating contract dated [] (**Agreement**) the Authority has appointed the Operator Partner to carry out in relation to [] (**Sites**) the provision of the Services (as defined in the Agreement).
- (B) The FM Contractor has been appointed by the Operator Partner under a contract dated [] (**FM Agreement**) to carry out the Maintenance Services.
- (C) [The employment of the Operator Partner under the Agreement has been terminated] [The Agreement has been terminated by the Authority].
- (D) The Operator Partner has transferred or agreed to transfer its interest in (or granted or agreed to grant a subordinate interest in) the Sites to the Authority.
- (E) The parties have agreed to novate the FM Agreement to the Authority on the terms set out below.

IT IS AGREED as follows:

1. **NOVATION OF FM AGREEMENT**

The FM Agreement is hereby novated from the Operator Partner and the FM Contractor to the Authority and the FM Contractor.

2. **RELEASE OF THE OPERATOR PARTNER**

The Operator Partner shall no longer owe any duty or obligation to the FM Contractor under or in respect of the FM Agreement whether by virtue of its terms or by virtue of any breach or otherwise.

3. **RELEASE OF THE FM CONTRACTOR**

The FM Contractor shall no longer owe any duty or obligation to the Operator Partner under or in respect of the FM Agreement whether by virtue of its terms or by virtue of any breach or otherwise.

4. **BINDING OF THE FM CONTRACTOR TO THE AUTHORITY**

- 4.1 The FM Contractor binds itself to the Authority in the terms of the FM Agreement as if the Authority were and always had been named in the FM Agreement in place of the Operator Partner.
- 4.2 The FM Contractor warrants to the Authority that prior to the date of this Deed it has performed and that it will continue to perform its duties and obligations as required by and in accordance with the terms of the FM Agreement.
- 4.3 The Authority shall not be precluded from recovering any losses incurred by the Authority or the Operator Partner resulting from any breach of Clause 4.2 by reason that (if it be the case) the acts or omissions causing such breach occurred before this Deed took effect, or that the Operator Partner will not incur or has not or would not have incurred any such losses. No waiver by the Operator Partner, either express or implied, will affect the FM Contractor Partner's liability to the Authority pursuant to this Clause 4.

5. **BINDING OF THE AUTHORITY TO THE FM CONTRACTOR**

The Authority binds itself to the FM Contractor in the terms of the FM Agreement as if the Authority were and always had been named in the FM Agreement in place of the Operator Partner and as if all acts and omissions of the Operator Partner (including any wrongful acts or omissions) under and in respect of the FM Agreement were the acts and omissions of the Authority.

6. **VESTING OF REMEDIES IN THE AUTHORITY**

All rights of action and remedies vested in the Operator Partner against the FM Contractor under and in respect of the FM Agreement shall hereupon vest in the Authority.

7. **VESTING OF REMEDIES AGAINST THE AUTHORITY**

All rights of action and remedies vested in the FM Contractor against the Operator Partner under and in respect of the FM Agreement shall hereinafter lie against the Authority.

8. **AFFIRMATION OF FM AGREEMENT**

Subject to the terms of this Deed the FM Agreement shall remain in full force and effect.

9. **THIRD PARTY RIGHTS**

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This Clause 9 does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

10. **GOVERNING LAW AND INTERPRETATION**

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above.

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PART 2 - WARRANTY FROM THE OPERATOR PARTNER'S LEISURE OPERATOR

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- (3) [Operator Partner] (Company Number []) whose registered office at [] (Operator Partner).

WHEREAS:

- (A) By a leisure operating contract dated [] (**Agreement**) the Authority has appointed the Operator Partner to carry out, in relation to the Site[s], the provision of serviced accommodation to the Authority at each and every Facility as contemplated by the Agreement including the provision of the Services.
- (B) The Leisure Operator has been appointed by the Operator Partner under a contract dated [] (**Leisure Contract**) to carry out the Leisure Services.
- (C) The Leisure Operator is obliged under the Leisure Contract to give a warranty in this form in favour of the Authority.
- (D) The Leisure Operator and the Operator Partner have agreed to execute this Deed in favour of the Authority.

IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATIONS

Unless expressly defined otherwise in this Deed any defined term in this Deed shall have the same meaning given to such term in the Leisure Contract.

1.1 Intellectual Property Rights

Any and all patents, trade marks, service marks, copyright, database rights, moral rights, rights in design, know how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attaching thereto which is created, brought into existence, acquired, used or intended to be used by the Leisure Operator for the purpose of carrying out the Leisure Services.

1.2 Project Data

1.2.1 All drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the Facilities (as defined in the Agreement) in each case that is used by or on behalf of the Leisure Operator in connection with the Leisure Services

or the performance of the Leisure Operator's obligations under the Leisure Contract.

1.2.2 Any other materials, documents or data acquired or brought into existence or used in relation to the Leisure Services or the Leisure Contract by or on behalf of the Leisure Operator in connection with the provision of the Leisure Services or the performance of the Leisure Operator's obligations under the Leisure Contract.

2. OPERATIVE PROVISIONS

In consideration of the payment of one pound (£1.00) by the Authority to the Leisure Operator, receipt of which the Leisure Operator acknowledges:

3. WARRANTY

- 3.1 The Leisure Operator warrants to the Authority that it has carried out and will continue to carry out all its obligations and duties under the Leisure Contract in accordance with and to the standard required by the Leisure Contract, provided always that the Leisure Operator has no liability hereunder which is greater or of a longer duration than that it owes to the Operator Partner under the Leisure Contract.
- 3.2 The Leisure Operator shall have no liability under Clauses 3.1 and 11 of this Deed that is greater or of longer duration than it would have had, and shall be entitled in any proceedings by the Authority to rely on any limitation in the Leisure Contract and to raise equivalent rights in defence of liability as it would have against the Operator Partner under the Leisure Contract.
- 3.3 Notwithstanding anything in this Deed and notwithstanding any payments which may be made by the Authority to the Leisure Operator, the Authority and the Leisure Operator will not be under any obligation to each other nor will any party have any claim or cause of action against the others unless and until the Authority has given written notice to the Leisure Operator pursuant to Clause 7.1.1 or Clause 7.3.

4. INTELLECTUAL PROPERTY

- 4.1 The Leisure Operator shall make available to the Authority free of charge (and hereby irrevocably licences the Authority to use) all Project Data that might reasonably be required by the Authority. The Leisure Operator shall obtain all necessary licences, permissions and consents necessary for it to make the Project Data available to the Authority on these terms, for any purpose whatsoever connected with the Project and such other purposes as are reasonably foreseeable, (**Approved Purposes**), and in this Clause 4 "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly. The Authority will not hold the Leisure Operator liable for any use it may make of the Project Data for any purpose other than the Approved Purposes unless the Leisure Operator authorise such use and confirms that the Project Data is suitable for it.
- 4.2 The Leisure Operator:
- 4.2.1 hereby grants to the Authority, free of charge, an irrevocable non-exclusive and transferable (subject to the restrictions continued in Clause 5 of this Deed) licence to use the Intellectual Property Rights that are or become vested in the Leisure Operator for the Approved Purposes;

4.2.2 shall (where any Intellectual Property Rights are or become vested in a third party) use all reasonable endeavours to procure the grant of a like licence to that referred to in Clause 4.2.1 to the Authority,

in both cases, solely for the Approved Purposes.

4.3 The Leisure Operator agrees on reasonable request at any time and following reasonable written prior notice to give the Authority or those authorised by it access to the Project Data and to provide copies (including copy negatives and CAD disks) thereof at the Authority's expense.

4.4 The Leisure Operator warrants to the Authority that the Project Data (save to the extent duly appointed sub-contractors have been used to prepare the same) is its own original work and that in any event their use in connection with the Services will not infringe the rights of any third party.

4.5 Where a claim or proceeding is made or brought against the Authority that arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Leisure Services infringes any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority otherwise than in accordance with this Deed, the Leisure Operator shall indemnify the Authority at all times from and against all Direct Losses and Indirect Losses (as defined in the Agreement) arising as a result of such claims and proceedings.

5. **ASSIGNMENT**

The benefit of and the rights of the Authority under this Deed may be assigned without the consent of the Leisure Operator on two (2) occasions only and the Authority will notify the Leisure Operator in writing following any such assignment specifying the name and address of the assignee and the date of the assignment. The Leisure Operator will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original beneficiary hereunder or by reason that the original beneficiary or any intermediate beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Sites or that the original beneficiary or any intermediate beneficiary has not suffered any, or as much, loss.

6. **AUTHORITY'S REMEDIES**

The rights and benefits conferred upon the Authority by this Deed are in addition to any other rights and remedies it may have against the Leisure Operator including without prejudice to the generality of the foregoing any remedies in negligence.

7. **STEP-IN RIGHTS IN FAVOUR OF THE AUTHORITY**

7.1 The Leisure Operator will not exercise or seek to exercise any right which may be or becomes available to it to terminate or treat as terminated or repudiated the

Leisure Contract or its employment under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to the Authority not less than thirty (30) Business Days' prior written notice specifying the Leisure Operator's ground for terminating or treating as terminated or repudiated the Leisure Contract or its employment under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the Leisure Contract. Within such period of notice:

- 7.1.1 the Authority may give written notice to the Leisure Operator that the Authority will thenceforth become the client under the Leisure Contract to the exclusion of the Operator Partner and thereupon the Leisure Operator will admit that the Authority is its client under the Leisure Contract and the Leisure Contract will be and remain in full force and effect notwithstanding any of the said grounds;
- 7.1.2 if the Authority has given such notice as aforesaid or under Clause 7.3, the Authority shall accept liability for the Operator Partner's obligations under the Leisure Contract and will as soon as practicable thereafter remedy any outstanding breach by the Operator Partner including any non-payment of sums due to the Leisure Operator that properly has been included in the Leisure Operator's specified grounds pursuant to this Clause 7.1 (and which has been notified to the Authority) and which is capable of remedy; and
- 7.1.3 if the Authority has given such notice as aforesaid or under Clause 7.3, the Authority will from the service of such notice become responsible for all sums properly payable to the Leisure Operator under the Leisure Contract accruing due after the service of the Leisure Operator's notice but the Authority will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to the Operator Partner under the Leisure Contract.

7.2 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Authority to the Leisure Operator, the Leisure Operator will not be under any duty to obey any direction or instruction from the Authority unless and until the Authority has given notice under Clauses 7.1.1 and 7.3.

7.3 The Leisure Operator further covenants with the Authority that if the employment of the Operator Partner under the Agreement is terminated or if the Agreement is terminated by the Authority the Leisure Operator, if requested by the Authority by notice in writing and subject to Clause 7.1.2 and Clause 7.1.3, will accept the instructions of the Authority to the exclusion of the Operator Partner in respect of the Leisure Services upon the terms and conditions of the Leisure Contract and will if so requested in writing enter into a novation agreement in the form set out in Appendix 1 to this Deed whereby the Authority is substituted for the Operator Partner under the Leisure Contract.

7.4 If the Leisure Operator is requested to enter into a novation agreement pursuant to Clause 7.3, the Operator Partner agrees to enter into the same at the request of the Authority.

7.5 The Operator Partner acknowledges that the Leisure Operator will be entitled to rely on a notice given to the Leisure Operator by the Authority under Clause 7.3 as conclusive evidence that the Operator Partner's employment under the Agreement has been terminated or that the Agreement has been terminated by the Authority.

7.6 The Authority may by notice in writing to the Leisure Operator appoint another person to exercise its rights under this Clause 7 subject to the Authority remaining liable to the Leisure Operator as guarantor for its appointee in respect of its obligations under this Deed.

8. **LIMITATION**

Without prejudice to the provisions of Clause 7.1, the Authority shall not be entitled to take any action or proceedings against the Leisure Operator pursuant to this Deed unless and until the Agreement has been terminated.

9. **INDEPENDENT ENQUIRY CLAUSE**

The liability of the Leisure Operator under this Deed shall not be modified, released, diminished or in any way affected by any independent inspection investigation or enquiry into any relevant matter which may be made or carried out by or for the Authority nor by any failure or omission to carry out any such inspection, investigation or enquiry nor by the appointment by the Authority of any independent firm, company or party whatsoever to review the progress of or otherwise report to the Authority in respect of the Leisure Services nor by any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to the Authority provided always that nothing in this Clause 9 shall modify or affect any rights which the Leisure Operator might have but for the existence of this Clause 9 to claim contribution from any third party whether under statute or at common law.

10. **NO VARIATION TO LEISURE CONTRACT WITHOUT AUTHORITY'S CONSENT**

The Operator Partner and the Leisure Operator undertake with the Authority not to vary or depart from the terms and conditions of the Leisure Contract without the prior written consent of the Authority (such consent to be sought in accordance with the Review Procedure where that procedure applies to the variation or departure in question), and agree that no such variation or departure made without such consent shall be binding upon the Authority, or affect or prejudice the Authority's rights hereunder, or under the Leisure Contract or in any other way.

11. **SEVERABILITY**

If any term, condition or provision of this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality and enforceability of the other provisions of or any other documents referred to in this Agreement.

12. **WAIVER**

12.1 No term or provision of this Deed shall be considered as waived by any party to this Deed unless a waiver is given in writing by that party.

12.2 No waiver under Clause 12.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Deed unless (and only to the extent) expressly stated in that waiver.

13. **THE CONTRACTOR'S INCLUSION AS PARTY**

The Operator Partner has agreed to be a party to this Deed for the purpose of Clause 8 and for acknowledging that the Leisure Operator shall not be in breach of the Leisure Contract by complying with the obligations imposed on it by this Deed.

14. **COUNTERPARTS**

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

15. **GOVERNING LAW AND JURISDICTION**

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

16. **THIRD PARTY RIGHTS**

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This Clause 16 does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

17. **NOTICES**

Any notice to be given by either party hereunder will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet, provided that if any notice sent by hand or facsimile is sent after 4.45 pm on any day it will be deemed to be served on the next Business Day. Any notice sent by post will be deemed to have been duly served at the expiration of forty-eight (48) hours after the time of posting if the end of that period falls before 4.45 pm on a Business Day and otherwise on the next Business Day.

IN WITNESS whereof this document is executed by the parties as a Deed and delivered on the date stated at the beginning of this Deed.

EXECUTED as a Deed by the **LEISURE**

OPERATOR

acting by two of its directors or a director and its secretary:

.....
Director

.....
Director/Secretary

EXECUTED AS A DEED by the Authority acting by two authorised signatories:

.....
Authorised Signatory

.....
Authorised Signatory

EXECUTED as a Deed by **[Operator Partner]** acting by two of its directors or a director and its secretary:

.....
Director

.....
Director/Secretary

APPENDIX 1 - FORM OF DEED OF NOVATION

- 4.1 The Leisure Operator binds itself to the Authority in the terms of the Leisure Contract as if the Authority were and always had been named in the Leisure Contract in place of the Operator Partner.
- 4.2 The Leisure Operator warrants to the Authority that prior to the date of this Deed it has performed and that it will continue to perform its duties and obligations as required by and in accordance with the terms of the Leisure Contract.
- 4.3 The Authority shall not be precluded from recovering any losses incurred by the Authority or the Operator Partner resulting from any breach of Clause 4.2 by reason that (if it be the case) the acts or omissions causing such breach occurred before this Deed took effect, or that the Operator Partner will not incur or has not or would not have incurred any such losses. No waiver by the Operator Partner, either express or implied, will affect the Leisure Operator's liability to the Authority pursuant to this Clause 4.

5. **BINDING OF THE AUTHORITY TO THE LEISURE OPERATOR**

The Authority binds itself to the Leisure Operator in the terms of the Leisure Contract as if the Authority were and always had been named in the Leisure Contract in place of the Operator Partner and as if all acts and omissions of the Operator Partner (including any wrongful acts or omissions) under and in respect of the Leisure Contract were the acts and omissions of the Authority.

6. **VESTING OF REMEDIES IN THE AUTHORITY**

All rights of action and remedies vested in the Operator Partner against the Leisure Operator under and in respect of the Leisure Contract shall hereupon vest in the Authority.

7. **VESTING OF REMEDIES AGAINST THE AUTHORITY**

All rights of action and remedies vested in the Leisure Operator against the Operator Partner under and in respect of the Leisure Contract shall hereinafter lie against the Authority.

8. **AFFIRMATION OF LEISURE CONTRACT**

Subject to the terms of this Deed the Leisure Contract shall remain in full force and effect.

9. **THIRD PARTY RIGHTS**

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This Clause 9 does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

10. **GOVERNING LAW AND INTERPRETATION**

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above.

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SCHEDULE 7 - REVIEW PROCEDURE

1. REVIEW PROCEDURE

- 1.1 The provisions of this Schedule 7 shall apply whenever any item, documents or course of action are required to be reviewed, approved or otherwise processed in accordance with the Review Procedure.
- 1.2 Each submission under the Review Procedure shall be accompanied by a copy of the document to be reviewed or a statement of the proposed course of action (the entire contents of a submission being referred to in this Schedule 7 as a "**Submitted Item**"). In relation to each Submitted Item, the following procedure shall apply:
 - 1.2.1 as soon as possible and, if the Submitted Item comprises a document or proposed course of action submitted in the case of an emergency,
 - 1.2.2 within ten (10) Business Days of the date of receipt of a submission (or re-submission, as the case may be) of the Submitted Item to the Authority's Representative (or such other period as the parties may agree), the Authority's Representative shall return one (1) copy of the relevant Submitted Item to the Operator Partner endorsed "no comment" or (subject to and in accordance with paragraph 1.3) "comments" as appropriate; and
 - 1.2.3 if the Authority's Representative fails to return a copy of any Submitted Item (including any re-submitted Submitted Item) duly endorsed in accordance with this paragraph 1.2, within ten (10) Business Days (or within such other period as the parties may agree in writing) of the date of its submission to the Authority's Representative, then the Authority's Representative shall be deemed to have returned the Submitted Item to the Operator Partner endorsed "no comment".
- 1.3 If the Authority's Representative raises comments on any Submitted Item in accordance with this paragraph 1.3 he shall state the ground upon which such comments are based and the evidence or other information necessary to substantiate that ground. To the extent that the Authority's Representative comments on a Submitted Item other than on the basis set out in this Schedule 7, or fails to comply with the provisions of this paragraph 1.3, the Operator Partner may, in its discretion, either:
 - 1.3.1 request written clarification of the basis for such comments and, if clarification is not received within five (5) Business Days of such request by the Operator Partner, refer the matter for determination in accordance with the Dispute Resolution Procedure; or
 - 1.3.2 at its own risk, proceed disregarding such comments.

2. FURTHER INFORMATION

- 2.1 The Operator Partner shall submit any further or other information, data and documents that the Authority's Representative reasonably requires in order to

determine whether he has a basis for raising comments or making objections to any Submitted Item in accordance with this Schedule 7. If the Operator Partner does not submit any such information, data and documents, the Authority's Representative shall be entitled to:

- 2.2 comment on the Submitted Item on the basis of the information, data and documents which have been provided; or
- 2.3 object to the Submitted Item on the grounds that insufficient information, data and documents have been provided to enable the Authority's Representative to determine whether he has a legitimate basis for commenting or objecting in accordance with this Schedule 7.

3. **GROUNDS OF OBJECTION**

3.1 The expression "**raise comments**" in this paragraph 3 shall be construed to mean "raise comments or make objections" unless the contrary appears from the context. The Authority's Representative may raise comments in relation to any Submitted Item on the grounds set out in the paragraph above or on the grounds that the Submitted Item would (on the balance of probabilities) breach any Legislation or not be in accordance with any Necessary Consent, but otherwise may raise comments in relation to a Submitted Item only as follows:

3.1.1 in relation to any Submitted Item:

- (a) the Operator Partner's ability to perform its obligations under this Agreement would (on the balance of probabilities) be adversely affected by the implementation of the Submitted Item; or
- (b) the implementation of the Submitted Item would (on the balance of probabilities) adversely affect any right of the Authority under this Agreement or its ability to enforce any such right;

3.1.2 in relation to any Submitted Item submitted pursuant to Clause 6.1:

- (a) the Authority's ability to perform its obligations under this Agreement would be adversely affected by the proposed course of action;
- (b) the Authority's ability to carry out any of its statutory functions would (on the balance of probabilities) be adversely affected by the proposed course of action;
- (c) the proposed course of action would be likely to result in an increase to the Authority's liabilities or potential or contingent liabilities under this Agreement;
- (d) the proposed course of action would adversely affect any right of the Authority under this Agreement or its ability to enforce any such right; or

- (e) the Operator Partner's ability to perform its obligations under this Agreement would be materially adversely affected by the proposed course of action;

3.1.3 in relation to the submission of any proposed revision or substitution for the Service Delivery Proposals on the grounds that:

- (a) the proposed revision or substitution is not in accordance with Good Industry Practice;
- (b) the performance of the relevant Services in accordance with the proposed revision or substitution would (on the balance of probabilities):
 - (i) be less likely to achieve compliance with relevant parts of the Services Specification;
 - (ii) have an adverse effect on the provision by the Operator Partner of the Services or on the safety of any Users of the Facilities; or
 - (iii) would cause the Authority to incur material additional expense; or
- (c) the proposed revision or substitution would (on the balance of probabilities) result in an inferior standard of performance of the relevant Services to the standard of performance in accordance with the Service Delivery Proposals prior to such proposed revision or substitution;

3.1.4 in relation to the submission of any Schedule of Programmed Maintenance, any revision to any Schedule of Programmed Maintenance on the grounds that:

- (a) carrying out the programmed maintenance in the period or at the times suggested would (on the balance of probabilities) interfere with the operations of the Facilities and such interference could be avoided or mitigated by the Operator Partner rescheduling the Programmed Maintenance;
- (b) the safety of Users or staff would (on the balance of probabilities) be adversely affected; or
- (c) the period for carrying out the Programmed Maintenance would (on the balance of probabilities) exceed the period reasonably required for the relevant works; and

3.1.5 in relation to any Submitted Item submitted pursuant to Clause 13 (Use of the Facilities), the proposed use of the Facilities by third parties:

- (a) could reasonably be expected to impair the provision of the Services or such use is not compatible with the use of the Facilities as community leisure facilities;
- (b) the use is one which the Authority (acting reasonably) has objected to;
- (c) the use involves the sponsorship, advertisement or other direct involvement by an organisation, entity or person engaged in, or with substantial interest in the production or sale of products containing or derived from tobacco or the manufacture of sale of arms and weapons; or
- (d) the use could be expected to involve undue violence (provided that the provision of organised sport shall not be considered undue violence) or otherwise be incompatible with the ethos of the Authority; or

3.1.6 in relation to any submission to defer the replacement of any part of the Facilities pursuant to Clause 14.21 on the grounds that:

- (a) the proposed deferral is not in accordance with Good Industry Practice;
- (b) the performance of the relevant Services in accordance with the proposed deferral would (on the balance of probabilities):
 - (i) be less likely to achieve compliance with relevant parts of the Services Specification;
 - (ii) have an adverse effect on the provision of the Services or on the safety of any Users; or
 - (iii) would cause the Authority to incur material additional expense;
- (c) the proposed deferral would (on the balance of probabilities) result in an inferior standard of performance of the relevant Services to the standard of performance in accordance with the Service Delivery Proposals prior to such proposed revision or substitution; or
- (d) would result in a decrease or worsening of the quality of the Sites.

4. EFFECT OF REVIEW

4.1 Any Submitted Item which is returned or deemed to have been returned by the Authority's Representative endorsed "**no comment**" may be complied with or implemented (as the case may be) by the Operator Partner.

4.2 In the case of any Submitted Item, if the Authority's Representative returns the

Submitted Item to the Operator Partner endorsed "**comments**", the Operator Partner shall comply with such Submitted Item after amendment in accordance with the comments unless the Operator Partner disputes that any such comment is on grounds permitted by this Agreement, in which case the Operator Partner or the Authority's Representative may refer the matter for determination in accordance with the Dispute Resolution Procedure.

- 4.3 The return or deemed return of any Submitted Item endorsed "no comment" shall mean that the relevant Submitted Item may be used or implemented for the purposes for which it is intended but, save to the extent expressly stated in this Agreement such return or deemed return of any Submitted Item shall not otherwise relieve the Operator Partner of its obligations under this Agreement nor is it an acknowledgement by the Authority that the Operator Partner has complied with such obligations.

5. **DOCUMENT MANAGEMENT**

- 5.1 The Operator Partner shall issue three copies of all Submitted Items to the Authority's Representative and compile and maintain a register of the date and contents of the submission of all Submitted Items.
- 5.2 The Operator Partner shall compile and maintain a register of the date of receipt and content of all Submitted Items that are returned or deemed to be returned by the Authority's Representative.
- 5.3 No review, comment or approval by the Authority shall operate to exclude or limit the Operator Partner's obligations or liabilities under this Agreement (or the Authority's rights under this Agreement).

6. **VARIATIONS**

- 6.1 Subject to paragraph 6.2, no approval or comment or any failure to give or make an approval or comment under this Schedule 7 shall constitute an Authority Change save to the extent expressly provided in this Schedule 7.
- 6.2 If, having received comments from the Authority's Representative, the Operator Partner considers that compliance with those comments would amount to an Authority Change, the Operator Partner shall, before complying with the comments, notify the Authority of the same and, if it is agreed by the parties or determined pursuant to the Dispute Resolution Procedure that an Authority Change would arise if the comments were complied with, the Authority may, if it wishes, implement the Authority Change and it shall be dealt with in accordance with Schedule 22 (Change Protocol). Any failure by the Operator Partner to notify the Authority that it considers compliance with any comments of the Authority's Representative would amount to an Authority Change shall constitute an irrevocable acceptance by the Operator Partner that any compliance with the Authority's comments shall be without cost to the Authority and without any extension of time.

SCHEDULE 8 - PROHIBITED MATERIALS

Materials which are generally known at the time of specification to be deleterious to health and safety or to the durability of works or of any part thereof in the particular circumstances in which they are used or are not in accordance with British or European standard or codes of practice current at the time of specification, (or where no such standard exists do not conform with a British Board of Agrément Certificate), or which do not comply with the guidance set out in (Good Practice in the Selection of Construction Materials 2011 published by the British Council of Offices.

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SCHEDULE 9 – NOT USED

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SCHEDULE 10 - WARRANTED DATA

PART 1 - OPERATOR PARTNER

WARRANTED DATA

1. Registered Name of Operator Partner:
[PREFERRED BIDDER TO COMPLETE] 2.
Registered Office of Operator Partner:
[PREFERRED BIDDER TO COMPLETE]
3. Company Registration Number of Operator Partner:
[PREFERRED BIDDER TO COMPLETE] 4.
Directors of Operator Partner:
[PREFERRED BIDDER TO COMPLETE]
5. Shareholders of Operator Partner (with respective shareholdings):
[PREFERRED BIDDER TO COMPLETE] 6.
Registered Name of Holdco:
[PREFERRED BIDDER TO COMPLETE] 7.
Registered Office of Holdco:
[PREFERRED BIDDER TO COMPLETE]
8. Company Registration Number of Holdco:
[PREFERRED BIDDER TO COMPLETE] 9.
Directors of Holdco:
[PREFERRED BIDDER TO COMPLETE]
10. Shareholders of Holdco (with respective shareholdings):
[PREFERRED BIDDER TO COMPLETE]

PART 2 - PROPOSED WORKFORCE INFORMATION

SCHEDULE 11 - PROJECT DOCUMENTS AND ANCILLARY DOCUMENTS

PART 1 - PROJECT DOCUMENTS

Document

Parties

[list to be completed on a case by case basis but assumed to include

this Agreement

[Parent Company Guarantee]

Collateral Warranty from Leisure Authority, Leisure Operator, Operator Operator Partner

Collateral Warranty from FM Authority, Leisure Operator, Operator Contractor Partner

[other Collateral Warranties]

Head Lease[s]

PART 2 - ANCILLARY DOCUMENTS

Document

Parties

Leisure Contract

FM Agreement

[any other relevant subcontract]

[guarantees/bonds provided in respect of those]

[Management Services Agreement][if Operator Partner is an SPV]

Underlease[s]

SCHEDULE 12 - TITLE MATTERS

PART 1- TITLE WARRANTIES

Save as disclosed in the Disclosed Title Matters, the Replies to Enquiries and the Disclosed Searches the Authority warrants that for the period of this Agreement:

1. each and every Site is in the sole legal and beneficial ownership of the Authority;
2. the Sites are not subject to any Adverse Rights;
3. no one is in adverse possession of the Sites or has acquired or is acquiring any Adverse Rights affecting the Sites;
4. there are no disputes, claims, actions, demands or complaints in respect of the Sites that are outstanding or that are expected by the Authority and that would prevent or disrupt the provision of Services;
5. from the Commencement Date no person, other than [the Authority], has any right (actual or contingent) to possession, occupation or use of or interest in the Sites;
6. the information set out or described in the Replies to Enquiries has been prepared after due and careful enquiry and is true, accurate and complete as at the Commencement Date; and
7. the Disclosed Title Matters comprise all of the documents relating to the title to the Sites.

Per Site:

PART 2 - DISCLOSED TITLE MATTERS

Official Copies and plan (where registered land) / epitome of title (where land is unregistered) and copies of any title documents.

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Per Site:

PART 3 - REPLIES TO ENQUIRIES

Replies to relevant Standard Pre-contract Enquiries (CPSE).

Replies to Standard Pre-contract Enquiries (Supplemental) Property subject to tenancies (commercial) (CPSE.2 v2.2).

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Per Site:

PART 4 - DISCLOSED SEARCHES

Search:

Date:

Official search in the Index Map (SIM).

Local search certificate and replies to enquiries in CON29R Enquiries of Local Authority (2007) and any other relevant enquiries in CON29O Optional Enquiries of Local Authority (2007).

Commercial drainage and water enquiries.

Common land and town and village greens search.

Enquiries of The Coal Authority as to past, present and future mining operations in proximity to the Site.

Where title to the Site is not registered, Land Charges Act searches against every estate owner who was a party to any transaction, or concerned in any event, comprised in the relevant title (see Section 25 of the Law of Property Act 1969) where there is no clear search with the title deeds.

Land Registry search (whether of whole or part), date of expiry of priority and name of party having benefit of priority period.

Where title to the Site is not registered, date of search at the Companies Registry of the file of all companies disclosed by the documents of title as estate owners of the Site since the root of title.

Enquiries of the Highways Authority to ascertain the boundaries of publicly maintainable highways abutting, and any footpaths or rights of way affecting, the Site.

Details of other searches or enquiries we considered to be appropriate:

1. BT;
2. Gas Utility Search;
3. Electricity Company Search; 4. Highways (including footpaths);
5. London Transport:

Per Site:

6. Dockland Light Railway;
7. London Underground Search;
8. British Waterways – Commercial (canals/lakes etc);

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9. Chancel Liability Search;
10. Cheshire Brine Subsidence Compensation Board (re salt extraction in Cheshire area);
11. Radon;
12. Clay (Ball/China);
13. Tin Mining;
14. Limestone; and
15. Forestry.

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SCHEDULE 13 - INSURANCES

This Schedule 13 (Insurances) comprises three Parts:

Part 1: Authority Insurances.

Part 2: Operator Partner Insurances.

Part 3: Endorsements.

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PART 1 - AUTHORITY INSURANCES

Physical damage buildings insurance for the Facilities.

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PART 2 - OPERATOR PARTNER INSURANCES

Common to all policies in Part 2 (unless stated otherwise):

Insureds

1. Operator Partner;
2. [Leisure Operator];
3. [FM Contractor],

each for their respective rights and interests in the Facilities.

1. PROPERTY DAMAGE INSURANCE

1.1 Insured Property

Any property of whatsoever nature or description associated with the Services at the Facilities that is the property of the Operator Partner or for which the Operator Partner may be responsible under this Agreement (excluding buildings insurance) including but not limited to the contents of the Facilities.

1.2 Coverage

"All risks" of physical loss or damage to the Insured Property from any cause not excluded, including machinery breakdown and computer breakdown in respect of appropriate equipment.

1.3 Sum Insured

At all times an amount not less than the total reinstatement or replacement value of the Insured Property plus provision to include other Principal Extensions as appropriate (escalated periodically as appropriate in accordance with Clause 35.5).

1.4 Maximum Deductible

£5,000 each and every claim, escalated periodically as appropriate in accordance with Clause 35.5.

1.5 Territorial Limits United Kingdom.

1.6 Period of Insurance

For the duration of this Agreement and renewable on an annual basis unless agreed otherwise by the parties.

1.7 Cover Features and Extensions

1.7.1 Terrorism.

- 1.7.2 Pollution and contamination to the Insured Property arising from an event which itself is not otherwise excluded. To include pollution or contamination resulting from accidental damage.
- 1.7.3 Insured Property whilst in transit.
- 1.7.4 Automatic reinstatement of sum insured.
- 1.7.5 Capital additions Clause.
- 1.7.6 72 hour Clause.
- 1.7.7 European Union local authorities Clause.
- 1.7.8 Replacement of computer records.
- 1.7.9 Professional fees.
- 1.7.10 Debris removal.
- 1.7.11 Repair / reinstatement basis of claims settlement with cash option for non-reinstatement.

1.8 **Principal Exclusions**

- 4.8.1 War and related perils (UK market agreed wording).
- 4.8.2 Nuclear/radioactive risks (UK market agreed wording).
- 4.8.3 Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds.
- 4.8.4 Wear, tear and gradual deterioration.
- 4.8.5 Consequential financial losses.
- 4.8.6 Cyber risks.

2. **BUSINESS INTERRUPTION INSURANCE**

2.1 **Insureds**

- 2.1.1 Operator Partner;
- 2.1.2 [Leisure Operator;] and 2.1.3 [FM Contractor], each for their respective rights and interests in the Facilities.

2.2 **Indemnity**

In respect of:

- 2.2.1 loss of anticipated Revenue during the Minimum Indemnity Period arising from an interruption or interference in the operation of the Services as a result of loss or damage covered under Property Damage Insurance effected in accordance with paragraph 1 of Part 2 of this including physical loss or damage which would be indemnifiable but for the application of any deductible; and
- 2.2.2 the additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of Revenue of the Operator Partner which without such expenditure would have taken place, during the Minimum Indemnity Period.

2.3 **Sum Insured**

An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.

2.4 **Maximum Excess**

Nil

2.5 **Minimum Indemnity Period** 36 months.

2.6 **Period of Insurance**

For the duration of this Agreement and renewable on an annual basis unless agreed otherwise by the parties.

2.7 **Cover Features and Extensions**

2.7.1 Denial of access.

2.7.2 Utilities.

2.7.3 Terrorism.

2.7.4 Subrogation waiver and non-vitiating Clause.

2.7.5 Accountants Clause.

2.7.6 Automatic reinstatement of Sum Insured and Indemnity Period.

2.8 **Principal Exclusions**

2.8.1 War and related perils (UK market agreed wording).

2.8.2 Nuclear/radioactive risks (UK market agreed wording).

2.8.3 Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds.

2.8.4 Wear, tear and gradual deterioration.

2.8.5 Cyber risks.

3. **PUBLIC AND PRODUCTS LIABILITY INSURANCE**

3.1 **Interest**

To indemnify the Insured in respect of all sums that they may become legally liable to pay (including claimant's costs and expenses) as damages in respect of accidental:

- 3.1.1 death, or bodily injury, illness, disease contracted by any person;
- 3.1.2 loss or damage to property; or
- 3.1.3 interference to property or any easement right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, nuisance, loss of amenities, or any like cause,
- 3.1.4 happening during the Period of Insurance and arising out of or in connection with the provision of the Services.

3.2 **Limit of Indemnity**

Not less than £40,000,000 (forty million pounds) (escalated periodically as appropriate in accordance with Clause 55.4) in respect of any one occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution and products liability.

3.3 **Maximum Deductible**

£5,000 for each and every occurrence of property damage, escalated periodically as appropriate. (Personal injury claims will be paid in full.)

3.4 **Territorial Limits**

Worldwide excluding USA, Canada and Australia.

3.5 **Jurisdiction**

Worldwide excluding USA, Canada and Australia.

3.6 **Period of Insurance**

For the duration of this Agreement and renewable on an annual basis unless agreed otherwise by the parties.

3.7 **Cover Features and Extensions**

- 3.7.1 Munitions of war.
- 3.7.2 Cross liability Clause.

3.7.3 Contingent motor liability.

3.7.4 Subrogation waiver and non-vitiating Clause.

3.8 **Principal Exclusions**

3.8.1 Liability for death, illness, disease or bodily injury sustained by employees of the Insured.

3.8.2 Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by Legislation in respect of such vehicles.

3.8.3 Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the Insured.

3.8.4 Liability in respect of loss or damage to property in the care, custody and control of the insured but this exclusion is not to apply to all property belonging to the Authority that is in the care, custody and control of another Insured.

3.8.5 Liability arising out of technical or professional advice (given for a fee) other than in respect of death or bodily injury to persons or damage to third party property.

3.8.6 Liability arising from the ownership, possession or use of any aircraft or marine vessel.

3.8.7 Liability arising from seepage and pollution unless caused by a sudden, identifiable, unintended and unexpected occurrence.

3.8.8 Losses under the insurances referred to in paragraphs 1 and 2 of this Part 2 of **Error! Reference source not found.**

PART 3 - ENDORSEMENTS

Unless the context otherwise requires defined terms set out in the following endorsements shall have the meaning set out in the Agreement.

Endorsement 1

Cancellation

This policy shall not be cancelled or terminated before the original expiry date is to take effect except in respect of non-payment of premium.

The insurer shall by written notice advise the Authority:

1. at least thirty (30) Business Days before any such cancellation or termination is to take effect
2. at least thirty (30) Business Days before any reduction in limits or coverage or any increase in deductibles is to take effect; and
3. of any act or omission or any event of which the insurer has knowledge and which might invalidate or render unenforceable in whole or in part this policy.

Endorsement 2

Multiple Insured/Subrogation/Non-Vitiation Clause

Each of the parties comprising the insured shall for the purpose of this policy be considered a separate co-insured entity, insured on a composite basis, with the words "the insured" applying to each as if they were separately and individually insured provided that the total liability of the insurers under each section of this policy to the insured collectively shall not (unless the policy specifically permits otherwise) exceed the limit of indemnity or amount stated to be insured under that section or policy. Accordingly, the liability of the insurers under this policy to any one insured shall not be conditional upon the due observance and fulfilment by any other insured party of the terms and conditions of this policy or of any duties imposed upon that insured party relating thereto, and shall not be affected by any failure in such observance or fulfilment by any such other insured party.

It is understood and agreed that any payment or payments by insurers to any one or more of the insureds shall reduce, to the extent of that payment, insurers' liability to all such parties arising from any one event giving rise to a claim under this policy and (if applicable) in the aggregate.

Insurers shall be entitled to avoid liability to or (as may be appropriate) claim damages from any insured party in circumstances of fraud misrepresentation non-disclosure or material breach of warranty or condition of this policy (each referred to in this Clause as a Vitiating Act) committed by that insured party save where such misrepresentation non-disclosure or breach of warranty or condition was committed innocently and in good faith.

It is however agreed that a Vitiating Act committed by one insured party shall not prejudice the right to indemnity of any other insured who has an insurable interest and who has not committed the Vitiating Act.

Insurers hereby agree to waive all rights of subrogation and/or recourse which they may have or acquire against any insured party (together with their employees and agents) except where the rights of subrogation or recourse are acquired in consequence of a Vitiating Act in which circumstances insurers may enforce such rights against the insured responsible for the Vitiating Act notwithstanding the continuing or former status of the vitiating party as an insured.

Notwithstanding any other provision of this policy or any other document or any act and/or omission by any insured party insurers agree that:

1. no party other than the Authority has any authority to make any warranty, disclosure or representation in connection with this policy on behalf of the Authority;
2. where any warranty, disclosure or representation is required from the Authority in connection with this policy insurers will contact the Authority in writing (in accordance with Endorsement 3 to the Agreement) and set out expressly the warranty, disclosure and/or representation required within a reasonable period of time from the Authority (regarding itself); and
3. save as set out in a request from insurers to the Authority in accordance with (2) above, the Authority shall have no duty to disclose any fact or matter to insurers in connection with this policy save to the extent that for the Authority not to disclose a fact or matter would constitute fraudulent misrepresentation and/or fraudulent non-disclosure.

Endorsement 3

Communications

All notices or other communications under or in connection with this policy shall be given to each insured (and the Authority) in writing or by facsimile. Any such notice will be deemed to be given as follows:

1. if in writing, when delivered;
2. if by facsimile, when transmitted but only if, immediately after transmission, the sender's facsimile machine records a successful transmission has occurred.

The address and facsimile number of the Authority for all notices under or in connection with this policy are those notified from time to time by the Authority for this purpose to the Operator Partner's insurance broker at the relevant time. The initial address and facsimile number of the Authority is as follows:

The Authority:

Address:

Facsimile No: [] Attention:

It is further agreed that a notice of claim given by the Authority or any other insured shall in the absence of any manifest error be accepted by the insurer as a valid notification of a claim on behalf of all insureds.

Endorsement 4

Primary Insurance

It is expressly understood and agreed that this policy provides primary cover for the insured parties and that in the event of loss destruction damage or liability covered by this policy

which is covered either in whole or in part under any other policy or policies of insurance effected by or on behalf of any of the insured parties the insurers will indemnify the insured parties as if such other policy or policies of insurance were not in force and the insurers waive their rights of recourse if any against the insurers of such other policy or policies of insurance.

Endorsement 5

Ring-fencing

The level of any indemnity available to an insured party under this policy in relation to any claim(s) concerning the Services shall not be affected and/or reduced by any claim(s) unrelated to the Services.

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SCHEDULE 14 - AUTHORITY POLICIES

Alcohol and Entertainment policies

Anti-Fraud Corruption Policy

Anti-Money Laundering Policy

Confidential Reporting (Whistleblowing) Policy 2018

Data Protection Policy 2018

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SCHEDULE 15 - NNDR

1. DEFINITIONS

Billing Authority has the meaning given to the term "billing authority" in the Local Government Finance Act 1992

National Domestic Rates or NNDR **Non** the National Non Domestic Rates as contained in the Local Government Finance Act 1988 (or any rates or tax that replaces it) payable in relation to the Sites and/or the Facilities

NNDR Failure means:

- (a) a failure by (or on behalf of) the Operator Partner [or Leisure Operator] to submit, or do anything reasonably required by the Authority (acting in its capacity as Billing Authority) in support of, an application for NNDR Relief
- (b) any act or omission of any Operator Partner Related Party and any of their servants, agents or employees which is calculated or intended to cause loss of or unavailability of NNDR Relief
- (c) any failure by the Operator Partner [or the Leisure Operator] to exercise reasonable skill and care and use all reasonable endeavours to obtain NNDR Relief or
- (d) a failure by the Operator Partner [or the Leisure Operator] to achieve the NNDR Relief status of []

NNDR Pre-Application Information shall have the meaning given in paragraph 2.2.1

NNDR Pre-Application Rate shall have the meaning given in paragraph 2.2.2

NNDR Relief relief from the obligation to pay NNDR applicable to the Sites and/or the Facilities pursuant to the provisions of:

- (a) sections 47 to 50 of the Local Government Finance Act 1988 (and/or any such similar scheme making provision for relief or exemption from or reduction of the payment of any part of NNDR); and/or
- (b) the NNDR Relief Policy

NNDR Relief Policy means the Authority's (acting in its capacity as Billing Authority) policy [include reference to the policy] for the application of NNDR Relief in the Authority's rating area and the

exercise of its discretion to award NNDR Relief in respect of the Facilities pursuant to such policy

NNDR Report shall have the meaning given in paragraph 5.3

Updated NNDR Rate shall have the meaning given in paragraph 3.4

2. ELIGIBILITY FOR NNDR RELIEF

2.1 The Operator Partner acknowledges and agrees that, subject to the following provisions of this Schedule 15 (NNDR), the Operator Partner shall [or shall procure that the Leisure Operator shall] be responsible for the payment of NNDR applicable to the Facilities from the Commencement Date until the Expiry Date or, if earlier, the Termination Date.

2.2 The parties acknowledge and agree that:

2.2.1 the Operator Partner has, prior to the Commencement Date, submitted to the Authority information relating to the contractual arrangements and the Services and corporate structure proposed by the Operator Partner for the purposes of the Services to assist the Authority to assess the eligibility of the Operator Partner [and/or Leisure Operator] to claim NNDR Relief in connection with the Facilities on and from the Commencement Date, such information being in the Agreed Form [or as set out in the Operator Partner's tender documents] (**NNDR Pre-Application Information**); and

2.2.2 having relied upon the information contained in the NNDR Pre-Application Information, the Authority has indicated to the Operator Partner that the contractual arrangements and Services and corporate structure proposed by the Operator Partner would, on the date of such indication, entitle the Operator Partner to claim NNDR Relief in connection with the Facilities on and from the Commencement Date at a particular rate (**NNDR Pre-Application Rate**) the parties acknowledging that for the purposes of the NNDR Pre-Application Rate, NNDR Relief will [include][not include] mandatory rate relief [only] and [no NNDR Policy] will apply in respect of discretionary rate relief].

3. INITIAL APPLICATION FOR NNDR RELIEF

3.1 The Operator Partner shall [or shall procure that the Leisure Operator shall] inform the [Financial Services Department] of the Authority in relation to the occupation of the Facilities by the [Operator Partner/Leisure Operator].

3.2 The Operator Partner shall [or shall procure that the Leisure Operator shall] submit an application for NNDR Relief to the [Financial Services Department] of the Authority [on or before the Commencement Date or following the issue of the first NNDR demand note by the Authority in respect of the Facilities (whichever is the earlier)]. Such application will confirm whether the contractual arrangements and project and corporate structure vary from the NNDR Pre-Application Information.

3.3 Where, following the application referred to in paragraph 3.2, the Authority (acting in its capacity as Billing Authority) determines that the contractual arrangements contemplated by this Agreement (and (where applicable) the Sub-Contracts) will entitle the Operator Partner [or Leisure Operator] to claim NNDR Relief in connection with the Facilities at the NNDR Pre-Application Rate, then the Operator Partner shall apply (and continue to apply) the full benefit of such NNDR Relief to the Services and the Operator Partner warrants and confirms that in calculating the Annual Payment it has taken into account NNDR Relief at the NNDR Pre-Application Rate in respect of the Sites and/or the Facilities (as the case may be), as contemplated in row [] of the LOBTA.

3.4 Where, following the application referred to in paragraph 3.2, the Authority (acting in its capacity as Billing Authority) determines that the contractual arrangements contemplated by this Agreement (and (where applicable) the Sub-Contracts) will not entitle the Operator Partner [or Leisure Operator] to claim NNDR Relief at the NNDR Pre-Application Rate and instead claim it at a different rate (including a nil rate) (**Updated NNDR Rate**) in connection with the Facilities so that the NNDR liability for the Services increases, then:

3.4.1 where the information on which such determination is made is:

- (a) consistent (in all relevant respects) with the information submitted in the NNDR Pre-Application Information; and
- (b) the reason for such determination does not arise as a result of an NNDR Failure; and
- (c) the reason for such determination does not arise as a result of a General Change in Law which was foreseeable at the Commencement Date,

then, subject to the following provisions of this Schedule 15 (NNDR), the Authority shall be responsible for the payment of additional NNDR in respect of the Facilities and the Annual Payment shall be adjusted in accordance with Clause 37 (Financial Adjustments) so as to put the Operator Partner in no better and no worse a position than it would have been in had the relevant determination not been made;

3.4.2 where the information on which such determination is made is inconsistent (in any relevant respect) with the information submitted in the NNDR Pre-Application Information and/or the reason for such determination arises as a result of an NNDR Failure and/or the reason for such determination arises because of a General Change in Law which was foreseeable at the date of this Schedule 15 (NNDR), the Operator Partner shall be responsible for meeting the additional costs of NNDR in respect of the Facilities.

4. **SUBSEQUENT APPLICATIONS FOR NNDR RELIEF**

4.1 Following the Operator Partner's [or Leisure Operator's] initial application for NNDR Relief pursuant to paragraph 3.2, the Operator Partner shall [or shall procure that

the Leisure Operator shall] submit an application for NNDR Relief to the [Financial Services Department] of the Authority whenever thereafter so required by the relevant rules and procedures of the Authority (acting in its capacity as Billing Authority). Such applications will confirm whether the contractual arrangements and project and corporate structure vary from the NNDR Pre-Application Information.

4.2 Where, following an application referred to in paragraph 4.1, the Authority (acting in its capacity as Billing Authority) determines that the contractual arrangements contemplated by this Agreement (and (where applicable) the Sub-Contracts) will entitle the Operator Partner [or Leisure Operator] to claim NNDR Relief in connection with the Facilities at the NNDR Pre-Application Rate or the Updated NNDR Rate (as applicable), then the Operator Partner shall apply (and continue to apply) the full benefit of such NNDR Relief to the Services and the Operator Partner will warrant and confirm that in calculating the Annual Payment it has taken into account NNDR Relief at the NNDR Pre-Application Rate or the Updated NNDR Rate (as applicable) in respect of the Sites and/or the Facilities (as the case may be), as contemplated in row [] of the LOBTA.

4.3 Where, following an application referred to in paragraph 4.1, the Authority (acting in its capacity as Billing Authority) determines that the contractual arrangements contemplated by this Agreement (and (where applicable) the Sub-Contracts) will not entitle the Operator Partner [or Leisure Operator] to claim NNDR Relief at the NNDR Pre-Application Rate or the Updated NNDR Rate (as applicable) and instead claim it at a different rate in connection with the Facilities so that the NNDR liability for the Services increases, then:

4.3.1 where the information on which such determination is made is:

- (a) consistent (in all relevant respects) with the information submitted in the NNDR Pre-Application Information;
- (b) the reason for such determination does not arise as a result of an NNDR Failure; and
- (c) the reason for such determination does not arise as a result of a General Change in Law which was foreseeable at the Commencement Date,

then, subject to the following provisions of this Schedule 15 (NNDR), the Authority shall be responsible for the payment of additional NNDR in respect of the Facilities and the Annual Payment shall be adjusted in accordance with Clause 37 (Financial Adjustments) so as to put the Operator Partner in no better and no worse a position than it would have been in had the relevant determination not been made; and

4.3.2 where the information on which such determination is made is inconsistent (in any relevant respect) with the information submitted in the NNDR Pre-Application Information and/or the reason for such determination arises as a result of an NNDR Failure and/or the reason for such determination arose because of a General Change in Law which was foreseeable at the

Commencement Date, then, subject to the following provisions of this Schedule 15 (NNDR), the Operator Partner shall be responsible for meeting the additional costs of NNDR in respect of the Facilities.

- 4.4 References in this paragraph 4 to "Updated NNDR Rate" shall include both any updated rate pursuant to paragraph 3.4 and also any subsequent updates pursuant to this paragraph 4 (Subsequent applications for NNDR relief).

5. **ALTERNATIVE STRUCTURES**

- 5.1 Where the Operator Partner [or Leisure Operator] is refused NNDR Relief at the NNDR Pre-Application Rate or the Updated NNDR Rate (as applicable) or has reason to believe that the Operator Partner [or Leisure Operator] will or is likely to lose all or any NNDR Relief (whether as a result of a General Change in Law or a change in the NNDR Relief Policy or otherwise), it shall notify the Authority as soon as reasonably practicable with full details of the implications of this and shall keep the Authority informed of any developments in relation to such occurrence or likely occurrence and the following provisions shall apply.
- 5.2 The parties shall, within ten (10) Business Days of the Operator Partner's notification under paragraph 5.1 (Alternative Structures), meet to discuss the implications of the lack or loss of NNDR Relief and how the impact of the lack or loss of NNDR Relief can be mitigated. If either party identifies a way in which the whole or any part of the NNDR Relief can be lawfully obtained by the Authority, the Operator Partner and/or [the Leisure Operator], the Operator Partner shall [or shall procure that the Leisure Operator shall] use its reasonable endeavours to obtain such NNDR Relief or assist the Authority in obtaining such NNDR Relief.
- 5.3 If the Authority so requests, the Operator Partner shall, from the date of such request, investigate what alternative lawful contract structures and/or forms of entity (which are acceptable to the Operator Partner, acting reasonably) may be available to minimise NNDR applicable to the Facilities and within one (1) month of such request present its findings to the Authority in a report (**NNDR Report**), provided that, except in the case of an NNDR Failure, the Authority shall reimburse the Operator Partner's reasonable expenses in taking the steps required under this paragraph 5.3.
- 5.4 Upon presentation by the Operator Partner of the NNDR Report to the Authority in accordance with paragraph 5.3 (Alternative Structures), the Authority shall assess the details of the NNDR Report and shall within one (1) month of such presentation notify the Operator Partner that it:
- 5.4.1 agrees the alternative structure and/or form of entity proposed in the NNDR Report; or
 - 5.4.2 does not agree the alternative structure and/or form of entity proposed in the NNDR Report; or

5.4.3 requires further information as is reasonable to make an assessment in respect of the NNDR Report, in which case the Operator Partner shall issue such information as soon as reasonably practicable. Alternatively, the Authority may require (at the Authority's cost) the opinion of a barrister or third party and the Authority will use its reasonable endeavours to not delay obtaining such opinion. The Authority shall within twenty (20) Business Days assess such additional information and/or opinion and shall notify the Operator Partner of its decision pursuant to paragraph 5.4.1 or 5.4.2 (as applicable).

5.5 Where the Authority accepts the alternative structure and/or form of entity proposed in the NNDR Report pursuant to paragraph 5.4.1, with such revisions as may be agreed to by the parties (acting reasonably) the Operator Partner shall proceed to implement such alternative structure and/or form of entity in accordance with Legislation and as agreed with the Authority, both parties acting reasonably. Such implementation shall be treated as an Authority Change, except where the reason for such Change arises as a result of an NNDR Failure, in which case it shall be treated as an Operator Partner Change.

6. **REDUCTIONS IN NNDR LIABILITY**

Where during the Contract Period, the Authority, subsequently becomes entitled to grant (and does so grant) the Operator Partner additional NNDR Relief in respect of the Facilities and/or where the total amount of NNDR payable in respect of the Facilities decreases for any other reason, then the Annual Payment shall be adjusted in accordance with Clause 37 (Financial Adjustments) by the same amount as the amount of relief from NNDR granted and/or the reduction in NNDR liability.

7. **NNDR FAILURE**

Where NNDR Relief is not granted or is lost, or where the percentage of NNDR Relief is changed from or different to that assumed in the LOBTA, so as to mean that additional NNDR is payable by the Operator Partner [or Leisure Operator], or where an alternative structure and/or form of entity is implemented pursuant to paragraph 5 (Alternative Structures), due in each case to any NNDR Failure, the Annual Payment shall not be adjusted in respect of the NNDR Relief not being granted or being lost and the increase in NNDR applicable to the Facilities shall as a result of such lack of or loss of relief be for the account of the Operator Partner.

8. **NNDR CHALLENGES AND APPEALS**

If the Authority shall require (acting reasonably) the Operator Partner shall [or shall procure that the Leisure Operator shall] challenge or appeal any decision of the Billing Authority in respect of NNDR in relation to any of the Facilities or otherwise seek any rebates, revaluations or other lawful methods of reducing the NNDR payable (other than by way of the Operator Partner [or Leisure Operator] applying for NNDR Relief in the normal course of events pursuant to paragraphs 3 and 4 of this Schedule 15 (NNDR), to which paragraphs 2 to 7 shall apply), in which case the Operator Partner shall agree its proposals in advance with the Authority (both

parties acting reasonably) and shall use its reasonable endeavours to succeed in any such challenge, appeal, rebate, revaluation or reduction. The Authority shall bear all reasonable and proper third party costs and disbursements properly incurred by the Operator Partner [or Leisure Operator] provided the Authority gives prior written approval for such costs and disbursements.

9. If the amount of the NNDR is varied (including retrospectively) as a result of any challenge, appeal or other action taken pursuant to paragraph 8 (NNDR challenges and appeals), then the Annual Payment shall be adjusted in accordance with Clause 37 (Financial Adjustments) so as to put the Operator Partner in no better and no worse a position than if the relevant variation had not been made.

10. **COSTS**

Where a party is entitled to be reimbursed its reasonable costs pursuant to this Schedule 15 (NNDR), it shall issue an invoice in respect of such costs to the other party with such information that may be reasonably required to verify such costs. The relevant party shall pay the amount of any such invoice submitted to it within twenty (20) Business Days of its receipt.

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SCHEDULE 16 - HEAD LEASES

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DATED

(1) [[] COUNCIL]

(2) [OPERATOR PARTNER]

LEASE

of []

LR1. Date of lease	[]
LR2. Title Number(s)	LR2.1 Landlord's title number(s) [] LR2.2 Other title number(s) None

LR3. Parties to this lease	Landlord [] Tenant [] Other parties None
LR4. Property	In the case of a conflict between this Clause and the remainder of this lease then, for the purposes of registration, this Clause shall prevail. Refer to the definition of Premises in Clause 1 of this Lease.
LR5. Prescribed statements etc.	LR5.1. Statements prescribed under rules 179 (dispositions in favour of a charity), 180 (dispositions by a charity) or 196 (leases under the Leasehold Reform, Housing and Urban Development Act 1993) of the Land Registration Rules 2003. None LR5.2 This lease is made under, or by reference to, provisions of: None
LR6. Term for which the Property is leased	The term as specified in this lease at Clause 1 (" Term ")
LR7. Premium	None
LR8. Prohibitions or restrictions on disposing of this lease	This lease contains a provision that prohibits or restricts dispositions.

BETWEEN:

- (1) [] of [] (**Landlord**); and
- (2) [] (registered under company registration number [] whose registered office is [] (**Tenant**).

IT IS AGREED as follows:

1. **DEFINITIONS**

The following expressions shall where the context so admits have the following meanings:

- "1954 Act"** means the Landlord and Tenant Act 1954
- "Authorised Use"** means use for the purposes prescribed under the Leisure Agreement
- "Conducting Media"** means all pipes, wires, cables, sewers, tanks, cisterns, pumps, ducts, drains and other service conducting media now or at any time during the Term [in, under, over or on the Retained Land and] serving the Premises and other adjoining land whether for gas, foul and surface water drainage, water, electricity, telephone, telecommunications or any other service to the Premises
- "this Lease"** means this deed as varied or supplemented by any document which is supplemental to this deed
- "Leisure Agreement"** means the agreement (and any agreement made supplemental to or in variation thereof from time to time) entered on today's date between (1) the Landlord and (2) the Tenant relating to the provision of [a] leisure centre[s] with ancillary uses at the Premises
- ["Leisure Operator"** means [insert name and company number]]
- "Plan"** means the plan annexed
- "Planning Acts"** means the Town and Country Planning Act 1990 (as amended), the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990 and the Planning (Consequential Provisions) Act 1990 and all secondary legislation including but not limited to the Town and Country (General Permitted Development) Order 1995
- "Premises"** means the land and buildings at [] shown [edged red] on the Plan together with all buildings, additions, alterations, improvements, and landlord's fixtures and fittings at the

same from time to time as the same forms part of the land registered at the Land Registry under title number []

["Retained Land"] means [the adjoining or neighbouring land of the Landlord being the land registered at the Land Registry under title number [] but excluding the Premises and a copy of the title plan to title number [] is attached to this Lease]

"Services" means foul and surface water, drainage, gas, electricity, telephone, telecommunications and other services to or on the Premises [and the Retained Land]

"Term" means the term of years from and including the date hereof and terminating on the [] day of [] 20[] being the Expiry Date as defined in the Leisure Agreement

["Underlease"] means the underlease relating to the Premises to be granted by the Tenant to the Leisure Operator in the agreed form]

"Yearly Rent" means £1 (one pound) per annum (if demanded)

2. INTERPRETATION

- 2.1 The expression "the Landlord" shall include the person for the time being entitled to the reversion immediately expectant on the determination of the Term while the expression "the Tenant" shall include the Tenant's successors in title and assigns.
- 2.2 Subject to and without prejudice to Clause 27 (Change in Law) of the Leisure Agreement, in this Lease references to any statute or statutory provision shall be deemed to refer to any statutory modification or re-enactment for the time being in force whether by statute or any directives and regulations (intended to have direct application within the United Kingdom) adopted by the Council of the European Communities.
- 2.3 The headings are inserted for convenience only and shall be ignored in construing the terms and provisions of this Lease.
- 2.4 References in this Lease to any Clause or sub-Clause, schedule or paragraph of a schedule without further designation shall be construed as a reference to the Clause, sub-Clause, schedule or paragraph of the schedule to this Lease so numbered.
- 2.5 Where there is any inconsistency between the terms of the Leisure Agreement and this Lease the Leisure Agreement shall prevail.

3. DEMISE AND RENT

In consideration of the rents and covenants on the part of the Tenant reserved and contained in this Lease the Landlord DEMISES to the Tenant with full title guarantee ALL THOSE the Premises TOGETHER WITH the rights set out in Schedule 2 EXCEPTING AND RESERVING nevertheless unto the Landlord the rights and matters set out in Schedule 1 TO HOLD the same to the Tenant for the Term but determinable as provided later in this Lease YIELDING AND PAYING the Yearly Rent throughout the Term if and when demanded.

4. **TENANT'S COVENANTS**

The Tenant covenants with the Landlord as follows:

4.1 **To Pay Rent**

To pay the Yearly Rent reserved in Clause 3.

4.2 **Signs**

Save where necessary to comply with its obligations under the Leisure Agreement not to affix, place or exhibit or permit or suffer to be affixed, placed or exhibited to or upon the exterior of any part of the Premises or to or through any windows or to or upon any boundary wall rail or fence at the Premises any sign, placard, poster, signboard or other advertisement save as may have been previously approved in writing by the Landlord such approval not to be unreasonably withheld or delayed.

4.3 **Planning**

Subject to the terms of the Leisure Agreement not to do anything in breach of the Planning Acts and to give as soon as reasonably practicable full particulars to the Landlord of any notice, proposal or order issued under the Planning Acts in respect of or affecting the Premises.

4.4 **User**

Not to use or permit or suffer the Premises to be used otherwise than for the Authorised Use.

4.5 **Notices**

4.5.1 To transmit as soon as reasonably practicable to the Landlord the original or a full and accurate copy of any notice concerning the Premises which is received by the Tenant.

4.5.2 As soon as reasonably practicable to give notice to the Landlord upon becoming aware of any defect or need of repair or renewal arising to the Premises which might result in the Landlord becoming liable to third parties by reason of the provisions of the Defective Premises Act 1972.

4.6 **Alienation**

[Subject to Clause 4.6.2:]

- 4.6.1 not to assign, underlet, charge, part with the possession or share the possession, use or occupation of the whole or any part or parts of the Premises nor enter into a binding agreement to do any of the same;
- 4.6.2 [the Landlord consents to the Tenant granting the Underlease to the Leisure Operator].

4.7 **To Yield Up**

To yield up the Premises in accordance with the provisions of the Leisure Agreement provided that the Landlord may treat as abandoned by the Tenant any property not removed by the Tenant prior to the expiration of the Term and may as agent of the Tenant (and the Landlord is hereby irrevocably appointed by the Tenant to act in that capacity) arrange for the removal and destruction or sale of the same after having given the Tenant at least 28 days' prior written notice of its intention to carry out such removal and destruction and having given the Tenant reasonable opportunity within such notice period to remove any such property.

5. **LANDLORD'S COVENANT**

The Landlord covenants with the Tenant that the Tenant shall and may peaceably and quietly hold and enjoy the Premises during the Term without any interruption by the Landlord or any person rightfully claiming under or in trust for the Landlord.

6. **PROVISOS AGREEMENTS AND DECLARATIONS**

Provided always and it is hereby expressly agreed as follows:

6.1 **Remedies**

Any breach of the covenants and obligations in this Lease by the Tenant shall be dealt with by way of Clause 6.2 and the remedies specified in the Leisure Agreement.

6.2 **Early Termination of the Term**

If the Leisure Agreement is terminated or determines for any reason in accordance with the terms of the Leisure Agreement then this Lease shall automatically determine on the same date without any further notice being served under this Lease but without prejudice to any claim by either party against the other in respect of any antecedent breach of any covenant or condition contained in this Lease and on such determination it shall be lawful for the Landlord at any time thereafter to re-enter the Premises or any part of the Premises in the name of the whole.

6.3 **No implied Rights**

Save for the rights expressly granted nothing in this Lease shall by implication of law or otherwise operate to confer on the Tenant any easement, right or privilege whatsoever over or against [the Retained Land or] any other property of the Landlord

which might in any way restrict or prejudicially affect the future rebuilding alteration or development of [the Retained Land or] such other property.

6.4 Security of Tenure - Exclusion of sections 24 to 28 of the 1954 Act

6.4.1 The parties confirm that before the Tenant became contractually bound to enter into the tenancy created by this Lease:

(a) the Landlord served a notice on the Tenant, as required by section 38A(3)(a) of the 1954 Act applying to the tenancy created by this Lease; and

(b) [the Tenant] / [name of declarant who was duly authorised by the Tenant to do so] made a [statutory] declaration dated [] in accordance with the requirements of section 38A(3)(b) of the 1954 Act.

6.4.2 The parties agree that the provisions of sections 24 to 28 of the 1954 Act are excluded in relation to the tenancy created by this Lease.

6.5 Notices

The service and receipt of notices shall be undertaken in accordance with the terms of the Lease Agreement.

6.6 Contracts (Rights of Third Parties) Act 1999

A person who is not a party to this Lease shall not have any rights under or in connection with this Lease by virtue of the Contracts (Rights of Third Parties) Act 1999.

6.7 Landlord and Tenant (Covenants) Act 1995

This Lease creates a new tenancy for the purposes of the Landlord and Tenant (Covenants) Act 1995.

6.8 Warranty on Use

Nothing in this Lease constitutes or shall constitute a representation or warranty that the Premises may lawfully be used for any purpose allowed by this Lease.

6.9 Local Authority Landlord's Capacity and Powers

The Landlord enters into this Lease solely in its capacity as a landowner in respect of the Premises and not in any other capacity. Nothing in this Lease shall restrict the Landlord's powers or rights as a local authority, local planning authority or statutory body to perform any of its statutory functions.

THIS LEASE is executed as a deed and is delivered on the date stated at the beginning of this Lease.

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SCHEDULE 1 EXCEPTIONS AND RESERVATIONS

1. [The free and uninterrupted passage and running of Services to and from the Retained Land in and through the Conducting Media which now are or may at any time hereafter during the Term be in, upon, through, under or over the Premises.]
2. [The right to maintain in, on, through, under or over the Premises at any time during the Term any easements or services for the benefit of the Retained Land, the right to connect into any Conducting Media on the Premises and the right to install and construct Conducting Media at the Premises to serve any part of the Retained Land.]
3. The right at any time during the Term in accordance with the conditions for such entry included within the Leisure Agreement or otherwise (if no such conditions apply) at reasonable times and after reasonable prior written notice (except in an emergency when no notice shall be required) to enter upon the Premises to:
 - 3.1 [inspect, maintain, relay, repair, replace or renew or execute any works whatever to or in connection with any of the Conducting Media easements or Services referred to in paragraphs 1 and 2 of this Schedule 1;]
 - 3.2 [carry out any cleaning and or maintenance of the Landlord's Retained Land; or]
 - 3.3 exercise any of the rights granted or reserved to the Landlord by this Lease or the Leisure Agreement,

the Landlord exercising such rights only if such works cannot reasonably be effected without such entry and causing as little inconvenience as possible and remedying any physical damage so caused to the Tenant's reasonable satisfaction.
4. [All liberties, privileges, easements, quasi-easements, rights and advantages whatsoever now held or enjoyed with or appertaining or reputed to appertain to any other part of the Retained Land provided always that those matters or any of them reserved pursuant to this paragraph do not materially interfere with the Tenant's proper performance and exercise of its obligations and rights contained in the Leisure Agreement.]
5. [The right to deal in any manner whatsoever with the Retained Land and to erect, maintain, rebuild or alter or suffer to be erected, maintained, rebuilt or altered thereon any buildings whatsoever.]
6. [The right of support and protection by and from the Premises for adjoining buildings (whether now in existence or erected during the term) situated on the Retained Land.]
7. The mines and minerals under the Premises and the airspace above the buildings on the Premises.

SCHEDULE 2 RIGHTS GRANTED TO THE TENANT

1. [The right of support and protection by and from the Retained Land for the Premises and buildings (whether now in existence or erected during the term) situated on the Premises.]
2. [The free and uninterrupted passage and running of Services to and from the Premises in and through the Conducting Media which now are or may at any time hereafter during the Term be in, upon, through, under or over the Retained Land.]
3. [The right at any time during the Term in accordance with the conditions for such entry included within the Leisure Agreement or otherwise (if no such conditions apply) at reasonable times and after reasonable prior written notice (except in an emergency when no notice shall be required) to enter upon the Retained Land to:
 - 3.1 inspect, maintain, relay, repair, replace or renew or execute any works whatever to or in connection with any of the Conducting Media, easements or Services referred to in paragraph 2 of this Schedule 2;
 - 3.2 carry out any cleaning and or maintenance of the Premises; or
 - 3.3 exercise any of the rights granted or reserved to the tenant by this Lease or the Leisure Agreement,the Tenant exercising such rights only if such works cannot reasonably be effected without such entry and causing as little inconvenience as possible and remedying any physical damage so caused to the Landlord's reasonable satisfaction.]

Executed as a Deed (but not delivered until the date of this Deed) by affixing the common seal of [NAME OF LOCAL AUTHORITY] in the presence of

.....
Full Name

.....
Authorised Signature

Common Seal



Executed as a Deed (but not delivered until the date of this Deed) by [] acting by

.....
Full Name (Director)

.....
Signature of Director

.....
Full Name (Director/Secretary)

.....
Signature of Director/Secretary

SCHEDULE 17 – BENCHMARKING

The terms and expressions used in this Schedule 17 (Benchmarking) shall have the same meaning as set out in Clause 1 (Definitions and Interpretation). The following words and expressions shall have the meanings set out below:

- Benchmark Consultant** means:
- an expert appointed by agreement between the parties who:
 - (a) possesses at least five years' experience of operating in, or as a consultant to, the leisure and sports facilities management industries;
 - (b) possesses at least five years' experience of valuing services

provided in the aforementioned industries;
and

- (c) is engaged or employed by a reputable independent leisure organisation which is independent of the parties and of any other operator,

or, in the absence of any such agreement:

- (i) a person appointed by such other mutually agreed professional body or, where the parties cannot agree on such person;
- (ii) such other competent person who is appointed by an Adjudicator,

provided that the person appointed is independent of the parties and satisfies the criteria set out in (a) to (c) of this definition

Comparable Market

the market for sports facilities of similar content to the Facilities operated by Reputable

Operators provided that at least three such facilities are considered and at least one of the three facilities is operated by a different Reputable Operator to the other two

Hard FM

any maintenance of a lifecycle nature provided

Soft FM Benchmarking Process	by the Operator Partner the procedure to establish the Revised Soft FM Costs as set out and described in this Schedule 17 (Benchmarking)
Reputable Operator	a reputable private sector leisure/sports facilities operator or trust leisure/sports facilities operator possessing a broadly comparable degree of skill, resources and financial standing as the Operator Partner has the meaning given to it in paragraph 1.1
Soft FM Benchmarking Date	
Soft FM Benchmarking Procedure	the process set out in this Schedule
Soft FM Benchmarking Proposal	has the meaning given to it in paragraph 1.2
Soft FM Services	the Services to be procured at the Facilities by the Operator Partner to satisfy the Services Specification, excluding Hard FM
Tested Period	the five years immediately preceding the relevant Soft FM Benchmarking Date

1. SOFT FM BENCHMARKING PROCESS

- 1.1 The Authority shall be entitled to undertake a Soft FM Benchmarking Process once during the terms of this Agreement, with such process beginning on or around the fifth anniversary of: (i) this Agreement; or (ii) the previous Soft FM Benchmarking Date, as the case may be (in either case, the **Soft FM Benchmarking Date**).
- 1.2 If the Authority, by notice in writing to the Operator Partner, states that it wishes to undertake a Soft FM Benchmarking Process, then the Operator Partner shall supply a proposal (**Soft FM Benchmarking Proposal**) which shall be a proposal containing the following information on a per Facility basis:
- 1.2.1 details of all Actual FM Costs for the Tested Period, broken down into the categories defined in the LOBTA;
 - 1.2.2 full details set out on a monthly basis for the Tested Period and on an annual basis for the immediately preceding seven year period of the Performance Failures under **Error! Reference source not found.** (PPM) in relation to Soft FM Services, and all mitigatory steps that have been taken by the Operator Partner;
 - 1.2.3 the proposed Revised Soft FM Costs; and
 - 1.2.4 details of the assumptions used in calculating the Base Modelled Income and Base Modelled Cost and the current status of those assumptions.
- 1.3 By a date that is two (2) months after receipt of the Soft FM Benchmarking Proposal, or such longer period as the parties, acting reasonably, shall agree, the Authority shall respond to the Operator Partner stating either:
- 1.3.1 that it requires further information which is reasonably required to enable the Authority to have a clear understanding of the Soft FM Benchmarking Proposal. If, within fifteen (15) Business Days of the Authority's response, the parties are unable to agree on the extent of any further information required, either party may appoint a Benchmark Consultant in accordance with the provisions of this Part 2. Upon receipt of such further information the Authority shall assess the details and respond to the Operator Partner pursuant to paragraph 1.3.2 within twenty Business Days of receipt of such information; or
 - 1.3.2 that:
 - (a) it accepts the Soft FM Benchmarking Proposal (together with further information provided by the Operator Partner pursuant to paragraph

1.3.1, if applicable) and that it will amend the Annual Payment in accordance with the provisions of paragraph 4 (Implementation); or

- (b) it does not accept the Soft FM Benchmarking Proposal (together with further information provided by the Operator Partner pursuant

to paragraph 1.3.1, if applicable). In these circumstances, the parties shall consult in good faith in an attempt to come to an agreement in relation to the Soft FM Benchmarking Proposal within twenty Business Days of the date of the Authority's response. If, following such consultation, an agreement is reached by the parties, the Annual Payment shall be adjusted in accordance with the provisions of paragraph 4 (Implementation). If the parties have not come to an agreement, the Authority may notify the Operator Partner that it does not accept the Soft FM Benchmarking Proposal and the parties shall appoint a Benchmark Consultant in accordance with the provisions of this Part 3 of this Schedule 17 (Benchmarking). Nothing shall prevent either party from seeking to agree a change to the Services Specification applicable to the Soft FM Services in accordance with the Change Protocol in which case such process shall run concurrently with this process.

1.4 If the Authority fails to respond to the Operator Partner within the relevant time prescribed by paragraph 1.3 then the Authority shall be deemed to have accepted the Soft FM Benchmark Proposal and the Annual Payment shall be adjusted in accordance therewith.

1.5 If the Operator Partner fails to issue a Soft FM Benchmark Proposal in accordance with the process described above, or issues a Soft FM Benchmark Proposal which is not a good faith attempt to comply with the intention of the Soft FM Benchmarking Process, the Authority may appoint a Benchmark Consultant in accordance with paragraph 2 and the Operator Partner shall be responsible for all of the costs resulting from such appointment.

2. **BENCHMARK CONSULTANT**

2.1 At the same time as seeking to agree the appointment of the Benchmark Consultant pursuant to this Part 3, the parties shall:

2.1.1 obtain a cost estimate from the prospective Benchmark Consultant prior to the appointment of the same;

2.1.2 notify the Benchmark Consultant that it is to act fairly and reasonably as between the Operator Partner and the Authority;

2.1.3 ensure that all parties are aware of the date(s) by which decisions and reports are required; and

2.1.4 agree the terms of reference for the Soft FM Benchmarking Process based on those set out in paragraph Schedule 172.2 of this Part 3,

and any failure to do so shall entitle either party to submit the dispute to the Dispute Resolution Procedure.

- 2.2 The Benchmark Consultant shall take into account the terms of reference for the Soft FM Benchmarking Process based on the criteria and factors set out in paragraph 0. The Benchmark Consultant shall benchmark on a like for like comparison basis, supported wherever possible by actual inputs from the Comparable Market, with the objective being in each case to determine what the Benchmark Consultant concludes the Revised Soft FM Costs should be for the purposes of any adjustment to the Annual Payment pursuant to paragraph 4 (Implementation). In making this conclusion, the Benchmarking Consultant shall take into account the following factors (which shall be included in his terms of reference):
- 2.2.1 the then current market-rate for Soft FM Services which are the same as, or similar to the Soft FM Services;
 - 2.2.2 the efficiencies which could be driven by bidders for the Soft FM Services taking into account, amongst other things, the costs of defaults and failures during the Tested Period which could be eliminated by a new provider of such services;
 - 2.2.3 efficiencies and best practice which could be introduced by a new provider of the Soft FM Services given current best practice.
 - 2.2.4 current labour rates and staffing costs at all levels (allowing for any regional variations) for the time being applying within the Comparable Market;
 - 2.2.5 cost variations in consumables and other materials used in the provision of the Soft FM Services;
 - 2.2.6 the age, specification and condition of the buildings comprising the Facilities and quality and availability of any on site hotel/ serviced accommodation serving the Facilities (based upon the assumption that they are being maintained in accordance with the Services Specification);
 - 2.2.7 the cost of any changes in work methods necessary for conformity with Quest accreditation (or equivalent or successor accreditation requirements), Good Industry Practice or Legislation including the impact of consequential additional capital investment;
 - 2.2.8 the terms and provisions of this Agreement and other agreements to which the Operator Partner is a party in relation to this Project;
 - 2.2.9 the range of services available within each Facility;
 - 2.2.10 information on the legal and taxation status of the organisations running leisure centres within the Comparable Market (including without limitation information as to whether the entities are not for profit organisations);
 - 2.2.11 information available from benchmark data collectors and distributors;

2.2.12 proposals of the Operator Partner in relation to the Revised Soft FM Costs;
and

2.2.13 such other criteria or terms of reference as the parties may agree (acting reasonably) when appointing and instructing the Benchmark Consultant,

provided always that all changes to be measured by the Benchmark Consultant pursuant to this paragraph 2 (Benchmark Consultant) shall be measured with reference to other local authority facilities offering similar services to the Soft FM Services in the Comparable Market during the time of the Tested Period and any other relevant resources.

2.3 All discussions with the Benchmark Consultant will be attended by a representative from each party.

2.4 Subject to paragraph 1.5, the parties shall bear their own costs, fees and expenses associated with the preparation, review and analysis of the Soft FM Benchmarking Process provided always that the Benchmark Consultant shall be paid his reasonable and proper costs in connection with the carrying out of his duties pursuant to the terms of his appointment and subject to paragraph 1.5 such costs shall be borne equally between the parties.

3. **BENCHMARKING REPORT AND RESOLUTION OF DISPUTES**

3.1 The Benchmark Consultant shall provide his final report (**FM Benchmarking Report**) as soon as is reasonably practicable and, in any event, within not more than three months of his appointment and shall deliver a copy of the Income Benchmarking Report to each of the Authority and the Operator Partner.

3.2 The Benchmark Consultant shall provide in the FM Benchmarking Report full supporting evidence of the assumptions, source of market pricing information and conclusions reached.

3.3 The FM Benchmarking Report shall contain as a minimum details of:

3.3.1 the proposed Revised Soft FM Costs income and costs in relation to each Facility, separately specifying any proposed consequential adjustment to the Annual Payment;

3.3.2 the methodology and all assumptions by which the Revised Soft FM Costs were determined;

3.3.3 assumptions made in respect of the Comparable Market;

3.3.4 how the representations made by each party have been taken into account in determining the Revised Soft FM Costs, and shall include full details of issues and comments raised by both parties;

3.3.5 full evidence to support the difference between: (i) the current costs in relation to Soft FM or Operator Partner's Revised Soft FM Costs and; (ii) the Revised Soft FM Costs set out in the Benchmarking Report;

- 3.3.6 full evidence in support of each of the criteria used to determine the Revised Soft FM Costs;
 - 3.3.7 full details of sources of information used in establishing the Revised Soft FM Costs;
 - 3.3.8 in respect of each component of the Revised Soft FM Costs, a breakdown of how each is comprised;
 - 3.3.9 costs of the Operator Partner's staff including management or otherwise;
 - 3.3.10 details of the Operator Partner's management and head office overhead costs;
 - 3.3.11 any efficiencies and innovations in Good Industry Practice and Sport England Guidance relevant to the delivery of the Soft FM Services at each Facility; and
 - 3.3.12 such other details as the parties may agree when appointing and instructing the Benchmark Consultant or which the Benchmark Consultant considers relevant.
- 3.4 The Authority and the Operator Partner shall use reasonable endeavours to ensure the Benchmark Consultant complies with its obligations under its appointment and, in particular, to produce the Benchmarking Report on the due date under the appointment.
- 3.5 Both parties shall within 20 Business Days of receiving the Benchmarking Report serve notice on the other party setting out whether or not it agrees with the Revised Soft FM Costs set out in the Benchmarking Report.
- 3.6 In the event that the parties agree with the Revised Soft FM Costs, the Annual Payment will be adjusted in accordance with paragraph 4 (Implementation).
- 3.7 In the event that neither party issues a notice disagreeing with the Revised Soft FM Costs within 20 Business Days of receiving the Benchmarking Report, unless either party requests in writing to the other that such period be extended, both parties shall be deemed to have approved the Revised Soft FM Costs and the Annual Payment will be adjusted in accordance with paragraph 4 (Implementation).
- 3.8 In the event that either party disagrees with the Revised Soft FM Costs within the prescribed time period (or as extended by agreement between the parties) it shall include in its notice to the other party its reasons for disputing such Revised Soft FM Costs and paragraph 3.9 shall apply.
- 3.9 If paragraph 3.8 applies and/or where the Authority does not agree with one or more other aspects of the relevant Soft FM Benchmarking Proposal, the Authority and the Operator Partner shall meet as soon as practicable and negotiate in good faith to agree the appropriate Revised Soft FM Cost and/or the contents of such Soft FM Benchmarking Proposal..

- 3.10 In circumstances where, notwithstanding the parties' efforts pursuant to paragraph 3.9, the parties are unable to agree the Revised Soft FM Costs and/or any other aspect of the Soft FM Benchmarking Proposal, then either party may refer the matter for determination by the Dispute Resolution Procedure. For the purposes of this paragraph 3.10, the party referring the dispute shall instruct the Adjudicator (as defined in the Dispute Resolution Procedure) to determine the dispute in accordance with the terms of this Schedule 17 (Benchmarking).
- 3.11 Once the Revised Soft FM Costs, and any other elements of the relevant Soft FM Benchmark Proposal are agreed or determined, paragraph 4 (Implementation) shall apply.

4. **IMPLEMENTATION**

- 4.1 Subject to paragraph 4.1, when the Revised Soft FM Costs and any other terms of the relevant Soft FM Benchmark Proposal is agreed, the parties shall seek to agree the any variations to this Agreement, including to the Annual Payment, required in order to reflect such agreement or determination. Any change in the Annual Payment shall be effective from the Benchmarking Date and, accordingly, backdated to such date there shall be no double counting or double recovery by the Operator Partner, and the Operator Partner may not propose Revised Soft FM Costs which represent an increase in the then current costs of providing the Soft FM Services.
- 4.2 [Appendix 1 to this Schedule 17 (Benchmarking) comprises a worked example of how the Soft FM Benchmarking Process is intended to work]

SCHEDULE 18- SURPLUS SHARE

1. This Schedule shall be applied to calculate the overall Excess Surplus/Deficit generated as a result of the management of the Facilities.
2. Subject to paragraph 6, within three (3) months of the end of each Contract Year following the Commencement Date the Operator Partner shall provide to the Authority a calculation of the Operating Surplus/Deficit and Excess Surplus/Deficit for the previous Contract Year, subject to the calculation being audited by the Operator Partner's auditors if an audited calculation cannot be provided within the required timescale. The calculation shall be in the form of a statement and certificate signed by the Operator Partner's auditors or another registered auditor (**Operating Surplus Statement**) confirming the figures for Income and Expenditure and presented in the same format as in the Leisure Operator's Base Trading Account and setting out details of the Operating Surplus/Deficit and Excess Surplus/Deficit for that previous Contract Year.

3. The Operating Surplus/Deficit for each Contract Year, as set out in each Operating Surplus Statement, shall be calculated in accordance with the formula:

OS/D = A – B, where:

OS/D means the Operating Surplus/Deficit for the relevant Contract Year

A means the Income received by and/or due to the Operator Partner in relation to the Services during the relevant Contract Year

B means all the Expenditure actually paid (or incurred but not paid) by the Operator Partner during the relevant Contract Year.

4. The Excess Surplus/Deficit (ES/D) shall be calculated in accordance with the formula:

ES/D = OS/D – the Operator Partner's Projected Surplus

5. Where the Operating Surplus Statement shows an Excess Surplus, the Excess Surplus in respect of that Contract Year shall be divided between the parties according to the following table.

Excess Surplus	Authority % ⁵	Operator Partner %
Up to £100,000		
£100,001 to £150,000		
Above £150,000		

6. Any dispute between the parties regarding the Operating Surplus Statement shall be dealt with in accordance with the Dispute Resolution Procedure.

⁵ Table to be populated based on bidder's submission
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7. Following agreement or as determined in accordance with paragraph 6, the Authority's share of any Excess Surplus shall be used at the discretion of the Authority.
8. The Operator Partner shall pay the Authority's share of the Excess Surplus to the Authority within thirty (30) Business Days of agreement or determination.
9. For the purpose of this Schedule the following terms shall have the following meanings:

Base Modelled Income the annual operating income (Indexed) that is projected to be earned in relation to the Facilities by the Operator Partner as shown in row [X] of the 'summary' worksheet of the LOBTA⁶

Base Head Office Costs in relation to the Facilities an amount (Indexed) which is [X%] of the Base Modelled Income shown in row [X] of the 'summary' worksheet of the LOBTA⁷

Base Profit in relation to the Facilities an amount (Indexed) which is [X%] of the Base Modelled Income shown in row [X] of the 'summary' worksheet of the LOBTA

Excess Surplus/Deficit the excess profit or deficit for the year, calculated as or **ES/D** per paragraph 4

Expenditure the amount of direct costs and expenditure actually paid (or incurred but not paid) by the Operator Partner during the relevant Contract Year in respect of the Services [including any Surplus Annual Payment] but excluding:

- (a) any sums paid in respect of a previous Contract Year;
- (b) any Performance Adjustments levied through the terms of Schedule 5 (PPM
- (c) any Operator Partner Profit; and
- (d) any Head Office Costs

Head Office Costs an amount which is a fixed amount of the income received by the Operator Partner in respect of the Services, calculated as [X%]⁸ of the Income for the relevant Contract Year

⁶ Figures and row references to be inserted by the Operator Partner at financial close based on the agreed LOBTA ⁷
⁷ Figures and row references to be inserted by the Operator Partner at financial close based on the agreed LOBTA. ⁸
⁸ Row reference to be inserted by the Operator Partner at financial close based on the agreed LOBTA.
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Income	means the actual operating income of the Operator Partner (or its Sub Operator Partner (without double counting)) in the operation of the Facilities (including any Annual Payment where it is a Deficit Annual Payment actually received by the Operator Partner in respect of the Services in respect of the relevant Contract Year) but excluding any sums received in respect of a previous Contract Year
Operator Partner Profit	an amount which is a fixed amount of the income received by the Operator Partner in respect of the Services, calculated as [X%] ⁷ of the Income for the relevant Contract Year
Operator Partner's Projected Surplus	the greater of the amount projected in the LOBTA, calculated in accordance with the definition of "Base Profit" plus "Base Head Office Costs" and the sum of "Operator Partner Profit" plus "Head Office Costs" for the relevant Contract Year
Operating Surplus/Deficit or OS/D	has the meaning ascribed to it in paragraph 3
Operating Surplus Statement	has the meaning ascribed to it in paragraph 2

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⁷ Percentage to be inserted by the Operator Partner at financial close based on the agreed LOBTA.
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SCHEDULE 19 - EQUALITY REQUIREMENTS

1. The Operator Partner (including its agents and employees) shall not, and shall procure that any Operator Partner Related Party shall not:
 - 1.1 discriminate directly or indirectly, or by way of victimisation or harassment, against any person on Protected Characteristics; or
 - 1.2 contravene Sections 39, 108 to 109 and 111 to 112 of the Equality Act 2010 and Section 24A of the Equality Act 2006 (or any of them), where appropriate.
2. The Operator Partner (including its agents and employees) shall, and shall procure that any Operator Partner Related Party shall, for purposes of ensuring compliance with paragraphs 1.1 to 1.2, in relation to staff engaged in the provision of Works or Services observe as far as possible the provisions of:
 - 2.1 the Equality and Human Rights Commission Code of Practice in Employment;
 - 2.2 the Equality and Human Rights Commission's Statutory Code of Practice on Equal Pay; and
 - 2.3 any other relevant code of practice introduced by a commission or other body set up by Parliament to promote, monitor and enforce Equalities Legislation, including, but not limited to, those provisions recommending the adoption, implementation and monitoring of an equal opportunities policy.
3. The Operator Partner shall, and shall procure that any Operator Partner Related Party shall, in performing its/their obligations under this Agreement, comply (to the extent permitted by law) with the provisions of sections 149 and 150 of the Equality Act 2010 as if they were a body within the meaning of Schedule 19 to the Equality Act 2010.
4. Where in connection with this Agreement the Operator Partner (including its agents and employees) or any Operator Partner Related Party are required to carry out work on the Authority's premises or alongside the Authority's employees on any other premises, they shall comply with the Authority's own employment policy and codes of practice relating to discrimination and equal opportunities.
5. The Operator Partner shall, and shall procure that any Operator Partner Related Party shall, notify the Authority's Representative forthwith in writing as soon as it becomes aware of any investigation of or proceedings brought against the Operator Partner or any Operator Partner Related Party under the Equalities Legislation.
6. Where any investigation is undertaken by a person or body empowered to conduct such investigation and/or proceedings are instituted in connection with any matter relating to the Operator Partner's performance of its obligations under this Agreement being in contravention of the Equalities Legislation, the Operator Partner shall, and shall procure that any Operator Partner Related Party shall, free of charge:
 - 6.1 provide any information requested in the timescale allotted;

- 6.2 attend any meetings as required and permit any of its staff to attend;
- 6.3 promptly allow access to and investigation of any documents or data deemed to be relevant;
- 6.4 allow itself and any of its staff to appear as witness in any ensuing proceedings; and
- 6.5 co-operate fully and promptly in every way required by the person or body conducting such investigation during the course of that investigation.

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SCHEDULE 20 - CONFIDENTIAL INFORMATION

PART 1 - COMMERCIALLY SENSITIVE CONTRACTUAL PROVISIONS

Column 1 - Commercially Sensitive Contractual Provisions	Column 2 - For period ending on date below:

PART 2 - COMMERCIALLY SENSITIVE MATERIAL

Column 1 - Commercially Sensitive Material	Column 2 - For period ending on date below :

SCHEDULE 21 - LOSS OF REVENUE

1. Subject to the provisions of this Schedule 21 (Loss of Revenue), any Loss of Revenue shall be calculated in respect of each relevant activity by determining the anticipated daily Revenue for the relevant activity in question for the period in question (**Anticipated Daily Revenue**) and deducting from that sum the actual daily revenue received for the relevant activity in question for the period in question.
2. The Authority shall be entitled to audit, at frequent intervals, actual Revenue received by the Leisure Operator at the Facilities.
3. The Anticipated Daily Revenue for each activity in respect of the Service Period can be calculated by reference to the LOBTA and will be indexed in accordance with Schedule 5.
4. The Operator Partner shall at all times use all endeavours to minimise and mitigate any loss of Revenue and the consequences of any Relevant Event or Loss of

Revenue Event which shall include addressing variable costs and making appropriate cost adjustments. Mitigation shall not include a reduction in Loss of Revenue based on an assessment of whether the prescribed rate for each area would have actually been achieved during the closure period in question.

5. In calculating any Loss of Revenue, the Operator Partner shall not be entitled to recover, as Loss of Revenue, any greater amount than the level of Revenue which it is projected to recover calculated by reference to the LOBTA.
6. The loss of membership revenue shall be equivalent to the price reduction given to the User in lieu of the relevant closures, to be agreed between the Operator Partner and the Authority in line with sensible commercial practice, plus the loss of membership revenue caused by membership cancellations during the closure period that are not replaced by membership revenue from new sales.
7. [In the circumstances where the Loss of Revenue is triggered by a Relevant Event and a period of six (6) months has elapsed from the occurrence of such Relevant Event, the amount of daily rate recoverable by the Operator Partner shall be reduced by [x]%⁸ to remove the Operator Partner's profit from the calculation of the Loss of Revenue.]
8. Compensation may be paid as follows

8.1 **Loss of Revenue Event**

The Authority shall (at its discretion) compensate the Operator Partner in respect of any Loss of Revenue arising from a Loss of Revenue Event by:

8.1.1 lump sum payment

8.1.2 instalments; or

8.1.3 pursuant to Clause 37 (Financial Adjustments).

8.2 **Relevant Event**

The Authority shall compensate the Operator Partner in respect of any Loss of Revenue arising from a Relevant Event pursuant to Clause 37 (Financial Adjustments).

⁸ Figure to be inserted by the Operator Partner at financial close based on the agreed LOBTA if agreed. Bidders will want to be kept in a no better and no worse position in the LOBTA.
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SCHEDULE 22 - CHANGE PROTOCOL

PART 1 - DEFINITIONS

Affordable	within the revenue resource parameters determined by the Authority and notified in writing by it to the Operator Partner as available for a proposed High Value Change
Approval Criteria	has the meaning given to it in paragraph 4.4 of Part 4 of this Schedule 22 (Change Protocol)
Approved Project	has the meaning given to it in paragraph 4.5.2(a) of Part 4 of this Schedule 22 (Change Protocol)
Assumed Redevelopment	the assumed features of the Farnborough Redevelopment (including in relation to location, design, facilities mix, and periods of closure) set out in the Specification at paragraphs 2.3.3 and 2.3.44
Authority Change	a Small Value Change, Medium Value Change or High Value Change
Authority Notice of Change	a Small Value Change Notice, a Medium Value Change Notice or a High Value Change Notice
Calculation Date	the relevant date for the purposes of calculating the Incurred Change Management Fee in accordance with Part 4 of this Schedule 22 (Change Protocol)
Capital Cost	in relation to any High Value Change the cost of carrying out the design, construction and commissioning of that High Value Change
Change	a change to the Services or additional works and/or Services or a change in the Authority Policies or a partial termination pursuant to Part 6 of this Schedule 22 (Change Protocol) that may be made under Clause 26 (Change Protocol) or this Schedule 22 (Change Protocol)
Change Management Fee	the fee calculated in accordance with paragraph 9 of Part 4 of this Schedule 22 (Change Protocol)
Operator Partner Change	a Change that is initiated by the Operator Partner by submitting an Operator Partner Notice of Change to the Authority
Operator Partner Notice of Change	has the meaning given to it in paragraph 1 of Part 4 of this Schedule 22 (Change Protocol)

Estimate has the meaning given to it in paragraph 2.5.1 of Part 3 of this Schedule 22 (Change Protocol)

Farnborough Proposals the Operator Partner's outline proposals in relation to the Farnborough Redevelopment, which are set out [] and which are based on the Assumed Redevelopment redevelopment of Farnborough Leisure Centre

Farnborough Redevelopment

Farnborough Redevelopment Change Notice

a High Value Change Notice which is intended to implement the Farnborough Redevelopment

High Value Change

a Change requested by the Authority that, in the reasonable opinion of the Authority, is likely either to cost in excess of [£250,000] (Indexed) or to require an adjustment to the Annual Payment that is 5% or more of the Annual Payment in the relevant Contract Year provided that the parties may agree that such a Change should instead be processed as a Medium Value Change. Without prejudice to the generality of this definition, a Change requested in relation to the redevelopment of Farnborough Leisure Centre shall be classified as a High Value Change

High Value Change Notice

has the meaning given to it in paragraph 1 of Part 4 of Schedule 22 (Change Protocol)

High Value Change Proposal

has the meaning given to it in paragraph 2.1.1 of Part 4 of this Schedule 22 (Change Protocol)

High Value Change Requirements

has the meaning given to it in paragraph 2.1.2 of Part 4 of this Schedule 22 (Change Protocol)

High Value Change Stage 2 Submission

has the meaning given to it in paragraph 4.1.1 of Part 4 of this Schedule 22 (Change Protocol)

Incurred Change Management Fee

the amounts actually incurred or payable by or on behalf of the Operator Partner up to the Calculation Date in respect of matters identified by the Operator Partner pursuant to paragraphs 3.2.3 and/or 4.3.7 of Part 4 of this Schedule 22 (Change Protocol) as falling within the Change Management Fee (and not already reimbursed by the Authority)

Medium Value Change

a Change requested by the Authority which is not a Small Value Change or a High Value Change provided that the parties may agree that such a Change should instead be processed as either a Small Value Change or as a High Value Change

Medium Value Change Notice	has the meaning given to it in paragraph 1 of Part 3 of this Schedule 22
Resubmission Longstop Date	has the meaning given to it in paragraph 4.5.3(a) of Part 4 of this Schedule 22 (Change Protocol)
Small Value Change	a Change which has an individual cost not exceeding five thousand pounds (£5,000) (Indexed), or as otherwise agreed from time to time, except for any request that would (if implemented) increase the likelihood of the Operator Partner failing to meet the Services Specification or materially and adversely affect the Operator Partner's ability to perform its obligations under this Agreement, provided that the parties may agree that such a Change should instead be processed as either a Medium Value Change
Small Value Change Notice	a request for a Small Value Change in the form reasonably determined by the Authority from time to time
Small Works Rates	the rates to be applied in respect of any request from the Authority for a Small Value Change set out in limb (b) of that definition
Stage 1 Approval	has the meaning given to it in paragraph 3.5 of Part 4 of this Schedule 22 (Change Protocol)
Stage 1 Approved Project	has the meaning given to it in paragraph 3.5 of Part 4 of this Schedule 22 (Change Protocol)
Stage 2 Approval	has the meaning given to it in paragraph 4.5.2(a) of Part 4 of this Schedule 22 (Change Protocol)
Stage 2 Approved Project	has the meaning given to it in paragraph 4.5.2(a) of Part 4 of this Schedule 22 (Change Protocol)
Target Cost	has the meaning given to it in paragraph 2.1.1 of Part 4 of this Schedule 22 (Change Protocol)
Whole Life Cost	in relation to any High Value Change, the estimated and (to the extent that such information is available) the actual cost of operating and maintaining that High Value Change over its intended design life (consistent with the Service Delivery Proposals)

PART 2 - SMALL VALUE CHANGES

1. SMALL VALUE CHANGE NOTICE

Where a Small Value Change is required by the Authority, it shall submit to the Operator Partner a Small Value Change Notice.

2. OPERATOR PARTNER RESPONSE AND AUTHORITY CONFIRMATION

2.1 Within five (5) Business Days of receipt of the Small Value Change Notice, the Operator Partner shall confirm in writing and in accordance with this Part 2 of this Schedule 22:

2.1.1 the cost of implementing the required Small Value Change;

2.1.2 the time period for implementing the Small Value Change; and

2.1.3 when it is proposed the Small Value Change is to be carried out.

2.2 The cost of implementing the required Small Value Change shall be calculated by reference to paragraph 3 of this Part 2 of this Schedule 22.

2.3 Other than the costs referred to in paragraph 2.2 of this Part 2 of this Schedule 22 (Change Protocol) the Operator Partner shall make no charge to the Authority for processing, implementing or managing a Small Value Change.

2.4 The Authority may object in writing within five (5) Business Days of receipt of the Operator Partner's confirmation pursuant to paragraph 2.1 of this Part 2 of this Schedule 22 to any part of that confirmation and in such circumstances the parties shall act reasonably to agree as soon as practicable how the Small Value Change is to be implemented. In the absence of any such notification, the Operator Partner shall proceed with the Small Value Change in question in accordance with the terms of its confirmation.

3. SMALL VALUE CHANGES

For the purposes of paragraph 2.2 of this Part 2 of this Schedule 22, the cost of implementing any Small Value Change shall be calculated on the basis that:

3.1 wherever practicable the Operator Partner shall procure that such works are carried out by an existing on-site and suitably qualified Operator Partner or Operator Partner Related Party employee and no labour element shall be charged to the Authority in respect of such works. Where such Small Value Change is not carried out by an existing on-site and suitably qualified Operator Partner or Operator Partner Related Party employee, the cost of the labour element shall be calculated in accordance with the Small Works Rates or, where such rates are not applicable, in accordance with rates which are fair and reasonable; and

3.2 the materials element shall be charged at the cost of materials to the Operator Partner or to the contractor carrying out the work (net of all discounts) and there shall be no management fee, margin, overhead, contingency or other cost applied in relation thereto.

4. IMPLEMENTATION

4.1 The Operator Partner shall implement the required Small Value Change so as to minimise any inconvenience to the Authority and within the timescales specified in

the confirmation provided pursuant to paragraph 2.1 of this Part 2 of this Schedule 22 (Change Protocol) (or agreed by the parties pursuant to paragraph 2.4 of this Part 2 of this Schedule 22 (Change Protocol)).

4.2 The Operator Partner shall notify the Authority when it believes the Small Value Change has been completed.

4.3 Where the Operator Partner has either:

4.3.1 failed to provide a response pursuant to paragraph 2.1 of this Part 2 of this Schedule 22 within fifteen (15) Business Days of the date of the Small Value Change Notice; or

4.3.2 has provided a response pursuant to paragraph 2.1 of this Part 2 of this Schedule 22 but has failed to fully implement the Small Value Change within ten (10) Business Days of the date that has been determined or agreed in accordance with paragraph 4.1 of this Part 2 of this Schedule 22 as being the date on which the Small Value Change should have been implemented,

then the Authority may notify the Operator Partner that the Small Value Change Notice is withdrawn and, following such notification, may procure the implementation of the Small Value Change without further recourse to the Operator Partner.

5. **PAYMENT**

5.1 Where the Small Value Change has been implemented to the satisfaction of the Authority acting reasonably, the Operator Partner shall include the costs of the Small Value Change in the next report submitted pursuant to Clause 36.4 of this Agreement following completion or implementation of the relevant Small Value Change.

5.2 All amounts payable for Small Value Changes shall be invoiced and paid in accordance with the procedure described in Clause 36 (Payment) of this Agreement.

6. **DOCUMENTATION AND MONITORING**

6.1 No due diligence (whether legal, technical, insurance or financial) shall be required in relation to Small Value Changes unless otherwise agreed between the parties.

6.2 No changes shall be made to this Agreement or any Project Document as a result of a Small Value Change, unless otherwise agreed between the parties.

6.3 Where it is agreed that an adjustment of the Annual Payment is required, the LOBTA shall be adjusted to give effect to such Small Value Changes once each Contract Year on a date to be agreed between the parties and all relevant Small

Value Changes that have occurred in the preceding Contract Year shall be aggregated together into a single cumulative adjustment in accordance with Clause 37 (Financial Adjustments).

6.4 The Operator Partner shall keep a record of all Small Value Changes processed, completed and outstanding and shall provide the Authority with a copy of that record whenever reasonably required by the Authority.

7. **DISPUTES**

Any dispute may be referred by either party to the Dispute Resolution Procedure, but the Operator Partner shall, nevertheless, be required to carry out or implement the Small Value Change within the prescribed timescales notwithstanding the dispute, where such dispute concerns the cost of the Small Value Change.

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PART 3 - MEDIUM VALUE CHANGES

1. MEDIUM VALUE CHANGES

The Authority has the right to propose Medium Value Changes in accordance with this Part 3 of this Schedule 22 (Change Protocol). If the Authority requires a Medium Value Change, it must serve a notice (**Medium Value Change Notice**) on the Operator Partner in accordance with paragraph 2 of this Part 3 of this Schedule 22 (Change Protocol). The Operator Partner shall be entitled to refuse a Medium Value Change that:

- 1.1 requires the Services to be performed in a way that infringes any Legislation or is inconsistent with Good Industry Practice;
- 1.2 would cause any Necessary Consent to be revoked (or would require a new consent to be obtained to implement the relevant change in the Services which, after using reasonable efforts, the Operator Partner has been unable to obtain);
- 1.3 would materially and adversely affect the Operator Partner's ability to deliver the Services (except those Services which have been specified as requiring to be amended in the Medium Value Change Notice) in a manner not compensated for pursuant to this Part 3 of this Schedule 22 (Change Protocol);
- 1.4 would materially and adversely affect the health and safety of any person;
- 1.5 would, if implemented, materially and adversely change the nature of the Services (including its risk profile);
- 1.6 the Authority does not have the legal power or capacity to require implementation of; or
- 1.7 is the subject of a Medium Value Change Notice that cannot reasonably be complied with.

2. MEDIUM VALUE CHANGE NOTICE

The Medium Value Change Notice shall:

- 2.1 set out the change in the Services required in sufficient detail to enable the Operator Partner to calculate and provide the estimated Change in Costs and estimated Change in Revenue in accordance with paragraph 3 of this Part 3 of this Schedule 22 (Change Protocol);
- 2.2 set out whether, in respect of any additional works, the Operator Partner is expected to provide soft services, facilities management services and lifecycle maintenance services in respect of such additional works;
- 2.3 set out the timing of the additional works or services required by the Authority;
- 2.4 set out details of the Authority's budgetary constraints and/or affordability thresholds; and

- 2.5 require the Operator Partner to provide to the Authority within fifteen (15) Business Days of receipt of the Medium Value Change Notice:
- 2.5.1 an estimate of the likely effects of the proposed variation (**Estimate**);
 - 2.5.2 confirmation as to when the Estimate is to be provided to the Authority (provided that the Operator Partner shall use all reasonable endeavours to obtain such information as is required expeditiously) provided that if the Authority does not believe the proposal from the Operator Partner is reasonable, the parties shall seek to agree the time period, failing which any dispute as to what is an appropriate period for submission of the Estimate may be referred to the Dispute Resolution Procedure; or
 - 2.5.3 notification in writing if the Operator Partner believes that any of the circumstances outlined in paragraph 1 of this Part 3 of this Schedule 22 (Change Protocol) apply .

3. **OPERATOR PARTNER'S ESTIMATE**

Other than where a notice is served under paragraph 2.5.3 of this Part 3 of this Schedule 22 (Change Protocol) the Operator Partner shall as soon as practicable and in any event within the time period agreed or determined pursuant to paragraph 2.5 of this Part 3 of this Schedule 22, the Operator Partner shall deliver to the Authority the Estimate. The Estimate shall include the opinion of the Operator Partner on:

- 3.1 a detailed timetable for implementation of the Medium Value Change;
- 3.2 whether relief from compliance with obligations is required, including the obligations of the Operator Partner to meet the requirements set out in the Services Specification during the implementation of the Medium Value Change;
- 3.3 an outline of the proposed design solution and design, including an appropriate analysis/risk appraisal and, to the extent relevant, the impact on whole life costings;
- 3.4 any impact on the provision of the Services including whether the proposed change is in contravention of paragraph 1 of this Part 3 of this Schedule 22 (Change Protocol);
- 3.5 any amendment required to this Agreement and/or any Project Document or Ancillary Document as a result of the Medium Value Change;
- 3.6 any estimated Change in Costs and estimated Change in Revenue that results from the Medium Value Change;
- 3.7 any Capital Expenditure that is required or no longer required as a result of the Medium Value Change;
- 3.8 any Necessary Consents that are required;
- 3.9 its suggested payment schedule for the Change based on milestones where relevant;

- 3.10 costs and details of:
- 3.10.1 any other approvals required and/or due diligence permitted pursuant to paragraph 12 of this Part 3 of this Schedule 22 (Change Protocol); and
 - 3.10.2 any third party costs (that is, external costs of the Operator Partner and its sub-contractors, including but without limitation the costs of consultants and advisers);
- 3.11 the method of implementation and the proposed method of certification of any construction or operational aspects of the works or the Services required by the proposed Medium Value Change; and
- 3.12 any other information requested by the Authority in the Medium Value Change Notice.

4. **COSTING OF THE ESTIMATE**

In computing the estimated Change in Costs and/or the Capital Expenditure and/or the estimated Change in Revenue, the Operator Partner shall apply the following principles wherever applicable:

- 4.1 any lifecycle replacement and maintenance associated with additional works shall be consistent with the lifecycle and maintenance profile of the Facilities envisaged in Schedule 2 (Service Delivery Proposals) including (without limitation) in terms of the replacement cycles for equipment provided that the Operator Partner shall reflect improvements in technology that can optimise whole life costs for the Authority);
- 4.2 any Loss of Revenue shall be calculated by applying Schedule 21 (Loss of Revenue);
- 4.3 other than as referred to in paragraph 4.1 of this Part 3 of this Schedule 22 (Change Protocol) no charge shall be made in respect of the Operator Partner's time, or that of any Operator Partner Related Party spent processing, managing or monitoring the Medium Value Change (or proposed Medium Value Change) (and no additional mark up or management fee shall be applied by the Operator Partner); and
- 4.4 where elements of the Medium Value Change are not addressed by paragraphs 4.1 to 4.3 of this Part 3 of this Schedule 22 (Change Protocol), they shall be costed on a fair and reasonable basis reflecting the then current market rates.

5. **STANDARDS OF PROVISION OF THE ESTIMATE**

In providing the Estimate the Operator Partner shall:

- 5.1 use reasonable endeavours to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
- 5.2 demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, reasonably foreseeable Changes in Law at that time have been taken into account by the Operator Partner;

- 5.3 demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Medium Value Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under paragraphs 3.6 and/or 3.7 of this Part 3 of this Schedule 22 (Change Protocol); and
- 5.4 provide written evidence of the Operator Partner's compliance with paragraphs 4 and 5.1 of this Part 3 of this Schedule 22 (Change Protocol).

6. **DETERMINATION OF THE ESTIMATE**

As soon as practicable after the Authority receives the Estimate, the parties shall discuss and agree the issues set out in the Estimate. If the parties cannot agree on the contents of the Estimate, the matter may be referred to the Dispute Resolution Procedure to determine if the Estimate represents a fair and reasonable approach to implementing the Medium Value Change in all respects.

7. **CONFIRMATION OR WITHDRAWAL OF THE MEDIUM VALUE CHANGE NOTICE**

- 7.1 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to the Dispute Resolution Procedure, the Authority shall:

7.1.1 confirm in writing to the Operator Partner the Estimate (as modified); or

7.1.2 withdraw the Medium Value Change Notice.

- 7.2 If, in any Contract Year, the Authority has either not confirmed an Estimate (as modified) within twenty (20) Business Days of the contents of the Estimate having been agreed or determined in accordance with the foregoing provisions of this Part 3 of this Schedule 22 (Change Protocol) or has withdrawn a Medium Value Change Notice on an aggregate of three or more occasions then the Authority shall pay to the Operator Partner on the third and each subsequent such occasion in that Contract Year the reasonable additional third party costs incurred by the Operator Partner in preparing the Estimate provided that:

7.2.1 the Operator Partner has used all reasonable endeavours to submit a reasonably priced Estimate;

7.2.2 the Operator Partner made available, with the Estimate, to the Authority a cost breakdown of the Estimate including and in accordance with paragraph 3.10 of this Part 3 of this Schedule 22 (Change Protocol) an estimate of third party costs to be incurred by the Authority in the event the Medium Value Change Notice is withdrawn or deemed to be withdrawn; and

7.2.3 the Authority has:

- (a) approved the estimate of third party costs referred to in paragraph 7.2.2 of this Part 3 of this Schedule 22 (Change Protocol) and the type of third party prior to any third party costs being incurred; and

- (b) agreed that, given the nature of the proposed Medium Value Change, it is reasonable to expect the relevant third party to incur costs in preparing the Estimate on the basis of the extent of the proposed change to the Services and the work required in submitting an accurate Estimate in compliance with this paragraph 7.2 of this Part 3 of this Schedule 22 (Change Protocol).

8. IMPLEMENTATION OF THE MEDIUM VALUE CHANGE

8.1 Where the Authority has confirmed the Estimate in accordance with paragraph 7.1 of this Part 3 of this Schedule 22 (Change Protocol) the Operator Partner shall implement the required Medium Value Change in accordance with the Estimate and so as to minimise any inconvenience to the Authority and to the provision of the Services.

8.2 The Operator Partner shall notify the Authority when it believes the Medium Value Change has been completed.

8.3 Where the Operator Partner has either:

8.3.1 failed to provide a response pursuant to paragraph 3 of this Part 3 of this Schedule 22 (Change Protocol) within fifteen (15) Business Days of the date of the Medium Value Change Notice;

8.3.2 provided an Estimate in accordance with paragraph 3 of this Part 3 of this Schedule 22 (Change Protocol) but failed to fully implement the Medium Value Change within ten (10) Business Days of the date set out in the Estimate as confirmed in accordance with paragraph 2.5.1 of this Part 3 of this Schedule 22 (Change Protocol) as being the date on which the Medium Value Change should have been implemented; or

8.3.3 where it is determined pursuant to paragraph 6 of this Part 3 of this Schedule 22 (Change Protocol) that the Operator Partner has failed to submit a fair and reasonable Estimate,

then the Authority may notify the Operator Partner that the Medium Value Change Notice is withdrawn and, following such notification, may procure the implementation of the Medium Value Change without further recourse to the Operator Partner.

9. CERTIFICATION OF THE MEDIUM VALUE CHANGE

9.1 If the Medium Value Change constitutes works, the procedure set out and agreed in the Estimate for certifying the completion of the Medium Value Change shall

apply to determine whether the Medium Value Change has been completed appropriately.

9.2 Where the Medium Value Change constitutes additional or varied Services, the PPM shall apply to determine whether the Medium Value Change has been properly implemented.

10. METHOD OF PAYMENT OF AUTHORITY CONTRIBUTION

- 10.1 The Authority and the Operator Partner shall agree:
- 10.1.1 a payment schedule in respect of the payment of a sum reflecting the amount and timing of the costs to be incurred by the Operator Partner in carrying out the Medium Value Change to the extent borne by the Authority; and
- 10.1.2 where payment for part of a Medium Value Change reflects the carrying out of, or specific progress towards, an element within the Medium Value Change, an objective means of providing evidence confirming that the part of the Medium Value Change corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,
- (such payment and evidence to be determined in accordance with the Dispute Resolution Procedure in the event of the Authority and the Operator Partner failing to agree its terms).
- 10.2 The Authority shall make a payment to the Operator Partner within fifteen (15) Business Days of receipt by the Authority of invoices presented to the Authority (complete in all material respects) in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Medium Value Change has been carried out.
- 10.3 If payment is not made in accordance with paragraph 10.2 of this Part 3 of this Schedule 22 (Change Protocol), the Authority shall pay interest to the Operator Partner on the amount unpaid from the date fifteen (15) Business Days after receipt of the relevant invoice until paid at the Prescribed Rate.

11. **ADJUSTMENT TO ANNUAL PAYMENT**

Any adjustment to the Annual Payment that is necessary due to the implementation of a Medium Value Change shall be calculated in accordance with Clause 37 (Financial Adjustments), together with any adjustment that is necessary pursuant to any Small Value Changes made under Part 2 of this Schedule 22 (Change Protocol) that have not already been taken account of.

12. **DUE DILIGENCE**

It is acknowledged that Changes may require authorisation from the insurers under the Operator Partner Insurances. The Operator Partner shall notify the relevant insurance broker immediately upon any material Medium Value Change being agreed (materiality being judged in relation to the size and nature of the scope of the Medium Value Change).

13. **PROJECT DOCUMENTATION**

- 13.1 Unless the parties otherwise agree, no changes to the Project Documents or Ancillary Documents shall be made as a result of a Medium Value Change.

- 13.2 The Operator Partner shall, no later than one (1) month following completion of the Change, update any As-built Drawings and the operating and maintenance manuals as necessary to reflect the Change.

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PART 4 - HIGH VALUE CHANGES

1. HIGH VALUE CHANGES

1.1 The Authority has the right to propose High Value Changes in accordance with this Part 4. If the Authority requires a High Value Change, it must serve a notice (**High Value Change Notice**) on the Operator Partner in accordance with paragraph 2 of this Part 4 of this Schedule 22. Subject to paragraph 1.2 of this Part 4 of this Schedule 22 (Change Protocol) the Operator Partner shall be entitled to refuse a High Value Change that:

1.1.1 requires the Services to be performed in a way that infringes any Legislation or is inconsistent with Good Industry Practice;

1.1.2 would cause any Necessary Consent to be revoked (or would require a new consent to be obtained to implement the relevant change in the Services which, after using reasonable efforts, the Operator Partner has been unable to obtain);

1.1.3 would materially and adversely affect the Operator Partner's ability to deliver the Services (except those Services which have been specified as requiring to be amended in the High Value Change Notice) in a manner not compensated pursuant to this Part 4 of this Schedule 22 (Change Protocol);

1.1.4 would materially and adversely affect the health and safety of any person;

1.1.5 would, if implemented, materially and adversely change the nature of the Services (including its risk profile);

1.1.6 is the subject of a High Value Change Notice that cannot reasonably be complied with; or

1.1.7 the Authority does not have the legal power or capacity to require implementation of.

1.2 The Operator Partner shall not be entitled to refuse a Farnborough Redevelopment Change Notice.

2. HIGH VALUE CHANGE NOTICE

2.1 Where the Authority wishes to propose a High Value Change, the Authority shall:

2.1.1 submit a written request for the Operator Partner to produce outline proposals for any High Value Change (**High Value Change Proposal**), including indicative funding proposals, setting out the maximum available capital and/or revenue the Authority is able to commit to that High Value Change (**Target Cost**);

2.1.2 identify any requirements in relation to the High Value Change that must be satisfied as part of the High Value Change Proposal (**High Value Change Requirements**);

- 2.1.3 identify how the Authority shall assess whether the High Value Change Stage 2 Submission offers it value for money; and
- 2.1.4 where the High Value Change is issued in order to effect the Farnborough Redevelopment, notify the Operator Partner of this and also provide details of the Farnborough Redevelopment (including, without limitation, the extent to which the Farnborough Redevelopment is consistent with, or differs from, the Assumed Redevelopment).
- 2.2 The parties may agree written protocols with express reference to this Part 4 of this Schedule 22 which explain or clarify any aspects of the High Value Change approval procedure set out in this Part 4 of this Schedule 22 (Change Protocol) and such protocols shall be read as if incorporated into this Part 4 of this Schedule 22 (Change Protocol) (including accelerated procedures with reduced requirements for High Value Changes of relatively low values).
- 2.3 Without prejudice to the generality of paragraph 2.2 of this Part 4 of this Schedule 22 (Change Protocol) , the parties shall:
- 2.3.1 within five (5) Business Days of receipt by the Operator Partner of any High Value Change Notice, discuss and review the nature of the High Value Change, including a discussion as to which of the items set out in paragraph 3.2 of this Part 4 of this Schedule 22 (Change Protocol) are appropriate to be included within the High Value Change Proposal; and
- 2.3.2 within five (5) Business Days of a High Value Change Proposal becoming a Stage 1 Approved Project, discuss and review the nature of the Stage 1 Approved Project, including a discussion as to which of the items set out in paragraph 4.3 of this Part 4 of this Schedule 22 (Change Protocol) are appropriate to be included within the High Value Change Stage 2 Submission.
- 2.4 The parties acknowledge and agree that:
- 2.4.1 as part of the Operator Partner's [Submission], it set out in detail the Farnborough Proposals in response to the Assumed Redevelopment;
- 2.4.2 part of the evaluation process undertaken by the Authority was based on the quality of the Farnborough Proposals; and
- 2.4.3 accordingly, a High Value Change Proposal, in respect of a Farnborough Redevelopment Change Notice, should be based on and reflect the Farnborough Proposals except to the extent that the Farnborough Redevelopment differs materially from the Assumed Redevelopment.
- 2.5 Without prejudice to any other specific provision of this Schedule 22 (Change Protocol) the parties shall take into account the principles set out at paragraph 2.4 of this Part 4 of this Schedule 22 (Change Protocol) in establishing the terms on which relevant High Value Changes shall be agreed and implemented by the parties.

3. **HIGH VALUE CHANGE PROPOSAL**

- 3.1 The Operator Partner shall notify the Authority in writing as soon as practicable and in any event within fifteen (15) Business Days after having received the High Value Change Notice if any of the circumstances outlined in paragraph 1 of this Part 4 of this Schedule 22 (Change Protocol) apply. If no such notice is served, the Operator Partner shall (within thirty (30) Business Days of its request issued in accordance with paragraph 2 of this Part 4 of this Schedule 22 (Change Protocol)) submit either a High Value Change Proposal to the Authority or shall provide confirmation as to when the High Value Change Proposal will be provided to the Authority (provided that the Operator Partner shall use all reasonable endeavours to obtain such information as is required expeditiously). If the Authority does not believe the proposed time period from the Operator Partner is reasonable, the parties shall seek to agree the time period, failing which any dispute as to what is an appropriate period for submission of the High Value Change Proposal may be referred to the Dispute Resolution Procedure.
- 3.2 Save where agreed by the parties to the contrary, all High Value Change Proposals will contain at least the following information in sufficient detail to enable the Authority to make an informed decision under paragraph 3.4 of this Part 4 of this Schedule 22 (Change Protocol):
- 3.2.1 a description of the High Value Change, with evidence of how the High Value Change meets the High Value Change Requirements;
 - 3.2.2 an outline of the proposed building solution and design including an appropriate analysis/risk appraisal of, in each case to the extent relevant (if at all), the preferred investment solution contemplated in terms of new build, refurbishment and whole life costings;
 - 3.2.3 a fixed Change Management Fee for the High Value Change;
 - 3.2.4 an estimated programme for submission of the High Value Change Stage 2 Submission together with the implementation of the High Value Change;
 - 3.2.5 whether relief from compliance with obligations is required, including the obligations of the Operator Partner to meet the requirements set out in the Services Specification during the implementation of the High Value Change;
 - 3.2.6 any impact on the provision of the Services;
 - 3.2.7 any amendment required to this Agreement and/or any Project Document or Ancillary Document as a result of the High Value Change;
 - 3.2.8 any estimated Change in Costs and estimated Change in Revenue that results from the High Value Change;
 - 3.2.9 an outline of how the Operator Partner proposes to finance the High Value Change;
 - 3.2.10 the Operator Partner's suggested payment schedule for the Change, based on milestones where relevant;
 - 3.2.11 any Necessary Consents which are required;

- 3.2.12 costs and details of any other approvals required or due diligence permitted pursuant to paragraph 13 of this Part 4 of this Schedule 22 (Change Protocol);
- 3.2.13 the proposed method of certification of any construction or operational aspects of the works or the Services required by the proposed High Value Change;
- 3.2.14 a value for money assessment explaining why the Operator Partner's proposals represent value for money taking into account both the proposed Capital Cost and Whole Life Cost;
- 3.2.15 if the Operator Partner reasonably believes that there is a substantial risk that it will not be able to obtain any Necessary Consent the High Value Change Proposal shall contain a statement to that effect along with evidence to support this belief; and
- 3.2.16 in relation to a Farnborough Redevelopment Change Notice, and to the extent not addressed by the Operator Partner's responses to the points above in this paragraph 3.2:
 - (a) details of the extent to which, in the opinion of the Operator Partner, the features of the Farnborough Redevelopment set out in the Farnborough Redevelopment Change Notice differ from the Assumed Redevelopment; and
 - (b) an illustration of the way in which the relevant High Value Change Proposals reflects all relevant elements of the Farnborough Proposal or, where this is not the case, a clear justification for such deviations based on the differences referred to above.

3.3 Liaison between the Operator Partner, the Authority and relevant Users

In developing a High Value Change Proposal the Operator Partner shall liaise with the Authority and relevant Users (being such persons or organisations as the Operator Partner in consultation with the Authority considers appropriate). The Authority shall provide to the Operator Partner such information as to its requirements as the Operator Partner may reasonably require and shall assist the Operator Partner in the review of any draft designs in relation to the High Value Change Proposal. Any and all information and other input or feedback provided by the Authority to the Operator Partner shall, unless expressly stated otherwise by the Authority, be provided without warranty and shall be without prejudice to the Authority's rights under this Part 4 of this Schedule 22 (Change Protocol).

3.4 Consideration of a High Value Change Proposal by the Authority

The Authority will consider in good faith each High Value Change Proposal put forward by the Operator Partner and the Authority will not unreasonably withhold or delay its consent to a High Value Change Proposal. If, acting reasonably, the Authority finds that:

- 3.4.1 any material aspects of the High Value Change Proposal are unsatisfactory to it; and/or
- 3.4.2 (in the case of a Farnborough Redevelopment Change Notice) the High Value Change Proposal contains elements which deviate from the Farnborough Proposals in a manner which is not justified by differences between the relevant Farnborough Redeveloped and the Assumed Redevelopment,

then it shall notify the Operator Partner of the same and offer reasonable assistance to the Operator Partner to enable it to address such deficiencies and resubmit the High Value Change Proposal as soon as reasonably practicable. If the Operator Partner addresses such deficiencies to the Authority's satisfaction, acting reasonably, paragraph 3.5 of this Part 4 of this Schedule 22 (Change Protocol) shall apply.

3.5 **Authority response to a High Value Change Proposal**

If the Authority approves a High Value Change Proposal (subject to any amendments to it agreed with the Operator Partner), then it shall be a **Stage 1 Approved Project** or be referred to as having received **Stage 1 Approval**, as the context requires.

3.6 **Operator Partner's costs in relation to a High Value Change Proposal that is not approved**

If a High Value Change Proposal submitted in accordance with this paragraph 3 of this Part 4 of this Schedule 22 (Change Protocol) does not become a Stage 1 Approved Project then the Operator Partner's costs in relation to the proposal shall be borne by the Operator Partner unless the Authority has either not responded to the High Value Change Proposal pursuant to paragraph 3.4 of this Part 4 of this Schedule 22 (Change Protocol) and/or is in material breach of its obligations under paragraph 3.4 of this Part 4 of this Schedule 22 (Change Protocol), in which case the Authority shall reimburse the Operator Partner's reasonable and proper costs.

4. **STAGE 2 APPROVAL**

4.1 **Development of a High Value Change Stage 2 Submission**

- 4.1.1 Within ten (10) Business Days of a High Value Change Proposal having become a Stage 1 Approved Project, the parties shall seek to agree the time period within which the Operator Partner shall develop the Stage 1 Approved Project into a detailed submission (**High Value Change Stage 2 Submission**). If the parties are unable to agree a reasonable time period

for such submission any dispute may be referred to the Dispute Resolution Procedure.

- 4.1.2 Following agreement or determination of what is an appropriate time period for submission by the Operator Partner of the High Value Change Stage 2 Submission pursuant to paragraph 4.1.1 of this Part 4 of this Schedule 22 (Change Protocol), the Operator Partner shall proceed regularly and

diligently to produce and submit the same to the Authority in accordance with the agreed or determined time period.

4.2 Liaison between the Operator Partner, the Authority and relevant Users

In developing a High Value Change Stage 2 Submission the Operator Partner shall continue to liaise with the Authority and relevant Users (being such persons or organisations as the Authority in consultation with the Operator Partner considers appropriate). The Authority shall provide to the Operator Partner such information as to its requirements necessary to enable the Operator Partner to submit a full and complete High Value Change Stage 2 Submission and any such other information as the Operator Partner may reasonably require and shall assist the Operator Partner in the review of any draft designs in relation to the Stage 1 Approved Project and in the development of other aspects of the High Value Change Stage 2 Submission (but not where this would involve the Authority incurring additional material expense). Any and all information and other input or feedback provided by the Authority to the Operator Partner shall be provided without warranty and shall be without prejudice to the Authority's rights under this Part 4 of this Schedule 22 (Change Protocol).

4.3 Content requirements in relation to a High Value Change Stage 2 Submission

Save where the parties agree otherwise, in relation to the relevant Stage 1 Approved Project, the Operator Partner shall procure that a High Value Change Stage 2 Submission shall include (but not be limited to):

- 4.3.1 draft(s) of the relevant Project Document(s) identifying (if relevant) any material changes or amendments proposed in respect of the relevant Stage 1 Approved Project, together with the reasons for any such changes or amendments proposed. This shall include full details of which provisions of the relevant Project Documents shall apply to the High Value Change so that it is implemented in equivalent manner and to an equivalent standard as required in respect of the Services as appropriate;
- 4.3.2 detailed design solutions (to RIBA Stage 4);
- 4.3.3 appropriate plans and drawings;
- 4.3.4 relevant detailed planning permissions and any other relevant planning approvals and Necessary Consents (or such lesser confirmation or information in relation to planning as may be agreed with the Authority);
- 4.3.5 a proposed revised LOBTA including the detailed price estimates for the Stage 1 Approved Project;
- 4.3.6 an explanation (together with appropriate supporting evidence) as to why the High Value Change Stage 2 Submission meets the Approval Criteria (as defined in paragraph 4.4 of this Part 4 of this Schedule 22 (Change Protocol));
- 4.3.7 confirmation (or details of any requested variations to (with supporting justification)) of the Change Management Fee referred to in

paragraph 3.2.3 of this Part 4 of this Schedule 22 (Change Protocol);

- 4.3.8 the proposed method of certification of any construction or operational aspects of the works or the Services required by the proposed High Value Change;
- 4.3.9 a value for money assessment explaining why the Operator Partner's proposals represent value for money taking into account both the proposed Capital Cost and Whole Life Cost;
- 4.3.10 a timetable and method statement setting out how the relevant High Value Change will be delivered which shall include (but not be limited to):
 - (a) proposals for the effective management of the building programme;
 - (b) an assessment as to the savings to be generated across the High Value Change, particularly on staff costs and lifecycle replacement and maintenance and operation of services;
 - (c) details of the Sub-Contractors together with evidence and explanation of the value testing undertaken by the Operator Partner in relation to the High Value Change;
 - (d) a completed risk register showing the potential risks identified in relation to the delivery of the High Value Change the occurrence of which are capable of adversely affecting the time for completion, cost and/or quality of the project, the probability of such risks occurring and a financial estimate of the most likely consequences of each risk occurring together with the prioritisation of all continuing risks and an action plan in respect of, and risk owners for, all risks prioritised as serious risks; and
- 4.3.11 any surveys and investigations and associated reports that are reasonably necessary to ascertain (in relation to Changes involving the construction of additional buildings) information as to the nature, location and condition of the relevant land (including hydrological, geological, geotechnical and sub-surface conditions) together with information relating to archaeological finds, areas of archaeological, scientific or natural interest and (in relation to the refurbishment of any existing buildings) information on the condition and quality of existing structures and, in particular, the presence of any latent defects.

4.4 **Approval Criteria**

For the purposes of this Part 4 of this Schedule 22 (Change Protocol), "**Approval Criteria**" means the criteria against which any Stage 1 Approved Project is to be judged by the Authority in determining whether it achieves Stage 2 Approval. The criteria are:

- 4.4.1 whether the costs of the Stage 1 Approved Project are within the Target Cost notified to the Operator Partner by the Authority;

- 4.4.2 whether it has been demonstrated that the Stage 1 Approved Project provides value for money assessed in accordance with the measures identified by the Authority in accordance with paragraph 2.1.3 of this Part 4 of this Schedule 22 (Change Protocol);
- 4.4.3 whether the Authority, acting reasonably, is satisfied that the High Value Change Stage 2 Submission meets the Authority's requirements;
- 4.4.4 whether any material changes or amendments to the relevant Project Document(s) as detailed pursuant to paragraph 4.3.1 of this Part 4 of this Schedule 22 (Change Protocol) are acceptable to the Authority, acting reasonably;
- 4.4.5 whether the High Value Change Stage 2 Submission contains all the information required pursuant to paragraph 4.3 of this Part 4 of this Schedule 22 (Change Protocol) (or as otherwise agreed by the parties); and
- 4.4.6 in the case of a Farnborough Redevelopment Change Notice, that the criteria set out at paragraphs 2.4 and 2.5 of this Part 4 of this Schedule 22 (Change Protocol) continue to be met.

4.5 Submission of the High Value Change Stage 2 Submission to the Authority and consideration of that submission by the Authority

- 4.5.1 The Operator Partner shall submit its High Value Change Stage 2 Submission to the Authority. The Authority will consider in good faith High Value Change Stage 2 Submissions put forward by the Operator Partner and the Authority will not unreasonably withhold or delay its consent to a High Value Change Stage 2 Submission. The Authority shall be entitled to call for such reasonable information as it considers appropriate to enable it to decide whether the High Value Change Stage 2 Submission meets the Approval Criteria. The Operator Partner shall reply promptly to all such requests for further information and assistance. If, acting reasonably, the Authority finds that any material aspects of the High Value Change Stage 2 Submission are unsatisfactory to it, it shall notify the Operator Partner of the same and offer reasonable assistance to the Operator Partner to address such deficiencies. If the Operator Partner addresses such deficiencies to the Authority's satisfaction, acting reasonably, paragraph 4.5.2(a) of this Part 4 of this Schedule 22 (Change Protocol) shall apply. If the Operator Partner is unable to resolve such deficiencies

to the satisfaction of the Authority (acting reasonably) paragraph 4.5.2(b) of this Part 4 of this Schedule 22 (Change Protocol) shall apply.

- 4.5.2 As soon as reasonably practicable after the submission to it of a High Value Change Stage 2 Submission the Authority shall give written notice of whether it:
 - (a) approves the relevant Stage 1 Approved Project (in which case the Stage 1 Approved Project shall be referred to as having received Stage 2 Approval or as being a Stage 2 Approved Project or an

Approved Project as the context requires); or (b) rejects the Stage 1 Approved Project:

- (i) subject to paragraph 4.5.2(b)(ii) of this Part 4 of this Schedule 22 (Change Protocol), on the grounds that the High Value Change Stage 2 Submission in relation to the relevant Stage 1 Approved Project has failed to meet one or more of the Approval Criteria in which case (subject to resubmission under paragraph 4.5.3 of this Part 4 of this Schedule 22 (Change Protocol)) paragraph 4.6 of this Part 4 of this Schedule 22 (Change Protocol) shall apply;
- (ii) because, as a result of any change to the Target Cost referred to in paragraph 2 of this Part 4 of this Schedule 22 (Change Protocol), the Stage 1 Approved Project is not in fact Affordable despite the High Value Change Stage 2 Submission being within the Target Cost referred to in paragraph 2.1.1 of this Part 4 of this Schedule 22 (Change Protocol); or
- (iii) otherwise on grounds other than those set out in paragraph 4.5.2(b)(i) or 4.5.2(b)(ii) of this Part 4 of this Schedule 22 (Change Protocol),

in which case paragraph 4.7 of this Part 4 of this Schedule 22 (Change Protocol) shall apply.

4.5.3 If the Authority rejects the High Value Change Stage 2 Submission on the grounds set out in paragraph 4.5.2(b)(i) of this Part 4 of this Schedule 22 (Change Protocol):

- (a) the Authority and the Operator Partner will work together to address the reasons for such failure and attempt in good faith to produce a revised High Value Change Stage 2 Submission which the Operator Partner shall re-submit to the Authority as soon as reasonably practicable after the rejection of the original submission and in any event within thirty (30) Business Days of the rejection (**Resubmission Longstop Date**);
- (b) the re-submission pursuant to paragraph 4.5.3(a) of this Part 4 of this Schedule 22 (Change Protocol) shall be treated as a High Value Change Stage 2 Submission. If:
 - (i) the resubmitted High Value Change Stage 2 Submission is rejected by the Authority on the grounds set out in paragraph 4.5.2(b)(i) of this Part 4 of this Schedule 22 (Change Protocol) (subject to having been through the Dispute Resolution Procedure under paragraphs 4.8 and 4.9 (if applicable) of this Part 4 of this Schedule 22 (Change Protocol)); or
 - (ii) no resubmission of the High Value Change Stage 2

Submission is made on or before the Resubmission Longstop Date,

then the relevant Stage 1 Approved Project shall be treated as having been properly rejected and the provisions of paragraph 4.6 of this Part 4 of this Schedule 22 (Change Protocol) shall apply and neither the Authority nor the Operator Partner shall have any further obligations in relation to the relevant High Value Change referred to in the High Value Change Stage 2 Submission; and

- (c) if the Authority rejects the Stage 1 Approved Project pursuant to paragraph 4.5.2(b)(i) because the Operator Partner has failed to meet one or more of the Approval Criteria and the sole reason for that failure is that any planning consent identified by the Operator Partner (in compliance with paragraph 3.2.15 of this Part 4 of this Schedule 22 (Change Protocol)) has not been obtained then the provisions of paragraph 4.7 of this Part 4 of this Schedule 22 (Change Protocol) shall apply, provided that the Operator Partner has used all reasonable endeavours to obtain the planning consent.

4.6 If a High Value Change Stage 2 Submission is properly rejected by the Authority

Where this paragraph 4.6 of this Part 4 of this Schedule 22 (Change Protocol) applies (as set out in paragraph 4.5.2(b)(i), paragraph 4.5.3(b) and paragraph 4.9 of this Part 4 of this Schedule 22 (Change Protocol)):

- 4.6.1 the Authority shall not be required to reimburse or compensate the Operator Partner in respect of any costs relating to the High Value Change including the Change Management Fee; and
- 4.6.2 the Authority shall be entitled to procure the High Value Change required under the relevant High Value Change Stage 2 Submission outside the terms of this Agreement.

4.7 If a High Value Change Stage 2 Submission is improperly rejected by the Authority

Where this paragraph 4.7 of this Part 4 of this Schedule 22 (Change Protocol) applies (as set out in paragraph 4.5.2(b)(ii) paragraph Schedule 224.8.2 and paragraph 5.2.1(b) and paragraph 5.2.2 of this Part 4 of this Schedule 22)):

4.7.1

- (a) subject to paragraph 4.7.1(b) of this Part 4 of this Schedule 22 (Change Protocol), the Incurred Change Management Fee in relation to the relevant High Value Change will be paid by the Authority within ten (10) Business Days of the date on which the Operator Partner receives written notice of the rejection or the date of the deemed rejection (as the case may be) with the date of the rejection or the deemed rejection (as the case may be) being the

Calculation Date for the purposes of calculating the amount of the Incurred Change Management Fee (unless a different Calculation Date is expressly stated in this Part 4 of this Schedule 22 (Change Protocol) in relation to the circumstances giving rise to the entitlement of the Operator Partner to be paid the Incurred Change Management Fee);and

- (b) if the parties are unable to agree the amount of the Incurred Change Management Fee for the purposes of paragraph 4.7.1(a) of this Part 4 of this Schedule 22 (Change Protocol) the matter shall be resolved by reference to the Dispute Resolution Procedure; and

4.7.2 the Authority shall be entitled to procure the High Value Change required under the relevant High Value Change Stage 2 Submission outside the terms of this Agreement.

Dispute resolution

- 4.8 If the Authority rejects a High Value Change pursuant to the provisions of paragraph 4.5.3(b)(i) of this Part 4 of this Schedule 22 (Change Protocol), the Operator Partner shall be entitled to refer the matter for consideration under the Dispute Resolution Procedure within ten (10) Business Days after receiving written notice of the Authority's decision. If, following a referral to the Dispute Resolution Procedure, it is agreed or determined that the High Value Change rejected by the Authority pursuant to paragraph 4.5.3(b)(i) of this Part 4 of this Schedule 22 (Change Protocol) met the Approval Criteria the Authority shall either:
 - 4.8.1 declare that the relevant High Value Change has received Stage 2 Approval and that High Value Change shall proceed; or
 - 4.8.2 declare that its rejection of the relevant High Value Change be treated as an improper rejection and that the provisions of paragraph 4.7 of this Part 4 of this Schedule 22 (Change Protocol) shall apply.
- 4.9 If, following a referral to the Dispute Resolution Procedure under paragraph 4.8 of this Part 4 of this Schedule 22 (Change Protocol), it is agreed or determined that the High Value Change did not meet the Approval Criteria, the provisions of paragraph 4.6 of this Part 4 of this Schedule 22 (Change Protocol) shall apply.
- 4.10 If the Authority rejects a High Value Change Proposal either party may refer the matter to the Dispute Resolution Procedure to determine whether the High Value Change Proposal comprised a fair and reasonable response to the High Value Change Notice. If it is agreed or determined that the High Value Change Proposal was not a fair and reasonable response, paragraph 4.6 of this Part 4 of this Schedule 22 (Change Protocol) shall apply. [If it is agreed or determined that the High Value Change Proposal was a fair and reasonable response no Performance Failures shall be deemed to occur r Performance Adjustments shall be applied under Schedule 5 (PPM) in relation to the High Value Change Proposal but the Authority shall not be obliged to accept the High Value Change Proposal and paragraph 0 of this Part 4 of this Schedule 22 (Change Protocol) shall still apply.]

5. TIME PERIODS FOR APPROVAL

- 5.1 Each High Value Change Proposal and each High Value Change Stage 2 Submission shall be valid for a period of three (3) months from the date of its submission by the Operator Partner.
- 5.2 If by the end of the three (3) month period referred to in paragraph 5.1 of this Part 4 of this Schedule 22 (Change Protocol) the Authority has not:
- 5.2.1 in relation to a High Value Change Proposal, approved or rejected that High Value Change Proposal in accordance with the procedures set out in this Part 4 of this Schedule 22 (Change Protocol):
- (a) the Operator Partner shall be entitled to withdraw the High Value Change Proposal at the end of that period; and
 - (b) the Operator Partner shall not be entitled to any costs relating to the High Value Change Proposal unless the Authority has either not responded to the High Value Change Proposal and/or is in material breach of its obligations in paragraph 3.4 of this Part 4 of this Schedule 22 (Change Protocol) in which case paragraph 4.7 of this Part 4 of this Schedule 22 (Change Protocol) shall apply;
- 5.2.2 in relation to a High Value Change Stage 2 Submission, approved or rejected that High Value Change Stage 2 Submission in accordance with the procedures set out in this Part 4 of this Schedule 22 (Change Protocol) (or has not given any notification of the Authority's response to the High Value Change Stage 2 Submission or has given written notice to the Operator Partner withdrawing or cancelling the High Value Change to which the High Value Change Stage 2 Submission relates) then the High Value Change Stage 2 Submission shall be deemed to have been improperly rejected by the Authority and paragraph 4.7 of this Part 4 of this Schedule 22 (Change Protocol) shall apply.

6. **CO-OPERATION OF THE AUTHORITY**

The Authority will co-operate with the Operator Partner in relation to any High Value Change Stage 2 Submission being developed by the Operator Partner, including (without limitation) promptly providing:

- 6.1 written confirmation of the Target Cost and/or High Value Change Requirements or any change to such Target Cost and/or High Value Change Requirements; and
- 6.2 any information reasonably required by the Operator Partner to enable it to satisfy the requirements of paragraph 4.3 of this Part 4 of this Schedule 22 (Change Protocol).

7. **CHANGES TO THE HIGH VALUE CHANGE REQUIREMENTS**

- 7.1 If the High Value Change Requirements or Approval Criteria are subject to any material variation in relation to a High Value Change by the Authority after the High Value Change Proposal has been submitted then:

7.1.1 the Operator Partner and the Authority shall negotiate in good faith as to the implications on the High Value Change Proposal or High Value Change Stage 2 Submission (as the case may be) and shall seek to agree changes thereto to accommodate the variation (including any change to the Target Cost and/or to the Change Management Fee);

7.1.2 if agreement has not been reached pursuant to paragraph 7.1.1 of this Part 4 of this Schedule 22 (Change Protocol) within twenty (20) Business Days (or such longer period as the parties may agree) then:

- (a) the Operator Partner shall be entitled by notice in writing to the Authority to withdraw the High Value Change Proposal or the High Value Change Stage 2 Submission (as the case may be) and to be paid the Incurred Change Management Fee with the Calculation Date being the date of the change notified by the Authority; and
- (b) the Authority shall not be entitled to procure the High Value Change without recommencing and complying with the procedure in this Part 4 of this Schedule 22 in relation to that High Value Change.

7.2 The Authority may, at any time, give notice in writing to the Operator Partner that it proposes to cancel a High Value Change without completing the process set out in paragraphs 3 to 5 of this Part 4 of this Schedule 22 (Change Protocol) in which case the Authority shall pay the Operator Partner the Incurred Change Management Fee in respect of the cancelled High Value Change with the Calculation Date being the date of such notice.

8. **INFORMATION AND NOTIFICATIONS BY THE AUTHORITY TO THE OPERATOR PARTNER AND CO-OPERATION OF THE AUTHORITY**

8.1 The Authority shall notify the Operator Partner as soon as it becomes aware of any matter which may have a reasonably foreseeable material adverse effect on the viability of any High Value Change including any:

8.1.1 planning issues likely to cause a material delay in the anticipated programme for the High Value Change or material cost increases; and

8.1.2 changes to funding which the Authority receives or to the way in which funding may be applied, either or both of which may affect whether a High Value Change is affordable.

8.2 The Authority shall provide reasonable assistance to the Operator Partner in relation to the procurement by the Operator Partner of all relevant Necessary Consents, provided that this paragraph 8 of this Part 4 of this Schedule 22 (Change Protocol) shall not apply to the Authority to the extent it is exercising its functions as a Local Planning Authority or Highways Authority.

9. **CHANGE MANAGEMENT FEE**

A proposed fixed management fee for each High Value Change must be submitted by the Operator Partner as part of the High Value Change Proposal and, once agreed, shall be the Change Management Fee for the High Value Change. The

Change Management Fee submitted pursuant to paragraph 3.2.3 of this Part 4 of this Schedule 22 (Change Protocol) shall include a breakdown of the proposed amount by reference to the following categories of costs (without any double counting between the amounts under paragraphs 9.1 to 9.8 of this Part 4 of this Schedule 22 (Change Protocol)):

- 9.1 the time incurred by or on behalf of the Operator Partner in project managing the development and procurement of the High Value Change Proposal and High Value Stage 2 Submission, which shall:
 - 9.1.1 be based on actual time spent (validated by timesheet records); and
 - 9.1.2 not include any mark-up or profit cost or additional overheads;
- 9.2 design costs;
- 9.3 legal advice;
- 9.4 financial advice;
- 9.5 technical advice;
- 9.6 surveys;
- 9.7 fees in connection with obtaining any relevant Necessary Contracts; and
- 9.8 other costs the Operator Partner shall be required to incur, acting reasonably, to finalise its High Value Change Stage 2 Submission,

in each case applying the Small Works Rates where appropriate and otherwise applying current market rates on a fair and reasonable basis.

10. **IMPLEMENTATION OF THE HIGH VALUE CHANGE**

The Operator Partner shall implement any High Value Change approved by the Authority so as to minimise any inconvenience to the Authority and to the provision of the Services and in accordance with:

- 10.1 the High Value Change Stage 2 Submission (subject to any amendments to it agreed by the parties);
- 10.2 the provisions of this Agreement, Good Industry Practice and Guidance; and
- 10.3 to the extent that the High Value Change involves works, the Operator Partner shall exercise in carrying out the design of the works, the level of skill and care reasonably to be expected from an appropriately qualified and competent professional designer providing those services in relation to a project of a similar size and scope to such works.

11. **METHOD OF PAYMENT OF AUTHORITY CONTRIBUTION**

- 11.1 This paragraph 11 of this Part 4 of this Schedule 22 (Change Protocol) shall apply where an Approved Project provides that the High Value Change shall be funded in whole or part other than by adjustment of the Annual Payment.

11.2 The Authority and the Operator Partner shall agree:

11.2.1 a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by the Operator Partner in carrying out the High Value Change to the extent borne by the Authority; and

11.2.2 where payment for part of a High Value Change reflects the carrying out of, or specific progress towards, an element within the High Value Change, an objective means of providing evidence confirming that the part of the High Value Change corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,

(such payment and evidence to be determined in accordance with the Dispute Resolution Procedure in the event of the Authority and the Operator Partner failing to agree as to its terms).

11.3 The Authority shall make a payment to the Operator Partner within fifteen (15) Business Days of receipt by the Authority of invoices presented to the Authority (complete in all material respects) in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the High Value Change has been carried out.

11.4 If payment is not made in accordance with paragraph 11.3 of this Part 4 of this Schedule 22 (Change Protocol), the Authority shall pay interest to the Operator Partner on the amount unpaid from the date fifteen (15) Business Days after receipt of the relevant invoice until paid at the Prescribed Rate.

12. **ADJUSTMENT TO ANNUAL PAYMENT**

Any adjustment to the Annual Payment which is necessary as a result of the implementation of a High Value Change shall be calculated in accordance with Clause 37 (Financial Adjustments), together with any adjustment that is necessary pursuant to any Small Value Changes made under Part 2 of this Schedule 22 (Change Protocol) and/or any Medium Value Changes made under Part 3 of this Schedule 22 (Change Protocol) that have not already been taken account of.

13. **DUE DILIGENCE**

It is acknowledged that High Value Changes may require authorisation from the insurers under the Operator Partner Insurances. The Operator Partner shall notify the relevant insurance broker immediately upon any material High Value Change being agreed (materiality being judged in relation to the size and nature of the scope of the High Value Change).

14. **PROJECT DOCUMENTATION**

14.1 The only changes to the Project Documents or Ancillary Documents to be made as a result of a High Value Change shall be those identified in the High Value Change Stage 2 Submission (subject to any amendments to it agreed by the parties).

- 14.2 The Operator Partner shall, on completion of the Change, update any As-built Drawings and the operating and maintenance manuals as necessary to reflect the Change.

PART 5 - OPERATOR PARTNER CHANGES

1. If the Operator Partner wishes to introduce an Operator Partner Change, it shall serve a notice containing the information required pursuant to paragraph 2 of this Part 5 of this Schedule 22 (Change Protocol) (**Operator Partner Notice of Change**) on the Authority.
2. The Operator Partner Notice of Change shall:
 - 2.1 set out the proposed Operator Partner Change in sufficient detail to enable the Authority to evaluate it in full;
 - 2.2 specify the Operator Partner's reasons for proposing the Operator Partner Change;
 - 2.3 indicate any implications of the Operator Partner Change;
 - 2.4 indicate what savings, if any, will be generated by the Operator Partner Change, including:
 - 2.4.1 whether a revision of the Annual Payment is proposed (and, if so, give details of such proposed revision, taking account of paragraph 8 of this Part 5 of this Schedule 22 (Change Protocol)); or
 - 2.4.2 whether such savings will be paid by a lump sum;
 - 2.5 if the Operator Partner Change is required as a result of a Qualifying Change in Law:
 - 2.5.1 indicate what sums, if any, will be payable by the Authority; and
 - 2.5.2 contain the information required by Clause 27.2;
 - 2.6 indicate whether there are any critical dates by which a decision by the Authority is required; and
 - 2.7 request the Authority to consult with the Operator Partner with a view to deciding whether to agree to the Operator Partner Change and, if so, what consequential changes the Authority requires as a result.
3. The Authority shall evaluate the Operator Partner Notice of Change in good faith, taking into account all relevant issues, including whether:
 - 3.1 a revision of the Annual Payment will occur;
 - 3.2 the Operator Partner Change may affect the quality of the Services or the likelihood of successful delivery of the Services (or any of them);
 - 3.3 the Operator Partner Change will interfere with the relationship of the Authority with third parties;

- 3.4 the financial strength of the Operator Partner is sufficient to perform the Services after implementation of the Operator Partner Change;
 - 3.5 the value and/or life expectancy of any of the Facilities and/or Assets is reduced; or
 - 3.6 the Operator Partner Change materially affects the risks or costs to which the Authority is exposed.
4. As soon as practicable after receiving the Operator Partner Notice of Change, the parties shall meet and discuss the matters referred to in it, including in the case of a Qualifying Change in Law those matters referred to in Clause 27.3. During discussions, subject to paragraph 9 of this Part 5 of this Schedule 22 (Change Protocol), the Authority may propose modifications to, or accept or reject, the Operator Partner Notice of Change.
 5. If the Authority accepts the Operator Partner Notice of Change (with or without modification) the parties shall consult and agree the remaining details as soon as practicable and upon agreement the Authority shall issue a notice confirming the Operator Partner Change which shall set out the agreed Operator Partner Change and:
 - 5.1 shall enter into any documents to amend this Agreement or any relevant Project Document which are necessary to give effect to the Operator Partner Change;
 - 5.2 subject to paragraph 7 of this Part 5 of this Schedule 22 (Change Protocol), the Annual Payment shall be revised in accordance with Clause 37 (Financial Adjustments); and
 - 5.3 the Operator Partner Change shall be implemented within the period specified by the Authority in its notice of acceptance.
 6. If the Authority rejects the Operator Partner Notice of Change, it shall not be obliged to give its reasons for such a rejection and the Operator Partner shall not be entitled to reimbursement by the Authority of any of its costs involved in the preparation of the Operator Partner Notice of Change.
 7. Unless the Authority's written acceptance expressly agrees to an increase in the Annual Payment or that the Operator Partner should be entitled to relief from any of its obligations, there shall be no increase in the Annual Payment or relief granted from any obligations as a result of an Operator Partner Change.
 8. If the Operator Partner Change causes, or will cause, the Operator Partner's costs or those of a sub-contractor to decrease, there shall be a decrease in the Annual Payment where it is a Deficit Annual Payment such that any cost savings (following deduction of costs reasonably incurred by the Operator Partner in implementing such Operator Partner Change) shall be shared on the basis of 50 per cent (50%) of the saving being retained by the Operator Partner and 50 per cent (50%) of the saving being paid to the Authority as a lump sum within ten (10) Business Days of agreement or determination or by way of revision of the Annual Payment pursuant to Clause 37 (Financial Adjustments). Where it is a Surplus Annual Payment, any cost savings shall be for the account of the Operator Partner.

9. The Authority shall not reject an Operator Partner Change that is required in order to conform to a Change in Law. The costs of introducing an Operator Partner Change resulting from a Qualifying Change in Law (including any resulting revision of the Annual Payment) shall be dealt with in accordance with Clause 27 (Change in Law) and, to the extent not dealt with therein, all costs shall be borne by the Operator Partner.

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PART 6 - PARTIAL TERMINATION

1. Provided that the Authority's right under this paragraph 1 of Part 6 of this Schedule 22 (Change Protocol) shall not be exercised more than three times during the Contract Period, the Authority may serve notice of its intention to remove a Facility from this Agreement by way of a High Value Change Notice (**Partial Termination Authority Notice of Change**) in accordance with this paragraph 1 of this Part 6 of this Schedule 22 (Change Protocol).
2. Subject to paragraphs 3 and 4 of this Part 6 of this Schedule 22 (Change Protocol), where the Authority has served a Partial Termination Authority Notice of Change, the provisions of paragraphs 2 to 14 of Part 4 of this Schedule 22 (Change Protocol) shall apply. The Operator Partner shall not be entitled to serve a notice under paragraph 3.1 of Part 4 of this Schedule 22 (Change Protocol) in respect of any Partial Termination Authority Notice of Change.
3. Proposals delivered by the Operator Partner under paragraph 3.1 of Part 4 of this Schedule 22 (Change Protocol) relating to a Partial Termination Authority Notice of Change shall be calculated on the basis that the partial termination shall be carried out on the basis that the Annual Payment shall be adjusted so as to leave the Operator Partner in a "no better and no worse" position in accordance with Clause 37.4.
4. In the event that a High Value Change Proposal pursuant to a Partial Termination Authority Notice of Change is confirmed by the Authority in accordance with paragraph 4.5.2 of Part 4 of this Schedule 22 (Change Protocol) the adjustment to the Annual Payment under paragraph 12 of Part 4 of this Schedule 22 (Change Protocol) shall be carried out so as to leave the Operator Partner in a "no better and no worse" position in accordance with Clause 37.4.

SCHEDULE 23 - LOBTA

SCHEDULE 24 - EXIT STRATEGY REQUIREMENTS

1. Without prejudice to any other provision of this Agreement, upon notification of termination of this Agreement, howsoever caused, or twelve months prior to the Expiry Date, the parties will meet to discuss a timetable for drawing up and will draw up a handover plan covering the performance of the obligations of both parties during the handover period. In any event, the Operator Partner will, at no cost to the Authority, provide such cooperation, information and assistance to the Authority and/or as may be reasonably required by the Authority to transfer and to enable a smooth migration of the Services being supplied by the Operator Partner including enabling the Authority and/or its New Operator Partner to perform services the same as or substantially the same as the Services in a similar manner as required under this Agreement.
2. The Operator Partner and the Authority shall use all reasonable endeavours to ensure all appropriate arrangements are put in place to give effect to the transition of the Services to the Authority or a New Operator Partner.
3. The Operator Partner agrees that if it is requested by the Authority it shall use all reasonable endeavours to assign or novate any then existing contracts which the Operator Partner has entered into with third parties in connection with the provision of the Services including the leasing of any equipment used in the delivery of the Services to the Authority or to any New Operator Partner.
4. The Operator Partner shall not [(and shall procure that the Leisure Operator shall not)] in the twelve month period prior to the Expiry Date (or such period remaining where a Termination Notice has been issued) (**Applicable Period**) in relation to the Services except with the prior written consent of the Authority, such consent not to be unreasonably withheld or delayed:
 - 4.1 incur any expenditure or enter into any commitments other than in the ordinary course of trading;
 - 4.2 dispose of or agree to dispose of or grant any option in respect of any part of the Assets other than stock in the ordinary course of trading;
 - 4.3 materially vary the terms of any contracts with any provider of goods and/or services already entered into;
 - 4.4 enter into any long-term (being 12 months or longer), unusual or abnormal contract or commitment;
 - 4.5 enter into any leasing, hire purchase, contract hire or other agreements or arrangements for payment on deferred terms;
 - 4.6 grant or issue or agree to grant or issue any mortgages, charges, debentures or other securities for money or redeem or agree to redeem any such securities or give or agree to give any guarantees or indemnities or, without prejudice to the foregoing generality, create or permit to subsist any other encumbrance over all or any of its present or future incomes or assets affecting this Agreement and/or the provision of the Services;

- 4.7 permit any of its insurances to lapse or do anything which would make any policy of insurance void or voidable;
- 4.8 in any way depart from the ordinary course of its day to day business either as regards the nature or scope or the manner of conducting the same;
- 4.9 pay any fees or commissions to any persons other than fees payable on arm's length terms to third parties who have rendered bona fide service or advice required in the ordinary course of business;
- 4.10 release, waive or modify any warranty or guarantee given by any supplier of goods or services;
- 4.11 cause or permit any item comprised in the records relating to the Services to be removed or destroyed or any programs or data held on the computer systems of the Operator Partner and relating to the Services to be removed or deleted except for the deletion of Personal Data where required to ensure compliance with the Data Protection Legislation or for the efficient running of the computer system in question after satisfactory back-up copies have been made and securely stored off-site;
- 4.12 terminate the employment of any of the Relevant Employees for any reason whatsoever without first obtaining the consent of the Authority to such termination save where, in the reasonable opinion of the Operator Partner, termination is justified for cause due to the actions of any such of the Relevant Employees;
- 4.13 alter or change in any way any of the terms and conditions of employment of any of the Relevant Employees whether with or without the consent of the Relevant Employees other than for wage or salary awards which are in line with those offered generally for similar individuals within the Operator Partner's workforce or as is required by law (the Operator Partner will provide upon request by the Authority evidence that any such wage or salary award is in line with those offered generally for similar individuals);
- 4.14 relocate or assign to new duties any of the Relevant Employees, or assign to the provision of the Services any employee not so assigned at the commencement of the Applicable Period, or increase to any significant degree the proportion of working time spent on the Services by any such employee, without the prior written consent of the Authority, such consent not to be unreasonably withheld or delayed; or
- 4.15 make any other alterations to the structure or composition of the Relevant Employees which are intended to or which may preclude the application of the Regulations upon the resumption of service by the Authority or another service provider.
5. In the event that the Authority fails to respond within five (5) Business Days of the Operator Partner's request for consent, the Authority shall be deemed to have given consent.