

DATED

2019

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**South Somerset District Council**

and

**XYZ**

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LEISURE OPERATING CONTRACT

in respect of XYZ

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Draft 15 March 2019

***Note – The Council reserve the right to use any updated version of the Sport England Contract that may become available during the procurement process.***

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This Agreement is made on

2019

## **BETWEEN**

1. **South Somerset District Council** of ... ('the **Authority**'); and
2. **XYZ** (company registration number XYZ) whose registered office is at ... ('the **Contractor**').

## **BACKGROUND**

- (A) Pursuant to Section 19 of the Local Government Miscellaneous Provisions Act 1976 and Section 1(1) of the Localism Act 2011 the Authority has the power to procure leisure facilities and associated services.
- (B) By an invitation to tender dated 17 December 2018, the Authority sought proposals for the management of leisure facilities and associated services.
- (C) Following the process set out in that documentation, the Authority formally resolved on [26 March 2019] to appoint the Contractor to carry out the services.

## **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 56.4 (Adjudication)

#### **Adjusted Amount**

has the meaning given to it in clause 55.5.4 (Unavailability of terms or conditions)

#### **Admission Body**

an admission body for the purposes of paragraph 1 of Part 3 of Schedule 2 of the LGPS Regulations

**Administering Authority**

Wiltshire Council of Bythesea Road, Trowbridge, Wiltshire BA14 8JN acting in its capacity as the administering authority of the Wiltshire 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 1.1 (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 or Annexed to this Agreement

**Agreement**

this agreement (including its Schedules)

**Ancillary Documents**

the documents listed in Part 2 of Schedule 12 (Project Documents and Ancillary Documents)

**Annual Payment**

the fee payable under this Agreement calculated in accordance with Schedule 6 (Payment and Performance Monitoring System)

**Annual Service Plan**

has the meaning given to it in clause 29.2.4 (Annual Service Report and Service Plan)

**Annual Service Report**

has the meaning given to it in clause 29.2.1 (Annual Service Report and Annual Service Plan)

**Annual Service Report Date**

the date on which the Annual Service Report is required to be submitted pursuant to the Services Specification

**Approved Purposes**

has the meaning given to it in clause 58.1 (Project Data)

**Asbestos**

has the meaning given to it in the Control of Asbestos Regulations 2006

**Asbestos Surveys**

the surveys

**Asbo**

an injunction or criminal behaviour order issued in accordance with the Anti-Social Behaviour Crime and Policing Act 2014

**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 the Facilities in sufficient detail to allow a competent person to understand all material elements of the construction of each part of the Facilities and to maintain, dismantle, reassemble, adjust and operate all plant, equipment, fixtures, structures and construction elements thereof

**Assets**

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

- (a) any land or buildings;
- (b) any equipment;
- (c) any books and records (including operating and maintenance manuals, health and safety manuals and other know how);
- (d) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred);
- (e) any Intellectual Property Rights subject to and in accordance with clause 58 (Intellectual Property); and
- (f) maintenance records, membership details/bulk transfer of direct debit details, but excluding any assets and rights in respect of which the Authority is full legal and beneficial owner;

**Assigned Employees**

has the meaning given to it in clause 21.8 (Retendering)

**Authority Change**

has the meaning given to it in the Change Protocol

**Authority Default**

one of the following events:

- (a) an expropriation, sequestration or requisition of a material part of the Assets and/or shares of the Contractor by the Authority or other Relevant Authority;
- (b) a failure by the Authority to make payment of an amount of money exceeding (in aggregate) three 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 Contractor, where the amount fell due and payable one (1) (or more) months prior to the date of service of the written demand;
- (c) a breach by the Authority of its obligations under this Agreement which substantially frustrates or renders it impossible for the Contractor to perform its obligations under this Agreement for a continuous period of two (2) months; or
- (d) a breach by the Authority of clause 59.1 (Restrictions on Transfer of this Agreement by the Authority)

**Authority Existing Employee**

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

**Authority Insurances**

the insurances described at Schedule 14 Part 1 (Insurances)

**Authority Lifecycle Items**

those Lifecycle Assets at the Facilities which are shown as the Authority's responsibility at **Appendix 4 (Lifecycle Replacement Responsibility Matrix)** of the Services Specification

**Authority Lifecycle Items Instruction**

has the meaning given to it in clause 15.7.4 (Authority Lifecycle Items)

**Authority Lifecycle Items Notice**

has the meaning given to it in clause 15.7.1 (Authority Lifecycle Items)

**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 Appendix 3 of the Services Specification which shall apply only until 1 January 2020 (and not to any new services or products introduced by the Contractor), and thereafter subject to annual inflation in line with RPI and consultation with the Authority

**Authority Related Party**

- (a) an officer, agent, contractor, employee or sub-contractor (of any tier) of the Authority acting in the course of his office or employment; and
- (b) any person visiting the Facilities at the invitation (express or implied) of the Authority,
- (c) any organisation using the Facilities pursuant to a contract with the Authority, but excluding in each case the Users, the Contractor and any Contractor Related Parties

**Authority's Policies**

any policies of the Authority referred to in Schedule 15 (Authority's Policies);

**Authority's Representative**

the representative appointed by the Authority pursuant to clause 10 (Representatives);

**Barred List**

the barred lists provided for under the Safeguarding Vulnerable Groups Act 2006, as amended by the Protection of Freedoms Act 2012

**Base Surplus Amount**

the Annual Payment as shown in the 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

**Building**

any building or other erection at any of the Site;

**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 14 (Insurances)

**Capital Costs**

means the costs incurred by the Contractor in respect of Capital Expenditure on behalf of the Authority at the Facilities

**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 Contractor 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 24 (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 Contractor and/or any Sub-Contractors (without double counting), including, as relevant, the following:

- (a) the reasonable costs of complying with the requirements of clauses 11 (Compensation Events), 47 (Change in Law), 49.4 (Step-In without Contractor Breach), 61 (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 Contractor 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 Contractor'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 Contractor (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 date of this Agreement of:

- (a) Legislation, other than any Legislation which on the date of this Agreement 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 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 Contractor and/or any Sub-Contractor save that any Loss of Revenue shall be calculated in accordance with Schedule 23 (Loss of Revenue)

#### **Change of Control**

means the sale of all or substantially all the assets of the Contractor, any merger, consolidation, or acquisition of the Contractor with or, by or into another corporation, entity or person; or any change in the ownership of more than fifty percent (50%) of the voting share capital of the Contractor

#### **Change Protocol**

the procedure set out in Schedule 24 (Change Protocol)

#### **Collateral Warranty**

a collateral warranty executed as a deed between the Authority and the Leisure Operator in the relevant form as set out in Schedule 7 (Collateral Warranties)

**Commencement Date**

1 July 2019

**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 21 (Confidential Information) in each case for the period specified in the respective columns 2 of Parts 1 and 2 of Schedule 21

**Compensation Event**

the occurrence of a breach by the Authority of the following provisions;

- (a) clause 8.8 (Compliance with Head Lease);
- (b) clause 13.8.7 (Fossils and antiquities);
- (c) clause 15.2.3 (Surveys);
- (d) clause 28 (Payment);
- (e) clause 35.2 (Minimisation of Disruption); and
- (f) clause 52.2 (Obligation on Parties)

**Confidential Information**

- (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 and sensitive personal data within the meaning of the DPL; and
- (b) Commercially Sensitive Information

**Contamination**

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 33.6 (Notice to Continue)

**Continuous Improvement Duty**

a 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 29.2.3 (Annual Service Report and Annual Service Plan)

**Contract Month**

any month in a Contract Year provided that:

- (a) the first Contract Month shall commence on the Commencement Date and end on the last day of the month in which the 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:

- (a) the first Contract Year shall be the period commencing on the 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 that day

**Contractor Admission Agreement**

an admission agreement entered into in accordance with paragraph 1 of Part 3 of Schedule 2 of the LGPS Regulations by the Administering Authority, the Authority and the Contractor or a Sub-Contractor (as appropriate)

**Contractor Change**

has the meaning given in the Change Protocol

**Contractor Damage**

any damage to the Facilities or Site caused by any omission, default or negligent act by the Contractor or a Contractor Related Party

**Contractor Default**

any one or more of the following:

- (a) a breach by the Contractor 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 Contractor be wound up or a resolution for a voluntary winding-up of the Contractor is passed;
- (d) any receiver or receiver manager in respect of the Contractor is appointed or possession is taken by or on behalf of any creditor of any property of the Contractor 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 Contractor;
- (f) an administration order is made or an administrator is appointed in respect of the Contractor;
- (g) failure to comply with clause 59.2 (Restriction on the Contractor) or clause 60 (Change in Ownership);
- (h) [in any three (3) month period the Contractor has incurred 50 or more Performance Adjustment Points];
- (i) [in each and every month of any six (6) month period the Contractor has incurred 10 or more Performance Adjustment Points;]
- (j) not used;
- (k) subject to clause 55 (Risks that become Uninsurable) a breach by the Contractor of its obligations to take out and maintain any of the Contractor Insurances; or
- (l) the Contractor 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 Contractor or any Contractor Related Party or the Authority under the Health and Safety Regime (**H&S Conviction**) provided that an H&S Conviction of a Contractor Related Party or the Authority shall not constitute a Contractor 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 Project of each relevant Contractor Related Party (which in the case of an individual director, officer or employee shall be deemed to include the Contractor Related Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by the Contractor in accordance with clause 59.2 (Restriction on the Contractor) provided always that in determining whether to exercise any right of termination or right to require the termination of the engagement of a Contractor Related Party under this limb (l), 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

**Contractor Insurances**

the insurances set out at Schedule 14 Part 2 (Insurances) and any insurances required by law

**Contractor IPR**

any Intellectual Property Rights created by or on behalf of the Contractor or the Leisure Operator 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 to the Facilities; and
- (iii) any booking system used at and in respect of the Facilities

**Contractor Lifecycle Items**

those Lifecycle Assets at the Facilities which are shown as the Contractor's responsibility at Appendix 4 (Lifecycle Replacement Responsibility Matrix) of the Services Specification and any other Lifecycle Assets at the Facilities which are not Authority Lifecycle Items

**Contractor Notice of Change**

has the meaning given in the Change Protocol

**Contractor Physical Damage Policies**

has the meaning given to it in clause 54.1 (Reinstatement and Change of Requirement after Insured Event)

**Contractor Related Party**

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

**Contractor Termination Notice**

has the meaning given to it in clause 30.2.1 (Termination on Authority Default)

**Contractor Warranted Data**

the information relating to the Contractor and its Affiliates contained in Part 2 of Schedule 11 (Warranted Data)

**Contractor's Holding Company**

XYZ or such other person as shall guarantee the obligations of the Contractor under this Agreement

**Contractor's Representative**

the person to be appointed by the Contractor pursuant to clause 10 (Representatives)

**Convictions**

other than in relation to any minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding overs (including any spent convictions as contemplated by section 1(1) of the Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exemptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order)

**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 56 (Dispute Resolution) of this Agreement

**CRC Scheme**

the emissions reduction scheme currently regulated by the CRC Energy Efficiency Scheme Order 2010 as amended from time to time, or such other emissions reduction scheme introduced from time to time having the same or similar effect

**Current Annual Payment**

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



**Data Protection Laws or DPL**

any and all laws, statutes, enactments, orders or regulations or other similar instruments of general application and any other rules, instruments or provisions in force from time to time relating to the processing of personal data and privacy applicable to the performance of this Agreement, including where applicable the Data Protection Act 2018, the Regulation of Investigatory Powers Act 2000, the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2426/2003) as amended or superseded and the GDPR (Regulation (EU) 2016/679)

**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, for the avoidance of doubt, 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;
- (f) defects brought about by adverse ground conditions or by reason of subsidence, water table change or any other change to ground conditions; or
- (g) wear and tear combined with historic failures to maintain or replace

**Deficit Annual Payment**

the Annual Payment where it is a negative number

**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 Contractor and/or its sub-contractors in connection with the provision of the Services or the performance of the Contractor's obligations under this Agreement

**Directive**

the Transfers of Undertakings Directive 2001/23/EC

**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**

The following information relating to the Project disclosed to the Contractor and its advisers before the date of this Agreement:

- (a) the ISOS document dated December 2018
- (b) written clarification responses issued by the Authority

**Disclosed Title Matters**

the matters set out in Schedule 13 (Title Matters)

**Disclosure and Barring Scheme**

the disclosure and barring scheme operated by the Disclosure and Barring Service

**Disclosure and Barring Service**

the non-departmental public body established pursuant to the Protection of Freedoms Act 2012

**Discriminatory Change in Law**

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

- (a) the Project and not to similar projects;
- (b) the Contractor 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 28.5.3 (Disputed Amounts)

**Dispute Resolution Procedure**

the procedure for the resolution of disputes set out in clause 56 (Dispute Resolution)

**Elections**

such local, regional, national, European elections or referenda that the local returning officer is statutorily required to administer

**Eligible Employees**

the Transferring Employees who are active members of or eligible to join the LGPS on a Relevant Transfer Date and for so long as they are employed in connection with the provision of the Services or part of such 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 Liability Information**

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

**Employee List**

means the list contained in Schedule 11, Part 1

**Energy**

electricity, gas or other fuel to which the CRC Scheme applies

**Environmental Information Regulations**

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

**Equalities Legislation**

the Equality Act 2010 and any regulations made thereunder

**Equality Requirements**

the requirements set out in Schedule 20 (Equality Requirements)

**Estimated Increased Maintenance Costs**

has the meaning given to it in clause 15.4.7 (Schedule of Programmed Maintenance)

**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**

31 March 2034

**Facility or Facilities**

the facilities listed in Schedule 4 (Facilities) being the buildings and other facilities to be provided, maintained and serviced in accordance with this Agreement located on the Site

**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 31.1 (Final Notice)

**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 50.10.8 (Freedom of Information)

**Force Majeure Event**

the occurrence after the date of this Agreement of:

- (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 Contractor or its sub-contractors or any breach by the Contractor of the terms of this Agreement; or
  - (c) pressure waves caused by devices travelling at supersonic speeds,
- which directly causes either party (**Affected Party**) to be unable to comply with all or a material part of its obligations under this Agreement;

**Forward Funded Amount**

means the amount profiled in Row [ ] of the LOBTA up to the Termination Date (as adjusted in accordance with this Agreement) less the actual Annual Payment paid up to the Termination Date;

**Fund**

the Wiltshire Pension Fund

**Future Contractor**

shall have the meaning given to it in clause 21.6.4 (Indemnities)

**Future Works**

any works which are not Works and which have been proposed and agreed pursuant to the Change Protocol

**General Change in Law**

a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law

**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 Contractor) or leisure operator or any sub- contractor under the same or similar circumstances

**Guidance**

any applicable guidance or directions with which the Contractor is bound to comply

**Handback Requirements**

the requirement that the Facilities have been maintained in accordance with the terms of this Agreement

**Head Lease**

the lease relating to the Site to be granted by the Authority to the Contractor in the Agreed Form as set out at Schedule 17 (Head Lease)

**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

**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

**Indemnified Party**

has the meaning given to it in clause 51.4 (Notification of Claims)

**Indemnifying Party**

has the meaning given to it in clause 51.4 (Notification of Claims)

**Index**

has the meaning given to it in the definition of CPI in this clause 1.1 (Definitions)

**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 Rate**

[ ] per cent ([ ]%) of the Eligible Employees Pensionable Pay

**Insurance Term**

any terms and/or conditions required to be in a policy of insurance by clause 52 (Contractor Insurances) and/or Schedule 14 (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 Contractor or any Contractor Related Party for the purposes of providing the Services and/or otherwise for the purposes of this Agreement

**Irrecoverable VAT**

has the meaning given to it in clause 47.7 (Payment of Irrecoverable VAT)

**Legislation**

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 7.1 (Documents and Co-operation), the agreement in the Agreed Form between the Contractor and the Leisure Operator relating to the Leisure Services

**Leisure Contract Dispute**

has the meaning given to it in clause 56.16.2 (Similar Disputes)

**Leisure Operator**

XYZ or such other leisure operator as the Contractor may, subject to clauses 7 (Documents and Co-operation) and 59 (Assignment and Sub-Contracting), appoint to provide the Leisure Services

**Leisure Operator's Base Trading Account or LOBTA**

the financial model included at Schedule 25 (LOBTA) and agreed between the parties prior to the date of this Agreement (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 or Local Government Pension Scheme**

the Local Government Pension Scheme as established by the LGPS Regulations

**LGPS Regulations**

the Local Government Pension Scheme Regulations 2013 (SI 2013/2356) as amended, re-enacted or re-instated from time to time

**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 Contractor Lifecycle Items

**Lifecycle Profile**

the amounts profiled to be spent by the Contractor on the replacement or renewal of Contractor Lifecycle Items at each Facility as shown in the LOBTA [in row 1] 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

**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 23 (Loss of Revenue)

**Loss of Revenue Event**

an event occurring pursuant to one or more of the following:

- (a) clause 15.4.7 (Schedule of Programmed Maintenance);
- (b) clause 17.2 (Emergencies);
- (c) clause 33.6.1 (Termination on Force Majeure); or
- (d) clause 49.4 (Step-In Without Contractor Breach)

**Maintenance Services**

those services set out in paragraph 1.16 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 Contractor'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 1.21 and Appendix 1 of the Services Specification

**Monthly Payment**

has the meaning given in Schedule 6 (Payment and Performance Monitoring System)

**Named Employee**

has the meaning given to it in clause 23.1 (Disclosure and Barring)



**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 Contractor'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 Contractor**

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

**New Employer**

has the meaning given to it in clause 22.13 (Transfer to another Employer)

**Notice of Adjudication**

has the meaning given to it in clause 56.3 (Adjudication)

**Operating Manual**

has the meaning given to it in clause 24.1 (Maintenance of Manual)

**Option Period**

has the meaning given to it in clause 55.3.2 (Consequences)

**Outstanding Work**

has the meaning given to it in clause 35.4 (Maintenance Work)

**Parent Company Guarantee**

the guarantee from the Contractor's Holding Company in the Agreed Form

**Partial Termination Authority Notice of Change**

has the meaning given to it in the Change Protocol

**Past Service Reserve**

the actuarial value, calculated on the basis that the provisions of Section 67 of the Equality Act 2010 applies directly to the Local Government Pension Scheme or Contractor Scheme (**Transferring Scheme**), of the aggregate of the benefits, whether immediate, prospective or contingent, payable under the Transferring Scheme to and in respect of each transferring member, his spouse and

dependants, by reference to pensionable service in the Transferring Scheme, but making proper allowance for projected increases in the rate of pensionable salary of each transferring member from the cessation of pensionable service to the expected date of withdrawal, retirement or death and increases (whether or not pursuant to a legal obligation) in pensions in payment using demographic and actuarial assumptions which are overall no less conservative than those adopted for the most recent funding valuation of the Transferring Scheme

**Payment and Performance Monitoring System**

the payment and performance monitoring system set out in Schedule 6 (Payment and Performance Monitoring System)

**Payment Period**

each calendar month or (in the case of the first and final Payment Period) part thereof during the Contract Period

**Pensionable Pay**

shall have the same meaning as "Pensionable Pay" as defined in the LGPS Regulations

**Performance Adjustment**

has the meaning given to it in the Payment and Performance Monitoring System

**Performance Adjustment Points**

has the meaning given to it in the Payment and Performance Monitoring System

**Persistent Breach**

a breach for which a Final Warning Notice has been issued which has continued for more than twenty eight (28) days or recurred in three (3) or more months within the six (6) month period after the date on which such Final Warning Notice is served on the Contractor

**Personal Data**

personal data as defined in the DPL which is supplied to the Contractor by the Authority or obtained by the Contractor in the course of performing the Services

**Prescribed Rate**

two per cent (2%) above the base rate from time to time of NatWest Bank plc

**Pricing Reference Date**

[1 July 2019];

**Profit Payment**

the loss of profit suffered by the Contractor as a result of termination of this Agreement pursuant to clause 30.1 (Voluntary termination by the Authority) or clause 30.2 (Termination on Authority Default) for the period from the date of termination or the period to the Expiry Date (whichever is shorter) (as shown at Schedule 25 (LOBTA))

**Programmed Maintenance**

the maintenance work and lifecycle replacement which the Contractor is to carry out in accordance with the Schedule of Programmed Maintenance

**Programmed Maintenance Information**

has the meaning given to it in clause 15.4.3 (Schedule of Programmed Maintenance)

**Prohibited Act**

- (a) offering, giving or agreeing to give to any servant of the Authority any gift or consideration of any kind as an inducement or reward:
  - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with the Authority; or
  - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Authority;
- (b) entering into this Agreement or any other contract with the Authority in connection with which commission has been paid or has been agreed to be paid by the Contractor or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Authority; or
- (c) committing any offence:
  - (i) under the Bribery Act 2010;
  - (ii) under Legislation creating offences in respect of fraudulent acts;
  - (iii) at common law in respect of fraudulent acts in relation to this Agreement or any other contract with the Authority; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Authority

**Project**

the provision and operation of leisure facilities at the Site by the Contractor as contemplated by this Agreement, including the provision of the Services

**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 Contractor and/or its sub- contractors in connection with the provision of the Services or the performance of the Contractor's obligations under this Agreement

**Project Documents**

the documents listed in Part 1 of Schedule 12 (Project Documents and Ancillary Documents)

**Project Liaison Group**

has the meaning given to it in paragraph 1.1 of Schedule 10 (Liaison Procedure)

**Protected Characteristics**

has the meaning given to it in Part 2, Chapter 1 of the Equality Act 2010

**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 sustainably for the price tendered;
- (c) the 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 Contractor

**Qualifying Change in Law**

- (a) a Discriminatory Change in Law;
- (b) a Specific Change in Law; or
- (c) a General Change in Law, which involves Capital Expenditure, which was not foreseeable at the date of this Agreement (and an item shall be regarded as foreseeable only if it has been published in a Government White Paper or draft Bill (in the case of legislation) or if it has been published in writing (in the case of guidance or a judgment);

**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 28.11.2 (VAT on Payments)

**Redundancy Costs**

the statutory notice and redundancy payments, any accrued but untaken holiday pay and any contractual notice and redundancy payments that were inherited by the Contractor or Sub-Contractor as result of each Relevant Transfer pursuant to clause 21.1.1 (Relevant Transfers)

**Referral Notice**

has the meaning given to it in clause 56.5 (Referral of the Dispute)

**Referring Party**

has the meaning given to it in clause 56.3 (Adjudications)

**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

**Relevant Event**

an Authority Change, Qualifying Change in Law, Compensation Event, step-in without Contractor breach pursuant to clause 49.4.2 (Step-in Without Contractor Breach) or other matter as a result of which there may be an adjustment to the Annual Payment in accordance with clause 61 (Financial Adjustments)

**Relevant Payment**

has the meaning given to it in clause 55.3.2 (Consequences)

**Relevant Transfer**

a relevant transfer for the purposes of TUPE

**Relevant Transfer Date**

the date on which an Eligible Employee transfers to the Contractor and/or a Sub-Contractor by virtue of a Relevant Transfer

**Relief Event**

any of the following:

- (a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, outbreak of infectious disease, terrorist incident, 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; or
- (f) any:
  - (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 Contractor or its Sub-Contractors; or
  - (g) the discovery of fossils, antiquities, or human remains requiring action in accordance with clause 13.8 (Fossils and Antiquities);
  - (h) Contamination and Site Conditions, unless (and only to the extent that) the Contractor is specifically responsible for the same under clause 13.2 (Site Matters);
  - (i) presence of Defects or Asbestos;
  - (j) extreme adverse weather conditions, including snow, ice, storms, flooding or drought;
- unless any of the events listed in paragraphs (a) to (i) inclusive arises (directly or indirectly) as a result of any wilful default or wilful act of the Contractor or any of its Sub-Contractors;

**Remuneration Costs**

has the meaning given to it in clause 21.4.4.2 (Employment Costs)

**Reorganisation Costs**

has the meaning given to it in clause 21.4.4.3 (Employment Costs)

**Representative**

the Authority's Representative or the Contractor'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 49.3 (Action by Authority)

**Required Standard**

has the meaning given to it in clause 35.3.1 (Results of Survey)

**Responding Party**

has the meaning given to it in clause 56.5 (Referral of the Dispute)

**Response**

has the meaning given to it in clause 56.6 (Response to the Referral)

**Retendered Annual Payment**

has the meaning given to it in clause 42.7 (Retendering Process)

**Retendered Contract**

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 Contractor than this Agreement at the Termination Date, but with the following amendments:

- (a) any accrued Performance Adjustment Points and/or Performance Adjustments and/or warning notices issued pursuant to clause 31 (Termination for Persistent Breach by the Contractor) 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 agreement shall be equal to the term from the Termination Date to the Expiry Date;
- (c) any other amendments which do not adversely affect the Contractor;

**Retendering Costs**

the reasonable and proper costs of the Authority incurred in carrying out the Retendering Process

**Retendering Information**

has the meaning given to it in clause 21.8.1.1 (Retendering)

**Retendering Process**

shall have the meaning given in clause 42 (Retendering Process)

**Retention Fund Account**

has the meaning given to it in clause 35.5 (Retention Fund)

**Return Date**

has the meaning given to it in clause 21.9.2 (Termination of Agreement)

**Returning Employees**

has the meaning given to it in clause 21.9.2 (Termination of Agreement)

**Revenue**

the revenue or income received by the Contractor, 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 8 (Review Procedure)

**RPI**

the Retail Prices (All Items) Index as published by the Office for National Statistics

**Schedule of Programmed Maintenance**

the Contractor's annual programme for the maintenance of each Facility to satisfy

the Services Specification which, for the avoidance of doubt, includes the Lifecycle Schedule

**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 Transfer Date**

the transfer on a date agreed by the parties to the Contractor 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 Part 2 of Schedule 1 (Services Specification)

**Shareholder**

any person from time to time holding share capital in the Contractor

**Site Conditions**

the physical condition of the Site

**Site Plan**

the plan of the Site set out in Schedule 5 (Site Plan)

**Site**

the area edged red on the Site Plan together with the Buildings and the service ducts and media thereon 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**

the English Sports Council (or its successors) of First Floor, 21 Bloomsbury Street, London WC1B 3HF



**Sub-Contractor**

the Leisure Operator or any other person engaged by the Contractor 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 Contractor

**Sub-Contractor Breakage Costs**

Losses that have been or will be reasonably and properly incurred by the Contractor 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 Project and in respect of the provision of Services, including:
  - (i) any materials or goods ordered or sub-contracts placed that cannot be cancelled without such Losses being incurred;
  - (ii) any 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 Project; 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; and
- (c) the Contractor and the relevant Sub-Contractor has each used its reasonable endeavours to mitigate the Losses;

**Sub-Contracts**

the contracts entered into between the Contractor and the Sub-Contractors

**Submitted Item**

has the meaning given to it in paragraph 1.2 of Schedule 8 (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 28.11.2 (VAT on Payments)

**Surplus Annual Payment**

the Annual Payment where it is a positive number (i.e. a payment made to the Authority)

**Tax**

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

**Termination Date**

the date of early termination of this Agreement in accordance with its terms

**Termination Notice**

a notice of termination issued in accordance with this Agreement

**Termination Sum**

any compensation payable by the Authority to the Contractor or the Contractor to the Authority on an early termination of this Agreement under clauses 37 (Compensation on Termination for Authority Default/Voluntary Termination), 38 (Compensation on Termination for Contractor Default and Corrupt Gifts and Fraud) and 40 (Compensation on Termination for Force Majeure)

**Third Party Claim**

has the meaning given to it in clause 51.4 (Notification of claims)

**Third Party Contractor**

any sub-contractor (other than the Contractor) engaged by or on behalf of the Authority to perform any service equivalent to a Service

**Transfer Amount**

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

**Transfer Value**

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

**Transferring Employee**

an employee of the Authority (excluding, without limitation, any person engaged by the Authority as an independent contractor) whose contract of employment becomes, by virtue of the application of TUPE in relation to what is done for the purposes of carrying out this Agreement between the Authority and the Contractor, a contract of employment with someone other than the Authority, including those shown on the Employee List

**TUPE**

the Transfer of Undertakings (Protection of Employment) Regulations 2006 (246/2006) and/or any other Regulations enacted for the purpose of implementing or transposing the principles of the Directive into English law

**Underlease**

means an underlease in the agreed form between (1) the Contractor and (2) the Leisure Operator;

**Uninsurable**

in relation to a risk, either that:

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

**Uninsured Losses**

losses arising from any risks against which the Contractor or any Contractor Related Party does not maintain insurance (where not required to maintain insurance for such risk under this Agreement or by law), provided that:

- (a) the amount of any losses that would otherwise be recoverable under any Contractor Insurance but for the applicable uninsured deductible in respect of such insurance; and
- (b) any exclusion of loss of insurance proceeds caused by or contributed to by any act or omission of the Contractor or any Contractor Related Party,

shall not be treated as Uninsured Loss

**Unsuitable Third Party**

any person who has a material interest in the production, distribution or sale of tobacco products, alcoholic drinks and/or pornography

**Users**

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 (which includes, for the avoidance of doubt, Energy)

**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

**Works**

together the works packages described in Schedule 3 and any Future Works

**Works Payments**

the payments described in Clause 9.2

**Works Programme**

means the programme set out in Schedule 3

**Zone**

has the meaning set out in Schedule 6 (Payment and Performance Monitoring System).

**1.2****Interpretation**

In this Agreement except where the context otherwise requires:

- 1.2.1 the 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 re-enacted;
- 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; and
- 1.2.8 words preceding "include", "includes", "including" and "included" shall be construed without limitation by the words which follow those words.

### **1.3 Schedules**

The Schedules to this Agreement form part of this Agreement.

### **1.4 Indexation**

In this Agreement, references to amounts expressed to be **Indexed** are references to such amounts at the Pricing Reference Date multiplied by:

$$\frac{I_1}{I_2}$$

where  $I_1$  is the value of CPI (or RPI where referenced) most recently published prior to the relevant calculation date, and  $I_2$  is the value of CPI (or RPI where referenced) on the Pricing Reference Date.

### **1.5 Precedence of Documentation**

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 6 (Payment and Performance Monitoring System), Schedule 8 (Review Procedure), Schedule 16 (NNDR), Schedule 18 (Benchmarking), Schedule 19 (Surplus Share) and Schedule 24 (Change Protocol);
- 1.5.2 Schedule 1 (Services Specification);
- 1.5.3 the Schedules (excluding Schedule 1 (Services Specification) and Schedule 2 (Service Delivery Proposals); and
- 1.5.4 Schedule 2 (Service Delivery Proposals).

### **1.6 Responsibility for Related Parties**

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

### **1.7 Approval**

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 Contractor 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.

## **1.8 Succession**

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 Exclusion of Legislation**

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.

## **3 Commencement and Duration**

**3.1** Subject to clause 3.2, this Agreement and the rights and obligations of the parties shall take effect on the Commencement Date and (subject to the provisions for early termination set out in this Agreement) shall continue until the Expiry Date.

**3.2** The Contract Period may be extended by an aggregate period of no more than two years from the Expiry Date by service of notice(s) by the Authority on the Contractor.

## **4 Collateral Warranties, Surveys and Guarantees**

**4.1** The Contractor shall:

4.1.1 deliver to the Authority the Collateral Warranty from the Leisure Operator to the Authority on or before the date of this Agreement;

4.1.2 not engage any new Leisure Operator in connection with the Project unless such person has delivered to the Authority a duly executed agreement substantially in the Agreed Form of the relevant Collateral Warranty duly executed as a deed and in each case such Collateral Warranties must be delivered to the Authority before such entity enters onto any Site; and

4.1.3 deliver to the Authority the Parent Company Guarantee on or before the date of this Agreement.

## **5 General Warranties**

### **5.1 Contractor Warranties**

The Contractor warrants and represents to the Authority that on the date hereof:

- 5.1.1 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;
- 5.1.2 it has the corporate power to enter into and to exercise its rights and perform its obligations under the Project Documents;
- 5.1.3 all action necessary on the part of the Contractor to authorise the execution of and the performance of its obligations under the Project Documents has been taken or, in the case of any Project Document executed after the date of this Agreement, will be taken before such execution;
- 5.1.4 the obligations expressed to be assumed by the Contractor under the Project Documents are, or in the case of any Project Document executed after the date of this Agreement will be, legal, valid, binding and enforceable to the extent permitted by law and each Project Document is or will be in the proper form for enforcement in England;
- 5.1.5 the execution, delivery and performance by it of the Project Documents does not contravene any provision of:
  - 5.1.5.1 any existing Legislation either in force, or enacted but not yet in force binding on the Contractor;
  - 5.1.5.2 the Memorandum and Articles of Association of the Contractor;
  - 5.1.5.3 any order or decree of any court or arbitrator which is binding on the Contractor; or
  - 5.1.5.4 any obligation which is binding upon the Contractor or upon any of its assets or revenues;
- 5.1.6 the Contractor Warranted Data is true and accurate in all respects;
- 5.1.7 no claim is presently being assessed and no litigation, arbitration or administrative proceedings are presently in progress or, to the best of the knowledge of the Contractor, pending or threatened against it or any of its assets which will or might have a material adverse effect on the ability of the Contractor to perform its obligations under any Project Document;

- 5.1.8 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 Contractor to perform its obligations under any Project Document;
- 5.1.9 no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Contractor, 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;
- 5.1.10 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
- 5.1.11 the copies of the Project Documents which the Contractor 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.

## **5.2 Contractor Undertakings**

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

- 5.2.1 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 the Project, the Contractor's ability to perform its obligations under this Agreement;
- 5.2.2 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 Contractor to perform its obligations under this Agreement;



- 5.2.3 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;
- 5.2.4 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;

### **5.3 Status of Warranties**

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

## **6 Authority Warranties**

### **6.1 Warranty by Authority**

Without prejudice to clause 6.2 (Fraudulent Statements), clause 6.3 (Authority Title Warranty), the Authority warrants the accuracy of the Disclosed Data.

### **6.2 Fraudulent Statements**

Nothing in this clause 6 (Authority Warranties) shall exclude any liability which the Authority or any of its agents or employees would otherwise have to the Contractor in respect of any statements made fraudulently prior to the date of this Agreement.

### **6.3 Authority Title Warranty**

The Authority warrants to the Contractor on the terms set out in Part 1 of Schedule 13 (Title Matters).

### **6.4 Contractor's Due Diligence**

The Contractor shall, subject to the terms of this Agreement, be deemed to have:

- 6.4.1 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
- 6.4.2 gathered all information necessary to perform its obligations under this Agreement and other obligations assumed including:
  - 6.4.2.1 information as to the nature, location and condition of the Facilities;
  - 6.4.2.2 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;
  - 6.4.2.3 any other risk or contingency that affects the performance of the Services and/or affects the performance of the Contractor's obligations under this Agreement; and
  - 6.4.2.4 undertaken all surveys of the Sites which the Contractor considers necessary.

## **6.5 No Relief**

Subject to clause 6.1 (Warranty by Authority), clause 6.2 (Fraudulent Statements), clause 6.3 (Authority Title Warranty), the Contractor 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.

## **6.6 Contractor acknowledgement**

The Contractor hereby acknowledges and agrees that it has been provided with copies of the Disclosed Title Matters listed in Schedule 13 (Title Matters) and that all such matters are disclosed against the warranties set out in Part 1 of Schedule 13 (Title Matters).

# **7 Documents and Co-Operation**

## **7.1 Ancillary Documents**

The Contractor shall perform its obligations under, and observe all of the provisions of, the Ancillary Documents and shall not:

- 7.1.1 terminate or agree to the termination of all or part of any Ancillary Document;
- 7.1.2 make or agree to any material variation of any Ancillary Document;
- 7.1.3 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
- 7.1.4 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 7.1.1 (Ancillary Documents), the Contractor has complied with clauses 59 (Assignment and Sub-Contracting) and 60 (Change in Ownership).

## **7.2 Delivery of Initial and Changed Ancillary Documents**

- 7.2.1 The Contractor has provided to the Authority copies of the Ancillary Documents.
- 7.2.2 Without prejudice to the provisions of clause 7.1 (Ancillary Documents), if at any time an amendment is made to any Ancillary

Document, or the Contractor enters into a new Ancillary Document (or any agreement which affects the interpretation or application of any Ancillary Document), the Contractor 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 Contractor.

### **7.3 Co-operation**

Each party agrees to co-operate, at its own expense (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.

## PART 2 – LAND ISSUES

### 8 Nature of Land Interests

#### 8.1 Grant of the Head Lease

On or before the Commencement Date the Authority shall grant to the Contractor, and the Contractor shall accept, the Head Lease for the Site.

#### 8.2 Exclusion of Security of Tenure for the Head Lease

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

- 8.2.1 The Authority served on the Contractor a notice dated [ ] 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**).
- 8.2.2 The Contractor, or a person duly authorised by the Contractor, in relation to the Head Lease Notice made a statutory declaration (**Head Lease Declaration**) dated [ ] in a form complying with the requirements of Schedule 2 of the Order.
- 8.2.3 The Contractor further confirms that, where the Head Lease Declaration was made by a person other than the Contractor, the declarant was duly authorised by the Contractor to make the Head Lease Declaration on the Contractor's behalf.
- 8.2.4 The Authority and the Contractor 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.

#### 8.3 Grant of the Head Lease

The grant of the Head Lease shall take place at the offices of the Authority. The term of the Head Lease relating to the Facilities shall commence on the Commencement Date.

#### 8.4 Early Termination

If this Agreement is terminated for any reason prior to the Expiry Date, the Head Lease 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 Lease shall automatically cease to apply). Where the Head Lease has been entered into, the Contractor shall forthwith deliver to the Authority the Head Lease 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 Lease. The Contractor 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 Lease.

**8.5 No Compensation**

Except as provided in this Agreement, the Contractor shall not be entitled to any compensation in respect of any variation of the terms of the Head Lease or the unexpired part of its interest as tenant under the Head Lease on assignment or surrender or automatic determination in accordance with this clause.

**8.6 Compliance with Disclosed Title Matters**

The Contractor shall without prejudice to clause 6.4 (Authority Title Warranty) procure that:

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

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

**8.7 Compliance with Head Lease**

The Authority and the Contractor shall comply with their respective obligations in the Head Lease.

**8.8 Underleases**

The Authority accepts and agrees that the Contractor shall be entitled to enter into the Underlease of the Site.

**8.9 Vacation of Office Space**

The Authority shall vacate the office areas occupied in the Facilities promptly to avoid delay to the progress of the Works.

## **PART 3 – THE SERVICES**

### **9 Works**

#### **9.1 The Contractor shall:**

- 9.1.1 deliver the Works in accordance with the Works Programme;
- 9.1.2 enter into a Building Contract for the procurement of the Works in a form reasonably agreed by the Authority; and
- 9.1.3 where requested in advance, procure that collateral warranties in relation to the Works are provided to the Authority in a form reasonable acceptable to it.

**9.2** The Contractor shall carry out the Works on behalf of the Authority and shall charge a management fee of [2% of the value of each works package]. Prior to the commencement of each works package the Authority and the Contractor shall agree the terms of payment for the Works and the need for and scope of any collateral warranties.

**9.3** As between the Contractor and the Authority, the Contractor shall be entirely responsible for the safety of any design which forms part of the Works and/or Services and for the adequacy, stability and safety of all site operations and methods of construction.

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

**9.5** The Contractor 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 Works and/or Services (other than those that remain with the Authority pursuant to Regulation 4(8) of the CDM Regulations). The Contractor 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 Works and/or Services during the Contract Period.

**9.6** Upon the Contractor's reasonable request, the Authority shall provide to the Contractor 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 Contractor to fulfil its duties as client for the purposes of the CDM Regulations.

**9.7** Notwithstanding the election referred to above, 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).

## 10 Representatives

### 10.1 Representatives of the Authority

The Authority's Representative shall be the [Town Clerk] or such other person appointed pursuant to this clause. The Authority's Representative shall exercise the functions and powers of the Authority in relation to the Project 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 Contractor from time to time.

10.2 The Authority's Representative shall be entitled at any time, by notice to the Contractor, 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.

10.3 The Authority may by notice to the Contractor change the Authority's Representative. The Authority shall (as far as practicable) consult with the Contractor prior to the appointment of any replacement for the Authority's Representative, taking account of the need for liaison and continuity in respect of the Project. 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 Contractor in the execution of its obligations under this Agreement).

10.4 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.

10.5 Save where notified in writing by the Authority before such act or instruction, the Contractor and Contractor'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 Contractor and the Contractor's Representative shall not be required to determine whether authority has in fact been given.

### 10.6 Representative of the Contractor

The Contractor's Representative shall be the Contractor's Regional Director (South West), or such other person appointed pursuant to this clause. The Contractor's Representative shall have full authority to act on behalf of the Contractor for all purposes of this Agreement. Except as previously notified in writing before such act by the Contractor to the Authority, the Authority and the Authority's Representative shall be entitled to treat any act of the Contractor's Representative in connection with this Agreement as being expressly authorised by the Contractor and the Authority and the Authority's Representative

shall not be required to determine whether any express authority has in fact been given.

- 10.7** The Contractor may by notice to the Authority, change the Contractor's Representative. Where the Contractor 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 the Project. Such appointment shall be subject to the approval of the Authority (not to be unreasonably withheld or delayed).

**10.8 Appointment of Representatives**

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

**11 Compensation Events**

**11.1 Effect of a Compensation Event**

If, as a direct result of the occurrence of a Compensation Event, the Contractor will:

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

11.1.2 incur costs or lose Revenue,

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

**11.2 Procedure for Relief and Compensation**

Subject to clause 11.4 (Late Provision of Notice or Information), to obtain relief and/or claim compensation the Contractor must:

11.2.1 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 Contractor 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;

11.2.2 within ten (10) Business Days of receipt by the Authority of the notice referred to in clause 11.2.1 (Procedure for Relief and Compensation), 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

11.2.3 demonstrate to the reasonable satisfaction of the Authority that:

11.2.3.1 the Compensation Event was the direct cause of:

11.2.3.1.1 the estimated Change in Costs; and/or



11.2.3.1.2 the estimated Change in Revenue;  
and/or

11.2.3.1.3 breach of the Contractor's obligations  
under this Agreement; and

11.2.3.2 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 Contractor acting in  
accordance with Good Industry Practice.

### **11.3 Giving of Relief and Compensation**

In the event that the Contractor has complied with its obligations under clause 11.2 (Procedure for Relief and Compensation), then

11.3.1 in the case of an additional cost being incurred or Change in Revenue, the Authority shall compensate the Contractor 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 11.6 (Method of Calculating Compensation) by an adjustment to the Annual Payment in accordance with clause 61 (Financial Adjustments); and/or

11.3.2 the Authority shall give the Contractor such relief from its obligations under this Agreement as is reasonable for such a Compensation Event.

### **11.4 Late Provision of Notice or Information**

In the event that information is provided after the dates referred to in clause 11.2 (Procedure for Relief and Compensation), then the Contractor 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.

### **11.5 Failure to Agree**

If the parties cannot agree the extent of any compensation, relief from the Contractor's obligations under this Agreement, or the Authority disagrees that a Compensation Event has occurred (or as to its consequences), or that the Contractor is entitled to relief under this clause 11 (Compensation Events), the parties shall resolve the matter in accordance with the Dispute Resolution Procedure.

### **11.6 Method of Calculating Compensation**

Any payment of compensation referred to in clause 11.3.1 (Giving of Relief and Compensation) shall be calculated in accordance with clause 61 (Financial Adjustments), other than any Loss of Revenue which, for the avoidance of doubt,

shall be calculated in accordance with Schedule 23 (Loss of Revenue) and compensated in accordance with clause 61 (Financial Adjustments).

**12 Not used**

**13 The Site**

**13.1 Access**

Subject to the other terms of this Agreement, if at any time the Contractor requires access to the Site or any interest in any land which does not form part of the Site or any additional rights beyond those which the Contractor has in relation to any part of the Site, the responsibility and cost of securing or acquiring such access or interest shall be the responsibility of the Contractor.

**13.2 Site Matters**

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

13.2.1.1 inspected and examined the Site and their surroundings and (where applicable) any existing structures on the Site;

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

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

13.2.1.4 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 Site with particular regard to the owners of any land adjacent to the Site; and

13.2.1.5 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.

13.2.2 Subject to the other terms of this Agreement, the Contractor accepts full responsibility for all matters referred to in this clause 13.2 (Site Matters).

13.2.3 Subject to clause 13.2.5 (Site Matters), the Authority shall be responsible for unforeseen ground conditions, Defects, Asbestos and/or Contamination existing in any parts of the Site.

13.2.4 Where pursuant to clauses 13.2.3 (Site Matters) and 13.2.6 (Site Matters) the Authority is responsible for any of the matters referred to then the following provisions shall apply:

13.2.4.1 such matter shall be deemed to be a Relief Event and no Performance Adjustment Points will accrue and no Performance Adjustments may be made in respect of the relevant Zone pursuant to Schedule 6 (Payment and Performance Monitoring System) 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

13.2.4.2 where any such matter is Contamination the Authority shall further hold the Contractor harmless from cleaning up and otherwise dealing with such Contamination and shall indemnify the Contractor in respect of all Direct Losses incurred by the Contractor resulting from such Contamination,

and the Contractor shall in carrying out any works referred to in clause 13.2.4.2 (Site Matters) 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 Contractor).

13.2.5 Subject to clauses 13.2.6 (Site Matters) and 13.2.7, to the extent that any part(s) of the Site suffer from or are affected by Contamination arising from a source off Site (whether or not on adjacent land) the Contractor 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:

13.2.5.1 such matter shall be deemed to be a Relief Event and no Performance Adjustment Points will accrue and no Performance Adjustments may be made in respect of the relevant Zone pursuant to Schedule 6 (Payment and Performance Monitoring System) 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 Contractor's responsibility and shall not constitute an Authority Change;

- 13.2.5.2 the Contractor shall:
- 13.2.5.2.1 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
  - 13.2.5.2.2 other than where clause 13.2.5.3 (Site Matters) applies and subject to clause 13.2.7 hold the Authority harmless from, and indemnify the Authority in respect of, all Direct Losses incurred by the Authority resulting from such Contamination; and
- 13.2.5.3 the Authority shall, but only to the extent that the Contractor 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 Contractor in cleaning up or otherwise dealing with such Contamination, at the Authority's option either:
- 13.2.5.3.1 take such action against third parties in its own name as the Contractor may (acting reasonably) direct; or
  - 13.2.5.3.2 permit the Contractor to take such action in the name of the Authority at the Contractor's own expense in which case the provisions of clauses 51.5 (Conduct of Claims) and 51.6 (Costs of Claims) shall apply as if the Contractor were the Indemnifying Party and the Authority were the Indemnified Party, except that the Contractor shall not pay or settle such claims without the prior consent of the Authority,
- subject to the Contractor 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 13.2.5.3.1 or 13.2.5.3.2 (Site Matters) (or where it is otherwise obliged to take action against third parties in respect of such losses), the Authority shall be liable to the

Contractor for all losses suffered or incurred by the Contractor as a result of its obligations under this clause 13.2.5 (Site Matters).

- 13.2.6 To the extent that any part(s) of the Site suffer from or are affected by Contamination arising from a source off Site where such off Site source is land for which the Authority is responsible, the Authority shall be responsible for such Contamination and the provisions of clause 13.2.4 (Site Matters) shall apply.
- 13.2.7 The Contractor's responsibility and liability under clause 13.2.5 (Site Matters) shall be limited to the amount recovered by the Contractor from the third party responsible for the Contamination arising from the source off the Site subject to the Contractor having taken all reasonable steps (including as applicable the operation of clause 13.2.5.3) to recover the losses suffered or incurred.

### **13.3 Consents**

The Contractor shall:

- 13.3.1 obtain and maintain all Necessary Consents which may be required for the performance of the Services;
- 13.3.2 be responsible for obtaining each Necessary Consent (which it is required to obtain pursuant to clause 13.3.1 (Consents)) within the period of its validity in accordance with its terms;
- 13.3.3 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;
- 13.3.4 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 Contractor to carry out the Services; and
- 13.3.5 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 date of this Agreement) or of any condition

attached to it but, subject to the compliance by the Contractor with its obligations under this clause 13.3 (Consents), 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.

#### **13.4 No Warranty**

Except as otherwise expressly provided in this Agreement, the Contractor shall take the Site in the state and condition in all respects as at the date of this Agreement 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 Site or any part thereof for the Services or for any other purpose.

#### **13.5 Third Party Rights**

The Contractor 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 Contractor 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.

#### **13.6 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 Contractor shall:

- 13.6.1 provide information relating to the operation of the fire alarm system and emergency lighting and any sprinkler system (provided that the Authority shall have supplied such information to the Contractor on the Commencement Date);
- 13.6.2 maintain maintenance and test records for the fire alarm systems and emergency lighting and any sprinkler system in relation to the Contract Period;
- 13.6.3 prepare risk assessments for emergency events including fires;
- 13.6.4 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;
- 13.6.5 prepare notices and signs reinforcing the evacuation procedures; and
- 13.6.6 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.

## **13.7 Fossils and Antiquities**

- 13.7.1 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 Site are or shall become, upon discovery, the absolute property of the Authority.
- 13.7.2 Upon the discovery of such item during the course of the Services, the Contractor shall:
- 13.7.2.1 immediately inform the Authority's Representative of such discovery;
  - 13.7.2.2 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
  - 13.7.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.
- 13.7.3 The Authority shall procure that the Authority's Representative promptly, and in any event within ten Business Days, issues an instruction to the Contractor 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 Contractor may continue to carry out the Services.
- 13.7.4 The Contractor shall promptly and diligently comply with any instruction issued by the Authority's Representative referred to in clause 13.8.3 (Fossils and Antiquities) at its own cost (except and to the extent that such instruction constitutes an Authority Change pursuant to clause 13.8.6 (Fossils and Antiquities) in which case the provisions of the Change Protocol shall apply).
- 13.7.5 If directed by the Authority's Representative, the Contractor shall allow representatives of the Authority to enter the Site 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 Facilities from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Representative from time to time.
- 13.7.6 If any instruction referred to in clause 13.8.3 (Fossils and Antiquities) includes a requirement for the Contractor 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.

- 13.7.7 The Authority shall act promptly and diligently in dealing with its obligations in this clause 13.8 (Fossils and Antiquities) in relation to any find so as to mitigate any effect on the Contractor and the Services.

## **14 Principal Obligations**

### **14.1 Standard of Performance**

Subject to clause 14.2 (Discrepancies):

- 14.1.1 the Contractor will at all times ensure that the Services at the Facilities comply with and meet all the requirements of this Agreement, the Services Specification, the Service Delivery Proposals, Good Industry Practice, Guidance, Quest, and all applicable Authority's Policies and Legislation with effect from the Commencement Date;
- 14.1.2 the Contractor shall ensure, and shall procure that any Contractor Related Party shall ensure, that the Services are carried out in compliance with the Equality Requirements;
- 14.1.3 the Contractor will at all times ensure that the Services are performed by appropriately qualified and trained personnel; and
- 14.1.4 the Contractor shall ensure that new materials or recycled materials that are in accordance with British Standards and/or Good Industry Practice only will be used in carrying out the Services (unless the Authority agrees otherwise in writing or the contrary is set out in the Services Specification) and all goods used or included in the Services will be of satisfactory quality, and there will be used or included in the Services none of those products and materials listed in Schedule 9 (Prohibited Materials) nor any products or materials not in conformity with relevant British or European Union Standards or codes of practice which at the time of use are widely known to facilities management contractors or members of the relevant design profession within the European Union to be deleterious to health or safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used.

### **14.2 Discrepancies**

In the event of a conflict or potential conflict between the standards listed in clause 14.1 (Standard of Performance), the Contractor shall notify the Authority in writing of the same and the Contractor shall submit proposals to the Authority for review through the Schedule 8 (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.

## **15 Condition of the Facilities**

### **15.1 Maintenance**

The Contractor 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:

- 15.1.1 the Facilities meet the requirements of this Agreement and the Services Specification;
- 15.1.2 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;
- 15.1.3 the Contractor can deliver the Services in accordance with this Agreement and the Services Specification; and
- 15.1.4 the Facilities are handed back to the Authority on the Expiry Date in a condition complying with the Handback Requirements.

### **15.2 Surveys**

- 15.2.1 If the Authority reasonably believes that the Contractor is in breach of its obligations under clause 15.1 (Maintenance), 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 Contractor in accordance with its obligations under clause 15.1 (Maintenance). This right may not be exercised more than once every two (2) years.
- 15.2.2 The Authority shall notify the Contractor 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 Contractor 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 Contractor (acting reasonably) is able to demonstrate that carrying out the survey on the notified date would materially prejudice the Contractor's ability to provide the Services.
- 15.2.3 When carrying out any survey, the Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the Services by the Contractor. The cost of the survey, except where clause 15.2.4 (Surveys) applies, shall be borne by the Authority. The Contractor 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.

- 15.2.4 If a survey shows that the Contractor has not complied or is not complying with its obligations under clause 15.1 (Maintenance), the Authority shall:
- 15.2.4.1 notify the Contractor of the standard that the condition of the Facilities should be in to comply with its obligations under clause 15.1 (Maintenance) and this Agreement generally;
  - 15.2.4.2 specify a reasonable period within which the Contractor must carry out such rectification and/or maintenance work; and
  - 15.2.4.3 if the survey shows a material non-compliance by the Contractor with its obligations under clause 15.1 (Maintenance), be entitled to be reimbursed by the Contractor 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 Contractor.
- 15.2.5 The Contractor 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.
- 15.2.6 In the event of any failure by the Contractor to comply with clause 15.2.5 (Surveys) or if the Authority is or becomes aware of a breach by the Contractor of its obligations under clause 15.2.5 (Surveys) 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 Contractor as a debt.

### **15.3 Programmed Maintenance**

The Contractor 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.

### **15.4 Schedule of Programmed Maintenance**

- 15.4.1 No later than two (2) months prior to the Commencement Date, the Contractor shall submit to the Authority's Representative in accordance with Schedule 8 (Review Procedure) a Schedule of Programmed Maintenance for each Facility for the period from the Commencement Date to the expiry of that Contract Year.

- 15.4.2 Not later than two (2) months prior to the commencement of each subsequent Contract Year the Contractor shall submit to the Authority's Representative in accordance with Schedule 8 (Review Procedure) a Schedule of Programmed Maintenance for that Contract Year.
- 15.4.3 Each Schedule of Programmed Maintenance shall contain the following information (**Programmed Maintenance Information**):
- 15.4.3.1 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);
  - 15.4.3.2 details of any effect of the Programmed Maintenance on the delivery of any of the Services; and
  - 15.4.3.3 a proposed Lifecycle Schedule, including details of when Contractor Lifecycle Items and Authority Lifecycle Items are proposed to be replaced (including the proposed costs of the replacement of the Authority Lifecycle Items).
- 15.4.4 Not later than twenty (20) Business Days prior to the commencement of any Contract Month, the Contractor may submit to the Authority's Representative in accordance with paragraph 3.1.4 of Schedule 8 (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 8 (Review Procedure), the Schedule of Programmed Maintenance as revised shall become the Schedule of Programmed Maintenance in respect of that Contract Year.
- 15.4.5 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 paragraph 3.1.4 of Schedule 8 (Review Procedure), he shall indicate whether, and if so when, the Programmed Maintenance can be re-scheduled and the Contractor shall amend the relevant Schedule of Programmed Maintenance accordingly. If the Contractor disagrees with the rescheduling instructed it may issue a notice in accordance with clause 15.4.7 below.
- 15.4.6 The Contractor 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 8 (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 15 (Condition of the Facilities).

- 15.4.7 Notwithstanding that there has been no objection to a Schedule of Programmed Maintenance, the Authority's Representative may, at any time, require the Contractor to accelerate or defer any Programmed Maintenance by giving written notice to the Contractor, (unless otherwise agreed) not less than forty (40) Business Days prior to the scheduled date for carrying out such Programmed Maintenance (where applicable, as accelerated), which notice shall set out the time and/or periods at or during which the Authority requires the Programmed Maintenance to be performed. The Contractor shall, within ten (10) Business Days, notify the Authority of the amount of any additional reasonable costs which it will incur as a direct consequence of such acceleration or deferment (**Estimated Increased Maintenance Costs**) and an estimate of any Revenue it will lose, calculated by reference to Schedule 23 (Loss of Revenue). The Authority shall, within a further period of ten (10) Business Days following receipt by the Authority of notification of the amount of the Estimated Increased Maintenance Costs and estimated Loss of Revenue, at its option, either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance. If the Authority does not respond within this ten (10) Business Day period, the request shall be deemed to have been confirmed. The Authority shall reimburse the Contractor:
- 15.4.7.1 the direct and reasonable costs actually incurred by the Contractor as a consequence of such acceleration or deferment up to, but not exceeding, the amount of the Estimated Increased Maintenance Costs; and
  - 15.4.7.2 the Revenue actually lost by the Contractor as a consequence of such acceleration or deferment, calculated by reference to Schedule 23 (Loss of Revenue), up to but not exceeding the amount of estimated Loss of Revenue.
- 15.4.8 Where Programmed Maintenance scheduled to be carried out in accordance with the Schedule of Programmed Maintenance has been deferred by the Authority's Representative under this clause 15 (Condition of the Facilities), the Contractor shall not be treated as having failed to perform the Services on account of the condition of the Facilities or any part of them from the time the Programmed Maintenance was scheduled to have been completed until the time the deferred Programmed Maintenance was scheduled to have been completed, but not afterwards, provided always, to avoid doubt, that the Contractor shall not be relieved from the consequences of any failure to maintain the Facilities in respect of any period prior to the period for performing the particular work according to the Schedule of Programmed Maintenance.

## **15.5 Unprogrammed Maintenance Works**

- 15.5.1 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**), the Contractor may carry out such Unprogrammed Maintenance Works provided that the Contractor 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 Contractor shall take all reasonable steps to minimise the duration of such Unprogrammed Maintenance Works.
- 15.5.2 For the avoidance of doubt, there shall be no restrictions on the performance of Unprogrammed Maintenance Works carried out outside of the Minimum Opening Hours.
- 15.5.3 Nothing in this clause 15.5 (Unprogrammed Maintenance Works) shall prevent the allocation of Performance Adjustment Points and/or Performance Adjustments in accordance with this Agreement.

## **15.6 Programmed Replacement – Contractor Lifecycle Items**

- 15.6.1 The Contractor shall or shall procure the replacement of Contractor Lifecycle Items in accordance with the Lifecycle Profile and the relevant Schedule of Programmed Maintenance (or if Contractor Lifecycle Items require replacing earlier than anticipated in the Lifecycle Profile or relevant Schedule of Programmed Maintenance, at the time required by applying Good Industry Practice).
- 15.6.2 No later than forty (40) Business Days before each occasion on which any of the Contractor Lifecycle Items are due for replacement (as identified in the Lifecycle Schedule), where the Contractor does not believe it is necessary to undertake such replacement, the Contractor shall submit to the Authority (under the Review Procedure) a written statement detailing:
- 15.6.2.1 the replacement(s) which the Lifecycle Schedule records as being due; and
- 15.6.2.2 why the Contractor does not believe it is necessary to undertake such replacement having regard to the condition of the relevant part and the Contractor's obligations under this Agreement.
- 15.6.3 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 Contractor shall amend the Lifecycle Schedule to reflect such deferral.
- 15.6.4 Without prejudice to clause 15.6.3 (Programmed Replacement - Contractor Lifecycle Items) the Contractor shall replace any items

listed in the Lifecycle Schedule (both Contractor 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.

15.6.5 In the event that the Contractor fails to either:

15.6.5.1 replace any Contractor Lifecycle Item by the date that it is due for replacement (as identified in the Lifecycle Schedule, or earlier, applying Good Industry Practice); or

15.6.5.2 comply with clause 15.6.4 (Programmed Replacement - Contractor Lifecycle Items),

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 Contractor.

15.6.6 For the avoidance of doubt, the Contractor is responsible for all costs of replacing the Contractor Lifecycle Items.

## **15.7 Authority Lifecycle Items**

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

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

15.7.1.2 giving as much notice as is reasonably possible of any Authority Lifecycle Items listed in the Lifecycle Schedule which the Contractor considers are due for replacement earlier than shown in the Lifecycle Schedule applying Good Industry Practice,

**(Authority Lifecycle Item Notice).**

15.7.2 The Contractor shall include in any Authority Lifecycle Item Notice the following details:

15.7.2.1 details of the Authority Lifecycle Item;

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

15.7.2.3 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 Contractor applying Good Industry Practice); and
- 15.7.2.4 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;
  - 15.7.2.5 if an Authority Lifecycle Item is due for replacement according to the Lifecycle Schedule, whether the Contractor, applying Good Industry Practice, considers that such replacement can be deferred with no adverse consequences for the Services; and
  - 15.7.2.6 if the Authority Lifecycle Item is due for replacement earlier than listed in the Lifecycle Schedule based upon the Contractor's application of Good Industry Practice, two Estimates (as defined in the Change Protocol): one showing the consequences of the Contractor replacing the item and one showing the consequences of the item not being replaced.
- 15.7.3 The Authority shall, within ten (10) Business Days of receipt of an Authority Lifecycle Item Notice confirm to the Contractor 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.
- 15.7.4 Within twenty (20) Business Days of receipt of the Authority Lifecycle Item Notice and the information referred to in clause 15.7.3 (Authority Lifecycle Items) and the meeting referred to in clause 15.7.3 (Authority Lifecycle Items) (whichever is the later), the Authority shall confirm in writing to the Contractor whether the Contractor 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**).
- 15.7.5 If the Authority does not give an Authority Lifecycle Item Instruction, the Contractor shall not proceed with the replacement of the relevant Authority Lifecycle Item.
- 15.7.6 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 Contractor 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 Contractor's obligations under this agreement, the Contractor 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.

15.7.7 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 Contractor provided to the Authority in the Authority Lifecycle Item Notice.

15.7.8 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 Contractor provided to the Authority in the Authority Lifecycle Item Notice.

15.7.9 When preparing any quote, proposal, Estimate or Schedule of Programmed Maintenance which includes the costs of replacement for an Authority Lifecycle Item, the Contractor 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 Contractor to obtain a quote from a particular contractor.

15.7.10 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.

15.7.11 In the event that the Contractor fails to either:

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

15.7.11.2 comply with clause 15.6.4 (Programmed Replacement),

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 Contractor.



## **15.8 Lifecycle Records**

The Contractor shall upon written request permit the Authority access to all the Contractor'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 Contractor 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 Contractor in the provision of the Services. The Contractor shall maintain all documents and information relating to any Lifecycle Asset.

## **16 Hazardous Substances**

### **16.1 Storage**

The Contractor 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 Site and shall comply with any other reasonable requirement of the Authority in respect of such materials and equipment.

### **16.2 COSHH Register**

The Contractor 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 Contractor's registered office and that a copy is given to the Authority. The Authority shall notify the Contractor of any items which it or any Authority Related Party is using or storing at the Site and which requires to be included in such register.

## **17 Emergencies**

### **17.1 Additional or Alternative Services**

If an Emergency arises which cannot be dealt with by performance of the Services, the Authority may instruct the Contractor to use its best endeavours to procure that such additional or alternative services are undertaken by the Contractor 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 Contractor shall not be obliged to provide any service which it is neither qualified nor competent to provide.

### **17.2 Costs**

The properly incurred costs of the Contractor of any additional or alternative services provided to the Authority under clause 17.1 (Additional or Alternative Services) and/or any Loss of Revenue (if any) arising as a direct result of the

Contractor providing any additional or alternative services shall be borne by the Authority (unless the Emergency was caused by the Contractor, in which case such costs and/or Loss of Revenue shall be borne by the Contractor). In respect of any such properly incurred costs and/or Loss of Revenue, these shall be paid against the Contractor's invoice in accordance with clause 28 (Payment). If such costs and/or Loss of Revenue are not agreed, the matter shall be referred to the Dispute Resolution Procedure.

## **18 Performance Monitoring**

### **18.1 Contractor Monitoring**

The Contractor shall monitor its performance in the delivery of the Services in accordance with the provisions of Schedule 6 (Payment and Performance Monitoring System).

### **18.2 Authority Monitoring**

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

**18.3** Without prejudice to the Authority's rights under clause 30.3 (Termination on Contractor Default) and to any other express rights under this Agreement, where the Contractor has been found to:

18.3.1 be fraudulent in the submission of monitoring reports or claims for payment under clause 28 (Payment); or

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

the Authority may by notice to the Contractor increase the level of its monitoring of the Contractor, and/or (at the Authority's option), of the Contractor'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 Contractor shall have demonstrated to the reasonable satisfaction of the Authority that it will perform (and is capable of performing) its obligations under this Agreement.

**18.4** For the purposes of clause 18.3 (Authority Monitoring), the Authority acknowledges that if the Contractor has otherwise failed to have demonstrated to the reasonable satisfaction of the Authority as required by clause 18.3 (Authority Monitoring) but:

18.4.1 if the Contractor has removed the person or persons responsible for the fraudulent reporting; or

18.4.2 (under clause 18.3.2) (Authority Monitoring), if in the following three (3) month period following the Authority notice (if it has not already been established) there have been no further materially erroneous reports of any kind,

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

**18.5** If the Authority issues a notice under clause 18.3 (Authority Monitoring), the Contractor 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 18.3.1 (Authority Monitoring).

**19 Not used**

**20 Use of the Facilities**

**20.1 Priority**

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.

**20.2 Use of the Facilities**

The Contractor may enter into arrangements for use of the Facilities provided that:

20.2.1 any such use is in accordance with Legislation;

20.2.2 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 centres;

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

20.2.4 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

20.2.5 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 is otherwise incompatible with the values of the Authority.

**20.3 Third Party Use**

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

#### **20.4 Elections**

The Contractor will allow the Authority to use the Facilities for the purpose of Elections provided reasonable prior notice has been given to the Contractor and the Authority agrees to pay for the use of (including any additional costs incurred) and the Loss of Revenue from the relevant parts of the Facilities for such purposes, with terms to be agreed between the parties acting reasonably.

#### **20.5 Surplus Share**

The Authority is entitled to share in the surpluses generated at the Facilities in accordance with the sharing mechanism set out in Schedule 19 (Surplus Share).

#### **20.6 Handback Activities**

The parties shall comply with the provisions set out in Schedule 26 (Handback).

### **21 TUPE and Employees**

#### **21.1 Relevant Transfers**

The Authority and the Contractor agree that the following events:

21.1.1 the Service Transfer Date; and

21.1.2 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 Relevant Employees shall have effect (subject to Regulation 4(7) of TUPE) thereafter as if originally made between those employees and the new provider except insofar as such contracts relate to those parts of an occupational pension scheme relating to old age, invalidity and survivors' benefits.

**21.2** The Authority shall comply with its obligations under TUPE in respect of each Relevant Transfer pursuant to clause 21.1 (Relevant Transfers) and the Contractor shall comply and shall procure that each Sub-Contractor shall comply with its obligations under TUPE in respect of each Relevant Transfer pursuant to clause 21.1 (Relevant Transfers) and each of the Authority and the Contractor shall indemnify the other against any Direct Losses sustained as a result of any breach of clause 21.1 or 21.2 (Relevant Transfers) by the party in default save that there shall be no obligation on the Authority to indemnify the Contractor for any breach by the Authority of its obligations under Regulation 13 of TUPE, or any award of compensation under Regulation 15 where such failure arises from the failure of the Contractor or any Sub-Contractor to comply with its or their duties under Regulation 13 of TUPE.

#### **21.3 Offer of Employment**

21.3.1 If TUPE does not apply to any person who is an Authority Existing Employee, the Contractor shall offer to or shall procure the offer by the relevant Sub-Contractor to each and every such employee a new

contract of employment commencing on the Service Transfer Date under which the terms and conditions including full continuity of employment shall not differ from those enjoyed immediately prior to the Service Transfer Date (except insofar as such terms and conditions relate to old age, invalidity and survivors' benefits under an occupational pension scheme) and the offer shall be in writing, shall be open to acceptance for a period of not less than ten (10) Business Days and shall be made:

21.3.1.1 if it is believed that TUPE will not apply to a person, not less than ten (10) Business Days before the Service Transfer Date; or

21.3.1.2 if it is believed that TUPE applies to a person but it is subsequently decided that TUPE does not so apply, as soon as is practicable and in any event no later than ten (10) Business Days after that decision is known to the Contractor.

21.3.2 Where any such offer as referred to in clause 21.3.1 (Offer of Employment) is accepted, the Authority shall indemnify and keep indemnified in full the Contractor on the same terms and conditions as those set out in clauses 21.7.1, 21.7.2 and 21.7.3 (Indemnities) of this Agreement as if there had been a Relevant Transfer in respect of each and every Authority Existing Employee who has accepted any such offer and the provisions of clause 21.5 (Employment Costs) shall apply in the event of any resulting increase or decrease in the Remuneration Costs and Reorganisation Costs.

21.3.3 Where any such offer as referred to in clause 21.3.1 (Offer of Employment) is accepted, the Contractor shall act and shall procure that each relevant Sub-Contractor shall act in all respects as if TUPE had applied to each and every Authority Existing Employee who has accepted any such offer and shall comply with clause 22 (Pensions) of this Agreement in respect of each and every such employee who was immediately before the Service Transfer Date an Authority Existing Employee.

21.3.4 For the avoidance of doubt, where any such offer as referred to in clause 21.3.1 (Offer of Employment) is not accepted and TUPE does not apply, the Authority Existing Employee shall remain an employee of the Authority.

## **21.4 Emoluments and Outgoings**

21.4.1 The Authority shall be responsible for or shall use reasonable endeavours to procure that any other employer of a Relevant Employee is responsible for all remuneration, benefits, entitlements and outgoings in respect of the Relevant Employees or Transferring Employees, including without limitation all wages, holiday pay, bonuses, commissions, payments of PAYE, national insurance contributions, and pension contributions up to the Service Transfer Date.

- 21.4.2 The Contractor shall be responsible or shall procure that any relevant Sub-Contractor is responsible for all remuneration, benefits, entitlements and outgoings in respect of the Relevant Employees and any other person who is or will be employed or engaged by the Contractor or any Sub-Contractor in connection with the provision of any of the Services, including without limitation all wages, holiday pay, bonuses, commission, payment of PAYE, national insurance contributions, pension contributions, from and including the Service Transfer Date.

## 21.5 Employment Costs

- 21.5.1 The Authority has supplied to the Contractor the information, as at the date of this Agreement, which is contained in Schedule 11 Part 1 (**Employee List**) 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 employees of the Authority and of any sub-contractor of the Authority who it is expected, if they remain in the employment of the Authority or of the sub-contractor of the Authority as the case may be until immediately before the Service Transfer Date, would be Relevant Employees and the Authority warrants the accuracy and completeness of this information.
- 21.5.2 Not used.
- 21.5.3 Without Prejudice to clauses 21.5.1 (Employment Costs) and 21.6 (Union Recognition), the Authority shall or shall procure if it has the contractual or legal powers to do so and shall otherwise use all reasonable endeavours to procure that every relevant sub-contractor of the Authority shall:
- 21.5.3.1 provide the Employee Liability Information to the Contractor at such time or times as are required by TUPE; and
- 21.5.3.2 update the Employee Liability Information to take account of any changes as required by TUPE.
- The Authority shall warrant the accuracy and completeness of the Employee Liability Information supplied by the Authority or any of its relevant sub-contractors.
- 21.5.4 The Contractor has provided to the Authority, and the Authority has agreed, the details which show, in respect of each of the Services, the following information:
- 21.5.4.1 the workforce which the Contractor 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;

- 21.5.4.2 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; and
- 21.5.4.3 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 (including but not limited to costs associated with dismissal by reason of redundancy or capability and costs of recruitment)]. These costs (**Reorganisation Costs**) have been calculated by the Contractor and the Sub-Contractors on the basis of (amongst other things) the information contained in the Employee List.
- 21.5.5 If at any time the Remuneration Costs and/or the Reorganisation Costs require to be adjusted on account of any inaccuracies in or omissions from the information contained in the Employee List then (subject to clauses 21.5.6, 21.5.7 and 21.5.9 (Employment Costs)) there shall be a corresponding adjustment to the Annual Payment to compensate the Contractor for any such difference.
- 21.5.6 If the circumstances described in clause 21.5.5 (Employment Costs) arise:
  - 21.5.6.1.1 in circumstances where there are more Relevant Employees than shown on the Employee List then the parties shall discuss the implications for the provision of Services; and
  - 21.5.6.2 the Contractor and the relevant Sub-Contractor shall take all reasonable steps to mitigate any additional costs and any adjustment to the Annual Payment shall be calculated as if they had done so.
- 21.5.7 In calculating any adjustment to be made to the Annual Payment pursuant to clause 21.5.5 (Employment Costs):
  - 21.5.7.1 no account shall be taken of a decrease in the Remuneration Costs or Reorganisation Costs to the extent that it arises from a reduction in the number of Relevant Employees or their whole time equivalent such that there are, immediately after the Service Transfer Date, fewer suitably qualified persons

available than are required in order to establish the Proposed Workforce and to the extent that the Contractor has employed replacement staff on equivalent remuneration and has used all reasonable endeavours to mitigate all expenses in recruiting and employing such replacement staff;

- 21.5.7.2 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 Contractor has been or will be compensated as a result of any Indexation of the Annual Payment under this Agreement;
- 21.5.7.3 to avoid doubt, any changes in costs which fall to be dealt with under clause 21.5.5 (Employment Costs) and which arise from a Change in Law shall be dealt with in accordance with the provisions of clause 21.5.5 (Employment Costs) and shall not be taken into account for the purposes of clause 47 (Change in Law);
- 21.5.7.4 no adjustments under clause 21.5.5 (Employment Costs) shall be made in respect of overpayments made by the Contractor or a Sub-Contractor to Relevant Employees which arise from reliance on the Employee List to the extent that the Contractor or the Sub-Contractor is able to correct overpayments in respect of continuing employment having taken reasonable steps to do so;
- 21.5.7.5 if there are underpayments by the Contractor or a Sub-Contractor to Relevant Employees, whether claimed or established as unlawful deductions from wages or as a breach of contract, which arise from reliance on the Employee List, there shall be an immediate increase to the Annual Payment in respect of all such liabilities of the Contractor or the Sub-Contractor for all such underpayments which are retrospective (save that any such liabilities which relate to the period prior to the Service Transfer Date shall be dealt with in accordance with clauses 21.4.1 (Emoluments and Outgoings) or 21.7.1 to 21.7.3 (Indemnities)) and an appropriate increase in respect of such liabilities of the Contractor which represent ongoing costs;
- 21.5.7.6 in order to prevent duplication, no adjustment shall be made under this clause 21.5.7 (Employment Costs) if any indemnity given by the Authority under any other provision of this Agreement would apply; and



21.5.7.7 no adjustments under clause 21.5.5 (Employment Costs) shall be made to the extent that any payment is made to the Contractor or Sub-Contractor under Regulation 12 of TUPE.

21.5.8 Either party may propose an adjustment to Annual Payment pursuant to clause 21.5.5 (Employment Costs) by giving not less than ten Business Days' notice to the other. Each party will provide or procure the provision to the other, on an open book basis, access to any information or data which the other party reasonably requires for the purpose of calculating or confirming the calculation of any adjustment pursuant to clause 21.5.5 (Employment Costs).

21.5.9 In relation to all matters described in clauses 21.5.6 and 21.5.7 (Employment Costs) the Contractor and the Authority shall, and the Contractor shall procure that the relevant Sub-Contractor shall, co-operate with the other or others and take all reasonable steps to mitigate any costs and expenses and any adverse effect on industrial or employee relations.

21.5.10 The Authority shall and the Contractor shall and shall procure that each and every Sub-Contractor shall take all reasonable steps, including co-operation with reasonable requests for information, to ensure that each and every Relevant Transfer pursuant to this Agreement takes place smoothly with the least possible disruption to the services of the Authority including the Services and to the employees who transfer.

## **21.6 Union Recognition**

21.6.1 The Authority shall and shall procure if it has the contractual or legal powers to do so and shall otherwise use all reasonable endeavours to procure that every relevant sub-contractor of the Authority shall supply to the Contractor no later than five (5) Business Days prior to the Service Transfer Date true copies of its union recognition agreement(s) and the Contractor 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.

21.6.2 The Contractor 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.

## 21.7 Indemnities

- 21.7.1 The Authority shall indemnify and keep indemnified in full the Contractor (for itself and for the benefit of each relevant Sub-Contractor) against all Direct Losses incurred by the Contractor or any relevant Sub-Contractor in connection with or as a result of:
- 21.7.1.1 a breach by the Authority of its obligations under clause 21.3.1 (Emoluments and Outgoings); and
- 21.7.1.2 subject to clause 21.7.5 (Indemnities) any claim or demand by any Transferring Employee arising out of the employment of any Transferring Employee provided that this arises from any act, fault or omission of the Authority in relation to any Transferring Employee prior to the date of the Relevant Transfer (save where such act, fault or omission arises as a result of the Contractor's or any relevant Sub-Contractor's failure to comply with Regulation 13 of TUPE).
- 21.7.2 Where any liability in relation to any Transferring Employee, in respect of his or her employment by the Authority or its termination which transfers in whole or part in accordance with TUPE and/or the Directive arises partly as a result of any act or omission occurring on or before the relevant Service Transfer Date and partly as a result of any act or omission occurring after the relevant Service Transfer Date, the Authority shall indemnify and keep indemnified in full the Contractor or the relevant Sub-Contractor against only such part of the Direct Losses sustained by the Contractor or any Sub-Contractor in consequence of the liability as is reasonably attributable to the act or omission occurring before the relevant Service Transfer Date.
- 21.7.3 The indemnities contained in clause 21.7.1 (Indemnities) shall apply as if references in those clauses to any Transferring Employee also included a reference to any Relevant Employee and references to any act, fault or omission of the Authority also included a reference to the relevant Third Party Contractor employer of the Relevant Employee prior to the Service Transfer Date to the extent that the Authority recovers any sum in respect of the subject matter of those indemnities from such Third Party Contractor under any indemnity or other legal entitlement it has against such Third Party Contractor. The Authority will use all reasonable endeavours to recover any such sums under any such entitlement as is mentioned in this clause 21.7.3 (Indemnities).
- 21.7.4 The Contractor shall indemnify and keep indemnified in full the Authority, and at the Authority's request each and every service provider who shall provide any service equivalent to any of the Services after expiry or earlier termination of this Agreement (**Future Contractor**) against:
- 21.7.4.1 all Direct Losses incurred by the Authority or any Future Contractor in connection with or as a result of any claim or demand against the Authority or any Future Contractor by any person who is or has been employed or engaged by the Contractor or any Sub-Contractor in connection with the provision of any of the Services where such claim arises as a result of any act, fault or omission of the Contractor and/or any Sub-Contractor after the Service Transfer Date and before the Expiry Date or Termination Date;

- 21.7.4.2 all Direct Losses incurred by the Authority or any Future Contractor in connection with or as a result of a breach by the Contractor of its obligations under clause 21.4.2 (Emoluments and Outgoings); and
- 21.7.4.3 all Direct Losses incurred by the Authority or any Future Contractor in connection with or as a result of any claim by any trade union or staff association or employee representative (whether or not recognised by the Contractor and/or the relevant Sub-Contractor in respect of all or any of the Relevant Employees) arising from or connected with any failure by the Contractor and/or any Sub-Contractor to comply with any legal obligation to such trade union, staff association or other employee representative whether under Regulations 13 or 14 of TUPE or any award of compensation under Regulation 15 of TUPE, under the Directive or otherwise and, whether any such claim arises or has its origin before or after the date of the Service Transfer Date.
- 21.7.5 The Contractor shall indemnify and keep indemnified in full the Authority, against all Direct Losses incurred by the Authority in connection with or as a result of:
  - 21.7.5.1 the change of identity of employer occurring by virtue of TUPE to the Contractor or the relevant Sub-Contractor being significant and detrimental to any of the Relevant Employees or to any person who would have been a Relevant Employee but for their objection or 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, and whether such claim arises before, on or after the Service Transfer Date;

21.7.5.2 any proposed or actual change by the Contractor or any Sub-Contractor to the Relevant Employees' working conditions, terms or conditions or any proposed measures of the Contractor or the relevant Sub-Contractor which are to any of the Relevant Employees' material detriment or to the material detriment of any person who would have been a Relevant Employee but for their objection or 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 or measures, and whether such claim arises before, on or after the Service Transfer Date; and

21.7.5.3 any claim arising out of any misrepresentation or mis-statement whether negligent or otherwise made by the Contractor or Sub-Contractor to the Relevant Employees or their representatives whether before on or after the Service Transfer Date and whether liability for any such claim arises before on or after the Service Transfer Date.

21.7.6 For the avoidance of doubt, the indemnities in clauses 21.7.4 and 21.7.5 (Indemnities) shall not apply in respect of any sum for which the Authority is to indemnify the Contractor or a relevant Sub-Contractor pursuant to clause 21.7.1 (Indemnities) or as a result of any adjustment to the Annual Payment in accordance with clause 21.5.5 (Employment Costs) or to the extent that the claim arises from a wrongful act or omission of the Authority.

21.7.7 Clause 51.5 (Conduct of Claims) of this Agreement shall apply where any claim is made in respect of the indemnities given under this clause 21.7 (Indemnities).

## **21.8 Provision of Details and Indemnity**

The Contractor shall immediately upon request by the Authority provide to the Authority details of any measures which the Contractor or any Sub-Contractor envisages it or they will take in relation to any employees who are or who will be the subject of a Relevant Transfer pursuant to clause 21.1 (Relevant Transfers) and if there are no measures, confirmation of that fact, and shall indemnify the Authority against all Direct Losses resulting from any failure by the Contractor to comply with this obligation.

## 21.9 Retendering

21.9.1 The Contractor shall (and shall procure that any Sub-Contractor shall) within the period of twelve (12) months immediately preceding the Expiry Date or following the service of a notice under clause 21.10 (Termination of Agreement) or as a consequence of the Authority notifying the Contractor of its intention to retender this Agreement:

21.9.1.1 on receiving a request from the Authority provide in respect of any person engaged or employed by the Contractor or any Sub-Contractor 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 Contractor 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**);

21.9.1.2 provide the Retendering Information promptly and at no cost to the Authority;

21.9.1.3 notify the Authority forthwith in writing of any material changes to the Retendering Information promptly as and when such changes arise;

21.9.1.4 be precluded from making any material increase or decrease in the numbers of Assigned Employees;

21.9.1.5 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

21.9.1.6 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.

21.9.2 Without prejudice to clauses 21.9.1 and 21.9.3 (Retendering) the Contractor 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.

21.9.3 The Contractor shall and shall keep indemnified in full the Authority and at the Authority's request any Future Contractor against all Direct Losses arising from any claim by any party as a result of the Contractor or Sub-Contractor failing to provide or promptly to provide the Authority and/or any Future Contractor 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.

## **21.10 Termination of Agreement**

21.10.1 On the expiry or earlier termination of this Agreement, the Authority and the Contractor agree that it is their intention that TUPE shall apply in respect of the provision thereafter of any service equivalent to any of the Services but the position shall be determined in accordance with Legislation at the Expiry Date or Termination Date as the case may be and this clause 21.9 (Termination of Agreement) is without prejudice to such determination.

21.10.2 For the purposes of this clause 21.9 (Termination of Agreement) **Returning Employees** shall mean those employees wholly or mainly engaged in the provision of the Services as the case may be as immediately before the Expiry Date or Termination Date whose employment transfers to the Authority or a Future Contractor pursuant to TUPE. Upon expiry or termination of this Agreement for whatever reason (such date being termed the **Return Date**), the provisions of this clause 21.10 (Termination of Agreement) will apply:

21.10.2.1 the Contractor shall or shall procure that all wages, salaries and other benefits of the Returning Employees and other employees or former employees of the Contractor or the Sub-Contractors (who had been engaged in the provision of the Services) and all PAYE tax deductions, pension contributions and national insurance contributions relating thereto in respect of the employment of the Returning Employees and such other employees or former employees of the Contractor or Sub-Contractors up to the Return Date are satisfied;

21.10.2.2 without prejudice to clause 21.10.2.1 (Termination of Agreement), the Contractor shall:

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

21.10.2.2.2 in respect of those employees who constitute Returning Employees the Contractor shall indemnify the Authority and any Future Contractor against all Direct Losses incurred by the Authority or any Future Contractor 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 (whether any such claim, attributable to the period up to and on the Return Date, arises before, on or after the Return Date) including but not limited to any failure by the Contractor or any Sub-Contractor 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 Contractor.

- 21.10.3 The Authority shall be entitled to assign the benefit of this indemnity to any Future Contractor.

## **21.11 Offer of Employment on Expiry or Termination**

- 21.11.1 If TUPE does not apply on the expiry or earlier termination of this Agreement, the Authority shall ensure that each relevant Future Contractor (or where applicable, the Authority) shall offer employment to the persons employed by the Contractor or a Sub-Contractor who are wholly or mainly engaged in the provision of the relevant Services immediately before the Return Date.

- 21.11.2 If an offer of employment is made in accordance with clause 21.11.1 (Offer of Employment on Expiry or Termination), 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 22 (Pensions) as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the Authority or Future Contractor 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 21.8 (Retendering).

- 21.11.3 Where any such offer as referred to in clause 21.11.1 (Offer of Employment on Expiry or Termination) is accepted, the Contractor shall indemnify and keep indemnified in full the Authority and/or any Future Contractor on the same terms and conditions as those set out in clause 21.7 (Indemnities) of this Agreement 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 21 (TUPE and Employees) each and every such employee shall be treated as if they were a Returning Employee.

- 21.11.4 For the avoidance of doubt, where any such offer as referred to in clause 21.11.1 (Offer of Employment on Expiry or Termination) is not accepted and TUPE does not apply, the employee shall remain an employee of the Contractor or Sub-Contractor as appropriate.

## **21.12 Redundancy on Expiry or Termination**

- 21.12.1 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 Contractor 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 Contractor or

Sub-Contractor complying with the obligations described in clause 21.12.2 (Redundancy on Expiry or Termination).

21.12.2 The Contractor 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 21.12.1 (Redundancy on Expiry or Termination).

### **21.13 Sub-Contractors**

In the event that the Contractor 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 clauses 21 (TUPE and Employees), 22 (Pensions) and 23 (Employees - General) and shall procure that the Sub- Contractor complies with such terms. The Contractor shall indemnify and keep the Authority indemnified in full against all Direct Losses, incurred or by the Authority or any Future Contractor as a result of or in connection with any failure on the part of the Contractor to comply with this clause 21.13 (Sub-Contractors) and/or the Sub-Contractor's failure to comply with such terms.

## **22 Pensions**

### **22.1 Contractor to Become an Admission Body**

Where the Contractor or a Sub-Contractor employs any Eligible Employees from a Relevant Transfer Date and wishes to offer those Eligible Employees membership of the LGPS, the Contractor shall procure that it or the relevant Sub-Contractor shall become an Admission Body. The Contractor shall before the Relevant Transfer Date execute and procure that each relevant Sub-Contractor executes a Contractor Admission Agreement which will have effect from and including the Relevant Transfer Date.

### **22.2 Contractor Admission Agreement**

22.2.1 The Authority shall before the Relevant Transfer Date execute each of the Contractor Admission Agreements referred to in clause 22.1 (Contractor to Become an Admission Body) and will procure that the Administering Authority executes each such Contractor Admission Agreement before the Relevant Transfer Date.

22.2.2 The Authority shall procure that when the Contractor or a Sub-Contractor enters into the Contractor Admission Agreement pursuant to clause 22.1 (Contractor to Become an Admission Body) the Contractor or Sub-Contractor shall be credited by the Administering Authority with a notional fund within the Fund at the Relevant Transfer Date (which for the avoidance of doubt shall not constitute an admission agreement fund for the purposes of Regulation 54 of the LGPS Regulations) (**Notional Fund**). The amount of the Notional Fund shall be determined by an actuary appointed by the Administering Authority by reference to the aggregate of the benefits, whether immediate, prospective or contingent, payable under the LGPS immediately before the Relevant Transfer Date in relation to the Eligible Employees who are active members of the LGPS or join the LGPS on the Relevant Transfer Date and such Eligible Employees' spouses and dependants, by reference to the pensionable service in the LGPS up to the Relevant Transfer Date but making proper allowance for projected increases



in the rate of pensionable salary of each such Eligible Employee to date of withdrawal, retirement or death and increases in pensions in payment using the demographic and actuarial assumptions which were adopted for the most recent funding valuation of the Fund.

- 22.2.3 Subject to clauses 22.2.6, 22.2.7 and 22.2.9 (Contractor Admission Agreement), if at any time during the term of this Agreement the Administering Authority, pursuant to the Contractor Admission Agreement or the LGPS Regulations, requires the Contractor or any Sub-Contractor to pay employer contributions or payments to the Fund in aggregate in excess of the Initial Contribution Rate and the overall contributions or payments made are in excess of those which would have been made had the Initial Contribution Rate been unchanged (**Standard Amount**), the excess of employer contributions above the Initial Contribution Rate, and to the extent that they exceed the Standard Amount, (**Excess Amount**) shall be paid by the Contractor or the Sub-Contractor, as the case may be, and the Contractor or any Sub-Contractor (as the case may be) shall be reimbursed in accordance with clause 22.2.9 (Contractor Admission Agreement).
- 22.2.4 Subject to clauses 22.2.6, 22.2.8 and 22.2.10 (Contractor Admission Agreement), if during the term of this Agreement, the Administering Authority, pursuant to the Contractor Admission Agreement or the LGPS Regulations, requires the Contractor or any Sub-Contractor to pay employer contributions or payments to the Fund in aggregate below the Initial Contribution Rate, the Contractor shall or shall procure that the Sub-Contractor shall reimburse the Authority an amount equal to A–B (**Shortfall Amount**) in accordance with clause 22.2.10 where:
- A = the amount which would have been paid if contributions and payments had been paid equal to the Initial Contribution Rate; and
- B = the amount of contributions or payments actually paid by the Contractor or Sub-Contractor, as the case may be, to the Fund.
- 22.2.5 Subject to clauses 22.2.6, 22.2.7 and 22.2.9 (Contractor Admission Agreement), where the Administering Authority obtains an actuarial valuation and a revised rates and adjustment certificate under the LGPS Regulations and/or the terms of the Contractor Admission Agreement when the Contractor Admission Agreement ceases to have effect and the Contractor or any Sub-Contractor is required to pay any revised contribution or payment to the Fund representing any exit payment under Regulation 64 of the LGPS Regulations (Exit Contribution), such contribution or payment shall be paid by the Contractor or any Sub-Contractor (as the case may be) and the Contractor or any Sub-Contractor (as the case may be) shall be reimbursed in accordance with clause 22.2.9 (Contractor Admission Agreement).
- 22.2.6 The Contractor shall and shall procure that any Sub-Contractors shall at all times be responsible for the following:
- 22.2.6.1 any employer contributions relating to the costs of early retirement benefits arising on redundancy or as a result of business efficiency under Regulation 30(7) of the LGPS Regulations or otherwise other than where the Authority has entered into a contractual commitment to

- make the individual Eligible Employee  
redundant before the Relevant Transfer Date or on  
termination or expiry of this Agreement;
- 22.2.6.2 any payment of Fund benefits on the grounds of ill  
health or infirmity of mind or body and any associated  
costs unless such grounds of ill health or infirmity of  
mind or body were diagnosed by a recognised medical  
practitioner and the results were notified to the  
Authority prior to the Relevant Transfer Date;
- 22.2.6.3 any employer contributions relating to the costs of  
flexible retirement where the actuarial reduction is  
waived in whole or in part or a cost neutral reduction is  
not applied with the consent of the Contractor or any  
relevant Sub-Contractor;
- 22.2.6.4 any employer contributions relating to the costs of  
enhanced benefits made at the discretion of the  
Contractor or any relevant Sub-Contractors including  
without limitation under Regulation 31 of the LGPS  
Regulations or otherwise;
- 22.2.6.5 any increase to the employer contribution rate resulting  
from the award of pay increases by the Contractor or  
relevant Sub-Contractors in respect of all or any of the  
Eligible Employees in excess of the pay increases  
assumed in the Fund's most recent actuarial valuation;  
and
- 22.2.6.6 to the extent not covered above, any other costs arising  
out of or in connection with the exercise of any  
discretion or the grant of any consent under the LGPS  
Regulations by the Contractor or any relevant Sub-  
Contractors where a member does not have an  
absolute entitlement to that benefit under the LGPS.
- 22.2.7 For the purposes of calculating the Exit Contribution or Excess Amount, any  
part of an Exit Contribution or Excess Amount, as the case may be, which is  
attributable to any matters for which the Contractor or Sub-Contractors are  
responsible for under clause 22.2.6 (Contractor Admission Agreement) shall  
be disregarded.
- 22.2.8 For the purpose of calculating the Shortfall Amount, any increase in the  
contributions or payments which are attributable to matters which are the  
Contractor's or relevant Sub-Contractor's responsibility for under clause  
22.2.6 (Contractor Admission Agreement) shall be disregarded.
- 22.2.9 Where an Excess Amount or an Exit Contribution is paid by the Contractor  
or any Sub-Contractor, the Contractor shall, subject to clause 22.2.11  
(Contractor Admission Agreement), forthwith as the liability to make the  
payment arises, invoice the Authority for payment

of the Excess Amount or Exit Contribution and the Authority shall make payment to the Contractor or any Sub-Contractor of the required amount within twenty Business Days of receipt of the invoice.

22.2.10 Where a Shortfall Amount is payable by the Contractor or any Sub-Contractor, the Contractor shall or shall procure that the Sub-Contractor, forthwith as the liability arises, notify the Authority of the Shortfall Amount, subject to clause 22.2.11 (Contractor Admission Agreement), and shall make payment to the Authority of the required amount within twenty Business Days of the notification.

### **22.3 Indemnity for a Breach of the Contractor Admission Agreement**

Without prejudice to the generality of this clause 22.3 (Indemnity for a Breach of the Contractor Admission Agreement), the Contractor hereby indemnifies the Authority and/or any Future Contractor and, in each case, their sub-contractors from and against all Direct Losses suffered or incurred by it or them which arise from any breach by the Contractor or any Sub-Contractor of the terms of the Contractor Admission Agreement to the extent that such liability arises before or as a result of the termination or expiry of this Agreement (howsoever caused).

### **22.4 Indemnity or Bond or Guarantee**

Without prejudice to the generality of the requirements of this clause 22 (Pensions), the Contractor shall procure that it and each relevant Sub-Contractor shall as soon as reasonably practicable obtain any indemnity or bond required in accordance with the Contractor Admission Agreements and the cost of such bond shall be invoiced to the Authority. Alternatively, if it is not desirable for the Contractor or Sub-Contractor to enter into a bond, the Authority shall as soon as reasonably practicable secure a guarantee in a form acceptable to the Administering Authority in accordance with the Contractor Admission Agreement.

### **22.5 Right of Set-Off**

The Authority shall have a right to set off against any payments due to the Contractor 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 Contractor or from any relevant Sub-Contractor (as applicable) under the Contractor Admission Agreement.

### **22.6 Claims from Eligible Employees or Trade Unions**

The Contractor hereby indemnifies the Authority and/or any Future Contractor and, in each case, their sub-contractors from and against all Direct Losses suffered or incurred by it or them which arise from claims by Eligible Employees of the Contractor and/or of any Sub-Contractor or by any trade unions, elected employee representatives or staff associations in respect of all or any such Eligible Employees which losses:

- 22.6.1 relate to pension rights in respect of periods of employment on and after the Relevant Transfer Date until the date of termination or expiry of this Agreement; or
- 22.6.2 arise out of the failure of the Contractor and/or any relevant Sub-Contractor

to comply with the provisions of this clause 22 before the date of termination or expiry of this Agreement.

#### **22.7 Liability for Costs**

Each party shall bear its own costs incurred in connection with the Contractor Admission Agreement.

#### **22.8 Transfer to another Employer**

Save on expiry or termination of this Agreement, if the employment of any Eligible Employee transfers to another employer (by way of a transfer under TUPE) the Contractor shall and shall procure that any relevant Sub-Contractor shall:

- 22.8.1 consult with and inform those Eligible Employees of the pension provisions relating to that transfer; and
- 22.8.2 procure that the employer to which the Eligible Employees are transferred (**New Employer**) complies with the provisions of this clause 22 (Pensions) provided that references to the **Sub-Contractor** will become references to the New Employer, references to **Relevant Transfer Date** will become references to the date of the transfer to the New Employer and references to **Eligible Employees** will become references to the Eligible Employees so transferred to the New Employer.

#### **22.9 Pension Issues on Expiry or Termination**

The Contractor shall (and shall procure that each relevant Sub-Contractor shall):

- 22.9.1 maintain such documents and information as will be reasonably required to manage the pension rights of and aspects of any onward transfer of any person engaged or employed by the Contractor or any Sub-Contractor in the provision of the Services on the expiry or termination of this Agreement (including without limitation identification of the Eligible Employees);
- 22.9.2 promptly provide to the Authority such documents and information mentioned in clause 22.9.1 (Pensions Issues on Expiry or Termination) which the Authority or the Administering Authority may reasonably request in advance of the expiry or termination of this Agreement; and
- 22.9.3 fully co-operate (and procure that the trustees of the Contractor Scheme shall fully co-operate) with the reasonable requests of the Authority or the Administering Authority relating to any administrative tasks necessary to deal with the pension rights of and aspects of any onward transfer of any person engaged or employed by the Contractor or any Sub-Contractor in the provision of the Services on the expiry or termination of this Agreement.

#### **22.10 Compliance with Part 1 Pensions Act 2008**

The Contractor shall and shall procure that any relevant Sub-Contractor shall comply with the requirements from time to time under Part 1 of the Pensions Act 2008 to make a minimum level of contributions to the National Employee Savings Trust or other qualifying scheme.

#### **22.11 Compliance with section 257 and 258 Pensions Act 2004**

The Contractor shall and shall procure that any relevant Sub-Contractor shall comply

with sections 257 and 258 of the Pensions Act 2004 in relation to any Relevant Employee (excluding, for the avoidance of doubt any Eligible Employees) who is on or immediately prior to the Relevant Transfer Date:

22.11.1 a member of or is entitled to be a member of their employer's occupational pension scheme; or

22.11.2 would have become eligible to be a member of their employer's occupational pension scheme had he served out the usual waiting period.

## **23 Employees – General**

### **23.1 Disclosure and Barring**

The Contractor shall procure that in respect of all potential staff or persons performing any of the Services and having access to vulnerable groups (other than the Transferring Employees) (each a **Named Employee**) before a Named Employee begins to attend the Sites to perform any of the Services (and only to the extent required under the Home Office Guidance):

23.1.1 each Named Employee is questioned as to whether he or she has any Convictions or Asbos;

23.1.2 the results are obtained of a check of the most extensive available kind made with the Disclosure and Barring Service in respect of each Named Employee; and

23.1.3 a copy of the results of such checks as are referred to in clause 23.1.2 (Disclosure and Barring) are notified to the Authority.

23.2 The Contractor shall procure that only to the extent required by the Home Office Guidance in relation to the Services:

23.2.1 no person who appears on a Barred List following the results of a Disclosure and Barring Service check shall be employed or engaged in the performance of any Services; and

23.2.2 it shall and shall procure that all sub-contractors shall comply with all reporting requirements to the Disclosure and Barring Service.

23.3 The Contractor shall procure that no person who discloses any Convictions or Asbos, or who is found to have any Convictions or Asbos following the results of a Disclosure and Barring Service check, is employed or engaged without the Authority's prior written consent (such consent not to be unreasonably withheld or delayed).

23.4 Insofar as permitted by Legislation, the Contractor shall procure that the Authority is kept advised at all times of any member of staff who, subsequent to his/her commencement of employment as a member of staff:

23.4.1 receives a Conviction or Asbo which becomes known to the Contractor or any sub-contractor or whose previous Convictions or Asbos become known to the Contractor or any sub-contractor;

23.4.2 in respect of whom information is referred to the Disclosure and Barring Service pursuant to the Disclosure and Barring Scheme; or

23.4.3 who is placed on a Barred List pursuant to the Disclosure and Barring

Scheme.

23.5 In the event that any member of staff or any employee of any sub-contractor of any tier involved in the provision of the Services is added to a Barred List, the Contractor shall procure that such member of staff or employee of a sub-contractor is immediately removed from the Site and shall cease to be engaged in the performance of the Services.

23.6 Save to the extent prescribed otherwise pursuant to the Disclosure and Barring Scheme, this clause 23 (Employees - General) shall not apply to those individuals who shall be required by the Contractor or any sub-contractor to attend the Site to provide emergency reactive services. In the case of such individuals, the Contractor shall or shall procure that any sub-contractor shall ensure that such individuals are accompanied at all times while on the Site by a member of the Contractor or any sub-contractor's staff who has been properly employed or engaged in accordance with clauses 23.1 to 23.3 (Employees - General).

**23.7 Conduct of Staff**

Whilst engaged at the Site the Contractor shall and shall procure that any sub-contractor shall comply with the Authority's Policies relating to the conduct of staff and security arrangements. The Authority (acting reasonably) may:

23.7.1 instruct the Contractor that disciplinary action is taken against any employee of the Contractor or any sub-contractor involved in the provision of the Services (in accordance with the terms and conditions of employment of the employee concerned) where such employee misconducts himself or is incompetent or negligent in his duties (in which case the Authority shall co-operate with any disciplinary proceedings and shall be advised in writing of the outcome); or

23.7.2 where the Authority has reasonable grounds for considering that the presence or conduct of an employee at any location relevant to the performance of the Services is undesirable, require the exclusion of the relevant employee from the relevant location(s).

**23.8 Admission to the Site**

23.8.1 Subject to the remainder of this clause 23.8 (Admission to the Site), the Contractor shall at least twenty (20) Business Days before the date on which the Contractor first provides any of the Services provide the Authority with a written list of the names and addresses of all employees or other persons who it expects may require admission to the Site in connection with the provision of the Services, specifying the capacities in which those employees or other persons are concerned with the Services and giving such other particulars as the Authority may require. The Contractor shall update this information as and when any such individuals are replaced or complemented by others, not less than twenty (20) Business Days before their inclusion. The decision of the Authority on whether any person is to be refused admission to a Site shall be final and conclusive and the Authority shall not be obliged to give reasons for its decision.

- 23.8.2 Where the Contractor is unable (acting reasonably) to comply with clause 23.8.1 (Admission to the Site) by the time period specified in it then the Contractor shall comply with its obligations under that clause as soon as reasonably practicable and by no later than the end of the day on which the relevant individual first goes onto the Site. Until such time as the Contractor has complied with its obligations in respect of that individual, he or she shall at all times be accompanied on the Site by a member of the Contractor or sub-contractor's staff who has been properly notified to the Authority in accordance with clause 23.8.1 (Admission to the Site).
- 23.8.3 This clause 23.8 (Admission to the Site) shall not apply to those individuals who shall be required by the Contractor or any sub-contractor to attend the Site to provide emergency reactive services. In the case of such individuals, the Contractor shall or shall procure that any sub-contractor shall ensure that such individuals are accompanied at all times while on the Site by a member of the Contractor or sub-contractor's staff who has been properly notified to the Authority in accordance with the terms of this clause 23.8.1 (Admission to the Sites).

#### **23.9 Refusal of Admission**

The Authority reserves the right to refuse to admit to the Site any person, employed or engaged by the Contractor or a sub-contractor, whose admission would, in the reasonable opinion of the Authority, present a risk to themselves or an Authority Related Party or property, and shall not be obliged to give any reasons for such refusal.

#### **23.10 Decision to Refuse Admission**

The decision of the Authority as to whether any person is to be refused admission to the Site pursuant to clause 23.9 (Refusal of Admission) shall be final and conclusive. If the Authority declines to give reasons and/or where reasons are given but are found to be unreasonable for exercising its rights under clauses 23.8 (Admission to the Sites) and 23.9 (Refusal of Admission) and 23.11 (Removal from Sites), the Authority shall indemnify the Contractor and keep the Contractor indemnified (for itself and for the benefit of each relevant sub-contractor) against all Direct Losses provided that the Contractor or the relevant sub-contractor has used its reasonable endeavours to re-deploy that person elsewhere and/or to mitigate the claim.

#### **23.11 Removal from Site**

The Contractor shall comply with and/or procure compliance with any notice issued by the Authority from time to time requiring the removal from the Site of any person employed thereon who in the opinion of the Authority acting reasonably is not acceptable on the grounds of risk to themselves or an Authority Related Party or property and that such persons shall not be employed again upon the Project without the written consent of the Authority.

## **23.12 Relief from Performance Adjustment Points and Performance Adjustments**

23.13 Where the Authority exercises its rights under this clause 23 (Employees – General) and it can be shown that:

23.13.1 the Contractor or any sub-contractor has acted in accordance with the relevant provisions of this clause 23; or

23.13.2 the Authority did not act reasonably in instructing the Contractor not to employ and/or in requesting any removal and/or in refusing admission,

then the Authority shall give the Contractor such relief from Performance Adjustment Points and Performance Adjustments for a reasonable period to allow the Contractor or any sub-contractor to make alternative arrangements to replace the person whose employment has been refused or whose removal has been requested. For the avoidance of doubt, any relief from Performance Adjustment Points and Performance Adjustments given under this clause 23.12 (Relief from Performance Adjustment Points and Performance Adjustments) shall only be in respect of those Services in which such person is or would have been engaged.

## **23.14 Resources and Training**

The Contractor shall procure that:

23.14.1 there shall be at all times a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the Services with the requisite level of skill and experience. This obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absences and anticipated and actual peaks in demand for each of the Services; and

23.14.2 all staff receive such training and supervision as is necessary to ensure the proper performance of the Services under this Agreement.

## **23.15 Personnel Policies and Procedures**

The Contractor shall procure that there are set up and maintained by it and by all sub-contractors involved in the provision of the Services, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). The Contractor shall procure that the terms and implementation of such policies and procedures comply with Legislation and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are forthwith issued to the Authority.

## **24 Operating Manual**

### **24.1 Maintenance of Manual**

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



## **24.2 Access to Manual**

The Contractor shall at the request of the Authority provide the Authority with access to the Operating Manual in order to demonstrate that the Contractor has complied with its obligation to maintain and update the Operating Manual under clause 24.1 (Maintenance of Manual).

## **24.3 Copy on Termination**

On termination of this Agreement (howsoever arising including expiry), the Contractor shall within ten (10) Business Days provide a copy of the Operating Manual to the Authority.

## **25 Quality Assurance**

25.1 The Contractor shall appoint (or shall procure the appointment of) as soon as reasonably practicable following the date of this Agreement 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:

25.1.1 implement and monitor a quality assurance system; and

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

25.2 The Authority may carry out periodic audits of the aforementioned quality assurance system and Quest at approximate intervals of three (3) months and may carry out other periodic monitoring, spot checks and auditing of the Contractor's quality system. The Contractor shall procure that the Authority shall have a like right in respect of any relevant sub-contractors. The Contractor 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 25 (Quality Assurance).

## **26 Co-operation for Investigation and Security**

26.1 The Contractor shall co-operate with any investigation relating to a breach of security relating to the Project which is carried out by or on behalf of the Authority and:

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

26.1.2 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.

- 26.2 The Authority shall, insofar as is practical, inform the Contractor of any specific or general security information which would reasonably be expected to affect the security of the Contractor or any Contractor Related Party or their property.
- 26.3 The Contractor shall comply with the Authority's reasonable reporting requirements relating to infectious and notifiable diseases to the extent made known to the Contractor.

## **27 Service Delivery Proposals**

- 27.1 For the avoidance of doubt, the Services Specification shall at all times have priority over the Service Delivery Proposals and the Contractor shall be obliged to comply with the Services Specification and provide the Services in accordance with the Services Specification.
- 27.2 Any changes to the Service Delivery Proposals may only be made in accordance with the Review Procedure.

## **PART 4 – PAYMENT**

### **28 Payment**

#### **28.1 Payment of the Monthly Payment and Works Payments**

- 28.1.1 Following the Commencement Date, the Authority shall pay the Contractor the Monthly Payment in respect of each Payment Period where the Annual Payment is a Deficit Annual Payment, and the Contractor shall pay the Authority the Monthly Payment in respect of each Payment Period where the Annual Payment is a Surplus Annual Payment, in each case calculated in accordance with Schedule 6 (Payment and Performance Monitoring System).
- 28.1.2 Where the Annual Payment is a Deficit Annual Payment, the Monthly Payment shall be reduced in each Payment Period by any Performance Adjustments applicable in accordance with Schedule 6 (Payment and Performance Monitoring System).
- 28.1.3 Where the Annual Payment is a Surplus Annual Payment, the Contractor shall separately pay to the Authority in respect of a Payment Period any Performance Adjustments applicable in accordance with Schedule 6 (Payment and Performance Monitoring System).
- 28.1.4 The Authority shall in addition pay the Contractor the Works Payments in accordance with Clause 9 above.

#### **28.2 Report and Invoice**

On the first Business Day of each Payment Period the Contractor shall submit to the Authority:

- 28.2.1 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 6 (Payment and Performance Monitoring System); and
- 28.2.2 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 Contractor, taking into account the Monthly Payment and any Performance Adjustments applied in accordance with clause 28.1.2 and for any VAT payable by the Authority in respect of that amount; or
- 28.2.3 in respect of a Surplus Annual Payment a statement showing the Monthly Payment payable by the Contractor to the Authority for the Authority to issue an invoice to the Contractor for such amount plus any VAT (if any) payable in respect of that amount. The Authority shall

issue its invoice to the Contractor, taking account of the Contractor's statement (but not being bound by it),

(together, the **Application**).

### **28.3 Final Payment Period**

Where the Annual Payment is a Deficit Annual Payment:

- 28.3.1 during the final two Payment Periods, in addition to the amounts referred to in clause 28.2.2 (Report and Invoice) the Authority may withhold an amount equivalent to the average per Payment Period of the sum of the Performance Adjustments applicable to the previous six (6) Payment Periods until such time as the Contractor shall have provided a report to the Authority in respect of those Payment Periods containing the information set out in clause 28.2.1 (Report and Invoice); and
- 28.3.2 on receipt of the reports from the Contractor in respect of the final two Payment Periods the Authority may retain from the amounts withheld pursuant to clause 28.3.1 (Final Payment Period) 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 56 (Dispute Resolution) as owing to the Authority. The Authority shall pay the balance of any monies withheld to the Contractor or if it is agreed or determined the Contractor owes monies to the Authority in excess of those sums withheld, the Contractor 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 28.3.1 (Final Payment Period) or from the date on which over payment was made (in the case of excessive claims by the Contractor) until all relevant monies have been paid in full and whether before or after judgement.

### **28.4 Payment**

- 28.4.1 Subject to clause 28.5 (Disputed Amounts), the Authority shall pay the amount stated in any invoice submitted under clause 28.2.2 (Report and Invoice) and the Contractor shall pay the amounts stated in any invoices submitted by the Authority pursuant to clause 28.2.3 on the final Business Day of the Payment Period in question.
- 28.4.2 Where the Annual Payment is a Surplus Annual Payment, the amount of any Performance Adjustments calculated in accordance with Schedule 6 (Payment and Performance Monitoring System) shall be paid by the Contractor to the Authority at the same time as the Monthly Payment in respect of the relevant Payment Period is paid.

## **28.5 Disputed Amounts**

28.5.1 If either party (**Disputing Party**) disputes the other Party's (**Claiming Party**) entitlement to any part of the amount claimed by the Contractor pursuant to clause 28.2 (Report and Invoice) in respect of any Payment Period the provisions of this clause 28.5 (Disputed Amounts) shall apply.

28.5.2 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:

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

28.5.2.2 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; or

28.5.2.3 any amount pursuant to clauses 28.2 and/or 28.3 that the Disputing Party is seeking to withhold.

Any notice shall set out the sum or sums proposed to be withheld, grounds for withholding payment and the amount attributable to each ground.

28.5.3 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 (a **Disputed Amount**) and submit to the Claiming Party such supporting evidence as the Disputing Party may have.

28.5.4 The Authority may withhold payment of any Disputed Amount pending agreement or determination of the Contractor's entitlement in relation to the Disputed Amount but shall pay on the due date any undisputed amounts. The Contractor 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.

## **28.6 Response to Disputing Party Notice**

Within five (5) Business Days following receipt by the Claiming Party of any notice served by the Disputing Party pursuant to clause 28.5.2 (Disputed Amounts), 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:

- 28.6.1 to retain on a permanent basis any amounts withheld pursuant to clause 28.5.4 (Disputed Amounts); and
- 28.6.2 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.

## **28.7 Dispute**

If the Claiming Party responds (pursuant to clause 28.6 (Response to Disputing Party Notice)) that it does not agree with all or any of the statements made in any notice served by the Disputing Party pursuant to clause 28.5.2 (Disputed Amounts), the matter or matters in question shall be determined under the Dispute Resolution Procedure.

## **28.8 Determination of Dispute**

If the determination of any dispute conducted pursuant to clause 28.7 (Dispute) shows that:

- 28.8.1 the Disputing Party has withheld any amount which the Claiming Party was entitled to be paid; or
- 28.8.2 the Claiming Party has claimed under clause 28.2 (Report and Invoice) 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.

## **28.9 Rights of Set Off**

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.

## **28.10 Set Off and Disputed Amounts**

If the payment or deduction of any amount referred to in clause 28.9 (Rights of Set Off) 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.

## **28.11 VAT on Payments**

- 28.11.1 All amounts due under this Agreement are exclusive of VAT.
- 28.11.2 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.
- 28.11.3 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.
- 28.11.4 The Contractor 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 Contractor.

## **28.12 Indexation**

The Annual Payment shall be adjusted in accordance with paragraph 3 of Schedule 6 (Payment and Performance Monitoring System).

## **28.13 NNDR**

The parties shall comply with the provisions of Schedule 16 (NNDR).

# **29 Continuous Improvement**

## **29.1 Authority's Continuous Improvement Duty**

29.1.1 The Contractor acknowledges that:

- 29.1.1.1 the Authority is subject to the Continuous Improvement Duty;
- 29.1.1.2 the provisions of this clause 29 (Continuous Improvement) are intended to assist the Authority in discharging its Continuous Improvement Duty in relation to the Services; and
- 29.1.1.3 the provisions of this clause 29.1.1 (Authority's Continuous Improvement Duty) shall apply in respect of the obligations of the Contractor and the Authority concerning the Continuous Improvement Duty and the 1999 Act generally.

29.1.2 The Contractor 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.

29.1.3 The Contractor 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:

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

29.1.3.1.1 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;

29.1.3.1.2 assist the Authority in relation to any action taken by the Secretary of State;

29.1.3.1.3 enable the Authority to comply with any Government departmental direction; and

29.1.3.1.4 enable the Authority to report on its performance to Relevant Authorities.

29.1.3.2 complying with all requests by the Authority to procure the attendance of specific officers or employees of the Contractor or any Sub-Contractor (or to procure the attendance of any of its or their sub-contractors) 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

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

## **29.2 Annual Service Report and Annual Service Plan**

29.2.1 Without prejudice to any other provision in this Agreement the Contractor shall on the Annual Service Report Date at its own cost, provide to the Authority a written report (**Annual Service Report**) in accordance with the requirements of the Services Specification.

29.2.2 The Contractor shall upon a written request from the Authority promptly provide such written evidence or other supporting information as the Authority may reasonably require to verify and audit



the information and other material contained in the Annual Service Report.

- 29.2.3 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 Contractor (a **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.
- 29.2.4 The Contractor shall, within twenty (20) Business Days of the date of receipt of the Continuous Improvement Service Change Notice, provide the Authority at its own cost with a written statement (**Annual Service Plan**) containing the Contractor's proposals to achieve the change to the Services (or the relevant part) in accordance with the Continuous Improvement Service Change Notice.
- 29.2.5 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 Contractor 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.
- 29.2.6 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.
- 29.2.7 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:
- 29.2.7.1 confirm in writing the Annual Service Plan; or
  - 29.2.7.2 withdraw the Continuous Improvement Service Change Notice.
- 29.2.8 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.
- 29.2.9 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).

- 29.2.10 The Contractor 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 29.2.9 (Annual Service Report and Annual Service Plan).

### **29.3 Utilities**

The Contractor shall:

- 29.3.1 procure or shall ensure that the Leisure Operator procures all Utilities required for the Facilities;
- 29.3.2 ensure that it or the Leisure Operator is the counterparty to the relevant Utility supply contracts;
- 29.3.3 pay or procure payment to the relevant Utility suppliers directly for all Utilities supplied; and
- 29.3.4 pay (at its own cost) 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 including all liabilities under the CRC Scheme. In the event that any liability under the CRC Scheme in respect of the supply of Energy to the Facilities falls to the Authority, the Contractor shall reimburse the Authority and the Authority shall be entitled to set off any such liabilities against sums due under this Agreement to the Contractor.

## PART 5 – TERMINATION

### 30 Termination of this Agreement

#### 30.1 Voluntary Termination by the Authority

- 30.1.1 The Authority may terminate this Agreement at any time on or before the Expiry Date by complying with its obligations under clause 30.1.2 (Voluntary Termination by the Authority).
- 30.1.2 If the Authority wishes to terminate this Agreement under this clause 30.1 (Voluntary Termination by the Authority), it must give a Termination Notice to the Contractor stating:
  - 30.1.2.1 that the Authority is terminating this Agreement under this clause 30.1 (Voluntary Termination by the Authority);
  - 30.1.2.2 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
  - 30.1.2.3 whether the Authority has chosen to exercise its option under clause 30.1.3 (Voluntary Termination by the Authority).
- 30.1.3 On termination, the Authority shall have the option to require the Contractor to transfer its rights, title and interest in and to the Assets to the Authority or as directed by the Authority.
- 30.1.4 This Agreement will terminate on the date specified in the notice issued in accordance with clause 30.1.2 (Voluntary Termination by the Authority).

#### 30.2 Termination on Authority Default

- 30.2.1 If an Authority Default has occurred and the Contractor wishes to terminate this Agreement, the Contractor must serve a termination notice (**Contractor Termination Notice**) on the Authority within thirty (30) Business Days of becoming aware of the Authority Default.
- 30.2.2 The Contractor Termination Notice must specify the type of Authority Default which has occurred entitling the Contractor to terminate.
- 30.2.3 This Agreement will terminate on the day falling thirty (30) Business Days after the date the Authority receives the Contractor Termination Notice, unless the Authority rectifies the Authority Default within twenty (20) Business Days of receipt of the Contractor Termination Notice.

### **30.3 Termination on Contractor Default**

- 30.3.1 Subject to clause 30.4 (Rectification), the Authority shall be entitled to terminate this Agreement by notice in writing to the Contractor if a Contractor Default has occurred.
- 30.3.2 On termination the Authority may require the Contractor to transfer all of its rights, title and interest in and to the Assets to the Authority or as directed by the Authority.

### **30.4 Rectification**

- 30.4.1 If a Contractor Default has occurred and the Authority wishes to terminate this Agreement, it must serve a Termination Notice on the Contractor.
- 30.4.2 The Termination Notice must specify:
  - 30.4.2.1 the type and nature of Contractor Default that has occurred, giving reasonable details; and
  - 30.4.2.2 that in the case of any Contractor Default falling within limbs (a) (material breach), (g) (assignment, subcontracting and change of control) and (k) (insurance) of the definition of Contractor Default this Agreement will terminate on the day falling forty (40) Business Days after the date the Contractor receives the Termination Notice, unless:
    - 30.4.2.2.1 in the case of a breach under limb (a) (material breach) of the definition of Contractor Default the Contractor puts forward an acceptable rectification programme within twenty (20) Business Days after the date the Contractor receives the Termination Notice (and implements such programme in accordance with its terms and rectifies the Contractor Default in accordance with the programme); or
    - 30.4.2.2.2 in the case of any Contractor Default falling within limbs (a) (material breach), (g) (assignment, subcontracting and change of control) and (k) (insurance) of the definition of Contractor Default the Contractor rectifies the Contractor Default within forty (40) Business Days after the date the Contractor receives the Termination Notice; or

30.4.2.3 that in the case of any other Contractor Default (not being limbs (a) (material breach), (g) (assignment, subcontracting and change of control) or (k) (insurance)), this Agreement will terminate on the date falling forty (40) Business Days after the date the Contractor receives the Termination Notice.

30.4.3 If the Contractor either rectifies the Contractor 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.

30.4.4 If either in the case of a Contractor Default within limb (a) (material breach) of the definition of that term where no acceptable rectification programme has been put forward pursuant to clause 30.4.2.2.1 or in the case of a Contractor Default falling within limbs (g) (assignment, subcontracting and change of control) or (k) (insurance) of the definition of Contractor Default, the Contractor fails to rectify the Contractor 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.

30.4.5 If the Contractor 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 Contractor of such failure to implement the rectification programme in accordance with its terms.

## **31 Termination for Persistent Breach by the Contractor**

### **31.1 Warning Notice**

If a particular breach, other than any breach for which Performance Adjustment Points 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 Contractor:

31.1.1 specifying that it is a formal warning notice;

31.1.2 giving reasonable details of the breach; and

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

### **31.2 Final Notice**

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 (a **Final Warning Notice**) on the Contractor:

- 31.2.1 specifying that it is a Final Warning Notice;
- 31.2.2 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
- 31.2.3 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.

### **31.3 Currency of Warning Notices**

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.

## **32 Termination for Corrupt Gifts and Fraud**

### **32.1 Corrupt Gifts and Fraud**

The Contractor warrants that in entering into this Agreement it has not committed any Prohibited Act.

### **32.2 Termination for Corrupt Gifts and Fraud**

- 32.2.1 If the Contractor or any Sub-Contractor (or anyone employed by or acting on behalf of any of them) or any of its or their agents or shareholders commits any Prohibited Act, then the Authority shall be entitled to act in accordance with the provisions of this clause 32.2 (Termination for Corrupt Gifts and Fraud).
- 32.2.2 Notwithstanding clauses 32.2.3 to 32.2.6 (Termination for Corrupt Gifts and Fraud), if a Prohibited Act is committed by the Contractor or by an employee not acting independently of the Contractor, then the Authority may terminate this Agreement by giving notice to the Contractor provided that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, the Authority may not terminate this Agreement unless, acting reasonably, it considers termination of this Agreement to be in the best interests of the Project.
- 32.2.3 If the Prohibited Act is committed by an employee of the Contractor acting independently of the Contractor, then the Authority may give notice to the Contractor of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice the Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Services by another person.
- 32.2.4 If the Prohibited Act is committed by a Sub-Contractor or by an employee of that Sub-Contractor not acting independently of that Sub-Contractor, then the Authority may give notice to the Contractor of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice the Contractor terminates

the relevant Ancillary Document and procures the performance of such part of the Services by another person provided that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, the Authority may not terminate this Agreement unless, acting reasonably, it considers termination of this Agreement to be in the best interests of the Project.

- 32.2.5 If the Prohibited Act is committed by an employee of a Sub-Contractor acting independently of that Sub-Contractor, then the Authority may give notice to the Contractor of termination and this Agreement will terminate, unless within twenty Business Days of receipt of such notice the Sub-Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Services by another person.
- 32.2.6 If the Prohibited Act is committed by any other persons not specified in clauses 32.2.2 (Termination for Corrupt Gifts and Fraud) to 32.2.5 (Termination for Corrupt Gifts and Fraud), then the Authority may give notice to the Contractor of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice the Contractor procures the termination of such person's employment and of the appointment of their employer (where not employed by the Contractor or the Sub-Contractors) and (if necessary) procures the performance of such part of the Services by another person provided that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, the Authority may not terminate this Agreement unless, acting reasonably, it considers termination of this Agreement to be in the best interests of the Project.
- 32.2.7 Any notice of termination under this clause 32.2 (Termination for Corrupt Gifts and Fraud) shall specify:
  - 32.2.7.1 the nature of the Prohibited Act;
  - 32.2.7.2 the identity of the party whom the Authority believes has committed the Prohibited Act; and
  - 32.2.7.3 the date on which this Agreement will terminate, in accordance with the applicable provision of this clause 32.2 (Termination for Corrupt Gifts and Fraud).
- 32.2.8 In this clause 32 (Termination on Corrupts Gifts and Fraud), the expression "not acting independently of" (when used in relation to the Contractor or a Sub-Contractor) means and shall be construed as acting with the authority of or knowledge of any one or more of the directors of the Contractor or the Sub-Contractor (as the case may be).
- 32.2.9 The Contractor undertakes to the Authority that it will throughout the duration of this Agreement use all reasonable endeavours to have in place adequate procedures (as referred to in section 7(2) of the Bribery Act 2010) designed to prevent persons associated with the

Contractor from bribing any person with the intention of obtaining or retaining business for the Contractor or with the intention of obtaining or retaining an advantage in the conduct of business for the Contractor.

### **33 Termination for Force Majeure**

#### **33.1 Obligations**

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. For the avoidance of doubt, the Authority shall not be entitled to terminate this Agreement for a Contractor Default if such Contractor Default arises from a Force Majeure Event (but without prejudice to clauses 33.4 (Unable to Agree), 33.5 (Consequences of Termination) or 33.6 (Notice to Continue)).

#### **33.2 Notification for Force Majeure**

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

#### **33.3 Consultation**

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.

#### **33.4 Unable to Agree**

If no such terms are agreed on or before the date falling eighty 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, subject to clause 33.5 (Consequences of Termination), either party may terminate this Agreement by giving twenty (20) Business Days' written notice to the other party.

#### **33.5 Consequences of Termination**

If this Agreement is terminated under clause 33.4 (Unable to Agree) or clause 33.6 (Notice to Continue):

- 33.5.1 compensation shall be payable by the Authority in accordance with clause 40 (Compensation on Termination for Force Majeure); and
- 33.5.2 the Authority may require the Contractor to transfer all of its title, interest and rights in and to any Assets to the Authority or as directed by the Authority.



### **33.6 Notice to Continue**

If the Contractor gives notice to the Authority under clause 33.4 (Unable to Agree) 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 Contractor such notice (**Continuation Notice**), then:

- 33.6.1 the Authority shall (where the Annual Payment is a Deficit Annual Payment) pay to the Contractor 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 Contractor 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 33.4 (Unable to Agree) as if the Services were being fully provided; and
- 33.6.2 this Agreement will not terminate until expiry of written notice (of at least twenty (20) Business Days) from the Authority to the Contractor that it wishes this Agreement to terminate.

### **33.7 Mitigation**

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 Contractor 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.

### **33.8 Cessation of Force Majeure Event**

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.

## **34 Consequences of Termination**

### **34.1 Compensation Provisions**

If this Agreement is terminated pursuant to:

- 34.1.1 Clause 30.1 (Voluntary Termination by the Authority), the provisions of clause 37 (Compensation on Termination for Authority Default/Voluntary Termination) shall apply;
- 34.1.2 Clause 30.2 (Termination on Authority Default), the provisions of clause 37 (Compensation on Termination for Authority Default/Voluntary Termination) shall apply;

- 34.1.3 Clause 30.3 (Termination on Contractor Default), the provisions of clause 38 (Compensation on Termination for Contractor Default and Corrupt Gifts and Fraud) shall apply;
- 34.1.4 Clause 32 (Termination on Corrupt Gifts and Fraud), the provisions of clause 38 (Compensation on Termination for Contractor Default and Corrupt Gifts and Fraud) shall apply;
- 34.1.5 Clause 33 (Termination on Force Majeure), the provisions of clause 40 (Compensation on Termination for Force Majeure) shall apply; or
- 34.1.6 Clause 55 (Risks that become Uninsurable), the provisions of clause 40 (Compensation on Termination for Force Majeure) shall apply.

## **34.2 Termination of Agreement**

Notwithstanding any other provisions of this Agreement, this Agreement shall only terminate in accordance with the express provisions of this Agreement.

## **34.3 Continuing Obligations**

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 43.2 (Exclusivity of Remedy) and 74 (Sole Remedy):

- 34.3.1 termination of this Agreement shall be without prejudice to any accrued rights or obligations under this Agreement as at the date of termination; and
- 34.3.2 termination of this Agreement shall not affect the continuing rights and obligations of the Contractor and the Authority under clause 8 (Nature of Land Interests), clause 21 (TUPE and Employees), clause 22 (Pensions), clause 28 (Payment) clause 36 (Transition to Another Contractor), Part 6 (Compensation on Termination), clause 50 (Freedom of Information and Confidentiality), clause 51 (Indemnities, Guarantees and Contractual Claims) in respect of any claim arising prior to the Termination Date, clause 52 (Contractor Insurances), clause 54 (Reinstatement and Change of Requirement after Insured Event), clause 55 (Risks that Become Uninsurable), clause 56 (Dispute Resolution), clause 58 (Intellectual Property), clause 65 (Notices), clause 70 (Contractor's Records), clause 72 (Interest on Late Payment), clause 73 (Governing Law and Jurisdiction), clause 74 (Sole Remedy). clause 75 (No Double Recovery) and clause 77 (Capacity) 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.

## **35 Surveys on Expiry and Retention Fund**

### **35.1 Final Survey**

- 35.1.1 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 Contractor in accordance with its obligations under clause 15.1 (Maintenance).
- 35.1.2 The Authority shall notify the Contractor 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 Contractor 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 Contractor (acting reasonably) is able to demonstrate that carrying out the final survey on the notified date would materially prejudice the Contractor's ability to provide the Services.

### **35.2 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 Contractor. The Contractor shall afford the Authority or any person carrying out the survey (free of charge) 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.

### **35.3 Results of Survey**

If the final survey shows that the Contractor has not complied with or is not complying with its obligations under clause 15.1 (Maintenance) the Authority shall:

- 35.3.1 notify the Contractor 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 Contractor had complied or was complying with its obligations under clause 15.1 (Maintenance) (**Required Standard**);
- 35.3.2 specify a reasonable period within which the Contractor must carry out such rectification and/or maintenance work; and
- 35.3.3 if the survey shows a material non-compliance by the Contractor with its obligations under clause 15.1 (Maintenance), recover the cost of the survey from the Contractor by means of a withdrawal from the Retention Fund Account or deduction from the next payment of the Monthly Payment.

### **35.4 Maintenance Work**

The Contractor shall carry out such rectification and/or maintenance work notified pursuant to clause 35.3.1 (**Outstanding Work**) in order to reach the Required

Standard within the period specified and any costs it incurs in carrying out the Outstanding Work shall be at its own expense.

### **35.5 Retention Fund**

If the Contractor has been notified under clause 35.3.1 (Results of Survey) 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 Contractor in the interim):

35.5.1 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 35.1 (Final Survey) from the next following instalment (or, if the amount of such instalment is insufficient, the next instalments as necessary) of Monthly Payment; or

35.5.2 where the Annual Payment is a Surplus Annual Payment, the Contractor shall pay the costs of that work as quantified by the survey referred to in clause 35.1 (Final Survey),

and in either case, the relevant party shall pay such amount into an interest bearing escrow account (**Retention Fund Account**) (subject to clause 35.6 (Costs)).

### **35.6 Costs**

If and to the extent that the Contractor 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 Contractor 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 Contractor's costs the Contractor shall bear the balance of such costs itself.

### **35.7 Failure to Carry Out Work**

If and to the extent that the Contractor fails to carry out the Outstanding Work within the period specified in clause 35.3.2 (Results of Survey), the Authority shall be entitled to carry out itself, or procure, such rectification and/or maintenance work at the Contractor'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 Contractor as a debt payable on demand.

### **35.8 Balance of Fund**

If:

35.8.1 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;

- 35.8.2 all such rectification and/or maintenance work has been paid for by the Contractor; and
- 35.8.3 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 Contractor as soon as practicable.

## **36 Transition to Another Contractor**

### **36.1 Duty to Co-operate**

During the final six (6) months of the Contract Period (where this expires by effluxion of time) or during the period of any Termination Notice of this Agreement, and in either case for a reasonable period thereafter, the Contractor shall co-operate fully with the transfer of responsibility for the Services (or any of the Services) to the Authority or any New Contractor of such works and/or services the same or similar to the Services, and for the purposes of this clause 36 (Transition To Another Contractor) the meaning of the term "co-operate" shall include:

- 36.1.1 liaising with the Authority and/or any New Contractor, and providing reasonable assistance and advice concerning the Services and their transfer to the Authority or to such New Contractor;
- 36.1.2 allowing any New Contractor access (at reasonable times and on reasonable notice) to the Facilities but not so as to interfere with or impede the provision of the Services;
- 36.1.3 (without prejudice to the obligations of the Contractor pursuant to clause 24 (Operating Manual)) providing to the Authority and/or to any New Contractor all and any information concerning the Facilities and the Services which is reasonably required for the efficient transfer of responsibility for their performance but, to avoid doubt, information which is commercially sensitive to the Contractor [and/or FM Contractor and/or Leisure Operator] shall not be provided (and for the purpose of this clause 36.1.3 (Duty to Co-operate), commercially sensitive shall mean Contractor IPR and information which would if disclosed to a competitor of the Contractor and/or Leisure Operator give that competitor a competitive advantage over the Contractor and/or Leisure Operator and thereby prejudice the business of the Contractor and/or Leisure Operator but shall, to avoid doubt, not include any information referred to in clause 21 (TUPE and Employees)); and
- 36.1.4 transferring its rights, title and interest in and to the Assets to the New Contractor with effect on and from the Termination Date or Expiry Date (as applicable).

### **36.2 Transfer of Responsibility**

The Contractor shall use all reasonable endeavours to facilitate the smooth transfer of responsibility for the Services to a New Contractor or to the Authority, as the case may be, and the Contractor shall take no action at any time during the Contract Period or thereafter which is calculated or intended, directly or indirectly, to prejudice or frustrate or make more difficult such transfer.

## **PART 6 – COMPENSATION ON TERMINATION**

### **37 Compensation on Termination for Authority Default/Voluntary Termination**

**37.1** On termination of this Agreement pursuant to clauses 30.1 (Voluntary Termination by the Authority) or 30.2 (Termination on Authority Default), the Authority shall pay the Contractor in accordance with clauses 43 (Miscellaneous Compensation Provisions) and 44 (Method of Payment) an amount equal to the aggregate of (without double counting):

37.1.1 such amounts properly due to the Contractor and invoiced in accordance with clause 28 (Payment) in respect of the period prior to such termination but which have not been previously paid;

37.1.2 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 28 (Payment) and/or such other amounts properly due to the Contractor in accordance with this Agreement which, in each case remains due at the Termination Date, including any sum set off by the Contractor pursuant to clause 28.9;

37.1.3 any Sub-Contractor Breakage Costs;

37.1.4 the Profit Payment;

37.1.5 any Capital Costs; and

37.1.6 any Forward Funded Amount,

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

37.1.7 where a Surplus Annual Payment applies such amounts properly due to the Authority in accordance with clause 28 (Payment) in respect of the period up to the Termination Date but which have not been previously paid;

37.1.8 amounts which the Authority is entitled to set off pursuant to clause 28.9 (Rights of set off); and

37.1.9 BI Proceeds, to the extent that they compensate the Contractor in respect of any of the items listed at clauses 37.1.1 to 37.1.5.

**38 Compensation on Termination for Contractor Default and Corrupt Gifts and Fraud**

**38.1** On termination of this Agreement in accordance with clauses 30.3 (Termination on Contractor Default) or 32 (Termination on Corrupt Gifts and Fraud), the Contractor shall be liable to and shall pay the Authority:

38.1.1 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 Contractor to comply with its obligations under this Agreement;

38.1.2 where the Authority carries out a Retendering Process, the Retendering Costs;

38.1.3 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 Provided always that the Contractor's total liability for Retendering Costs and the amount payable under this sub-clause shall not exceed £250,000;

38.1.4 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 28.9 (Rights of Set Off):

38.1.5 such amounts properly due to the Contractor and invoiced in accordance with clause 28 (Payment) in respect of the period prior to such termination but which have not been previously paid; and

38.1.6 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 28 (Payment) and/or such other amounts properly due to the Contractor in accordance with this Agreement which, in each case, remains due at the Termination Date including any sum set off by the Contractor pursuant to clause 28.9.

**39 Not used**

**40 Compensation on Termination for Force Majeure**

**40.1** On termination of this Agreement under clause 33 (Termination on Force Majeure), the Authority shall pay to the Contractor in accordance with clauses 43 (Miscellaneous Compensation Provisions) and 44 (Method of Payment) an amount equal to the aggregate of (without double counting):

40.1.1 such amounts properly due to the Contractor and invoiced in accordance with clause 28 (Payment) in respect of the period prior to such termination but which have not been previously paid;

40.1.2 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 28 (Payment)



and/or such other amounts properly due to the Contractor in accordance with this Agreement which, in each case remains due at the Termination Date including any sum set off by the Contractor pursuant to clause 28.9;

40.1.3 any Sub-Contractor Breakage Costs;

40.1.4 any Capital Costs; and

40.1.5 any Forward Funded Amount,

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

40.1.6 where a Surplus Annual Payment applies such amounts properly due to the Authority in accordance with clause 28 (Payment) in respect of the period up to the Termination Date but which have not been previously paid;

40.1.7 amounts which the Authority is entitled to set off pursuant to clause 28.9 (Rights of set off); and

40.1.8 BI Proceeds, to the extent that they compensate the Contractor in respect of any of the items listed at clauses 40.1.1 to 40.1.4.

## **41 Assets**

**41.1** Where this Agreement expires due to effluxion of time or terminates earlier, the Authority shall have the option to require the Contractor 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. This right shall apply to Assets which have been paid for through this Agreement and the Authority shall pay for other Assets at their written down value.

**41.2** Not used

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

41.3.1 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 Contractor 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 Contractor shall forthwith deliver up to the Authority such Assets.

41.3.2 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 Contractor Default, the Authority reserves its right to take action against the Contractor 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.

## **42 Retendering Process**

If the Authority elects to retender the Services following termination under clauses 30.3 (Termination on Contractor Default) or 32 (Termination on Corrupt Gifts and Fraud), then the following provisions shall apply (**Retendering Process**):

- 42.1** The objective of the retendering process shall be to retender the Services and enter into a Retendered Contract with a replacement contractor.
- 42.2** 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.
- 42.3** The Authority shall notify the Contractor 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.
- 42.4** The Contractor authorises the release of any information by the Authority under the Retendering Process which would otherwise be prevented under clause 50 (Freedom of Information and 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 36.1.3.
- 42.5** 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.
- 42.6** 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.
- 42.7** The replacement contractor shall be required to set out in its tender submission the proposed annual payment amount (**Retendered Annual Payment**).
- 42.8** 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.

## **43 Miscellaneous Compensation Provisions**

### **43.1 Gross Up of Termination Payments**

If any amount of compensation payable by the Authority or the Contractor (whether payable as a lump sum or in instalments) under clauses 37 (Compensation on Termination for Authority Default/Voluntary Termination), 38 (Compensation on Termination for Contractor Default and Corrupt Gifts and Fraud) or 40 (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 Contractor or the Contractor 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 Contractor or the Authority to reduce the Tax to which the payment is subject.

#### **43.2 Exclusivity of Remedy**

Any and all sums irrevocably paid by the Authority to the Contractor or the Contractor 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:

- 43.2.1 any antecedent liability of the Contractor to the Authority which the Authority has been unable to set off pursuant to this Agreement;
- 43.2.2 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
- 43.2.3 any liabilities arising in respect of any breach by either party of their obligations under clause 34.3 (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.

### **44 Method of Payment**

#### **44.1 Termination Sum**

- 44.1.1 All amounts payable by a party to the other party pursuant to clauses 37 (Compensation on termination for Authority Default/Voluntary Termination) to 40 (Compensation on Termination for Force Majeure) of this Agreement shall (save where the Authority elects to pay in instalments pursuant to clause 0) 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.
- 44.1.2 For the avoidance of doubt, 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 37 to 40, but shall instead be paid by the party described as receiving such sum pursuant to clauses 37 to 40 to the other party.

## **PART 7 – GENERAL**

### **45 Liaison**

The parties shall give effect to the procedure set out in Schedule 10 (Liaison Procedure).

### **46 Relief Events**

#### **46.1 Occurrence**

If and to the extent that a Relief Event adversely affects the ability of the Contractor to perform any of its obligations under this Agreement, then the Contractor shall be entitled to apply for relief from any rights of the Authority arising under clause 30.3 (Termination on Contractor Default) and its obligations under this Agreement.

#### **46.2 Relief**

To obtain relief, the Contractor must:

- 46.2.1 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 Contractor 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;
- 46.2.2 within five (5) Business Days of receipt by the Authority of the notice referred to in clause 46.2.1 (Relief), give full details of the relief claimed; and
- 46.2.3 demonstrate to the reasonable satisfaction of the Authority that:
  - 46.2.3.1 the Contractor 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;
  - 46.2.3.2 the Relief Event directly caused the need for relief from obligations;
  - 46.2.3.3 the relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or dealt with by the Contractor acting in accordance with Good Industry Practice, without incurring material expenditure; and
  - 46.2.3.4 the Contractor is using reasonable endeavours to perform its obligations under this Agreement.

#### **46.3 Consequences**

In the event that the Contractor has complied with its obligations under clause 46.2 (Relief), then the Authority shall not be entitled to exercise its right to terminate this Agreement under clause 30.3 (Termination on Contractor Default) and, subject to clause 46.4 (Performance Adjustment Points and Performance Adjustments), shall give such other relief as has been requested by the Contractor.

#### **46.4 Performance Adjustment Points and Performance Adjustments**

Nothing in clause 46.3 (Consequences) shall, where the Annual Payment is a Deficit Annual Payment, affect any entitlement to apply Performance Adjustment Points and/or Performance Adjustments under clause 28 (Payment) and Schedule 6 (Payment and Performance Monitoring System) during the period in which the Relief Event is subsisting provided that any such Performance Adjustment Points and Performance Adjustments shall be disregarded for the purposes of the Authority's right to terminate this Agreement for a Contractor Default.

#### **46.5 Information**

In the event that information required by clause 46.2 (Relief) is provided after the dates referred to in that clause, then the Contractor shall not be entitled to any relief during the period for which the information is delayed.

#### **46.6 Notice**

The Contractor 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.

#### **46.7 Disputes**

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

### **47 Change in Law**

#### **47.1 Occurrence**

The Contractor 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.

#### **47.2 Qualifying Change in Law**

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:

47.2.1 any necessary change to the Services;

- 47.2.2 whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law;
- 47.2.3 whether relief from compliance with obligations is required, including the obligation of the Contractor to meet the Services Specification and/or the Service Delivery Proposals during the implementation of any relevant Qualifying Change in Law;
- 47.2.4 any Change in Revenue that will result from the relevant Qualifying Change in Law;
- 47.2.5 any estimated Change in Costs that directly result from the Qualifying Change in Law; and
- 47.2.6 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 47.3 (Parties to Discuss) to 47.6 (Adjustment to Annual Payment).

### **47.3 Parties to Discuss**

As soon as practicable after receipt of any notice from either party under clause 47.2 (Qualifying Change in Law), the parties shall discuss and agree the issues referred to in clause 47.2 (Qualifying Change in Law) and any ways in which the Contractor can mitigate the effect of the Qualifying Change in Law, including:

- 47.3.1 providing evidence that the Contractor 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;
- 47.3.2 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 Contractor;
- 47.3.3 giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project, including similar businesses in which the shareholders or their Affiliates carry on business; and
- 47.3.4 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 47.2.5 (Qualifying Change in Law) and/or 47.2.6 (Qualifying Change in Law);

#### **47.4 Change Agreed**

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

#### **47.5 Financing**

If the Contractor has used reasonable endeavours to obtain funding for the Capital Expenditure referred to in clause 47.4 (Change Agreed), but has been unable to do so within forty (40) Business Days of the date that agreement or determination pursuant to clause 47.4 (Change Agreed) occurred, then the Authority shall pay to the Contractor an amount equal to that Capital Expenditure on or before the date falling twenty (20) Business Days after the Capital Expenditure has been incurred.

#### **47.6 Adjustment to Annual Payment**

Any compensation payable under this clause 47 (Changes in Law) by means of an adjustment to or reduction in the Annual Payment shall be determined and made in accordance with clause 61 (Financial Adjustments).

#### **47.7 Payment of Irrecoverable VAT**

The Authority shall pay to the Contractor from time to time as the same is incurred by the Contractor 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 Contractor 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 47.7, **Irrecoverable VAT** means input VAT incurred by the Contractor 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 Contractor is not entitled to repayment or credit from HM Revenue & Customs in respect of such input VAT.

### **48 Authority and Contractor Changes**

The provisions of Schedule 24 (Change Protocol) shall have effect in respect of Changes except as otherwise expressly provided in this Agreement.

### **49 Authority Step-In**

#### **49.1 Right to Step-In**

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

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

49.1.2 to discharge a statutory duty; and/or

49.1.3 because an Emergency has arisen,

then the Authority shall be entitled to take action in accordance with clauses 49.2 (Notice to the Contractor) to 49.5 (Step-In on Contractor Breach).

#### **49.2 Notice to the Contractor**

If clause 49.1 (Right to Step-In) applies and the Authority wishes to take action, the Authority shall notify the Contractor in writing of the following:

49.2.1 the action it wishes to take;

49.2.2 the reason for such action;

49.2.3 the date it wishes to commence such action;

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

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

#### **49.3 Action by Authority**

49.3.1 Following service of such notice, the Authority shall take such action as notified under clause 49.2 (Notice to the Contractor) and any consequential additional action as it reasonably believes is necessary (together, the **Required Action**) and the Contractor shall give all reasonable assistance to the Authority while it is taking the Required Action. The Authority shall provide the Contractor 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.

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

#### **49.4 Step-In without Contractor Breach**

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

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

49.4.2 in respect of the period in which the Authority is taking the Required Action and provided that the Contractor 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 Contractor shall equal the amount the Contractor would receive



if it were satisfying all its obligations and providing the Services affected by the Required Action in full, 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

- 49.4.3 where the Annual Payment is a Surplus Annual Payment due from the Contractor to the Authority it shall be suspended and the Authority shall account to the Contractor 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 Contractor being in a no worse position in respect of the amount of revenue and Loss of Revenue received or paid.

#### **49.5 Step-In on Contractor Breach**

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

- 49.5.1 the Contractor shall be relieved of its obligations to provide such part of the Services; and
- 49.5.2 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 Contractor shall equal the amount the Contractor would receive if it were satisfying all its obligations and providing the Services affected by the Required Action in full over that period, less an amount equal to 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 Contractor; or
- 49.5.3 where the Annual Payment is a Surplus Annual Payment due from the Contractor to the Authority it shall be suspended and the Authority shall account to the Contractor for all revenue received by the Authority in respect of the Services affected by the Required Action in full over that period, less:
- 49.5.3.1 an amount equal to all the Authority's costs of operation in taking the Required Action; and
- 49.5.3.2 the Surplus Annual Payment adjusted pro rata for that period.

## **50 Freedom of Information and Confidentiality**

### **50.1 Duty of Confidentiality**

- 50.1.1 The parties agree that the terms of this Agreement and each Project Document shall, subject to clause 50.1.2 (Duty of Confidentiality), not be treated as Confidential Information and may be disclosed without restriction.
- 50.1.2 Clause 50.1.1 (Duty of Confidentiality) shall not apply to terms of this Agreement or a Project Document designated as Commercially Sensitive Information and listed in Part 1 of Schedule 21 (Commercially Sensitive Contractual Provisions) to this Agreement, which shall, subject to clause 50.2 (Permitted Disclosure), be kept confidential for the relevant periods specified in that Part.
- 50.1.3 The parties shall keep confidential all Confidential Information received by one party from the other party relating to this Agreement and the Project Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any Confidential Information.

### **50.2 Permitted Disclosure**

Clauses 50.1.2 and 50.1.3 (Duty of Confidentiality) shall not apply to:

- 50.2.1 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;
- 50.2.2 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 clause 50 (Freedom of Information and Confidentiality);
- 50.2.3 any disclosure to enable a determination to be made under the Dispute Resolution Procedure or in connection with a dispute between the Contractor or any of its sub-contractors;
- 50.2.4 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;
- 50.2.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;

- 50.2.6 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 to the Leisure Operator for the purposes of performance under its Sub-Contract 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 Contractor to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in the Contractor or any associated company 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;
- 50.2.7 any disclosure by the Authority of information relating to the design, construction, operation and maintenance of the Project 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 re-tender this Agreement;
- 50.2.8 any registration or recording of the Necessary Consents and property registration required;
- 50.2.9 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
- 50.2.10 any disclosure for the purpose of:
- 50.2.10.1 the examination and certification of the Authority's or the Contractor's accounts; or
  - 50.2.10.2 any examination pursuant to the 1999 Act of the economy, efficiency and effectiveness with which the Authority has used its resources; or
  - 50.2.10.3 complying with a proper request from either party's insurance advisers or insurers on placing or renewing any insurance policies; or
  - 50.2.10.4 (without prejudice to the generality of clause 50.2.4) compliance with the FOIA and/or the Environmental Information Regulations,

provided that, for the avoidance of doubt, neither clauses 50.2.10.4 (Permitted Disclosure) or 50.2.4 (Permitted Disclosure) shall permit disclosure of Confidential Information otherwise prohibited by clause 50.1.3 (Duty of Confidentiality) where that information is exempt from disclosure under section 41 of the FOIA.

### **50.3 Obligations Preserved**

Where disclosure is permitted under clause 50.2 (other than clauses 50.2.2, 50.2.4, 50.2.5, 50.2.8 and 50.2.10 (Permitted Disclosure)) 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.

### **50.4 Audit**

For the purposes of:

- 50.4.1 the examination and certification of the Authority's accounts;
- 50.4.2 the Local Government Finance Act 1982 (and any other Legislation relating to the inspection, examination and auditing of the Authority's accounts); and
- 50.4.3 an examination pursuant to the 1999 Act of the economy, efficiency and effectiveness with which the Authority has performed its functions,

the auditor may examine such documents as he or it may reasonably require which are owned, held or otherwise within the control of the Contractor and any sub-contractor and may require the Contractor and any sub-contractor to produce such oral or written explanations as he or it considers necessary.

### **50.5 Exploitation of Information**

The Contractor 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.

### **50.6 Not used**

### **50.7 Expiry**

On or before the Expiry Date or the Termination Date, the Contractor shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any User or Authority Related Party including any documents in the possession, custody or control of a sub-contractor, are delivered up to the Authority.

### **50.8 Disclosure by Auditor**

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

### **50.9 Not used.**

## **50.10 Freedom of Information**

- 50.10.1 The Contractor acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall facilitate the Authority's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in clauses 50.10.2 to 50.10.8 (Freedom of Information) (inclusive).
- 50.10.2 Where the Authority receives a Request for Information in relation to Information that the Contractor is holding on its behalf the Authority shall transfer to the Contractor such Request for Information that it receives as soon as practicable and in any event within five Business Days of receiving a Request for Information and the Contractor shall:
- 50.10.2.1 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
  - 50.10.2.2 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.
- 50.10.3 Following notification under clause 50.10.2 (Freedom of Information) and up until such time as the Contractor has provided the Authority with all the Information specified in clause 50.10.2.1 (Freedom of Information), the Contractor 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:
- 50.10.3.1 whether the Information is exempt from disclosure under the FOIA and the Environmental Information Regulations; and
  - 50.10.3.2 whether the Information is to be disclosed in response to a Request for Information,
- and in no event shall the Contractor respond directly, or allow its sub-contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Authority.
- 50.10.4 The Contractor 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.

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

50.10.6 The Contractor 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 in accordance with the requirements of the FOIA and the Environmental Information Regulations.

50.10.7 In the event of a request from the Authority pursuant to clause 50.10.2 (Freedom of Information), the Contractor shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of the Contractor'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 Contractor in writing whether or not it still requires the Contractor to comply with the request and where it does require the Contractor 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 Contractor of such additional days as soon as practicable after becoming aware of them and shall reimburse the Contractor for such costs as the Contractor 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.

50.10.8 The Contractor acknowledges that (notwithstanding the provisions of this clause 50) 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 Contractor or the Project:

50.10.8.1 in certain circumstances without permission of the Contractor; or

50.10.8.2 following consultation with the Contractor and having taken their views into account,

provided always that where clause 50.10.8.1 (Freedom of Information) applies, the Authority shall, in accordance with the recommendations

of the FOIA Code, draw this to the attention of the Contractor and use reasonable endeavours to consult with the Contractor prior to any disclosure.

## **51 Indemnities, Guarantees and Contractual Claims**

### **51.1 Contractor's Indemnity**

51.1.1 The Contractor shall, subject to clause 51.2 (Contractor not Responsible), be responsible for, and shall release and indemnify the Authority on demand from and against all liability for Direct Losses arising from:

51.1.1.1 death or personal injury;

51.1.1.2 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 Contractor to provide under this Agreement and which form part of the Facilities; and

51.1.1.3 third party actions, claims and/or demands other than those which are the subject of the indemnity in clause 51.1.2,

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

51.1.2 The Contractor shall, subject to clause 51.2 (Contractor not Responsible), 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 51.1.1.3) 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 Contractor of its obligations under this Agreement to the extent that there are no other remedies available to the Authority under this Agreement.

### **51.2 Contractor not Responsible**

The Contractor shall not be responsible or be obliged to indemnify the Authority for:

51.2.1 any matter referred to in clause 51.1 (Contractor's Indemnity) which arises as a direct result of the Contractor acting on a written notice issued by the Authority (and for the purposes of this clause 51.2.1, clause 1.6 (Responsibility for Related Parties) shall not apply); or

- 51.2.2 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 Contractor of its obligations under this Agreement) or by the breach of the Authority of its obligations under this Agreement.
- 51.2.3 in respect of any claim made pursuant to clause 51.1.2 to the extent that, when taken together with any other claims made under that clause in any Contract Year, the amount of the Contractor's Uninsured Losses exceeds £250,000 (Indexed)

### **51.3 Limitation of Indemnity**

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.

### **51.4 Notification of Claims**

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 (a **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.

### **51.5 Conduct of Claims**

Subject to the rights of the insurers under the Contractor Insurances and the Authority Insurances, the Indemnifying Party may at its own expense and 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.

### **51.6 Costs of Claims**

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.

### **51.7 Mitigation**

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.

### **51.8 Sub-Contractor Losses**

Where:

- 51.8.1 a Sub-Contractor is entitled to claim any compensation and/or relief from the Contractor under the Sub-Contracts; and
- 51.8.2 the Contractor 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 Contractor's claim on the ground that the Contractor 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.

## **52 Contractor Insurances**

### **52.1 Requirement to Maintain**

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

### **52.2 Obligation on Parties**

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.

### **52.3 Evidence of Policies**

The Contractor shall provide to the Authority:

52.3.1 copies on request of all insurance policies referred to in clause 52.1 (Requirement to Maintain) (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

52.3.2 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 52 (Contractor Insurances) and Schedule 14 (Insurances).

### **52.4 Renewal Certificates**

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

### **52.5 Breach**

If the Contractor is in breach of clause 52.1 (Requirement to Maintain), 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 Contractor on written demand.

### **52.6 Notification of Claims**

The Contractor 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 Contractor Insurances or which, but for the application of the applicable

insurance policy excess, would be made on any of the Contractor Insurances and (if required by the Authority) give full details of the incident giving rise to the claim.

**52.7 Limit of Liability**

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

**52.8 Premia**

Save where expressly set out in this Agreement, the insurance premia for the Contractor Insurances and the amount of any loss that would otherwise be recoverable under any of the Contractor 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 Contractor.

**52.9 Authority Approval**

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

**53 Authority Insurances**

**53.1** The Authority shall take out and maintain the Authority Insurances.

**53.2** The Authority shall notify the Contractor of the type of insurance it has obtained including relevant deductibles and premia.

**53.3** In relation to the Authority Insurances the Contractor shall:

53.3.1 comply with all reasonable requirements of the insurers;

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

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

**53.4** Claims under the Authority Insurances shall be pursued by the Authority at the Contractor's request. Where the Authority pursues such claims, the Contractor 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.

**53.5** Not used.

## **54 Reinstatement and Change of Requirement after Insured Event**

**54.1** All insurance proceeds received under any policy referred to in paragraph 1 of Part 2 of Schedule 14 (Insurances) (the **Contractor 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.

**54.2** In the event of any damage to the Facility or the Site which damage is covered or would be covered by the Authority Insurances, the Authority shall in consultation with the Contractor 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.

## **55 Risks that become Uninsurable**

### **55.1 Uninsurable Risks**

Nothing in clause **Error! Reference source not found.** (Insurance) or this clause **Error! Reference source not found.** (Risks that Become Uninsurable) shall oblige the Contractor 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 Contractor or a Contractor Related Party.

### **55.2 Risks Become Uninsurable**

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:

55.2.1 the Contractor shall notify the Authority within five (5) Business Days of the risk becoming Uninsurable; and

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

55.2.2.1 the risk being Uninsurable is not caused by the actions, breaches, omissions or defaults of the Contractor or a sub-contractor; and

55.2.2.2 the Contractor has demonstrated to the Authority that the Contractor 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 Contractor would in similar circumstances (in the absence of the type of relief envisaged by this clause **Error! Reference source not found.**) 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).

### 55.3 Consequences

55.3.1 If the requirements of clause 55.2 (Risks that Become Uninsurable) are satisfied, but the parties cannot agree as to how to manage or share the risk, then:

55.3.1.1 in respect of such third party liability insurance only, the Authority shall (at the Authority's option) either pay to the Contractor an amount equal to the amount set out in clause **Error! Reference source not found.** (Compensation on Termination for Force Majeure) and this Agreement will terminate or elect to allow this Agreement to continue and clause 55.3.1.2 (Consequences) shall thereafter apply in respect of such risk;

55.3.1.2 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 55.3.1.1) 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 Contractor 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 **Error! Reference source not found.** (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;

55.3.1.3 where pursuant to clauses 55.3.1.1 and/or 55.3.1.2 (Consequences) 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 Contractor in respect of the relevant risk in the Contract Year prior to it becoming Uninsurable (Indexed) 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 Contractor;

55.3.1.4 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

55.3.1.5 where pursuant to clauses 55.3.1.1 and/or 55.3.1.2 (Consequences) this Agreement continues the Contractor shall approach the insurance market at least every four months to establish whether the risk remains Uninsurable. As soon as the Contractor is aware that the risk is no longer Uninsurable, the Contractor 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.

55.3.2 If, pursuant to clause 55.3.1.2 (Consequences), the Authority elects to make payment to the Contractor (such that the Agreement will terminate) (the **Relevant Payment**) the Contractor shall have the option (exercisable within twenty (20) Business Days of the date of such election by the Authority (the **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 Contractor'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.

#### **55.4 Increase in Insured Amounts**

The limit of indemnity and the maximum deductibles for each of the Contractor 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.

#### **55.5 Unavailability of Terms or Conditions**

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

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

55.5.1.2 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 Contractor and/or any sub-contractors) then clause 55.5.2 (Unavailability of Terms or Conditions) shall apply.

- 55.5.2 If it is agreed or determined that clause 55.5.1 (Unavailability of Terms or Conditions) applies then the Authority shall waive the Contractor's obligations in clause **Error! Reference source not found.** (Contractor Insurances) and/or Schedule 14 (Insurances) in respect of that particular Insurance Term and the Contractor 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 55.5.1 (Unavailability of Terms or Conditions) continue to apply to such Insurance Term.
- 55.5.3 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 Contractor 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 Contractor'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 Contractor 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 Contractor.
- 55.5.4 Where the Authority has exercised the waiver pursuant to clause 55.5.2 (Unavailability of Terms or Conditions), it shall where a Deficit Annual Payment applies, be entitled to deduct from the Monthly Payment the **Adjusted Amount**, such amount being an amount equal to one twelfth the amount paid for the particular Insurance Term in the preceding Contract Year (using a reasonable estimate of such amount where a precise figure is not available) less any annual amount paid or payable by the Contractor 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 55.5.3 (Unavailability of Terms or Conditions).
- 55.5.5 While clause 55.5.1 (Unavailability of Terms or Conditions) applies, the Annual Payment where a Deficit Annual Payment applies, shall be reduced each Contract Year by the Adjusted Amount, Indexed from the date that the particular Insurance Term is no longer available.
- 55.5.6 The Contractor shall notify the Authority as soon as reasonably practicable and in any event within five days of becoming aware that clause 55.5.1.1 and/or 55.5.1.2 (Unavailability of Terms or Conditions) 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 Contractor 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.

- 55.5.7 In the event that clause 55.5.1.1 and/or 55.5.1.2 (Unavailability of Terms or Conditions) apply in respect of an Insurance Term (irrespective of the reasons for the same) the Contractor shall approach the insurance market at least every four months to establish whether clause 55.5.1.1 and/or 55.5.1.2 (Unavailability of Terms or Conditions) remain applicable to the Insurance Term. As soon as the Contractor is aware that clause 55.5.1.1 and/or 55.5.1.2 (Unavailability of Terms or Conditions) has ceased to apply to the Insurance Term, the Contractor 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 55.5.4 or 55.5.5 (Unavailability of Terms and Conditions) shall cease to apply.

## **56 Dispute Resolution**

### **56.1 Disputes**

Any dispute arising in relation to any aspect of this Agreement shall be resolved in accordance with this clause 56.

### **56.2 Consultation**

If a dispute arises in relation to any aspect of this Agreement, the Contractor 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 Contractor.

### **56.3 Adjudication**

Without prejudice to clause 56.2 (Consultation), 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 56.4 (Identity of Adjudicator).

### **56.4 Identity of Adjudicator**

The Adjudicator nominated to consider a dispute referred to him shall be agreed between the parties if the Authority and the Contractor are unable to agree on the identity of the expert to be appointed, 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.

### **56.5 Referral of the Dispute**

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.

**56.6 Response to the Referral**

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.

**56.7 Procedure**

Subject to clause 56.18 (Sub-Contractors' Submissions), 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.

**56.8 Adjudicator's Decision**

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.

**56.9 Adjudicator's Costs**

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.

**56.10 Adjudicator as Expert**

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.

**56.11 Adjudicator's Powers**

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.

**56.12 Confidentiality**

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 50 (Freedom of Information and 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.

**56.13 Liability of Adjudicator**

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.

**56.14 Reference to the Courts**

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 56.8 (Adjudicator's Decision)) give notice to the other party of its intention to refer the dispute to the courts of England and Wales for final determination.

**56.15 Parties' Obligations**

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 56 and shall give effect forthwith to every decision of the Adjudicator and the courts delivered under this clause 56.

**56.16 Similar Disputes**

If any dispute arising under this Agreement raises issues which relate to:

- 56.16.1 any dispute between the Contractor and the Leisure Operator arising under the Leisure Contract or otherwise affects the relationship or rights of the Contractor and/or the Leisure Operator under the Leisure Contract (**Leisure Contract Dispute**),
- 56.16.2 any dispute between the Contractor and a building contractor arising under a building contract (**Building Contract Dispute**); or

then the Contractor may include as part of its submissions made to the Adjudicator or to the court submissions made by the Leisure Operator or the building contractor as appropriate.

**56.17 Jurisdiction over Sub-Contractors**

The Adjudicator shall not have jurisdiction to determine the Leisure Contract Dispute or the Building Contract Dispute but the decision of the Adjudicator and/or the courts shall, subject to clause 56.14 (Reference to the Courts), be binding on the Contractor and the Leisure Operator insofar as it determines the issues relating to the Leisure Contract Dispute and on the Contractor and the Building Contractor insofar as it determines the issues relating to the Building Contract Dispute.

**56.18 Sub-Contractors' Submissions**

Any submissions made by the Leisure Operator or the building contractor shall:

- 56.18.1 be made within the time limits applicable to the delivery of submissions by the Contractor; and

56.18.2 concern only those matters which relate to the dispute between the Authority and the Contractor under this Agreement.

#### **56.19 Costs**

Where the Leisure Operator or the building Contractor makes submissions in any reference before:

56.19.1 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 Contractor; and

56.19.2 the courts, the costs of the litigation shall be in the discretion of the court.

#### **56.20 Authority's Liability**

The Authority shall have no liability to the Leisure Operator or the building 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 building contractor in participating in the resolution of any dispute under this Agreement.

#### **56.21 Access to Documents**

The Contractor shall not allow the Leisure Operator or the building contractor access to any document relevant to issues in dispute between the Authority and the Contractor save where:

56.21.1 the document is relevant also to the issues relating to the Leisure Contract Dispute or the Building Contract Dispute as the case may be; and

56.21.2 the Contractor has first delivered to the Authority a written undertaking from the Leisure Operator and/or the building 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 building contractor (as appropriate) to advise in connection with the dispute.

### **57 Ordering of Goods and Services**

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.

### **58 Intellectual Property**

#### **58.1 Project Data**

The 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 and the Contractor 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:

- 58.1.1 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
- 58.1.2 following termination 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,

(together, the **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.

## **58.2 Licence in respect of Intellectual Property Rights**

The Contractor:

- 58.2.1 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) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in the Contractor; and
- 58.2.2 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 58.2.1 to the Authority,

in both cases, solely for the Approved Purposes.

## **58.3 Vesting of Intellectual Property Rights**

The Contractor 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 Contractor and the Contractor shall enter into appropriate agreements with any Contractor Related Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

## **58.4 Maintenance of data**

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 Contractor shall:

- 58.4.1 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 Contractor 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
- 58.4.2 upon request and subject to the Authority paying the costs thereof, 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.

**58.5** The Contractor shall ensure the back up and storage in safe custody of the data, materials and documents referred to in clause 58.4 in accordance with Good Industry Practice. Without prejudice to this obligation, the Contractor 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 Contractor shall comply, and shall cause all Contractor Related Parties to comply, with all procedures to which the Authority's Representative has given its approval. The Contractor 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.

**58.6 Indemnity**

58.6.1 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 Project 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 Contractor 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 51 (Indemnities, Guarantees and Contractual Claims) shall apply.

58.6.2 Where a claim or proceeding is made or brought against the Contractor 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 Project 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 58 by the Contractor then the Authority shall indemnify the Contractor at all times from and against all Direct Losses and Indirect Losses arising as a result of such claims and proceedings.

**58.7 Licence to Contractor**

The Authority hereby grants to the Contractor a non-transferable, non-exclusive, 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 the Project any Intellectual Property Rights relating to the Project which are or become vested in the Authority.

**58.8 Intellectual Property Rights on expiry or termination of this Agreement**

The rights referred to in clause 58.1 (Project Data) and clause 58.2 (Licence in respect of Intellectual Property Rights) shall not apply to the Contractor 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 Contractor IPR)) is necessary for the operation and/or maintenance of the Facilities

by the Authority and/or any New Contractor and is not available to the Authority and/or any New Contractor on reasonable commercial terms following such expiry or termination from any third party, then the Contractor may grant to the Authority, an irrevocable, non-exclusive and transferable licence (carrying the

right to grant sub-licences) to use the relevant elements of such Contractor IPR for the Approved Purposes on reasonable commercial terms and rates.

## **59 Assignment and Sub-Contracting**

### **59.1 Restrictions on Transfer of this Agreement by the Authority**

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:

- 59.1.1 a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975;
- 59.1.2 any Local Authority which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Agreement; or
- 59.1.3 any other public body whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the Contractor) 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.

### **59.2 Restriction on the Contractor**

Subject to clause 59.3 (Exception), the Contractor shall not sub-contract, assign, underlet, charge, sell, bargain or otherwise deal in any way with the benefit of this Agreement in whole or in part except with the prior written consent of the Authority.

### **59.3 Exception**

59.3.1 Nothing in this Agreement shall prohibit the Contractor 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 Sub-Contractor under the relevant Sub-Contract provided that:

- 59.3.1.1 such Sub-Contractor's identity has been notified to the Authority and the Authority has approved it in writing;
- 59.3.1.2 the Contractor has complied with its obligations under clause 4.1 (Collateral Warranties and Surveys);
- 59.3.1.3 if required by the Authority, such Sub-Contractor's terms of Sub-Contract have been notified to the

Authority by the Contractor and the Authority has approved them in writing;

59.3.1.4 if required by the Authority, the Contractor provides the Authority with a certified copy of the Sub-Contract within ten (10) Business Days of the Sub-Contract being completed;

59.3.1.5 if required by the Authority, the Contractor procures a parent company guarantee or bond from the Sub-Contractor; and

59.3.1.6 the Contractor shall remain primarily and directly liable for the Contractor's obligations under this Agreement.

59.3.2 By entering into this Agreement, the Authority approves the appointment of the Leisure Operator under the Leisure Contract in the Agreed Form, provided that the Contractor complies with its obligations under clause 4.1 (Collateral Warranties, Surveys and Guarantees) and the Contractor shall remain primarily and directly liable for the Contractor's obligations under this Agreement.

#### **59.4 Contractor's Obligations**

The Contractor shall perform its obligations under and observe all the terms of any Sub-Contract with a Sub-Contractor.

#### **59.5 Sub-Contractors**

Nothing in this Agreement shall prohibit or prevent any Sub-Contractor employed by the Contractor from being employed by the Authority at any establishments of the Authority.

#### **59.6 Replacement of Sub-Contractors**

The rights set out in clause 59.6.1 (Replacement of Sub-Contractors) may be exercised on no more than two (2) occasions during the Contract Period.

59.6.1 On the substitution or replacement of the defaulting Leisure Operator (in all cases provided that the Contractor is acting in compliance with clause 7.1 (Ancillary Documents), the Contractor may elect that, for the purposes of clause 30.3 (Termination on Contractor Default) only:

59.6.1.1 any accrued Performance Adjustment Points and/or Performance Adjustments; and/or

59.6.1.2 any warning notices or Final Warning Notices in respect of clause 31 (Termination for Persistent Breach by the Contractor),

in each case relating to the relevant Services in respect of which the Leisure Operator is being replaced, shall be cancelled. The Contractor shall notify the Authority on or before the appointment of any such substitute or replacement Leisure Operator whether it elects for this clause 59.6 (Replacement of Sub-Contractors) to apply on that occasion.

59.6.2 Where an election is made pursuant to clause 59.6.1 (Replacement of Sub-Contractors) above on the substitution or replacement of the defaulting Leisure Operator then, for the purposes of clause 30.3 (Termination on Contractor Default) only:

59.6.2.1 no Performance Adjustment Points shall accrue for the purposes of sub-paragraph (h) of the definition of Contractor Default;

59.6.2.2 no Performance Adjustment Points shall accrue for the purposes of sub-paragraph (i) of the definition of Contractor Default; and

59.6.2.3 no warning notices or Final Warning Notices in respect of clause 31 (Termination for Persistent Breach by the Contractor) shall accrue for the purposes of sub-paragraph (b) of the definition of Contractor 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. For the avoidance of doubt, Performance Adjustment Points and/or Performance Adjustments shall still be made to the Annual Payment during that period but whereas at the date of replacement pursuant to clause 59.6.1 (Replacement of Sub-Contractors) a ratchet is being applied pursuant to paragraphs [6.4 to 6.6] of the Payment and Performance Monitoring System the ratchet shall be reset with effect from the date of such replacement.

## **60 Change In Ownership**

### **60.1 Restriction**

A Change of Control may only occur to a Suitable Third Party.



## **60.2 Notification**

- 60.2.1 The Contractor shall provide the Authority with at least ten (10) Business Days' prior written notice of any Change of Control contemplated by clause 60.1 (Restriction).
- 60.2.2 The Authority may, not more than twice in any Contract Year, or at any time when a Contractor Default is outstanding, request that the Contractor 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 of Control.
- 60.2.3 The Contractor's obligation under clause 60.2.1 shall, except where a legal transfer of shares is proposed, be limited to the extent of the Contractor's awareness.
- 60.2.4 The Contractor's obligation under clause 60.2.2 shall, except where a legal transfer of shares has occurred, be limited to the extent of the Contractor's awareness having made all reasonable enquiry.
- 60.2.5 For the purposes of this clause 60.2 (Notification) 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.

## **61 Financial Adjustments**

### **61.1 Updating the LOBTA**

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 61 (Financial Adjustments). Where for the purposes of this clause 61 (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 Contractor, 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 Contractor shall be entitled to take into account, inter alia:

- 61.1.1 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;
- 61.1.2 reasonable economic assumptions prevailing at the time; and
- 61.1.3 changes in the prospective technical performance of the Project arising as a result of the Relevant Event or Loss of Revenue Event,

provided that the Authority shall not be required (and the Contractor 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 Contractor bears under the terms of this Agreement, including (to the extent so borne by the Contractor under this Agreement) changes in VAT rates, taxation rates, CPI and the impact of Performance Adjustments.

## **61.2 Application to the LOBTA**

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 61 (Financial Adjustments), the Contractor 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 Contractor with that in which it would have been under the version of the LOBTA applicable immediately prior to the relevant adjustment.

## **61.3 No Better and no Worse**

61.3.1 Subject to clause 61.3.2, any reference in this Agreement to **no better and no worse** or to leaving the Contractor in a **no better and no worse position** shall be construed by reference to the Contractor's:

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

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

so as to ensure that:

61.3.1.3 the Contractor 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 18 (Benchmarking) by reference to the version of the LOBTA applicable immediately prior to the Relevant Event than had the Relevant Event not occurred; and

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

61.3.2 In respect of any Loss of Revenue, the sum calculated pursuant to Schedule 23 (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 Contractor in a "no better and no worse position".

- 61.3.3 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.

**61.4 Replacement of LOBTA and Loss of Revenue Schedule**

- 61.4.1 Any LOBTA produced following adjustments in accordance with this clause 61 (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.
- 61.4.2 When an LOBTA is updated for the purposes of this clause 61 (Financial Adjustments), an updated Schedule 23 (Loss of Revenue) shall also be prepared. When the updated Schedule 23 (Loss of Revenue) is approved by the Authority (such approval not to be unreasonably withheld), it shall become Schedule 23 (Loss of Revenue) for the purposes of this Agreement until its further amendment in accordance with this Agreement.

**61.5 Amendments to Logic and/or Formulae**

- 61.5.1 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.
- 61.5.2 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.

**61.6 Copies of the Revised LOBTA and Loss of Revenue Schedule**

Following any change to the LOBTA and/or Schedule 23 (Loss of Revenue) under the provisions of this clause 61 (Financial Adjustments), the Contractor shall promptly deliver a copy of the revised LOBTA and/or Schedule 23 (Loss of Revenue) to the Authority in the same form as is established at the date of this Agreement or in such other form as may be agreed between the parties.

**62 Audit Access**

The Contractor shall provide to the Authority's Representative all information, documents, records and the like in the possession of, or available to, the Contractor (and to this end the Contractor shall use all reasonable endeavours to procure that all such items in the possession of the Contractor or any sub-contractor shall be available to it and the Contractor

has included or shall include, relevant terms in all contracts with sub-contractors to this effect) as may be reasonably requested by the Authority's Representative for any purpose in connection with this Agreement.

## **63 No Agency**

### **63.1 No Partnership or Employment**

Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Authority and the Contractor.

### **63.2 Power to Bind**

Save as expressly provided otherwise in this Agreement, the Contractor shall not be, or be deemed to be, an agent of the Authority and the Contractor shall not hold itself out as having authority or power to bind the Authority in any way.

### **63.3 Deemed Knowledge**

Without limitation to its actual knowledge, the Contractor shall for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project as is held (or ought reasonably to be held) by any Contractor Related Party.

## **64 Entire Agreement**

### **64.1 Prior Representations etc Superseded**

Except where expressly provided in this Agreement, this Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

### **64.2 Acknowledgements**

Each of the parties acknowledges that:

64.2.1 subject to clause 5.1 (Contractor Warranties), and clause 6 (Authority Warranty) it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement; and

64.2.2 this clause shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

## **65 Notices**

### **65.1 Form and Service of Notices**

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 email or other electronic means with a hard copy by first class post or by hand, or leaving the same at:

<b>Contractor</b>	<b>Authority</b>

### **65.2 Provision of Information to Representatives**

Where any information or documentation is to be provided or submitted to the Authority's Representative or the Contractor's Representative it shall be provided or submitted by sending the same by email or other electronic means with a hard copy by first class post or by hand, or leaving the same at:

<b>Contractor's Representative</b>	<b>Authority's Representative</b>

### **65.3 Change of Details**

Either party to this Agreement (and either Representative) may change its nominated address by prior notice to the other party.

### **65.4 Effectiveness of Notices**

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.

## **66 Severability**

If any term, condition or provision of this Agreement 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.

## **67 Waiver**

### **67.1 Waiver to be Written**

No term or provision of this Agreement shall be considered as waived by any party unless a waiver is given in writing by that party.

**67.2      Extent of Waiver**

No waiver under clause 67.1 (Waiver to be Written) 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 Agreement unless (and then only to the extent) expressly stated in that waiver.

**68      Public Relations and Publicity**

**68.1      Restriction**

The Contractor shall not by itself, its employees or agents, and shall procure that its sub-contractors shall not communicate with representatives of the press, television, radio or other communications media on any matter concerning this Agreement or the Project without the prior written approval of the Authority.

**68.2      Photographs**

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

**69      Advertisements**

The Contractor shall not exhibit or attach to any part of the Sites any notice or advertisement (other than one promoting or relating to the Leisure Services) without the prior written permission of the Authority's Representative, save where otherwise required to comply with Legislation.

**70      Contractor's Records**

**70.1      Records and Open Book Accounting**

The Contractor shall (and shall procure that each sub-contractor shall):

- 70.1.1      at all times maintain a full record of particulars of the costs of performing the Services;
- 70.1.2      upon request by the Authority, provide a written summary of any of the costs referred to in clause 70.1.1 (Records and Open Book Accounting), including details of any funds held by the Contractor 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 Contractor of its obligations under this Agreement;
- 70.1.3      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 70.1 (Records and Open Book Accounting); and
- 70.1.4      provide to the Authority copies of its annual report and accounts within twenty (20) Business Days of publication.

## **70.2 Books of Account**

Compliance with clause 70.1 (Records and Open Book Accounting) shall require the Contractor 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:

- 70.2.1 administrative overheads;
- 70.2.2 payments made to the Sub-Contractors and from the Sub-Contractors to their sub-contractors;
- 70.2.3 capital and revenue expenditure; and
- 70.2.4 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 Contractor shall have (and procure that its sub-contractors shall have) the books of account evidencing the items listed in sub-clauses 70.2.1 to 70.2.4 (Books of Account) 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.

## **70.3 Maintenance of Records**

- 70.3.1 The Contractor 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 25 (Quality Assurance) and any applicable Legislation.
- 70.3.2 Without prejudice to clause 70.3.1 (Maintenance of Records), the Contractor shall maintain or shall procure that the following are maintained:
  - 70.3.2.1 a full record of all incidents relating to health, safety and security which occur during the term of this Agreement;
  - 70.3.2.2 full records of all maintenance procedures carried out during the term of this Agreement; and
  - 70.3.2.3 full records of all staff matters including turnover, pay and disciplinary matters,

and the Contractor shall have the items referred to in clauses 70.3.2.1 (Maintenance of Records) to 70.3.2.3 (Maintenance of Records) 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.

#### **70.4 Auditor**

The Contractor shall permit all records referred to in this clause 70 (Contractor's Records) to be examined and copied from time to time by the Authority's auditor (whether internal or external) and their representatives and other representatives of the Authority who reasonably require access to the same.

#### **70.5 Retention**

The records referred to in this clause 70 (Contractor's Records) shall be retained for a period of at least five (5) years after the Contractor's obligations under this Agreement have come to an end.

#### **70.6 Termination or Expiry**

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 project the same as or similar to the Project, the Contractor shall (and shall ensure that the sub-contractors will) comply with all reasonable requests of the Authority to provide information relating to the Contractor's costs of operating and maintaining the Project.

#### **70.7 Provision of Information**

The Contractor 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.

#### **70.8 Confidentiality**

All information referred to in this clause 70 (Contractor's Records) is subject to the obligations set out in clause 50 (Freedom of Information and Confidentiality).

### **71 Data Protection**

#### **71.1 General**

71.1.1 If for any reason Personal Data is transferred under this Agreement, the Contractor shall at all times comply with the DPL as a data controller if necessary, including maintaining a valid and up to date registration or notification under the DPL covering the data processing to be performed in connection with the Project.

71.1.2 The Contractor and any sub-contractor shall only undertake processing of Personal Data as instructed by the Authority in connection with the Project and shall not transfer any Personal Data to any country or territory outside the European Economic Area unless permitted by law.



## **72 Interest on Late Payment**

Save where otherwise specifically provided, where any payment or sum of money due from the Contractor to the Authority or from the Authority to the Contractor 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 Contractor with a substantial remedy pursuant to Sections 8 and 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

## **73 Governing Law and Jurisdiction**

The Agreement shall be governed by and construed in all respects in accordance with the laws of England. Subject to clause 56 (Dispute Resolution), the English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement.

## **74 Sole Remedy**

### **74.1 Common Law Rights for the Contractor**

Without prejudice to any entitlement of the Contractor:

74.1.1 to specific performance of any obligation under this Agreement; or

74.1.2 to injunctive relief;

the Contractor'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 Contractor shall have no additional right or remedy arising by common law, in equity, by statute or otherwise.

**74.2** The Contractor's sole remedy in relation to any Compensation Event shall be the operation of clause 11 (Compensation Events).

### **74.3 Common Law Rights of the Authority**

Subject to:

74.3.1 any other express right of the Authority pursuant to this Agreement; and

74.3.2 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 Contractor, 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 Part 6 (Compensation on Termination),

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 6 (Payment and Performance Monitoring System).

**74.4** Nothing in clause 74.3 (Common Law Rights of the Authority) 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.

**74.5 No Breach**

The Contractor 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.

**74.6 Indirect Losses**

Save where stated to the contrary, the indemnities under this Agreement shall not apply and (without prejudice to the Authority's rights under the Payment and Performance Monitoring System) 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 Contractor 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 74.

**75 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.

**76 Counterparts**

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

**77 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 Contractor.

**SCHEDULE 1**  
**SERVICES SPECIFICATION**

Services Specification

**SCHEDULE 2**  
**SERVICE DELIVERY PROPOSALS**

**SCHEDULE 3**

**WORKS AND**

**WORKS**

**PROGRAMME**

**SCHEDULE 4**  
**FACILITIES**

means.

**SCHEDULE 5**

**SITE PLAN**

**SCHEDULE 6**  
**PAYMENT AND PERFORMANCE MONITORING SYSTEM**





## **SCHEDULE 7**

### **COLLATERAL WARRANTY**

Warranty from the Contractor's Leisure Operator

## SCHEDULE 8

### REVIEW PROCEDURE

#### 1 REVIEW PROCEDURE

- 1.1 The provisions of this Schedule 8 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 (entire contents of a submission being referred to in this Schedule 8 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 Contractor 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 Contractor 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 8, or fails to comply with the provisions of this paragraph 1.3, the Contractor 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 Contractor, 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 Contractor 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 8. If the Contractor does not submit any such information, data and documents, the Authority's Representative shall be entitled to:
- 2.1.1 comment on the Submitted Item on the basis of the information, data and documents which have been provided; or
  - 2.1.2 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 8.

## **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:
    - 3.1.1.1 the Contractor'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
    - 3.1.1.2 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 7.1 (Ancillary Documents):
    - 3.1.2.1 the Authority's ability to perform its obligations under this Agreement would be adversely affected by the proposed course of action;
    - 3.1.2.2 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;
    - 3.1.2.3 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;

- 3.1.2.4 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
- 3.1.2.5 the Contractor'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:
  - 3.1.3.1 the proposed revision or substitution is not in accordance with Good Industry Practice;
  - 3.1.3.2 the performance of the relevant Services in accordance with the proposed revision or substitution would (on the balance of probabilities):
    - 3.1.3.2.1 be less likely to achieve compliance with relevant parts of the Services Specification;
    - 3.1.3.2.2 have an adverse effect on the provision by the Contractor of the Services or on the safety of any Users of the Facilities; or
    - 3.1.3.2.3 would cause the Authority to incur material additional expense; or
  - 3.1.3.3 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:
  - 3.1.4.1 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 Contractor rescheduling the Programmed Maintenance;
  - 3.1.4.2 the safety of Users or staff would (on the balance of probabilities) be adversely affected; or
  - 3.1.4.3 the period for carrying out the Programmed Maintenance would (on the balance of probabilities)

exceed the period reasonably required for the relevant works;

3.1.5 in relation to any Submitted Item submitted pursuant to clause 20 (Use of the Facilities), the proposed use of the Facilities by third parties:

3.1.5.1 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 centres;

3.1.5.2 the use is one which the Authority (acting reasonably) has objected to;

3.1.5.3 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;

3.1.5.4 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;

3.1.6 in relation to any submission to defer the replacement of any part of the Facilities made pursuant to clause 15.6 (Programmed Replacement) on the grounds that:

3.1.6.1 the proposed deferral is not in accordance with Good Industry Practice;

3.1.6.2 the performance of the relevant Services in accordance with the proposed deferral would (on the balance of probabilities):

3.1.6.2.1 be less likely to achieve compliance with relevant parts of the Services Specification;

3.1.6.2.2 have an adverse effect on the provision of the Services or on the safety of any Users; or

3.1.6.2.3 would cause the Authority to incur material additional expense;

3.1.6.3 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

3.1.6.4 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 Contractor.
- 4.2 In the case of any Submitted Item, if the Authority's Representative returns the Submitted Item to the Contractor endorsed "comments", the Contractor shall comply with such Submitted Item after amendment in accordance with the comments unless the Contractor disputes that any such comment is on grounds permitted by this Agreement, in which case the Contractor or the Authority's Representative may refer the matter for determination in accordance with clause 56 (Dispute Resolution).
- 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 Contractor of its obligations under this Agreement nor is it an acknowledgement by the Authority that the Contractor has complied with such obligations.

#### **5 DOCUMENT MANAGEMENT**

- 5.1 The Contractor shall issue [NUMBER] 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 Contractor 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 Contractor'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 8 shall constitute an Authority Change save to the extent provided in this Schedule 8.
- 6.2 If, having received comments from the Authority's Representative, the Contractor considers that compliance with those comments would amount to an Authority Change, the Contractor 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 24 (Change Protocol). Any failure by the Contractor 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 Contractor that any compliance with the Authority's comments shall be without cost to the Authority and without any extension of time.



## **SCHEDULE 9**

### **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.

## SCHEDULE 10

### LIAISON PROCEDURE

#### 1 PROJECT LIAISON GROUP

- 1.1 The Authority and the Contractor shall establish and maintain throughout the Contract Period a project liaison group (**Project Liaison Group**), consisting of three (3) members from the Authority, three (3) members from the Contractor and Leisure Operator, a chairman (**Chairman**), and, where a majority of the Project Liaison Group so determines, additional members being properly qualified to participate in discussions relating to any particular matter, these members having no voting rights, which shall have the functions described below.
- 1.2 Each party will have the right to make reasonable objections to the other party's proposed members or the Chairman but not so as to frustrate the rotation of the chairmanship.
- 1.3 Should the Authority and the Contractor agree that the best interests of the Project would be served by the removal of one or more members of the Project Liaison Group, they may so direct in writing and the Authority or the Contractor, as the case may be, will put forward to the Authority and Contractor the name of a substitute member of the Project Liaison Group.
- 1.4 The relevant person shall with the consent of the other party, such consent not to be unreasonably withheld or delayed, become a member of the Project Liaison Group as from the date of its next meeting.

#### 2 FUNCTIONS

The functions of the Project Liaison Group shall be:

- 2.1 to provide a means for the joint review of all aspects of the performance of this Agreement;
- 2.2 to provide a forum for joint strategic discussion and consideration of all aspects with regard to this Agreement including ensuring dissemination of information and consideration of the views of all the stakeholders connected with the Project; and
- 2.3 consideration of issues relating to:
  - 2.3.1 Necessary Consents;
  - 2.3.2 provision of the Services;
  - 2.3.3 Authority Changes; and
  - 2.3.4 others as agreed from time to time

### **3 ROLE**

The role of the Project Liaison Group is to make recommendations to the Authority and to the Contractor, which the Authority and the Contractor may accept or reject at their complete discretion. Neither the Project Liaison Group itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of this Agreement or to make any decision binding on the parties. The Authority and the Contractor shall not rely on any act or omission of the Project Liaison Group, or any members of the Project Liaison Group acting in that capacity, so as to give rise to any waiver or personal bar in respect of any right, benefit or obligation of the Authority or of the Contractor under this Agreement. No discussion, review or recommendation by the Project Liaison Group shall relieve the Authority or the Contractor of any liability or vary any such liability or any right or benefit.

### **4 REPRESENTATIVES**

The Authority and the Contractor may appoint their representatives on the Project Liaison Group and remove those representatives and appoint replacements, by written notice delivered to the other at any time. A representative on the Project Liaison Group may appoint and remove an alternate (who may be another representative of that party) in the same manner. If a representative is unavailable (and the other parties' representative may rely on the alternate's statement that the representative is unavailable) his alternate shall have the same rights and powers as the representative.

### **5 PRACTICES AND PROCEDURES**

Subject to the provisions of this Schedule 10, the members of the Project Liaison Group may adopt such procedures and practices for the conduct of the activities of the Project Liaison Group as they consider appropriate, from time to time, provided that the quorum for a meeting of the Project Liaison Group shall be [four (4)] (with at least [two (2)] members of the Authority and [two (2)] members of the Contractor present).

### **6 RECOMMENDATIONS**

Recommendations and other decisions of the Project Liaison Group must have the affirmative vote of all those voting on the matter, which must include not less than one (1) representative of the Authority and not less than one (1) representative of the Contractor.

### **7 VOTING**

Each member of the Project Liaison Group shall have one (1) vote.

### **8 CHAIRMAN**

The Chairman of the Project Liaison Group shall be nominated by the Authority and by the Contractor alternately every six (6) months during the Contract Period (commencing with the Authority). The Chairman shall be in addition to each party's representatives on the Project Liaison Group. The Chairman shall not have a vote.

### **9 FREQUENCY OF MEETINGS**

The Project Liaison Group shall meet at least once every quarter.

## **10 CONVENING OF MEETINGS**

Any member of the Project Liaison Group may convene a meeting of the Project Liaison Group at any time.

## **11 NOTICES OF MEETINGS**

Not less than ten (10) Business Days' notice (identifying the agenda items to be discussed at the meeting) shall be given to convene a meeting of the Project Liaison Group, except that in emergencies, a meeting may be called at any time on such notice as may be reasonable in the circumstances.

## **12 ATTENDANCE AT MEETINGS**

Meetings of the Project Liaison Group should normally involve the attendance (in person or by alternative) of representatives at the meeting. Where the representatives of the Project Liaison Group consider it appropriate (by affirmative vote of all those voting on the matter which must include not less than one (1) representative of the Authority and one (1) representative of the Contractor) meetings may also be held by telephone or another form of telecommunication by which each participant can hear and speak to all other participants at the same time.

## **13 MINUTES**

Minutes of all decisions (including those made by telephone or other telecommunication form) and meetings of the Project Liaison Group shall be kept by the Contractor and copies circulated promptly to the Authority, normally within ten (10) Business Days of the making of the decision or the holding of the meeting. A full set of minutes shall be kept by the Contractor and shall be open to inspection by the Authority at any time, upon request.

## **14 PARTNERING CHARTER**

The Partnering Charter appended at Appendix 1 of this Schedule 10 (Liaison Procedure) shall take effect.

## **APPENDIX 1**

### **Partnering Charter**

- 1** For the duration of the Agreement, this "Partnering Charter" will apply. The parties shall each work cooperatively with each other to discharge their respective responsibilities under this Agreement and to provide strategic direction for the provision of the Services and the operation of the Facilities. The parties will provide support to the Project Liaison Group and its functions shall include:-
  - 1.1 Considering and agreeing annual participation targets- establish and agree appropriate targets on an annual basis in accordance with the Agreement and monitor effectiveness for collating data and reporting against selected targets
  - 1.2 Monitoring Service performance - ensure the Services are delivered to the standards required by the Agreement, in particular by commissioning qualitative and quantitative reports on performance and implementing/reviewing procedures for self-monitoring and reporting through the use of the agreed key performance indicators.
  - 1.3 Creating and monitoring a Risk and Project Register - establish a joint approach to risk and project management by creating and regularly reviewing a register of the risks and projects associated with the implementation and on-going Service delivery and determining which of the parties should assume responsibility/are responsible for the risk(s) and project actions.
  - 1.4 Being Innovative - develop and/or consider proposals for continuous service improvement and for greater cost-effectiveness in the delivery of the Services. This may be implemented by studying examples of best practice elsewhere, implementing studies, reports and projects managed by the Authority and the Contractor.
  - 1.5 Being Proactive - anticipate and consider proposals for any change in the Services that may be required, for example, by any change in law or policy, or by any change in economic or social circumstances or expectations.
  - 1.6 Ensuring a partnering ethos – fully and properly consider any representations that may be made by either party concerning any matter that appears to be inconsistent with the parties commitment to work cooperatively.
  - 1.7 Resolving Differences - seek the rapid and fair resolution of any differences between the parties. The parties commit to discuss problems as soon as they arise and to work together in a no blame culture.
  - 1.8 Reviewing Service performance – review monthly/annual reports prepared and consider/discuss openly the parties' opinions on the state of the partnering relationship, successes and shortcomings over a Contract Year, and proposals for improvement in the future.
- 2** The Authority's Representative and the Contractor's Representative will meet regularly to ensure that the day-to-day operational requirements of the Agreement are being met. The

dates for these meetings will be agreed between the parties and will vary according to operational requirements.

**3** Furthermore, the parties each accept a duty to:

- 3.1 make a sincere effort to understand the other party's obligations, goals, expectations, duties and objectives in the performance of the Services and operation of the Facilities;
- 3.2 be just and faithful in all dealings in respect of the relationship between the parties, the Agreement and the Project, and to give a true account of such dealings;
- 3.3 work at all times within a spirit of co-operation to ensure the delivery of the Services to the required standard;
- 3.4 resolve differences that may arise in relation to the Agreement by good faith discussions and negotiations wherever possible;
- 3.5 communicate clearly and effectively, and in a timely manner, on all matters relating to the Agreement;
- 3.6 make the most efficient use of resources, and seek to achieve cost effective savings and to enhance User participation and revenue to the benefit of both parties;
- 3.7 make every reasonable endeavour to ensure that all persons engaged on the Project diligently and faithfully employ themselves to bring about its performance to a high standard;
- 3.8 give an early warning to the other party of any material mistakes, discrepancies or omissions of which either party becomes aware within the Agreement, and offer fair and reasonable solutions where practicable; and
- 3.9 give an early warning to the other party of any matter that they become aware of that could affect the achievement of any obligations, goals, expectations, duties and objectives in the performance of the Services and operation of the Facilities.

## **SCHEDULE 11**

### **WARRANTED**

#### **DATA**

if further information is



Part 2 – Contractor Warranted Data

- 1      **Registered Name of Contractor:**
- 2      **Registered Office of Contractor:**
- 3      **Company Registration Number of Contractor:**
- 4      **Directors of Contractor:**
- 5      **Shareholders of Contractor (with respective shareholdings):**
- 6      **Registered Name of Holdco:**
- 7      **Registered Office of Holdco:**
- 8      **Company Registration Number of Holdco:**
- 9      **Directors of Holdco:**
- 10     **Shareholders of Holdco (with respective shareholdings):**



## SCHEDULE 12

### PROJECT DOCUMENTS AND ANCILLARY DOCUMENTS

#### Part 1 – Project Documents

Document	Parties
Leisure Operating Contract	
Headlease	

#### Part 2 – Ancillary Documents

Document	Parties
Collateral Warranty from Leisure Operator	
LGPS Admission Agreement	

## **SCHEDULE 13**

### **TITLE MATTERS**

#### **Part 1 – Title Warranties**

Save as disclosed in the Disclosed Title Matters, the Replies to Enquiries the Authority warrants that for the period of this Agreement:

- 1** each and every part of the 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 Replies to Enquiries has been prepared after due and careful enquiry and is true, accurate and complete as at the date of this Agreement; and
- 7** the Disclosed Title Matters comprise all of the documents relating to the title to the 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.

**SCHEDULE 14**  
**INSURANCES**

## **SCHEDULE 15**

### **AUTHORITY'S POLICIES**

The Authority's Policies are listed below

## **SCHEDULE 16**

### **NNDR**

#### **1 Definitions**

##### **Billing Authority**

has the meaning given to the term "billing authority" in the Local Government Finance Act 1988;

##### **National Non Domestic Rates or NNDR**

means 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 Contractor or Leisure Operator to submit, or do anything reasonably required by the Billing Authority in support of, an application for NNDR Relief;
- (b) any act or omission of any Contractor 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 Contractor or the Leisure Operator to exercise reasonable skill and care and use all reasonable endeavours to obtain NNDR Relief;

##### **NNDR Pre-Application Information**

shall have the meaning given in paragraph 2.2.1 (Eligibility for NNDR Relief);

##### **NNDR Pre-Application Rate**

shall have the meaning given in paragraph 2.2.2 (Eligibility for NNDR Relief);

##### **NNDR Relief**

means relief from the obligation to pay NNDR applicable to the Site 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 Billing Authority's policy for the application of NNDR Relief in the relevant 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 (Alternative Structures);



### **Updated NNDR Rate**

shall have the meaning given in paragraph 3.4 (Initial Application for NNDR Relief);

## **2 Eligibility for NNDR Relief**

2.1 The Contractor acknowledges and agrees that, subject to the following provisions of this Schedule 16 (NNDR), the Contractor 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 Contractor has, prior to the Commencement Date, submitted to the Authority information relating to the contractual arrangements and the Project and corporate structure proposed by the Contractor for the purposes of the Project to assist the Billing Authority to assess the eligibility of the Contractor and/or Leisure Operator to claim NNDR Relief in connection with the Facilities on and from the Commencement Date, such information being as set out in the Contractor's tender documents (**NNDR Pre-Application Information**); and

2.2.2 having relied upon the information contained in the NNDR Pre-Application Information, the Billing Authority has indicated to the Contractor that the contractual arrangements and Project and corporate structure proposed by the Contractor would, on the date of such indication, entitle the Contractor 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 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 Contractor shall or shall procure that the Leisure Operator shall inform the Billing Authority in relation to the occupation of the Facilities by the Leisure Operator.

3.2 The Contractor shall or shall procure that the Leisure Operator shall submit an application for NNDR Relief to the Billing Authority following the issue of the first NNDR demand note by the Billing Authority in respect of the Facilities. 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 (Initial Application for NNDR Relief), the Billing Authority determines that the contractual arrangements contemplated by this Agreement (and (where applicable) the Sub-Contracts) will entitle the Contractor or Leisure Operator to

claim NNDR Relief in connection with the Facilities at the NNDR Pre-Application Rate, then the Contractor shall apply (and continue to apply) the full benefit of such NNDR Relief to the Project and the Contractor 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 the LOBTA.

- 3.4 Where, following the application referred to in paragraph 3.2 (Initial Application for NNDR Relief), the Billing Authority determines that the contractual arrangements contemplated by this Agreement (and (where applicable) the Sub-Contracts) will not entitle the Contractor or Leisure Operator to claim NNDR Relief at the NNDR Pre-Application Rate and instead claim it at a different rate (including for the avoidance of doubt, a nil rate) (**Updated NNDR Rate**) in connection with the Facilities so that the NNDR liability for the Project increases, then:

3.4.1 where the information on which such determination is made is:

- 3.4.1.1 consistent (in all relevant respects) with the information submitted in the NNDR Pre-Application Information; and
- 3.4.1.2 the reason for such determination does not arise as a result of an NNDR Failure; and
- 3.4.1.3 the reason for such determination does not arise as a result of a General Change in Law which was foreseeable at the date of this Agreement,

then, subject to the following provisions of this Schedule 16 (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 61 (Financial Adjustments) so as to put the Contractor 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 Agreement, then, subject to the following provisions of this Schedule 16 (NNDR), the Contractor 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 Contractor's or Leisure Operator's initial application for NNDR Relief pursuant to paragraph 3.2 (Initial Application for NNDR Relief), the Contractor shall or shall procure that the Leisure Operator shall submit an application for NNDR Relief to the Billing Authority whenever thereafter

so required by the relevant rules and procedures of the 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 (Subsequent Applications for NNDR Relief), the Billing Authority determines that the contractual arrangements contemplated by this Agreement (and (where applicable) the Sub-Contracts) will entitle the Contractor 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 Contractor shall apply (and continue to apply) the full benefit of such NNDR Relief to the Project and the Contractor 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 the LOBTA.

4.3 Where, following an application referred to in paragraph 4.1 (Subsequent Applications for NNDR Relief), the Billing Authority determines that the contractual arrangements contemplated by this Agreement (and (where applicable) the Sub-Contracts) will not entitle the Contractor 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 Project increases, then:

4.3.1 where the information on which such determination is made is:

4.3.1.1 consistent (in all relevant respects) with the information submitted in the NNDR Pre-Application Information;

4.3.1.2 the reason for such determination does not arise as a result of an NNDR Failure; and

4.3.1.3 the reason for such determination does not arise as a result of a General Change in Law which was foreseeable at the date of this Agreement,

then, subject to the following provisions of this Schedule 16 (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 61 (Financial Adjustments) so as to put the Contractor in no better and no worse a position than it would have been in had the relevant determination not been made;

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 date of this Agreement, then, subject to the following provisions of this Schedule 16 (NNDR), the Contractor shall be responsible for meeting the additional costs of NNDR in respect of the Facilities.

- 4.4 For the avoidance of doubt, 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.

## **5 Alternative Structures**

- 5.1 Where the Contractor 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 Contractor 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 Contractor'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 Contractor and/or the Leisure Operator, the Contractor 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 Contractor shall, from the date of such request, investigate what alternative lawful contract structures and/or forms of entity (which are acceptable to the Contractor, 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 Contractor's reasonable expenses in taking the steps required under this paragraph 5.3.
- 5.4 Upon presentation by the Contractor 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 Contractor 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 Contractor 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 Contractor of its decision pursuant to paragraph 5.4.1 or 5.4.2 (Alternative Structures) (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 (Alternative Structures), with such revisions as may be agreed to by the parties (acting reasonably) the Contractor 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 a Contractor Change.

## **6 Reductions in NNDR Liability**

Where during the Contract Period, the Authority, subsequently becomes entitled to grant (and does so grant) the Contractor 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 61 (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 Contractor 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 Contractor.

## **8 NNDR Challenges and Appeals**

If the Authority shall require (acting reasonably) the Contractor 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 the Facilities or otherwise seek any rebates, revaluations or other lawful methods of reducing the NNDR payable (other than by way of the Contractor or Leisure Operator applying for NNDR Relief in the normal course of events pursuant to paragraphs 3 and 4 of this Schedule 16 (NNDR), to which paragraphs 2 to 7 shall apply), in which case the Contractor 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 Contractor 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 for the avoidance of doubt retrospectively) as a result of any challenge, appeal or other action taken pursuant to paragraph 8, then the Annual

Payment shall be adjusted in accordance with clause 61 (Financial Adjustments) so as to put the Contractor 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 16 (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.

**SCHEDULE 17**

**HEAD LEASE**

**Dated**

**2019**

**SOUTH SOMERSET DISTRICT COUNCIL**

**and XYZ**

**Lease**



LR1. Date of lease	[ ] 2019
LR2. Title Number(s)	<b>LR2.1 Landlord's title number(s)</b> [ ] <b>LR2.2 Other title number(s)</b> None
LR3. Parties to this lease	<b>Landlord</b> South Somerset District Council  <b>Tenant</b>  <b>Other parties</b> None
LR4. Property	<b>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.</b>  Refer to the definition of Premises in clause 1 of this Lease.
LR5. Prescribed statements etc.	<b>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.</b>  None  <b>LR5.2 This lease is made under, or by reference to, provisions of:</b>  None
LR6. Term for which the Property is leased	The term as specified in this lease at clause 1 ("the Term")
LR7. Premium	None
LR8. Prohibitions or restrictions on disposing of this lease	This lease contains a provision that prohibits or restricts dispositions.
LR9. Rights of acquisition etc.	<b>LR9.1 Tenant's contractual rights to renew this lease, to acquire the reversion or another lease of the Property, or to acquire an interest in other land</b>  None  <b>LR9.2 Tenant's covenant to (or offer to) surrender this lease</b>  None

	<b>LR9.3 Landlord's contractual rights to acquire this lease</b> None
<b>LR10. Restrictive covenants given in this lease by the Landlord in respect of land other than the Property</b>	None
<b>LR11. Easements</b>	<b>LR11.1 Easements granted by this lease for the benefit of the Property</b>  The easements as specified in Schedule 2 of this lease.  <b>LR11.2 Easements granted or reserved by this lease over the Property for the benefit of other property</b>  The easements as specified in Schedule 1 of this lease.
<b>LR12. Estate rentcharge burdening the Property</b>	None
<b>LR13. Application for standard form of restriction</b>	<b>The parties to this lease apply to enter the following standard form of restriction</b>  None
<b>LR14. Declaration of trust where there is more than one person comprising the Tenant</b>	None

## DATE

## PARTIES

- (1) **South Somerset District Council** of ...("Landlord");
- (2) **Contractor** (company registration number ...) whose registered office is at ... ("Tenant").

## IT IS AGREED AS FOLLOWS:

### 1 DEFINITIONS

The following expressions shall where the context so admits have the following meanings:

#### **"1954 Act"**

The Landlord and Tenant Act 1954;

#### **"Authorised Use"**

Use for the purposes prescribed under the Leisure Agreement;

#### **"Conducting Media"**

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"**

This deed as varied or supplemented by any document which is supplemental to this deed;

#### **"Leisure Agreement"**

The operating 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 with ancillary uses at the Premises;

#### **"Leisure Operator"**

means;

#### **"Plan"**

The plan annexed;

#### **"Planning Acts"**

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"**

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"]**

[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"**

Foul and surface water, drainage, gas, electricity, telephone, telecommunications and other services to or on the Premises [and the Retained Land];

**"Term"**

The term of years from and including the date hereof and terminating on the 30 June 2034 being the Expiry Date as defined in the Leisure Agreement;

**"Underlease"**

The underlease relating to the Premises to be granted by the Tenant to the Leisure Operator in the agreed form;

**"Yearly Rent"**

One pound (£1) 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 47 (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:

6.4.1.1 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

6.4.1.2 [ ] 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.

## **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.]

**THE COMMON SEAL of SOUTH SOMERSET DISTRICT COUNCIL**

was affixed in the presence of: )

Authorised Signatory

Authorised Signatory

**EXECUTED AS A DEED** by **XYZ** acting by a Director in the presence of a witness:

Director

Witness Signature

Witness Name

Witness Address

## **SCHEDULE 18 BENCHMARKING**

### **Part 1 Definitions**

The terms and expressions used in this Schedule 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:

#### **Actual Income**

means the annual operating income of the Contractor and/or without double counting the Leisure Operator in relation to the Facilities [(and excluding any actual Excluded Items (Income)] where the Actual Leisure Management Amount is a deficit figure)], generated through the provision of the Benchmarked Services in relation to the Facilities after adding back in any monies not received by the Contractor and/or without double counting the Leisure Operator due to any fraudulent or criminal act or omission and the amount of loss of operating income due to Non-Rectified Performance Failures as defined in and referred to in Schedule 6 (Payment and Performance Monitoring System);

#### **Actual Operating Cost**

means the annual actual operating costs as such cost headings are identified in the LOBTA, to include the Head Office Costs and Profit and cost of goods sold, that are incurred by the Contractor or (without double counting) the Leisure Operator in providing the Benchmarked Services in relation to the Facilities (but excluding Excluded Costs);

#### **Actual Leisure Management Amount**

means the Actual Income less the Actual Operating Costs (where Actual Income is greater than the Actual Operating Costs this shall be a surplus (positive number); where Actual Income is less than Actual Operating Cost this shall be a deficit (negative number)) in relation to the Facilities;

#### **Actual Utility Cost**

means the actual cost of the Benchmarked Utilities actually consumed or used at the Facilities using the Target Consumption Level;

#### **Assessment Year**

has the meaning given to it in paragraph 6.1 of Part 5 of this Schedule;

**Base Head Office Costs**

means in relation to the Facility an amount (Indexed) which is a percentage of the Base Modelled Income profiled on an annual basis for which the annual percentage profile [shown as a percentage of Base Modelled Income] is shown in row [X] of the 'summary' worksheet of the LOBTA;

**Base Leisure Management Amount**

means the Base Modelled Income less the Base Modelled Costs shown in row [X] of 'summary' worksheet of the LOBTA (which at the date of this Agreement for the first year following the Commencement Date gives rise to a [Deficit/Surplus] Annual Payment)<sup>1</sup>;

**Base Modelled Income**

means the annual operating income (Indexed) that is projected to be earned in relation to the Facilities by the Contractor [and/or without double counting the Leisure Operator] in providing the Benchmarked Services as the same are identified in the LOBTA [(and excluding any Excluded Items (Income) projected in the LOBTA where the Base Leisure Management Amount is a deficit figure)], as adjusted in accordance with this Agreement;

**Base Modelled Costs**

means the annual operating costs (Indexed) that are projected to be incurred in relation to the Facility by the Contractor and/or without double counting the Leisure Operator in providing the Benchmarked Services as the same are identified in the LOBTA (to include the Base Head Office Costs and Base Profit and cost of goods sold [but excluding Excluded Costs projected in the LOBTA]), as adjusted in accordance with this Agreement;

**Base Profit**

means in relation to the Facility an amount (Indexed) which is [X%] of the Base Modelled Income shown in row [X] of the 'summary' worksheet of the LOBTA;

**Base Utility Cost**

means the cost of the Benchmarked Utilities projected to be consumed or used at the Facility and included within the table[s] at Appendix 1 to Part 2 of this Schedule, as may be amended at each Cost Benchmarking Date pursuant to paragraph 3.2 of Part 2 of this Schedule;

**Benchmark Consultant**

means:

an expert appointed by agreement between the parties who:-

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<sup>1</sup> Figures and row references to be inserted by the Contractor at financial close based on the agreed LOBTA

- (a) possesses at least five (5) years' experience of operating in, or as a consultant to, the leisure and sports facilities management industries;
- (b) possesses at least five (5) 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;

#### **Benchmarked Services**

means the Services to be procured at the Facility by the Contractor to satisfy the Services Specification [excluding Hard FM];

#### **Benchmarked Utilities**

the provision of gas and electricity at the Facility and Benchmarking Utility shall be construed accordingly;

#### **Comparable Market**

means 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);

#### **Compensatory Amount**

means:

- (a) the Actual Leisure Management Amount for the Tested Period of the immediately preceding Net Income Benchmarking Process (Indexed up to the Income Benchmarking Date) or if none the Base Leisure Management Amount for the Tested Period (Indexed up to the Income Benchmarking Date);
- LESS:

- (b) the Actual Leisure Management Amount for the Tested Period adjusted to take account of the duty to mitigate as set out in paragraph 1.4 of Part 3 of this Schedule;

if this figure is a negative number;

**Compensatory Amount Increase**

has the meaning given to it in paragraph 4.1.2(a) of Part 3 of this Schedule;

**"Compensatory Amount Decrease"**

has the meaning given to it in paragraph 4.1.2(b) of Part 3 of this Schedule;

**Cost Benchmarking Date**

means, subject to paragraph 1.3 of Part 2 of this Schedule, the date which is five years after the Commencement Date and thereafter on each fifth anniversary of the last Cost Benchmarking Date;

**Cost Benchmarking Procedure**

means the procedure to establish the Cost Figure as set out and described in Part 2 of this Schedule;

**Cost Benchmarking Proposal**

means the proposal produced pursuant to paragraph 2 of Part 2 of this Schedule;

**Cost Figure**

means, subject to the operation of Paragraph 5 of Part 2 of this Schedule:

$$A - B$$

where:

A = the Actual Utility Cost of the Benchmarked Utilities at the Target Consumption Levels (or the actual consumption levels, if lower) since the last Cost Benchmarking Date; and

B = for the first Cost Benchmarking Procedure, the Base Utility Cost at the Target Consumption Levels and for each Cost Benchmarking Procedure thereafter, the updated Base Utility Cost at the Target Consumption Levels (or the actual consumption levels, if lower) agreed or determined at the previous Cost Benchmarking Procedure.

**Deficit Payment Increase**

has the meaning given to it in paragraph 4.1.1(a) of Part 3 of this Schedule;

**[Excluded Costs**

means all costs payable by the Contractor in relation to insurance, Utilities, NNDR, Hard FM and any Performance Adjustments payable in accordance with Schedule 6 (Payment and Performance Monitoring System);

**Excluded Items (Income)**

means receipt of payment on a pass through basis by the Contractor in respect of all relevant elements of the Annual Payment (to include any management fee payable to the Contractor) and the Benchmarked Utilities;]

**Hard FM**

means any maintenance of a lifecycle nature provided by the Contractor;

**Head Office Costs**

means an amount which is a percentage of the Actual Income profiled on an annual basis for which the annual percentage profile is shown in row [X]<sup>2</sup> of the 'summary' worksheet of the LOBTA;

**Income Benchmarking Date**

means the date, subject to paragraph 1.1.1 and paragraph 1.1.2 of Part 3 of this Schedule, on which either party serves a notice on the other party pursuant to paragraph 1.2 of Part 3 of this Schedule;

**Income Benchmarking Report**

means the report to be produced by the Benchmark Consultant pursuant to paragraph 3 of Part 3 of this Schedule;

**Income Proposal**

means the report to be supplied by the Contractor to the Authority pursuant to paragraph 1.3 of Part 3 of this Schedule;

**[Key User Facilities**

means that part of the Facility or Services being used by a Key User;]

**[Key User Assessment Period**

means the period of twelve months from the date on which a Special Benchmarking Warning Notice is issued pursuant to paragraph 2 of Part 4 of this Schedule;]

**[Key User Base Modelled Income**

means the annual income (Indexed) that is projected to be earned from the Key User by the Contractor [and/or the Leisure Operator] (without double counting) as set out in the 'key user income' worksheet of the LOBTA;]

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<sup>2</sup> Row reference to be inserted by the Contractor at financial close based on the agreed LOBTA

**[Key User Information Notice]**

means the notice to be served in accordance with paragraph 6 of Part 4 of this Schedule;]

**Net Income Benchmarking Process**

means the procedure to establish the Net Income Figure or Compensatory Amount as set out and described in Part 3 of this Schedule;

**Net Income Figure**

means:

- (a) the Actual Leisure Management Amount for the Tested Period of the immediately preceding Net Income Benchmarking Process (Indexed up to the Income Benchmarking Date) or if none the Base Leisure Management Amount for the Tested Period (Indexed up to the Income Benchmarking Date);

LESS:

- (b) the Actual Leisure Management Amount for the Tested Period, adjusted to take account of the duty to mitigate as set out in this Schedule;

if this figure is a positive number;

**Net Income Figure (Competing Facility)**

means:

- (a) the Base Leisure Management Amount for the Competing Facility Assessment Period (Indexed up to the Competing Facility income benchmarking date);

LESS:

- (b) the Actual Leisure Management Amount for the Competing Facility Assessment Period;

if this figure is a positive number;

**New Supplier**

has the meaning given to it in paragraph 4.1 of Part 2 of this Schedule;

**Profit**

means an amount which is [X%]<sup>3</sup> of the Actual Income;

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<sup>3</sup> Percentage to be inserted by the Contractor at financial close based on the agreed LOBTA



**Receiving Party**

has the meaning given to it in paragraph 2.1 of Part 2;

**[Reduced Actual Income**

means the reduced annual operating income of the Contractor and/or the Leisure Operator in relation to that part of the Facilities or Services which is no longer used by a Key User (without double counting and excluding any Excluded Items (Income) where the Actual Leisure Management Amount is a deficit figure), after adding back in any revenue actually received by the Contractor and/or the Leisure Operator and any monies not received by the Contractor and/or the Leisure Operator due to any failure to mitigate the circumstances of the loss of the Key User including reasonable steps to generate more income;

**Reputable Operator**

means 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 Contractor;

**Requesting Party**

has the meaning given to it in paragraph 2.1 of Part 2;

**Surplus Payment Increase**

has the meaning given to it in paragraph 4.1.1(b) of Part 3 of this Schedule;

**Target Consumption Level**

means the target consumption levels of Benchmarked Utilities at the Facility as shown in Appendix 1 of Part 2 as may be adjusted in accordance with paragraph 2 of Appendix 1 of this Schedule;

**Tested Period**

means the seven (7) years immediately preceding the Income Benchmarking Date;

## Part 2 Utility Cost Benchmarking Procedure

### 1 Utility Cost Benchmarking Procedure

- 1.1 In respect of Benchmarked Utilities, a Cost Benchmarking Procedure may be carried out to determine the Cost Figure in accordance with this Schedule on each Cost Benchmarking Date.
- 1.2 If either party wishes to submit a Benchmarked Utility to a Cost Benchmarking Procedure it must issue a notice in writing to that effect to the other party no later than five (5) Business Days before a Cost Benchmarking Date.
- 1.3 If, away from the Cost Benchmarking Date, either party believes that extraordinary fluctuations in the utility market have resulted in the requirement for a Cost Benchmarking Procedure, it may issue a notice in writing to that effect to the other party. Both parties must meet (but with no obligation to act) within ten (10) Business Days of the date of the notice to discuss the extraordinary utility market fluctuations and the possibility of agreeing a Cost Benchmarking Procedure away from the Cost Benchmarking Date at each party's discretion. For the avoidance of doubt, the Cost Benchmarking Procedure will not take place if both parties are not in agreement that it should take place away from the Cost Benchmarking Date.

### 2 Cost Benchmarking Proposal

- 2.1 Within two (2) months of the Cost Benchmarking Date, the party requesting the Cost Benchmarking Procedure (the "**Requesting Party**") shall carry out at its own cost a benchmarking procedure with a view to establishing the information set out in paragraph 2.2 and the Cost Figure and shall by the end of the same two (2) month period, deliver to the other party (the "**Receiving Party**") its proposals for the Cost Figure (the "**Cost Benchmarking Proposal**").
- 2.2 The Cost Benchmarking Proposal shall be in a report containing all of the following information provided by the Requesting Party:
  - 2.2.1 the Base Utility Cost (Indexed) and Actual Utility Cost for the period since the last Cost Benchmarking Date (or for the first Cost Benchmarking Procedure, since the Commencement Date);
  - 2.2.2 in addition to the Actual Utility Cost, any supporting evidence relevant to the particular Benchmarked Utility including invoices paid and actual consumption levels at the Facilities with reference to the applicable Target Consumption Level;

- 2.2.3 any efficiency steps which the Contractor has taken to reduce the impact of higher utility costs;
- 2.2.4 any mitigatory steps which might reasonably be taken to reduce the future impact of increased utility costs;
- 2.2.5 details of any tendering for supply of Benchmarked Utilities recently undertaken, including brokerage arrangements;
- 2.2.6 details and an analysis of tariff changes, charges and structures of four natural gas and electricity suppliers or alternatively the details and an analysis of tariff charges and structures tendered by natural gas and electricity suppliers for any portfolios to which the Contractor has access since the last Cost Benchmarking Date where gas or electricity is being benchmarked;
- 2.2.7 the proposed Cost Figure for the relevant Benchmarked Utility and the proposed consequential adjustment to the Annual Payment;
- 2.2.8 the methodology and all assumptions by which the Cost Figure has been determined;
- 2.2.9 assessments made in respect of the Benchmarked Utilities by a Comparable Market (in so far as such information is available after having made reasonable enquiry);
- 2.2.10 evidence in support of each of the criteria used to determine the Cost Figure and proposed consequential adjustment to the Annual Payment;
- 2.2.11 full details of sources of information used in establishing the Cost Figure and proposed consequential adjustment to the Annual Payment;
- 2.2.12 in respect of each component of the Cost Figure and proposed consequential adjustment to the Annual Payment, a breakdown of how each is comprised;
- 2.2.13 any other evidence required (so as to provide further evidence to that already provided) to support the proposed consequential adjustment to the Annual Payment and enable a decision to be made by the other party;
- 2.2.14 such other details as the parties may agree at the time.

2.3 The parties shall meet within 1 month of the Receiving Party receiving the Cost Benchmarking Proposal to review and discuss the Cost Benchmarking Proposal taking into account the following:

- 2.3.1 any above CPI change relating to price movement since the last Cost Benchmarking Date (or for the first Cost Benchmarking Procedure, since the Pricing Reference Date) as identified through

enquiries with local and national providers in accordance with paragraph 2.2.6 and taking into account utility prices paid by the Authority; and

2.3.2 actual consumption levels at the Facilities in comparison to the applicable Target Consumption Level.

2.4 For the avoidance of doubt, subject to paragraph 2 of Appendix 1 of this Schedule, the unit cost of the Benchmarked Utilities shall only be negotiated by the parties and not consumption levels. The consumption levels applied to such unit costs will be the actual consumption levels up to but no greater than the relevant Target Consumption Levels. For the avoidance of doubt, subject to the other terms of this Agreement, where the Benchmarked Utility consumption level is above the relevant Target Consumption Level, any cost associated with such excess shall be met by the Contractor.

2.5 By a date that is no more than two (2) months after receipt of the Cost Benchmarking Proposal the Receiving Party shall respond to the Requesting Party in writing indicating whether or not it accepts the Cost Benchmarking Proposal. If the Receiving Party agrees the content of the Cost Benchmarking Proposal and the proposed variation to the Annual Payment, paragraph 3 of this Part 2 shall apply. If the Receiving Party rejects the Cost Benchmarking Proposal the matter shall be determined by the Dispute Resolution Procedure.

2.6 If the Receiving Party fails to respond to the Cost Benchmarking Proposal within the period referred to in paragraph 2.5 above, it shall be deemed to have approved the Cost Benchmarking Proposal and the proposed variation to the Annual Payment and paragraph 3 of this Part 2 shall apply.

### **3 Implementation**

3.1 When the Cost Figure is agreed or determined pursuant to Part 2 of this Schedule the Annual Payment shall be adjusted by the full amount of the Cost Figure and such adjustment shall be effective from the Cost Benchmarking Date, and, as appropriate, backdated to such date. For the avoidance of doubt, the Annual Payment:

3.1.1 where it is a Surplus Annual Payment:

- (a) shall be decreased where the Cost Figure is positive; or
- (b) subject to clause 69.4.3 shall be increased where the Cost Figure is negative; or

3.1.2 where it is a Deficit Annual Payment;

- (a) shall be increased where the Cost Figure is positive; or
- (b) shall be decreased where the Cost Figure is negative.

- 3.2 For the avoidance of doubt the Base Utility Cost will be rebased at the end of each Cost Benchmarking Procedure to reflect the price payable per unit as a result of that Cost Benchmarking Procedure. Accordingly, the parties agree that following agreement or determination of the Actual Utility Cost in accordance with paragraph 3.1 above, the Actual Utility Cost (for that period) becomes the Base Utility Cost for the next Cost Benchmarking Procedure.
- 3.3 Appendix 2 to this part of this Schedule comprises a worked example of how the Cost Figure is established and the adjustment to the Annual Payment.

#### **4 Choice of Supplier**

- 4.1 Subject to paragraph 4.2 of this Part 2, if prior to the Contractor or Leisure Operator entering into a contract with its utility supplier, the Authority provides to the Contractor a detailed written quotation which identifies a cheaper appropriately regulated utility supplier than that proposed by the Contractor, then the Contractor shall or shall require the Leisure Operator to contract with the supplier identified by the Authority. The Authority shall have no responsibility for or liability in respect of the identified or any other supplier. Any comparison should be on a like for like basis. For the avoidance of doubt, the requirement for the Contractor or the Leisure Operator to enter into contract with the supplier identified by the Authority ("**New Supplier**") shall only apply where the Contractor's or Leisure Operator's existing contract with its existing supplier expires following a fixed term product or otherwise on the Authority's instruction and only to the extent that the contract with the New Supplier is not on any materially more onerous terms than the Contractor's or Leisure Operator's contract with its current supplier at that time.
- 4.2 The Contractor shall have the option for it or the Leisure Operator to contract with its own choice of utility supplier provided that any cheaper tariff (which is available to the Contractor or as applicable the Leisure Operator (whether they take it or not)) identified by this Cost Benchmarking Procedure shall be the unit cost used to calculate the Actual Utility Cost and the Cost Figure.

#### **5 CRC Scheme**

To the extent the Contractor's liabilities under the CRC Scheme as referred to in clause 29.3.4 of this Agreement increase or will increase as a result of any adjustment to the Base Utility Costs or Target Consumption Levels in accordance with this Schedule, any such increase shall be taken into account for the purposes of calculating the Cost Figure.

## **PART 2 - APPENDICES**

<b>Appendix 1</b>	<b>Target Consumption Levels</b>
<b>Appendix 2</b>	<b>Worked example of Cost Figure</b>
<b>Appendix 3</b>	<b>Utilities Benchmarking – Process Diagram</b>

## PART 2 – APPENDIX 1

1. The following Table 1 shall apply for each relevant year of the Contract Period for the Facilities

**Table 1 – Target Consumption Levels**

<b>Benchmarked Utility</b>	<b>Facilities</b>	<b>Target Consumption Level Per Annum</b>	<b>Unit of Measurement</b>	<b>Base Benchmarking Utility Cost Per Unit (£)*</b>	<b>Total Base Utility Cost at Target Consumption Level (£)</b>

\*For the avoidance of doubt, the cost per unit shall include all relevant fixed costs/ standing charges relating to that utility.

2. The Target Consumption Level for each of the Benchmarking Utilities at the Facilities as set out in the table above shall be substituted with the actual annual consumption levels (taking into account consumption in accordance with Good Industry Practice for a leisure operator) for each of the Benchmarking Utilities measured over the first two years from the Commencement Date and (subject to as may be determined in respect of any dispute between the parties as referred to below) such substituted consumption levels shall become the Target Consumption Levels for the purpose of subsequent Cost Benchmarking Procedures under Part 2 of this Schedule. In the absence of agreement as to the average of the annual consumption levels either party may refer the matter to the Dispute Resolution Procedure.

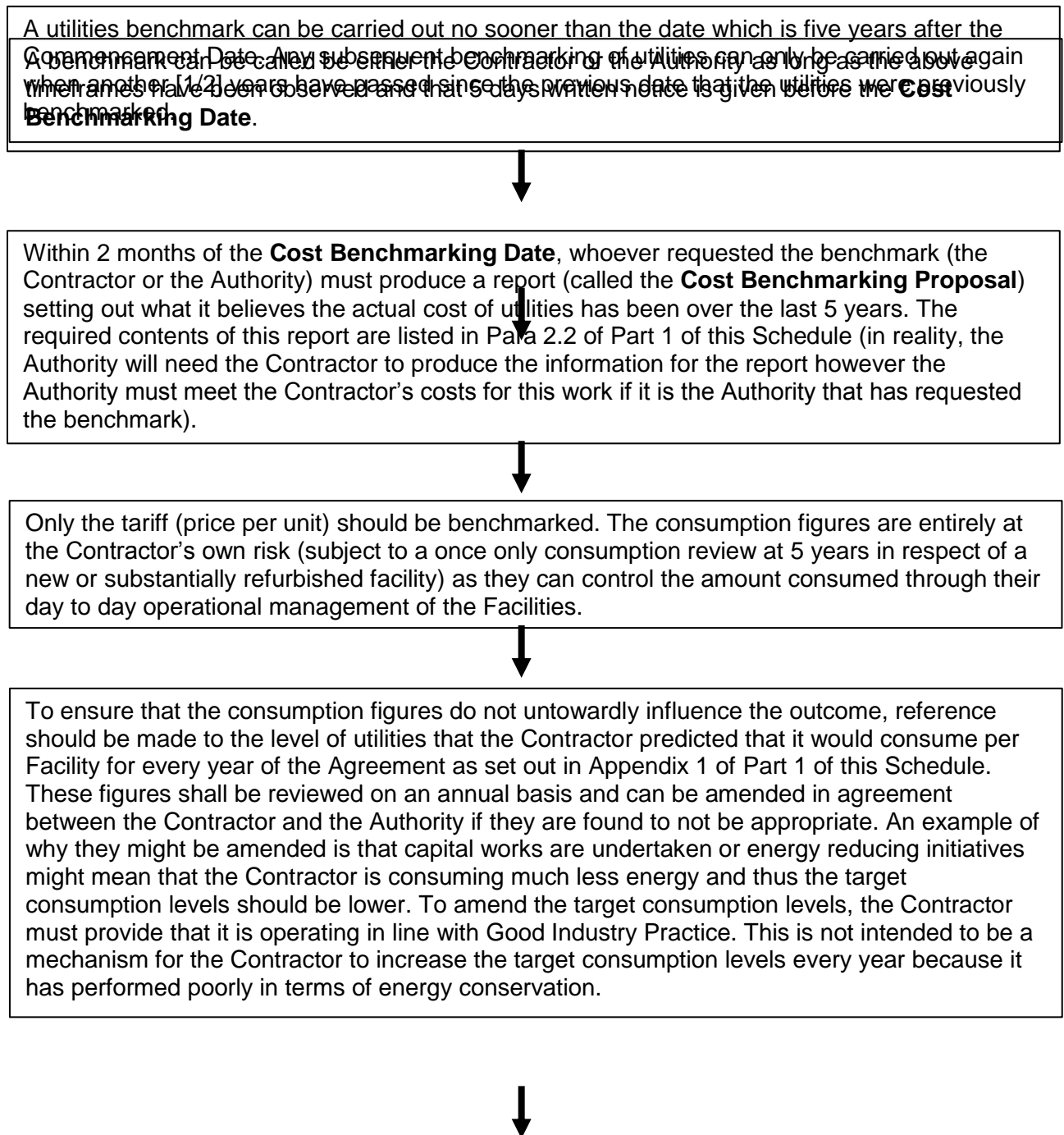
## **PART 2 – APPENDIX 2**

### **Worked example of Cost Figure**



## PART 2 - APPENDIX 3

### Utilities Benchmarking – Process Diagram



If the Contractor's actual consumption levels are higher than the figures it predicted it would consume in Appendix 1, it is the target consumption levels set out in Appendix 1 that should be the consumption figures applied in the calculation of the Cost Figure (and not the actual consumption figures that have turned out to be higher). If the actual consumption figures are lower than the figures it predicted it would consume in Appendix 1, then the lower actual figures are the ones that should be applied to the calculation.



The consumption figures to be applied (as determined above) should be multiplied by the actual tariff that the Contractor is being charged to identify the **Actual Utility Cost**. The difference between this figure and the predicted utility position as contained in Appendix 1 (the **Base Cost Figure**), is the **Cost Figure**. This should be done so that the utility types can be benchmarked separately or on their own if required however this would only be done if both parties agreed. In reality, if one side wanted to benchmark the gas only (for example), the other side has the right to call for a benchmark on the other utility types at the same time (thus resulting in a net position being taken).



Within 1 month of receiving the **Cost Benchmarking Proposal**, the Contractor and the Authority must meet to discuss the **Cost Benchmarking Proposal**.



Within 2 months after receipt, the party (Authority or Contractor) that received the report must let the party who requested the benchmark know whether it agrees the contents of the report, specifically the proposed variation to the Annual Payment, contained within the report (called the '**Cost Figure**'). If the two parties cannot agree the proposed variation to the Annual Payment, the Dispute Resolution Procedure contained in the Agreement will apply. It is crucial that the party that receives the report must respond within the 2 month period discussed above. If it fails to do so, the report and the variation to the Annual Payment will automatically be deemed to be accepted.



When the **Cost Figure** is agreed, the increase or deduction to the Annual Payment is applied and backdated to the date of the benchmark. Where it is a surplus scheme, the **Surplus Annual Payment** shall be decreased where the **Cost Figure** is positive or increased where it is negative. Where it is a deficit scheme, the **Deficit Annual Payment** shall be increased where the Cost Figure is positive or decreased where it is negative.



Once the **Actual Utility Cost** has been determined as described above, this figure becomes the **Base Utility Cost** for the next **Cost Benchmarking Procedure**.



The Authority is within its rights to compel the Contractor to contract with a different utility supplier when the Contractor's existing contract with its utility supplier expires if the Authority can prove that the utilities can be obtained at a cheaper rate and the contract with the identified supplier is not on any materially more onerous terms. If the Contractor does not wish to contract with this new utility supplier, it must ensure that the cheaper tariff which is available from the new utility supplier shall be unit cost applied in the next utilities benchmarking process.

## **PART 3**

### **Net Income Benchmarking Process**

#### **1 Net Income Benchmarking Process**

1.1 Either party shall be entitled to undertake a Net Income Benchmarking Process as follows:

1.1.1 The Contractor shall be entitled to undertake a Net Income Benchmarking Process if:-

- (a) at least seven (7) years have passed since the Income Benchmarking Date applicable to the last Net Income Benchmarking Process (and for the first Net Income Benchmarking Process only at least seven (7) years have passed since the Commencement Date; and
- (b) Actual Income (expressed as a 12 month average) earned during the Tested Period has decreased by 5% or more by comparison to the Actual Income (Indexed and expressed as a 12 month average) for the Tested Period of the immediately preceding Net Income Benchmarking Process or if none, the Base Modelled Income (expressed as a 12 month average) for the Tested Period; or Actual Operating Cost (expressed as a 12 month average) incurred during the Tested Period has increased by 5% or more by comparison to the Actual Operating Cost (Indexed and expressed as a 12 month average) for the Tested Period of the immediately preceding Net Income Benchmarking Process or if none, the Base Modelled Cost (expressed as a 12 month average) for the Tested Period; and
- (c) when taking into account Actual Income (expressed as a 12 month average) during the Tested Period and deducting Actual Operating Costs (expressed as a 12 month average) incurred during the Tested Period and comparing that to the figure calculated by deducting the Actual Operating Costs (Indexed) expressed as a 12 month average from the Actual Income (Indexed and expressed as a 12 month average) in both cases for the Tested Period of the immediately preceding Net Income Benchmarking Process or if none, the Base Modelled Costs (expressed as a 12 month average) from Base Modelled Income (expressed as a 12 month average) for the Tested Period; the Net Income Figure has

a differential of the equivalent of or greater than [X%] of the Base Head Office Costs plus Base Profit (Indexed and expressed as a 12 month average) during the Tested Period; or

- (d) when taking into account Actual Income (expressed as a 12 month) average during the Tested Period and deducting Actual Operating Costs (expressed as a 12 month average) incurred during the Tested Period and comparing that to the figure calculated by deducting the Actual Operating Costs (Indexed and expressed as a 12 month average) from the Actual Income (Indexed and expressed as a 12 month average) in both cases for the Tested Period of the immediately preceding Net Income Benchmarking Process or if none, the Base Modelled Costs (expressed as a 12 month average) from Base Modelled Income (expressed as a 12 month average) for the Tested Period; the Net Income Figure has a differential of the equivalent of or greater than [X%] of the Base Head Office Costs plus Base Profit (Indexed and expressed as a 12 month average) during the Tested Period.

1.1.2 The Authority shall be entitled to request a Net Income Benchmarking Process if at least seven (7) years have passed since the Income Benchmarking Date applicable to the last Net Income Benchmarking Process (and for the first Net Income Benchmarking Process only at least seven (7) years have passed since the Commencement Date.

1.2 If either party is entitled to and wishes to commence a Net Income Benchmarking Process, it shall serve a written notice to this effect on the other party within one (1) month of the Net Income Benchmarking Date.

1.3 Within (two) 2 months of the Income Benchmarking Date if either party has submitted a notice pursuant to paragraph 1.2 above, the Contractor shall supply an Income Proposal which shall be a proposal containing the following information:

- 1.3.1 details of all Actual Income and Actual Operating Costs for the Tested Period broken down into the categories defined in the LOBTA;
- 1.3.2 the proposed Net Income Figure or Compensatory Amount and the proposed revised Annual Payment requested from the Income Benchmarking Date;
- 1.3.3 details of the assumptions used in calculating the Base Modelled Income and Base Modelled Cost and the current status of those assumptions; and

1.3.4 details of the anticipated Actual Income and anticipated Actual Cost for the remainder of the Contract Period where the Contractor, exercising its reasonable skill and care, believes that such anticipated figures differ from Base Modelled Income and Base Modelled Costs for the remainder of the Contract Period and the assumptions used in calculating such anticipated Actual Income and anticipated Actual Cost.

1.4 The Contractor must on a continuous basis:

1.4.1 take reasonable steps to mitigate all losses; and

1.4.2 do all things reasonably necessary or desirable as would a prudent leisure operator performing to a standard consistent with the proper performance of the Contractor's obligations hereunder in so mitigating all losses,

including without prejudice to the generality of the foregoing considering the amendment of the Service Delivery Proposals and Services Specification applicable to the Benchmarked Services and reviewing core pricing, provided always that any amendment to the Services Specification or this Agreement shall be subject to the Change Protocol. Where it is agreed by both parties or determined by the Benchmark Consultant that the Contractor has failed to carry out its duty to mitigate, a cost adjustment shall be made as part of the Net Income Benchmarking Process.

1.5 By a date that is two (2) months after receipt of the Income Proposal, or such longer period as the parties, acting reasonably, shall agree, the Authority shall respond to the Contractor stating either:

1.5.1 that it requires further information which is reasonably required to enable the Authority to have a clear understanding of how the proposed revised Annual Payment has been calculated and including steps taken by the Contractor in accordance with paragraph 1.4 of this Part 3 above in which case the Contractor shall issue such information in the form reasonably required by the Authority within a reasonable time having regard to the nature of the information requested as agreed with the Authority. If within fifteen (15) Business Days of the Authority's response the parties are unable to agree further information requested, either party may appoint a Benchmark Consultant in accordance with the provisions of this Part 3. Upon receipt of such further information the Authority shall assess the details and respond to the Contractor pursuant to paragraph 1.5.2 of this Part 3 within twenty (20) Business Days of receipt of such information; or

1.5.2 that:

- (a) it accepts the Income Proposal (together with further information provided by the Contractor pursuant to paragraph 1.5.1, if applicable) and that it will amend the Annual Payment in accordance with the provisions of paragraph 4 of this Part 3; or
- (b) it does not accept the Income Proposal (together with further information provided by the Contractor pursuant to paragraph 1.5.1, if applicable) giving full and particularised reasons why it does not and the parties shall consult in good faith in an attempt to come to an agreement in relation to the Income Proposal within twenty (20) 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, [subject to clause 69.4.3], be adjusted in accordance with the provisions of paragraph 4 of this Part 3. If the parties have not come to an agreement, the Authority shall notify the Contractor that it does not accept the Income Proposal and the parties shall appoint a Benchmark Consultant in accordance with the provisions of this Part 3 of this Schedule. Nothing shall prevent either party from seeking to agree a change to the Services Specification applicable to the Benchmarked Services in accordance with the Change Protocol in which case such process shall run concurrently with this process.

1.6 If the Authority fails to respond to the Contractor within the relevant time prescribed by paragraph 1.5 of this Part 3 the Authority shall be deemed to have accepted the Income Proposal and the Annual Payment shall be adjusted in accordance therewith.

1.7 Any failure by the Contractor to issue an Income Proposal will be deemed to mean that:

1.7.1 if the Contractor served the notice at paragraph 1.2 of this Part 3, that there is a zero Net Income Figure; or

1.7.2 if the Authority served the notice at paragraph 1.2 of this Part 3, the Contractor does not agree that any Net Income Benchmarking Process is necessary and a Benchmark Consultant can be appointed to conduct the Net Income Benchmarking Process by either party and the procedure in paragraphs 2 and 3 of this Part 3 shall apply and in such circumstances, the Contractor shall be responsible for all of the costs in respect of the Benchmark Consultant.

## **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 Contractor 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 Net Income Benchmarking Process based on those set out in paragraph 2.3 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 Net Income Benchmarking Process based on the criteria and factors set out in paragraph 2.3 of this Part 3. 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 Net Income Figure or Compensatory Amount should be for the purposes of any adjustment to the Annual Payment pursuant to paragraph 4 of this Part 3.

- 2.3 The Benchmark Consultant shall determine the Net Income Figure or Compensatory Amount taking into account the following considerations over the Tested Period:
- 2.3.1 the Services Specification in relation to the Benchmarked Services;
  - 2.3.2 socio-economic groups within a catchment area and the demographics of that area;
  - 2.3.3 accessibility to the Facilities including its location, public transport to the Site and available car parking;
  - 2.3.4 the Authority's strategic objectives, social and leisure policies;
  - 2.3.5 the Authority's pricing policy and other prices for similar services within the Comparable Market;
  - 2.3.6 competition in the catchment area of the Facilities and from similar facilities to the Facilities nationally;
  - 2.3.7 current labour rates and staffing costs at all levels (allowing for any regional variations) for the time being applying within the Comparable Market;



- 2.3.8 cost variations in consumables and other materials used in the provision of the Benchmarked Services;
- 2.3.9 the age, specification and condition of the buildings comprising the Facilities (based upon the assumption that they are being maintained in accordance with the Services Specification);
- 2.3.10 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;
- 2.3.11 the terms and provisions of this Agreement and other agreements to which the Contractor is a party in relation to this Project;
- 2.3.12 the range of services available within the Facilities;
- 2.3.13 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);
- 2.3.14 information available from benchmark data collectors and distributors;
- 2.3.15 details of any steps taken by the Contractor to mitigate the effects of decreases in Actual Income or increases in Actual Operating Costs particularly any changes to the Services Specification or Service Delivery Proposals in relation to the Benchmarked Services or prices for the activities that the Contractor implemented with a view to complying with its obligations under paragraph 1.4 of this Part 3;
- 2.3.16 the proposal to adjust the Annual Payment by taking into account the proposed Net Income Figure or Compensatory Amount;
- 2.3.17 the level of costs that ought to have been incurred in relation to the provision of the Benchmarked Services pursuant to the terms of this Agreement by comparison to the standards, prices and levels of projected income, subsidy and costs in relation to substantially similar services provided in the Comparable Market and bodies requiring similar services on a similar basis by reputable organisations possessing a broadly comparable degree of skill, resources and financial standing relative to the provision of the Benchmarked Services;
- 2.3.18 the level of income that should be achievable for the Facilities assuming a range of activities and programming were employed when considering the capabilities of the Facilities and the requirements of the market with reference to the relevant Marketing Plan in accordance with the Services Specification; and

2.3.19 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 shall be measured with reference to other local authority facilities offering similar services to the Benchmarked Services in the Comparable Market during the time of the Tested Period and any other relevant resources.

2.4 All discussions with the Benchmark Consultant will be attended by a representative from each party.

2.5 Subject to paragraph 1.7.2 of this Part 3, the parties shall bear their own costs, fees and expenses associated with the preparation, review and analysis of the Net Income 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 1.7.2 of this Part 3 such costs shall be borne equally between the parties.

### 3 Benchmarking Report

3.1 The Benchmark Consultant shall provide his final report (the "**Income Benchmarking Report**") as soon as is reasonably practicable and, in any event, within not more than three (3) months of his appointment and shall deliver a copy of the Income Benchmarking Report to each of the Authority and the Contractor.

3.2 The Benchmark Consultant shall provide in the Income Benchmarking Report full supporting evidence of the assumptions, source of market pricing information and conclusions reached.

3.3 The Income Benchmarking Report shall contain as a minimum details of:

3.3.1 the proposed Net Income Figure or Compensatory Amount for the Facilities showing income and costs and net profit or net loss separately and specifying the proposed consequential adjustment to the Annual Payment;

3.3.2 the methodology and all assumptions by which the Net Income Figure or Compensatory Amount was 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 Net Income Figure or Compensatory Amount and shall include full details of issues and comments raised by both parties;

- 3.3.5 full evidence to support the difference between:
- (a) Actual Income and Base Modelled Income or Actual Income for the Tested Period of the immediately preceding Net Income Benchmarking Process; and
  - (b) Actual Operating Costs and Base Modelled Costs or Actual Operating Costs of the Tested Period of the immediately preceding Net Income Benchmarking Process;
- to arrive at the Net Income Figure or Compensatory Amount (as the case may be);
- 3.3.6 full evidence to support the difference between the previous income and costs of providing the Benchmarked Services and mitigation in such respect and in respect of each component a breakdown of how each is comprised;
- 3.3.7 full evidence in support of each of the criteria used to determine the Net Income Figure or Compensatory Amount;
- 3.3.8 full details of sources of information used in establishing the Net Income Figure or Compensatory Amount;
- 3.3.9 in respect of each component of the Net Income Figure or Compensatory Amount a breakdown of how each is comprised;
- 3.3.10 costs of the Contractor's staff including management or otherwise;
- 3.3.11 details of the Contractor's management and head office overhead costs;
- 3.3.12 any efficiencies and innovations in Good Industry Practice and Sport England Guidance relevant to the delivery of the Benchmarked Services at the Facilities; and
- 3.3.13 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 Contractor shall use reasonable endeavours to ensure the Benchmark Consultant complies with its obligations under its appointment and, in particular, to produce the Income Benchmarking Report on the due date under the appointment.

3.5 If the Benchmark Consultant fails to produce an Income Benchmarking Report by the due date without good cause, then (subject to paragraph 3.6) either party may require the Benchmark Consultant to be replaced and the parties shall reserve the right in the appointment of the Benchmark Consultant to withhold payment of the remaining elements of payment due to the Benchmark Consultant in such circumstances. If the Benchmark Consultant fails to

complete on time and he is to be replaced, the parties shall ensure the Benchmark Consultant agrees to return all the information provided by the Authority and the Contractor and to provide the incomplete Income Benchmarking Report to the Authority and the Contractor.

- 3.6 In circumstances where a Benchmark Consultant fails to deliver an Income Benchmarking Report and the parties reasonably believe that no Benchmark Consultant is likely to produce an adequate Income Benchmarking Report, the provisions of paragraph 3.11 of this Part 3 below shall apply.
- 3.7 Both parties shall within twenty (20) Business Days of receiving the Income Benchmarking Report serve notice on the other party setting out whether or not it agrees with the Net Income Figure or Compensatory Amount.
- 3.8 In the event that the parties agree with the Net Income Figure or Compensatory Amount the Annual Payment will be adjusted in accordance with paragraph 4 of this Part 3.
- 3.9 In the event that neither party issues a notice disagreeing with the Net Income Figure or Compensatory Amount within twenty (20) Business Days of receiving the Income 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 Net Income Figure or Compensatory Amount and the Annual Payment will be adjusted in accordance with paragraph 4 of this Part 3.
- 3.10 In the event that either party disagrees with the Net Income Figure or Compensatory Amount 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 Net Income Figure or Compensatory Amount and paragraph 3.11 of this Part 3 shall apply.
- 3.11 if paragraph 3.6 or paragraph 3.10 of this Part 3 applies and/or where the Benchmark Consultant fails to establish the Net Income Figure or Compensatory Amount acceptable to both parties, the Authority and the Contractor shall meet as soon as practicable and negotiate in good faith to agree the appropriate Net Income Figure or Compensatory Amount. In such circumstances if the parties have been unable to agree an appropriate Net Income Figure or Compensatory Amount within fifteen (15) Business Days of first meeting, then the parties shall use all reasonable endeavours for a further period of up to thirty (30) Business Days to agree the contents of a Change pursuant to the Change Protocol with a view to a change to the Services Specification, the Facilities and/or the Method Statements, the effect of which would be to mitigate the negative or adverse implications to both parties of any adjustment to the Annual Payment which would otherwise result from the Net Income Benchmarking Process.
- 3.12 In circumstances where, notwithstanding the parties' efforts pursuant to paragraph 3.11 of this Part 3 above, the parties have been unable to agree the

Net Income Figure or Compensatory Amount within the fifteen (15) Business Day period above (or where the parties have endeavoured to agree a Change in accordance with the Change Protocol but have failed to do so, then within fifteen (15) Business Days of expiry of the aforementioned thirty (30) Business Day period or where such Change has been agreed but the implementation of the Change has not been agreed or determined in accordance with the Change Protocol, then within fifteen (15) Business Days of the exhaustion of the procedure in the Change Protocol), either party may refer the matter for determination by the Dispute Resolution Procedure. For the purposes of this paragraph 3.12, the party referring the dispute shall instruct the Adjudicator (as defined in Clause 64 (Dispute Resolution)) to determine the dispute in accordance with the terms of this Part 3.

- 3.13 Once the Net Income Figure or Compensatory Amount is agreed or determined in accordance with this Schedule, the provisions of paragraph 4 of this Part 3 below shall apply in relation to adjustment of the Annual Payment.

## 4 Implementation

- 4.1 Subject to paragraph 4.3, when the Net Income Figure or Compensatory Amount is agreed or determined in accordance with Part 3 of this Schedule any increase or decrease in the Annual Payment shall be calculated as follows and shall be effective from the Income Benchmarking Date, and, as appropriate, backdated to such date:

- 4.1.1 [X%] of the Net Income Figure shall be applied in full:

- (a) where a Surplus Annual Payment applies to decrease the Annual Payment to the Authority ("**Surplus Payment Decrease**") unless and until such Surplus Payment Decrease is replaced pursuant to a further Net Income Benchmarking Process; or
- (b) where a Deficit Annual Payment applies to increase the Annual Payment to the Contractor ("**Deficit Payment Increase**") unless and until such Deficit Payment Increase is replaced pursuant to a further Net Income Benchmarking Process; or

- 4.1.2 [X%] of the Compensatory Amount shall be applied in full:

- (a) where a Surplus Annual Payment applies to increase the Annual Payment to the Authority ("**Compensatory Amount Increase**") unless and until such Compensatory Amount Increase is replaced pursuant to a further Net Income Benchmarking Process; or

(b) where a Deficit Annual Payment applies to decrease the Annual Payment to the Contractor ("**Compensatory Amount Decrease**") unless and until such Compensatory Amount Decrease is replaced pursuant to a further Net Income Benchmarking Process.

4.2 Without prejudice to the adjustment of the LOBTA and the Annual Payment as permitted under this Agreement, the LOBTA shall not be amended by the Net Income Figure or Compensatory Amount.

4.3 There shall be no double counting or double recovery by the Contractor.

4.4 Appendix 1 to this Part 3 comprises a worked example of how the Net Income Benchmarking Process is intended to work.

## **5 Information**

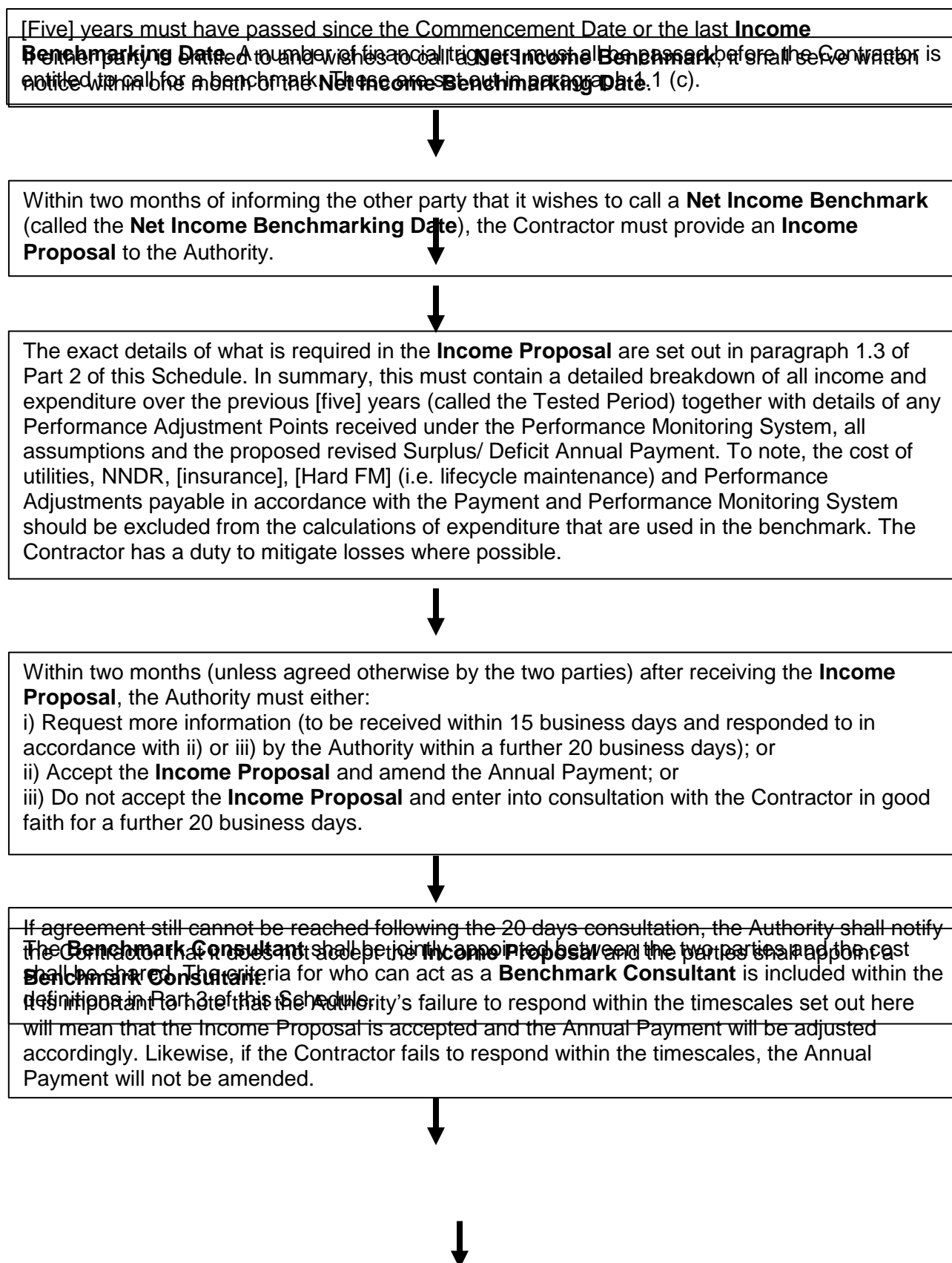
Within three (3) months of the end of the first year following the Commencement Date and within three (3) months of the end of each subsequent year the Contractor shall, in addition to its obligations under Clause 70 (Contractor's Records) provide to the Authority such information as the Contractor would use for the purposes of calculating the Net Income Figure or Compensatory Amount for that year for the Facilities notwithstanding that the Net Income Benchmarking Process is not being conducted in respect of that year.

## **PART 3 – APPENDIX 1**

### **Worked example Net Income Benchmarking**

## PART 3 – APPENDIX 2

### Net Income Benchmarking – Process Diagram





The **Benchmark Consultant** shall produce a report within 3 months taking into account the criteria listed in paragraph 2.3 of Part 2 with the end result of benchmarking the income and expenditure on a like for like comparison basis with other similar leisure facilities to recommend what the **Net Income Figure** or **Compensatory Amount** should be and therefore the proposed change to the Annual Payment.



Each party has 20 days to agree the **Net Income Figure** or **Compensatory Amount** and the resultant new Annual Payment recommended in the **Benchmark Report**. If either party disagrees, both parties shall negotiate for a further 15 days. If agreement still cannot be reached, both parties have up to 30 days to discuss and agree an amended specification to mitigate the adverse impact of the implementation of the **Net Income Figure** or **Compensatory Amount** on the Annual Payment. If agreement still cannot be reached, the final recourse is Dispute Resolution.



Once the **Net Income Figure** or **Compensatory Amount** has been agreed, the adjustment shall be made as follows and backdated to the **Income Benchmarking Date**:

For a surplus scheme;

- **X%** of the **Net Income Figure** shall be applied in full to decrease the Annual Payment to the Authority ('**Surplus Payment Decrease**')
- **X%** of the **Compensatory Amount** shall be applied in full to increase the Annual Payment to the Authority ('**Compensatory Amount Increase**')

For a deficit scheme;

- **X%** of the **Net Income Figure** shall be applied in full to increase the Annual Payment to the Contractor ('**Deficit Payment Increase**')
- X%** of the **Compensatory Amount** shall be applied in full to decrease the Annual Payment to the Contractor ('**Compensatory Amount Decrease**')



The Leisure Operator's Base Trading Account shall not be amended by the **Net Income Figure** or **Compensatory Amount** after the benchmarking process is complete.

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- 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 Contractor shall provide to the Authority a calculation of the Operating Surplus/Deficit, Excess Surplus/Deficit and Average Excess Surplus for the previous Contract Year, subject to the calculation being audited by the Contractor'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 Contractor's auditors or another registered auditor (the "**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, Excess Surplus/Deficit and Average 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 Contractor in relation to the Services during the relevant Contract Year

B means all the Expenditure actually paid (or incurred but not paid) by the Contractor 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 Contractor's Projected Surplus**

- 5 The Average Excess Surplus (AES) attributable to a Contract Year shall be calculated by the Contractor in accordance with the provisions of this paragraph 5 on the dates specified at paragraph 6 of this Schedule. The AES shall be the total ES/D for the preceding three (3) Contract Years divided by the number of Contract Years and shall be calculated using the following formula:

$$AES = \frac{(ES / D1 + ES / D2 + ES / D3)}{3}$$

where:

ES/D1 means the ES/D for the Contract Year ending immediately before the Contract Year during which the calculation is taking place

ES/D2 means the ES/D for the Contract Year immediately preceding ES/D1

ES/D3 means the ES/D for the Contract Year immediately preceding ES/D2

- 6 The first Average Excess Surplus calculation shall be undertaken by the Contractor at the same time as the Excess Surplus/Deficit calculation following the expiry of the third (3<sup>rd</sup>) Contract Year following the Commencement Date. Subsequent Average Excess Surplus calculations shall be undertaken annually by the Contractor at the same time as the Excess Surplus/Deficit Calculation for the relevant Contract Year.

- 7 Where the Operating Surplus Statement shows a positive Average Excess Surplus, the Average Excess Surplus shall be divided between the parties according to the following table.

Contractor's share of the Average Excess Surplus	Authority's share of the Average Excess Surplus
70%	30%

9 Any dispute between the parties regarding the Operating Surplus Statement shall be dealt with in accordance with the Dispute Resolution Procedure.

10 Following agreement or as determined in accordance with paragraph 8, the Authority's share of any Average Excess Surplus shall be used at the discretion of the Authority.

11 The Contractor shall pay the Authority's share of the Average Excess Surplus to the Authority within thirty (30) Business Days of agreement or determination.

12 For the purpose of this Schedule the following terms shall have the following meanings:

**"Average Excess Surplus" or "AES"**

means the average excess profit to be shared between the Contractor and the Authority, calculated in accordance with paragraphs 5, 6 and 7;

**"Base Modelled Income"**

means the annual operating income (Indexed) that is projected to be earned in relation to the Facilities by the Contractor as shown in row [X] of the 'summary' worksheet of the LOBTA

**"Base Head Office Costs"**

means 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;

**"Base Profit"**

means 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;

**"Contractor Profit"**

means an amount which is a fixed amount of the income received by the Contractor in respect of the Services, calculated as [X%] of the Income for the relevant Contract Year;

**"Contractor's Projected Surplus"**

means 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 "Contractor Profit" plus "Head Office Costs" for the relevant Contract Year;

**"Excess Surplus/Deficit" or "ES/D"**

means the excess profit or deficit for the year, calculated as per paragraph 4;

**"Expenditure"**

means the amount of direct costs and expenditure actually paid (or incurred but not paid) by the Contractor 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 6 (Payment and Performance Monitoring System);
- (c) any Contractor Profit; and
- (d) any Head Office Costs.

**"Head Office Costs"**

means an amount which is a fixed amount of the income received by the Contractor in respect of the Services, calculated as [X%] of the Income for the relevant Contract Year;

**"Income"**

means the actual operating income of the Contractor (or its Sub Contractor (without double counting)) in the operation of the Facilities (for the avoidance of doubt including any Annual Payment where it is a Deficit Annual Payment actually received by the Contractor in respect of the Services in respect of the relevant Contract Year) but excluding any sums received in respect of a previous 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.

**Worked Example** (excluding any inflationary impacts)

The following worked example assumes a Surplus Annual Payment of £200,000 when taking into account total modelled income (£2,500,000) less total modelled expenditure (£2,300,000). Total modelled expenditure includes Base Profit costs of £125,000 (5% of total operating income) and Base Head Office Costs of £125,000 (5% of total operating income).

Income (A) = £2,500,000 (all income)

Expenditure (B) = £2,250,000 (all expenditure excluding Base Profit of £125,000 and Base Head Office Costs of £125,000 but including the Surplus Annual Payment)

In the base model, the Operating Surplus/Deficit is £250,000 surplus which is equal to the Contractor's Projected Surplus (Base Profit plus Base Head Office Costs = £250,000) i.e. no Excess Surplus.

$OS/D = A - B = £2,500,000 - £2,250,000 = £250,000$  Operating Surplus

**$ES/D = £250,000 - £250,000 = £0$**

If at the end of Year 1 there has been an increase in income:

Income (A) = £2,800,000 (all income)

Expenditure (B) = £2,250,000 (all expenditure excluding Contractor's Profit of £140,000 (5% of total operating income) and Head Office Costs of £140,000 (5% of total operating income) but including the Surplus Annual Payment)

$OS/D = A - B = £2,800,000 - £2,250,000 = £550,000$  Operating Surplus

**$ES/D1 = OS/D (£550,000) - \text{the Contractor's Projected Surplus (£280,000)} = £270,000$  Excess Surplus**

To note; the Contractor's Projected Surplus is the greater of Base Profit plus Base Head Office Costs (£250,000) and Contractor's Profit and Head Office Costs (£280,000)

If at the end of Year 2 there have been savings in expenditure:

Income (A) = £2,800,000 (all income)

Expenditure (B) = £2,150,000 (all expenditure excluding Contractor's Profit of £140,000 (5% of total operating income) and Head Office Costs of £140,000 (5% of total operating income) but including the Surplus Annual Payment)

$OS/D = A - B = £2,800,000 - £2,150,000 = £650,000$  Operating Surplus

**$ES/D2 = OS/D (£650,000) - \text{the Contractor's Projected Surplus (£280,000)} = £370,000$  Excess Surplus**

To note; the Contractor's Projected Surplus is the greater of Base Profit plus Base Head Office Costs (£250,000) and Contractor's Profit and Head Office Costs (£280,000)

If at the end of Year 3 there has been a decrease in income:

Income (A) = £2,450,000 (all income)

Expenditure (B) = £2,150,000 (all expenditure excluding Contractor's Profit of £122,500 (5% of operating income) and Head Office Costs of £122,500 (5% of operating income) but including the Surplus Annual Payment)

$OS/D = A - B = £2,450,000 - £2,150,000 = £300,000$  Operating Surplus

**ES/D3 = OS (£300,000) – the Contractor's Projected Surplus (£250,000) = £50,000 Excess Surplus**

*To note; the Contractor's Projected Surplus is the greater of Base Profit plus Base Head Office Costs (£250,000) and Contractor's Profit and Head Office Costs (£245,000)*

*The AES for this period is*

$$= \frac{(ES / D1 + ES / D2 + ES / D3)}{3} = \frac{(\pounds270,000 + \pounds370,000 + \pounds50,000)}{3} = \pounds230,000$$

*shared between the Contractor and Authority on a 70:30 basis*

*Contractor – [£161,000]*

*Authority – [£69,000]*

## **SCHEDULE 20**

### **EQUALITY REQUIREMENTS**

- 1.1 The Contractor (including its agents and employees) shall not, and shall procure that any Contractor Related Party shall not:
- 1.1.1 discriminate directly or indirectly, or by way of victimisation or harassment, against any person on Protected Characteristics; and/or
  - 1.1.2 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.
- 1.2 The Contractor (including its agents and employees) shall, and shall procure that any Contractor Related Party shall, for purposes of ensuring compliance with paragraphs 1.1.1 to 1.1.2, in relation to staff engaged in the provision of Works or Services observe as far as possible the provisions of:
- 1.2.1 the Equality and Human Rights Commission Code of Practice in Employment;
  - 1.2.2 the Equality and Human Rights Commission's Statutory Code of Practice on Equal Pay; and
  - 1.2.3 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.
- 1.3 The Contractor shall, and shall procure that any Contractor Related Party shall, in performing its/their obligations under this Agreement have regard to the provisions of section 149(2) of the Equality Act 2010.
- 1.4 The Contractor shall, and shall procure that any Contractor 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 Contractor or any Contractor Related Party under the Equalities Legislation.
- 1.5 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 Contractor's performance of its obligations under this Agreement



being in contravention of the Equalities Legislation, the Contractor shall, and shall procure that any Contractor Related Party shall, free of charge:

- 1.5.1 provide any information requested in the timescale allotted;
- 1.5.2 attend any meetings as required and permit any of its staff to attend;
- 1.5.3 promptly allow access to and investigation of any documents or data deemed to be relevant;
- 1.5.4 allow itself and any of its staff to appear as witness in any ensuing proceedings; and
- 1.5.5 co-operate fully and promptly in every way required by the person or body conducting such investigation during the course of that investigation.

## SCHEDULE 21

### CONFIDENTIAL INFORMATION

#### Part 1 – Commercially Sensitive Contractual Provisions

Column 1 - Commercially Sensitive Contractual Provisions	Column 2 - For period ending on date below:
Details concerning the Contractor's and Leisure Operator's personnel, operating methods and proprietary systems, operating manuals, method statements and know-how, details of pricing structures	Throughout Contract Period and six years thereafter

#### Part 2 – Commercially Sensitive Material

Column 1 - Commercially Sensitive Material	Column 2 - For period ending on date below:
Details concerning the Contractor's and Leisure Contractor's personnel, operating methods and proprietary systems, operating manuals, method statements and know-how, details of pricing structures	Throughout Contract Period and six years thereafter

**SCHEDULE 22 – NOT USED**

## **SCHEDULE 23**

### **LOSS OF REVENUE**

- 1** Subject to the provisions of this Schedule 23 (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 6.
- 4** The Contractor 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. For the avoidance of doubt 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 Contractor 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 Contractor 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** Compensation may be paid as follows
  - 7.1** Loss of Revenue Event

The Authority shall (at its discretion) compensate the Contractor in respect of any Loss of Revenue arising from a Loss of Revenue Event by:

    - 7.1.1** lump sum payment
    - 7.1.2** instalments; or
    - 7.1.3** pursuant to Clause 61 (Financial Adjustments).

## 7.2 Relevant Event

The Authority shall compensate the Contractor in respect of any Loss of Revenue arising from a Relevant Event pursuant to Clause 61 (Financial Adjustments).

**SCHEDULE 24**  
**CHANGE PROTOCOL**

Part 1 – Definitions

**Approval Criteria**

has the meaning given to it in paragraph 1.1 of Part 4 of this Schedule 24;

**Approved Project**

has the meaning given to it in paragraph 1.1 of Part 4 of this Schedule 24;

**Authority Change**

means any change proposed by the Authority;

**Authority Notice of Change**

Means a Notice of Change given by the Authority;

**Change**

means a change to the Services or additional works and/or Services or a change in the Authority's Policies [or a partial termination pursuant to Part 6 of this Schedule 24] that may be made under clause 48 (Authority and Contractor Changes) or this Schedule 24;

**Change Management Fee**

means the fee calculated in accordance with paragraph 9 of Part 4 of this Schedule 24;

**Contractor Change**

means a Change that is initiated by the Contractor by submitting a Contractor Notice of Change to the Authority;

**Contractor Notice of Change**

has the meaning given to it in paragraph 1.1 of Part 5 of this Schedule 24;

**Estimate**

has the meaning given to it in paragraph 2.5.1 of Part 3 of this Schedule 24;

**Change Notice**

has the meaning given to it in paragraph 1 of Part 3 of this Schedule 24;

**Resubmission Longstop Date**

has the meaning given to it in paragraph 1.1 of Part 4 of this Schedule 24;

## Part 2 – Not Used

## 1 Part 3 –Changes

The Authority has the right to propose Changes in accordance with this Part 3 of this Schedule 24. If the Authority requires a Change, it must serve a notice (**Change Notice**) on the Contractor in accordance with paragraph 2 of this Part 3 of this Schedule 24. The Contractor shall be entitled to refuse a 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 Contractor has been unable to obtain);
- 1.3 would materially and adversely affect the Contractor's ability to deliver the Services (except those Services which have been specified as requiring to be amended in the Change Notice) in a manner not compensated for pursuant to this Part 3 of this Schedule 24;
- 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 Project (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 Change Notice that cannot reasonably be complied with.

## 2 Change Notice

The Change Notice shall:

- 2.1 set out the change in the Services required in sufficient detail to enable the Contractor 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 24;
- 2.2 set out whether, in respect of any additional works, the Contractor 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 Contractor to provide to the Authority within fifteen (15) Business Days of receipt of the 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 Contractor 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 Contractor 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 Contractor believes that any of the circumstances outlined in paragraph 1 of this Part 3 of this Schedule 24 apply.

### **3 Contractor's Estimate**

Other than where a notice is served under paragraph 2.5.3 of this Part 3 of this Schedule 24 the Contractor 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 24, the Contractor shall deliver to the Authority the Estimate. The Estimate shall include the opinion of the Contractor on:

- 3.1 a detailed timetable for implementation of the Change;
- 3.2 whether relief from compliance with obligations is required, including the obligations of the Contractor to meet the requirements set out in the Services Specification during the implementation of the 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 24;
- 3.5 any amendment required to this Agreement and/or any Project Document or Ancillary Document as a result of the Change;
- 3.6 any estimated Change in Costs and estimated Change in Revenue that results from the Change;
- 3.7 any Capital Expenditure that is required or no longer required as a result of the 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 (i) any other approvals required and/or due diligence permitted pursuant to paragraph 12 of this Part 3 of this Schedule 24 and (ii) any third party costs (that is, external costs of the Contractor 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 Change; and

3.12 any other information requested by the Authority in the 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 Contractor shall apply the following principles wherever applicable:

- 4.1 the unit cost of any construction or installation works or associated preliminaries (excluding any temporary or demolition works, professional fees, contingencies, overheads and profit margins) required to implement the Change shall be the equivalent unit rates set out in Part 1 of Appendix 2 of this Schedule 24, uplifted using the [DTI Pubsec] index for construction cost inflation in the period between the Commencement Date and the date the Change is to be commenced;
- 4.2 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 Contractor shall reflect improvements in technology that can optimise whole life costs for the Authority. The unit costs to be applied to the pricing of the lifecycle maintenance shall be the equivalent unit rates set out in Part 2 of Appendix 2 of this Schedule 24 (Indexed);
- 4.3 any professional fees, contingencies, overheads and/or profit margins charged by any consultant, sub-contractor or supplier in respect of construction and/or installation and/or lifecycle and/or service provision shall be the equivalent rates set out in Part 3 of Appendix 2 of this Schedule 24. If the Contractor can demonstrate to the satisfaction of the Authority, acting reasonably, that the professional fees, contingencies, overheads and profit margins being charged by consultants, sub-contractors and/or suppliers in current market conditions have changed significantly from those set out in Part 3 of Appendix 2 of this Schedule 24, then the Authority shall agree to amend the rates set out in Part 3 of Appendix 2 of this Schedule 24 to reflect current market rates;
- 4.4 the unit cost of any extension of, or change to, any Service (either in scope or area), taking into account the capacity of existing labour resources, shall be consistent with the equivalent unit rates set out in Part 4 of Appendix 2 to this Schedule 24 (Indexed). If the Contractor can demonstrate, to the satisfaction of the Authority, acting reasonably, that as a result of the Change, the relevant Service will be of a higher quality than required by the relevant Service Specification then the Authority shall agree to increase such rates to reflect any increase in quality;
- 4.5 any Loss of Revenue shall be calculated by applying Schedule 23 (Loss of Revenue);
- 4.6 other than as referred to in paragraphs 4.1 to 4.4 of this Part 3 of this Schedule 24 no charge shall be made in respect of the Contractor's time, or that of any Contractor Related Party spent processing, managing or monitoring the Change (or proposed Change) (and no additional mark up or management fee shall be applied by the Contractor); and

- 4.7 where elements of the Change are not addressed by paragraphs 4.1 to 4.6 of this Part 3 of this Schedule 24, 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 Contractor 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 Contractor; and
- 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 Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under paragraphs 3.6 (Contractor's Estimate) and/or 3.7 (Contractor's Estimate) of this Part 3 of this Schedule 24; and
- 5.4 provide written evidence of the Contractor's compliance with paragraphs 4 and 5.1 of this Part 3 of this Schedule 24.

## **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 Change in all respects.

## **7 Confirmation or Withdrawal of the 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 Contractor the Estimate (as modified); or
- 7.1.2 withdraw the 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 24 or has withdrawn a Change Notice on an aggregate of three or more occasions then the Authority shall pay to the Contractor on the third and each subsequent such occasion in that Contract Year the reasonable additional third party costs incurred by the Contractor in preparing the Estimate provided that:
- 7.2.1 the Contractor has used all reasonable endeavours to submit a reasonably priced Estimate;

- 7.2.2 the Contractor 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 24 an estimate of third party costs to be incurred by the Authority in the event the Change Notice is withdrawn or deemed to be withdrawn; and
- 7.2.3 the Authority has:
  - 7.2.3.1 approved the estimate of third party costs referred to in paragraph 7.2.2 of this Part 3 of this Schedule 24 and the type of third party prior to any third party costs being incurred; and
  - 7.2.3.2 agreed that, given the nature of the proposed 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 24.

## **8 Implementation of the Change**

- 8.1 Where the Authority has confirmed the Estimate in accordance with paragraph 7.1 of this Part 3 of this Schedule 24 the Contractor shall implement the required 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 Contractor shall notify the Authority when it believes the Change has been completed.
- 8.3 Where the Contractor has either:
  - 8.3.1 failed to provide a response pursuant to paragraph 3 of this Part 3 of this Schedule 24 within fifteen (15) Business Days of the date of the Change Notice;
  - 8.3.2 provided an Estimate in accordance with paragraph 3 of this Part 3 of this Schedule 24 but failed to fully implement the Change within ten (10) Business Days of the date set out in the Estimate as confirmed in accordance with paragraph 7.1 of this Part 3 of this Schedule 24 as being the date on which the Change should have been implemented; or
  - 8.3.3 where it is determined pursuant to paragraph 6 of this Part 3 of this Schedule 24 that the Contractor has failed to submit a fair and reasonable Estimate,

then the Authority may notify the Contractor that the Change Notice is withdrawn and, following such notification, may procure the implementation of the Change without further recourse to the Contractor.

## **9 Certification of the Change**

- 9.1 If the Change constitutes works, the procedure set out and agreed in the Estimate for certifying the completion of the Change shall apply to determine whether the Change has been completed appropriately.
- 9.2 Where the Change constitutes additional or varied Services, the Payment and Performance Monitoring System shall apply to determine whether the Change has been properly implemented.

## **10 Method of Payment of Authority Contribution**

- 10.1 The Authority and the Contractor 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 Contractor in carrying out the Change to the extent borne by the Authority; and
  - 10.1.2 where payment for part of a Change reflects the carrying out of, or specific progress towards, an element within the Change, an objective means of providing evidence confirming that the part of the 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 Contractor failing to agree its terms).
- 10.2 The Authority shall make a payment to the Contractor 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 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 24, the Authority shall pay interest to the Contractor 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 Change shall be calculated in accordance with clause 61 (Financial Adjustments), together with any adjustment that is necessary pursuant to any Small Value Changes made under Part 2 of this Schedule 24 that have not already been taken account of.

## **12 Due Diligence**

It is acknowledged that Changes may require authorisation from the insurers under the Contractor Insurances. The Contractor shall notify the relevant insurance broker immediately upon any material Change being agreed (materiality being judged in relation to the size and nature of the scope of the 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 Change.
- 13.2 The Contractor 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.

13.3 Part 4 – Not Used

## Part 5 – Contractor Changes

- 1** If the Contractor wishes to introduce a Contractor Change, it shall serve a notice containing the information required pursuant to paragraph 2 of this Part 5 of this Schedule 24 (a Contractor Notice of Change) on the Authority.
- 2** The Contractor Notice of Change shall:
  - 2.1 set out the proposed Contractor Change in sufficient detail to enable the Authority to evaluate it in full;
  - 2.2 specify the Contractor's reasons for proposing the Contractor Change;
  - 2.3 indicate any implications of the Contractor Change;
  - 2.4 indicate what savings, if any, will be generated by the Contractor 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 24); or
    - 2.4.2 whether such savings will be paid by a lump sum;
  - 2.5 if the Contractor 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 47.2 (Qualifying Change in Law ) of this Agreement;
  - 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 Contractor with a view to deciding whether to agree to the Contractor Change and, if so, what consequential changes the Authority requires as a result.
- 3** The Authority shall evaluate the Contractor 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 Contractor Change may affect the quality of the Services or the likelihood of successful delivery of the Services (or any of them);
  - 3.3 the Contractor Change will interfere with the relationship of the Authority with third parties;
  - 3.4 the financial strength of the Contractor is sufficient to perform the Services after implementation of the Contractor Change;
  - 3.5 the value and/or life expectancy of any of the Facilities and/or Assets is reduced; or



- 3.6 the Contractor Change materially affects the risks or costs to which the Authority is exposed.
- 4 As soon as practicable after receiving the Contractor 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 47.3 (Parties to Discuss) of this Agreement. During discussions, subject to paragraph 9 of this Part 5 of this Schedule 24, the Authority may propose modifications to, or accept or reject, the Contractor Notice of Change.
- 5 If the Authority accepts the Contractor 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 Contractor Change which shall set out the agreed Contractor 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 Contractor Change;
- 5.2 subject to paragraph 7 of this Part 5 of this Schedule 24, the Annual Payment shall be revised in accordance with clause 61 (Financial Adjustments); and
- 5.3 the Contractor Change shall be implemented within the period specified by the Authority in its notice of acceptance.
- 6 If the Authority rejects the Contractor Notice of Change, it shall not be obliged to give its reasons for such a rejection and the Contractor shall not be entitled to reimbursement by the Authority of any of its costs involved in the preparation of the Contractor Notice of Change.
- 7 Unless the Authority's written acceptance expressly agrees to an increase in the Annual Payment or that the Contractor 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 a Contractor Change.
- 8 If the Contractor Change causes, or will cause, the Contractor'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 Contractor in implementing such Contractor Change) shall be shared on the basis of [50] per cent ([50%]) of the saving being retained by the Contractor 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 61 (Financial Adjustments). Where it is a Surplus Annual Payment, any cost savings shall be for the account of the Contractor.
- 9 The Authority shall not reject a Contractor Change that is required in order to conform to a Change in Law. The costs of introducing a Contractor Change resulting from a Qualifying Change in Law (including any resulting revision of the Annual Payment) shall be dealt with in accordance with clause 47 (Change in Law) and, to the extent not dealt with therein, all costs shall be borne by the Contractor.





**SCHEDULE 25**

**LOBTA**

## **SCHEDULE 26**

### **HANDBACK**

- 1** Without prejudice to the provisions set out in clause 20.6 and clause 45 of this Agreement, upon notification of this Agreement terminating, 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 Contractor 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 Contractor including enabling the Authority and/or its New Contractor to perform services the same as or substantially the same as the Services in a similar manner as required under this Agreement.
- 2** The Contractor 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 Contractor.
- 3** The Contractor 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 Contractor 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 Contractor.
- 4** The Contractor 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 Contractor and relating to the Services to be removed or deleted except for the deletion of Personal Data where required to ensure compliance with the DPL 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 Contractor, 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 Contractor's workforce or as is required by law (for the avoidance of doubt, the Contractor 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 Contractor's request for consent, the Authority shall be deemed to have given consent.

**THIS AGREEMENT** is executed as a deed and delivered on the date stated at the beginning of this Agreement.

THE COMMON SEAL of SOUTH SOMERSET DISTRICT COUNCIL was )

affixed in the presence of: \_\_\_\_\_ )

Authorised Signatory

Authorised Signatory

**EXECUTED AS A DEED** by XYZ acting by a Director in the presence of a witness

Director

Witness Signature

Witness Name

Witness Address