

**DRAFT**

**TEMPLATE PROJECT AGREEMENT**



**National Development  
Finance Agency**

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**TEMPLATE PROJECT AGREEMENT (“TPA”)  
for the design, construction, financing,  
operation and maintenance [AMEND AS APPROPRIATE]  
of a [·] at [·]**

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## **INTRODUCTION**

The Template PPP Project Agreement (“TPA”) is a template contract which is suitable for PPP accommodation projects i.e. projects that involve the financing, design, construction, operation and maintenance of a building from which the private sector will provide the relevant service to the public sector.

The TPA has been drafted on the basis of the following assumptions:

1. There is a single building only. Adaptations will have to be made where there are multiple sites and buildings.
2. The Authority provides the site with outline planning permission but passes the ground condition risk to PPP Co.
3. Demand risk remains with the Authority.
4. Availability Risk is passed to the PPP Co.
5. There are no existing services on site to be taken over.
6. The project will be funded principally by way of senior debt with a small amount of equity/junior debt.
7. The risk profile of the Project is as per the risk matrix attached.
8. It assumes a typical consortium such as the following:
  - Project Company which is a special purpose company
  - Design and Build Contractor
  - Facilities Management Contractor
  - Equity providers
  - Senior Debt and Junior Debt providers

If any of the assumptions above is incorrect, the TPA will have to be adapted.

Authorities must continue to use external legal advisers when embarking on a PPP as the complexity of such projects means that there are inevitably project specific issues that impact on the contract.

### **Revision 1 updated 15th of October 2007.**

The TPA, Revision 1, contains updates to reflect changes in the provisions in respect of project insurances. These changes are substantially in line with Standardisation of PFI Contracts Version 4 (SOPC4) and adjusted for the Irish market.

**RISK MATRIX**

<b>No.</b>	<b>RISK</b>	<b>CLAUSE</b>	<b>PRIVATE SECTOR</b>	<b>PUBLIC SECTOR</b>	<b>SHARED</b>	<b>COMMENT</b>
1.	<b>SITE RISK</b>					
1.1	Planning				X	Where the Authority provides the site on which the Project Facility is to be built, it makes sense to obtain outline planning permission to ensure, in advance of the tender process commencing, that the Project is feasible. The Preferred Bidder will then be responsible for obtaining full planning permission on the basis of his detailed design.
1.2	Physical Condition	5.2 5.6 5.7(iii) 6.2	X			The Authority normally passes the risk associated with the condition of the site (being the risk that adverse ground conditions could cause increases in cost and/or construction delays) to PPP Co. This position is reflected in the TPA. PPP Co. will in turn pass the risk to D&C Co. D&C Co. will mitigate its loss by way of due diligence on the site and site surveys to ensure an appropriate construction bid is compiled. If the information turns out to be wrong, then the risk of increased costs or delays lies with D&C Co., who would also indemnify PPP Co. against any impact of delay.
1.3	Sufficiency of Title			X		In an accommodation project where the site is

No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
						provided by the public sector, it should assume the risk of providing a site with good title. It may not, however, be possible to give a full warranty as to title and a warranty as to the accuracy of replies may be more appropriate. This must be looked at by a property lawyer in the context of the Project and the site involved.
1.4	Access to Site	5.5(b) 6.2		X		In an accommodation project where the site is provided by the public sector, it should assume the risk of providing a site to which PPP Co. will have unimpeded access to commence the Project. Where the PPP Co. does not have control over the site, it cannot manage the risk associated with access, for example from protestors. To transfer this risk to the private sector in an accommodation project would be poor value for money for the Authority. The TPA assumes that the public sector will take the risk on access until such time as PPP Co. is granted a licence to the site and commences work on the Project.
1.5	Environmental risk		X			This has been passed to PPP Co. and would normally be passed down from PPP Co. to D&C Co. However, depending on the nature of the site and the project, it may be

No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
						<p>appropriate to include environmental contamination in the Relief Events. This would be appropriate where comprehensive examination of the site is not practicable or cost effective or if there are pre-existing services on it.</p> <p>In such circumstances it may prove to be more effective for the public sector to treat contamination as a Relief Event which would give PPP Co. an extension of time to remedy the issue so as to avoid payment of damages and/or possible termination, whilst the associated costs would remain PPP Co.'s risk, mitigated by insurance.</p> <p>However, as with site risk, the public authority should consider whether it represents value for money to pass this risk. If it has owned and operated from the site for some time, it may choose to retain the risk and thus lower the cost of the project. The TPA assumes transfer of this risk to the private sector but has included Environmental Contamination as a possible Relief Event.</p>
1.6	Archaeological risk	6.3			X	<p>This is a particularly sensitive issue in Irish projects. Depending on the nature of the site and project, it may be appropriate to include this in the list of Relief Events. Alternatively, a</p>

No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
						risk sharing approach to cost could be used. The standard Project Agreement includes Archaeological Discoveries in the list of Relief Events and offers a cost sharing option. However, the public sector should always consider on a case-by-case basis, whether it would be better value for money to bear this risk itself.
2	<b>DESIGN AND CONSTRUCTION RISK</b>	7-16	X			PPP Co. is responsible for the design, construction, integration, installation, testing, commissioning, operation, maintenance and ultimate performance of any asset procured or developed for the purposes of meeting the requirements of the Output Specification. The Authority should not (save in exceptional circumstances) take any responsibility for this risk. Correspondingly, PPP Co. should be afforded the freedom to manage its activities without interference from the Authority. It is PPP Co.'s risk whether the design and development it has carried out are capable of satisfying the Authority's service requirements. The Authority should not, save in exceptional circumstances agree to any role before or following Service Commencement which involves the Authority taking back any part of PPP Co.'s design and construction risk.

No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
						<p>In this context, the Authority should not make payments against construction milestones nor should it have a right of termination for failure by D&amp;C Co. to meet a Construction milestone.</p> <p>The Authority's role after signature of the Project Agreement and prior to Service Commencement will normally include:</p> <ul style="list-style-type: none"> <li>• reviewing and commenting upon PPP Co.'s designs, maintenance and operational procedures as they are developed;</li> <li>• viewing and observing tests of any equipment being developed;</li> <li>• following the agreed procedure by which PPP Co. demonstrates to the Authority that Service Commencement can be accepted;</li> <li>• following the agreed procedure in relation to a failure to meet the Service Commencement Date and agreeing with PPP Co. the measures to be taken and the financial consequences if any; and</li> </ul>

No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
						<ul style="list-style-type: none"> <li>auditing PPP Co.'s activities in accordance with an acceptable Quality Management Systems regime.</li> </ul> <p>It must be made clear in the Project Agreement that all of these tasks are carried out without any approval from the Authority in the sense that the Design or Works as constructed or finalised will be capable of meeting the Output Specifications.</p>
3	<b>DEMAND RISK</b>	24 Schedule 15		X		The TPA leaves demand risk with the Authority. In an accommodation project such as a school, hospital or prison, where the private sector has no control over the number of users, it would not be good value for money to transfer such risk.
4	<b>AVAILABILITY AND PERFORMANCE RISK</b>		X			<p>The payment mechanism is based on a Unitary Charge which is payable only when a unit (classroom, cell, etc.) is available in accordance with the standards set down in the Project Agreement. Deductions will be made for unavailability or substandard performance. For example, if the toilets in a prison are flooded, they will be unavailable and PPP Co. will suffer a predetermined deduction from the Unitary Payment for that month.</p> <p>However, if the toilets have not been cleaned,</p>



No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
						PPP Co. will suffer a lesser Performance Deduction as the toilets can still be used.
5	<b>CHANGE IN LAW</b>					
5.1	Discriminatory change in law	30 Schedule 21		X		<p>Under more traditional commercial contracts, PPP Co. is usually able to pass on the costs of changes in law to its customers through an increase in price or, in contracts of relatively short duration, is able to take a view on the prospects of changes in law arising during the term of the contract. As the prices in PPP contracts are agreed on a long-term basis and are not flexible in the same way, PPP Co. will often not be in a position to price the full cost of changes in law effectively.</p> <p>A sharing approach is the best way to ensure that the costs of implementing changes in law are minimised. The approach set out in the TPA in respect of the sharing of risks relating to changes in law is intended to play to the strengths of both the public and private sectors and ensure that PPP Co. is incentivised to manage its costs, even where the Authority agrees to meet PPP Co.'s costs resulting from complying with a change in law.</p>
5.2	General Change in law involving	30 Schedule 21			X	This is primarily a public sector risk as PPP Co. has no control over such matters and the

No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
	capital expenditure during the Service Period					Authority will receive the benefit of the capital output.
5.3	General Change in Law other than that involving capital expenditure	30 Schedule 21	X			The private sector bears this risk on the basis that other service contractors will be in the same position and these changes will in any event be absorbed via benchmarking. An example would be changes in employment law that result in higher labour costs.
5.4	Change in VAT	27		X		The public sector should bear this risk as PPP Co. has no control over it and there is no point in the public sector paying a risk premium to transfer it.
6	<b>RESIDUAL VALUE</b>		X			<p>In most PPP projects, the Authority's long-term objectives will be best served by retaining ownership in the Project Facility. The TPA is drafted on this basis. This should be the case where:</p> <ul style="list-style-type: none"> <li>• legal constraints prevent any practical alternative option, for example the private sector cannot be a roads authority so roads must revert to the public sector Authority;</li> <li>• contracts which involve Project Facilities, such as hospitals and</li> </ul>

No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
						<p>schools, are specifically designed to cater for a particular service. In these sectors, the Project Facilities have a useful economic life if retained by the Authority but there is no realistic alternative use for the Project Facility. These may be only limited scope for alternative use on expiry of the Contract Period and conversion is likely to be costly;</p> <ul style="list-style-type: none"> <li>the Authority requires long-term use of the asset for the continued provision of its services; or</li> <li>bidders are likely to discount the residual value of the assets.</li> </ul>
7	<b>MAINTENANCE RISK</b>	17 18	X			<p>PPP Co. will base its costings on a forecast capital replacement programme of plant, machinery, equipment, fixtures, fittings and furniture designed to maintain the building environment at the specified output standards. PPP Co. will also consider the means of funding this expenditure throughout the life of the Project. The risk associated with assessing what will need replacing, when and how much this will cost, is one that PPP Co. should take</p>

No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
						<p>and therefore the Authority should not attempt to be prescriptive in this respect.</p> <p>The Authority will wish to ensure that PPP Co. is as equally incentivised to maintain the Assets in the latter years of the Term as it is in the early years. The Authority should have the ability to conduct a final survey towards the end of the Term and withhold payment of the Unitary Charge if the Assets are not restored to the required maintenance standard.</p> <p>Maintenance should be left firmly at PPP Co.'s risk and the Authority should not attempt to prescribe the quantum, location or availability of a sinking fund. The Authority should consider whether it needs to take security over the sinking fund or whether it is adequately protected by the Project Agreement. For example, if the term of the Senior Debt is significantly shorter than the Term of the Project Agreement, the Authority may wish to have secured rights over a sinking fund once the Senior Debt has been repaid in full.</p> <p>If the size of the Project (including associated maintenance obligations) is comparatively large in relation to the financial resources of a</p>

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						PPP Co. which is not relying on third party Senior Debt financing, the Authority may want to consider requiring a sinking fund over which it has secured rights.
8	INSURANCE	45			X	<p>In order to ensure optimal risk transfer, the Authority should allow PPP Co. to manage its insurance arrangements as far as possible. However, the Authority must require that certain Required Insurances be taken out and maintained so that insurance proceeds are available in the event of a claim and to ensure that the Authority's separate insurable interests are fully protected. It is essential in every project that insurance advice is sought as to the precise requirements for Required Insurances before the Project Agreement/ITN is sent to bidders. The insurance costs are an integral part of the bid and the insurance provisions require the Authority to have full transparency and detailed insurance cost calculations (these to be accurately reconciled in the Financial Model).</p> <p>Every project is unique as far as insurance is concerned and the Project insurance regime must therefore be reviewed in detail to reflect the insurable profile of the project in question.</p>

No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
8.1	Increase in Premiums	45.7			X	<p>It is not possible to place insurance to cover the full life of a Project Agreement. Whilst it may be possible to purchase insurance policies to cover the Construction Period (as long as the build period is not too long), Operational Period insurances are usually renewed on an annual basis. It is difficult to cost such insurance over the life of a Project and who should bear the risk of any increases has become an area of debate in PPP projects given the potential for significant increases in insurance premia due to the cyclical and variable trading status of insurance markets. The TPA adopts the position in Standardisation of PFI Contracts Version 4 ("SoPC4") with some minor amendments. This is a complicated area and should not be changed without consultation with the NDFA. In brief, the position involves agreement between the parties and the fixing of insurance costs at the Bid stage (via an agreed Base Cost). The Base Cost calculation is derived on a long run median level principle. The private sector then takes the risk of increases in premia due to defined general insurance market movements up to 30% above this figure. After that increases are shared, with the</p>

No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
						public sector taking 85% of the risk and the private sector taking 15%. The premium sharing mechanism also operates in a like manner for premium decreases below the Base Cost.
8.2	Unavailable Terms and Conditions Uninsurability	45.3 45.4		X		The consequence of a Risk covered by a Required Insurance becoming Uninsurable, will depend on the type of Risk and whether either Party is responsible for the Uninsurability. Assuming that neither Party is responsible for the Uninsurability, in the case of third party liability insurance becoming Uninsurable, the Authority may elect to act as “insurer of last resort” or terminate the Project Agreement. If the Authority elects to terminate, it must pay compensation to PPP Co. equivalent to that payable on a Force Majeure Termination. If the Authority elects to continue the Project and stand as “insurer of last resort” and the Risk materialises, the Authority must pay any claim on the same basis as the insurer would have and in addition Force Majeure compensation. If the Authority takes the Risk, and the Project Agreement continues, the amount of the premium previously paid should be deducted from the Unitary Charge.

No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
						<p>Continuing Uninsurability is required to be tested periodically and if it becomes insurable again cover is required to be reinstated. Similar arrangements exist in relation to property damage or business interruption insurances other than the Project automatically continues with the Authority as “insurer of last resort” up to any loss occurring. On the loss occurring the Authority either pays the claim and continues the Project or terminates under Force Majeure.</p> <p>The TPA also contains a mechanism to manage the circumstance when a Required Insurance policy term or condition becomes Unavailable. This relieves the PPP Co of contractual default but the consequences of the unavailability of the policy term or condition no longer being available are required to be managed by the PPP Co.</p>
9	REFINANCING	47			X	In the TPA, the Authority will receive a 50% share of any refinancing with respect to Senior Debt. In the case of Junior Debt, bidders should be asked to bid how much of a Refinancing Gain they are prepared to share with the Authority, subject to a floor of 50%.
10	COMPENSATION	39			X	The Compensation on Termination provisions



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	<b>ON TERMINATION</b>	Schedule 17				of the TPA should only be altered if there is a very project specific reason to do so.
10.1	Compensation on Termination for PPP Co. Default.	39 Schedule 17, Part 1	X			<p>The amount of compensation payable on PPP Co. Default termination is one of the key commercial issues for all parties concerned. The market value approach adopted in the TPA is the recommended approach for all accommodation projects. It basically provides that on termination for PPP Co Default, the project is sold to the highest bidder if there is a liquid PPP market. If there is no such market, the value of the unexpired Term is determined by an expert. The amount of the highest bid or the expert valuation is the basis of the compensation paid to PPP Co.</p> <p>The Market Value approach represents a balance between protecting the Authority's interest and not imposing unreasonable deductions on PPP Co. for its default. It also encourages the Senior Lenders to step-in and rescue the Project instead of simply relying on the termination payment to pay their outstanding debt.</p> <p>The Market Value approach facilitates the Senior Lenders right to step-in, manage and</p>

No.	RISK	CLAUSE	PRIVATE SECTOR	PUBLIC SECTOR	SHARED	COMMENT
						rescue or sell the Project if PPP Co. defaults, but, if they fail to do so, offer compensation on termination based on the market value of the unexpired Term.
10.2	Compensation on Termination for Authority Default and Voluntary Termination	39 Schedule 17, Part 2		X		<p>The objective should be to ensure that PPP Co. and its financiers are fully compensated i.e. no worse off because of Authority Default or Voluntary Termination than if the Project Agreement had proceeded as expected.</p> <p>PPP Co. should be required to specify is preferred method of calculation of equity return at the time of its bid. It should choose between the level set out in the original base case, the market value at the time of termination and the original base case return from the Termination Date.</p>
10.3	Compensation on Termination for Force Majeure, Uninsurable Risk or Change in Law	39 Schedule 17, Part 3			X	If the Project Agreement terminates for Force Majeure, Uninsurable Risk or Change in Law, the Authority should pay Compensation on Termination to PPP Co. that reflects the principle that the circumstances are neither Party's fault and they should share the financial consequences. This is reflected in the TPA.

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10.4	Compensation on Termination for Corrupt Gifts and Fraud and Breach of the Refinancing Provisions.	39 Schedule 17, Part 4				The only Compensation on Termination that should be paid in these circumstances is the Revised Senior Debt Termination Amount. Equity Holders should not be compensated as their relationship with PPP Co renders them responsible for its actions.

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**AGREEMENT** dated [ ● ]

**BETWEEN:**

1. [ ● ] of [ ● ] acting by its Agent, the National Development Finance Agency of Treasury Building, Grand Canal Street, Dublin 2 (“**the Authority**”); and
2. [ ● ] a company incorporated in Ireland (company number [ ● ]) whose registered office is at [ ● ] (“**PPP Co.**”).

**BACKGROUND:**

- (A) The Authority requires the provision of a [ ● ] at [ ● ] (the “Project Facility”).
- (B) By a notice published in the Official Journal of the European Communities on [ ● ] the Authority invited expressions of interest from appropriately qualified parties for the design, construction, financing, operation and maintenance [**AMEND AS APPROPRIATE**] of a Project Facility.
- (C) The solution proposed by PPP Co. has been selected by the Authority.
- (D) The Authority and PPP Co. wish to enter into this Project Agreement and have agreed, inter alia, that:
  - (i) PPP Co. will design, build, finance, operate and maintain [**AMEND AS APPROPRIATE**] the Project Facility in accordance with the terms of this Project Agreement; and
  - (ii) the Authority will grant a licence of the Site to PPP Co. for the sole purpose of enabling PPP Co. to fully comply with its obligations under this Project Agreement.

**THIS DEED PROVIDES** as follows:

**PART 1 – DEFINITIONS AND INTERPRETATION**

**1. DEFINITIONS AND INTERPRETATION**

**1.1 Definitions**

The Project Agreement and Schedules will be interpreted in accordance with the provisions of Schedule 1 (Definitions) and in accordance with Clause 1.2 (Interpretation).

**1.2 Interpretation**

In this Project Agreement unless otherwise specified:

- (a) references to Clauses, Sub-Clauses, Paragraphs, Sub-Paragraphs, Sub-Sub-Paragraphs and Schedules are to Clauses, Sub-Clauses Paragraphs, Sub-Paragraphs and Sub-Sub-Paragraphs of, and Schedules to, this Project Agreement;
- (b) references to a “company” will be construed so as to include any company, corporation or other body corporate, wherever and however incorporated or established;
- (c) references to a “person” will be construed so as to include any individual, firm, company, government, state or agency of a state, local authority or government body or any joint venture, association or partnership (whether or not having separate legal personality);
- (d) a reference to any statute or statutory provision will be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or re-enacted;
- (e) any reference to a “day” or a “Business Day” will mean a period of twenty-four (24) hours running from midnight to midnight;
- (f) references to times are to time in Ireland;
- (g) references to a “month” will mean a calendar month;
- (h) references to any agreement (including this Project Agreement) document or other instrument include (subject to all relevant approvals and any other provision of this Project Agreement expressly concerning such agreement, document or other instrument) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned;
- (i) any phrase introduced by the terms “including”, “include”, “in particular” or other similar expression will be construed as illustrative and will not limit the sense or meaning of the words preceding those terms;
- (j) references to the singular include the plural and vice versa; and
- (k) references to the masculine include the feminine and vice versa.

1.3 All headings and titles are inserted for convenience only. They are to be ignored in the interpretation of this Project Agreement. The Appendices and Schedules form an integral part of this Project Agreement and reference to this Project Agreement includes the Appendices and Schedules.

#### 1.4 **Precedence of Documents**

In the event of any ambiguity or discrepancy between this Project Agreement and the Schedules, Appendices or documentation referred



to in this Project Agreement, then the provisions of the clauses of this Project Agreement will prevail.

## **PART 2 – APPOINTMENT AND DURATION**

### **2. APPOINTMENT**

2.1 The Authority hereby appoints PPP Co. to design, construct, finance, operate and maintain the Project Facility and provide the Services in accordance with the terms of this Project Agreement and PPP Co. hereby accepts such appointment upon the terms and conditions of this Project Agreement.

### **3. TERM OF PROJECT AGREEMENT<sup>1</sup>**

3.1 This Project Agreement and the rights and obligations of the Parties will take effect on the Commencement Date.<sup>2</sup>

3.2 The Term of this Project Agreement will commence on the Commencement Date and will terminate on the Expiry Date or Termination Date.

### **4. DELIVERY OF REQUIRED DOCUMENTS<sup>3</sup>**

On or before the Commencement Date, PPP Co. will deliver (and will procure that the Funder(s) deliver) to the Authority the Required Documents.

## **PART 3 – REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS**

### **5. REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS**

#### **5.1 Reliance**

PPP Co. acknowledges that the Authority has entered into this Project Agreement in reliance on the representations and warranties contained in this Project Agreement.

#### **5.2 PPP Co. Warranties**

PPP Co. represents and warrants to the Authority that as at the date of this Project Agreement:

- (a) it is a limited liability company duly incorporated and validly existing under the laws of Ireland and has the legal right and full power and

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<sup>1</sup> This approach assumes a fixed term for the Project Agreement. Another way of dealing with this is to have a maximum length but have the Project Agreement terminate when a specified level of return has been achieved or some other agreed event has occurred. This is not common, but may be appropriate, for example, where a significant proportion of project revenues are generated from third parties by way of user charges and the Authority has a legitimate interest in capturing surplus revenues for the public benefit.

<sup>2</sup> It is often possible for contract signature and financial close to be simultaneous. If there are project specific reasons for conditions precedent being required (e.g. planning conditions or permission), then the concept of conditions precedent and “Effective Date” will be needed (and the effect of pricing of interest rate fluctuations, between the date of contract signature and financial close, will need to be addressed).

<sup>3</sup> The Required Documents set out in Schedule 11 are illustrative only and must be reviewed on a project -specific basis.

authority to carry on its business as currently carried on and to own its property and assets;

- (b) it has the legal right and full power and authority to execute, deliver and perform all its obligations under this Project Agreement and each of the Project Documents to which it is a party and to exercise its rights under them;
- (c) all necessary action has been taken (and not revoked) and any necessary third party consents, approvals, authorisations have been obtained and are valid and subsisting to authorise the execution, delivery and performance of the Project Agreement and the Project Documents by PPP Co., and the Project Agreement and the Project Documents when executed will constitute valid and legally binding agreements of the PPP Co. enforceable in accordance with the terms thereof. PPP Co. has not at any time prior to the date hereof entered into any other legally binding agreements with any other party other than the Project Agreement, the Project Documents and the Funding Agreements;
- (d) the execution, delivery and performance of the Project Agreement and Project Documents by PPP Co. does not:
  - (i) contravene any Law to which it is subject; or
  - (ii) result in any actual or potential breach of or default under any obligation, agreement, licence, instrument or consent to which it is a party or by which it is bound or which it requires to carry on its business; or
  - (iii) result in any actual or potential breach of or default under any Encumbrance, lease, contract, order, judgment, award, injunction, regulation or other restriction or obligation of any kind or character by which or to which any assets of PPP Co. is bound or subject; or
  - (iv) relieve any person from any obligation to PPP Co. (whether contractual or otherwise) or enable any person to determine or avoid any such obligation or any right or benefit enjoyed by PPP Co. or enable any person to exercise any right whether under an agreement with or otherwise in respect of PPP Co.; or
  - (v) result in the creation, imposition, crystallisation or enforcement of any security interest whatsoever on any assets of PPP Co.; or
  - (vi) contravene any provision of its memorandum of association or of its articles of association;
- (e) it has not traded since its incorporation other than for the purposes of entering into the Project Agreement, the Project Documents and the

Funding Agreements and has no liabilities other than liabilities that have arisen in connection with preparing to enter into the Project Agreement, the Project Documents and the Funding Agreements;

- (f) PPP Co. is not, nor has it at any time been involved in any litigation (whether civil or criminal), arbitration, administrative or other proceedings and, without limitation, no dispute with or investigation by any statutory or governmental authority relating to PPP Co., is taking place or has taken place, and no such proceedings, disputes or investigations are pending or (to its knowledge having made due and careful enquiry) threatened by or against it or any of its assets or any person for whose acts or defaults it may be vicariously liable that will or might have a material adverse effect on the ability of PPP Co. to perform its obligations under any the Project Agreement, Project Documents or Funding Agreements;
- (g) there is no outstanding judgement, order, decree, arbitral award or decision of any court, tribunal, arbitrator or governmental agency against PPP Co. or any person for whose acts or defaults PPP Co. may be vicariously liable;
- (h) no PPP Co. Default or other breach of any of the Project Agreement, the Project Documents or the Funding Agreements has occurred and is continuing nor to the best of its knowledge (having made due and careful enquiry) has any event or circumstance occurred or arisen which, with the giving of notice, lapse of time, determination of materiality or satisfaction of any other condition may become a PPP Co. Default or other breach of any of the Project Agreement, the Project Documents or the Funding Agreements nor will a PPP Co. Default result from the entry by PPP Co. into this Project Agreement, the Project Documents or the Funding Agreements to which it is a party;
- (i) it is not in default in the filing, registration or recording of any document under any legal or statutory obligation or requirement which default might have a material adverse effect on its business, assets or financial condition or its ability to observe or perform its obligations under the Project Agreement, the Project Documents or the Funding Agreements;
- (j) all Necessary Consents, which are necessary in connection with
  - (i) the PPP Co.'s entry into the Project Agreement, the Project Documents or the Funding Agreements; and/or
  - (ii) the performance of the Project Agreement, Project Documents or the Funding Agreements, by PPP Co.,

have been obtained or made, are valid and subsisting and will not be contravened by the execution or performance of the Project Agreement, the Project Documents or the Funding Agreements;

- (k) except as expressly provided in the Shareholders Agreement (as at the date hereof) and/or the Articles of Association (as at the date hereof) or the Funding Agreements (as at the date hereof) of PPP Co. there is no agreement, arrangement or obligation in force which calls for the present or future allotment, issue or transfer of, or the grant to any person of the right (whether conditional or otherwise) to call for the allotment, issue or transfer of, any share or loan capital of PPP Co. (including, without limitation, any option or right of pre-emption or conversion in PPP Co.);
- (l) except as expressly provided in the Funding Agreements there is no Encumbrance, nor is there any agreement, arrangement or obligation to create or give any Encumbrance, on, over or affecting any issued or unissued shares of PPP Co. and no claim has been made by any person to be entitled to any such Encumbrance;
- (m) PPP Co. warrants and represents to the Authority that the legal and beneficial ownership of the Shareholders at the Commencement Date is as set out in Schedule 19 (PPP Co. and its Shareholders);
- (n) it has no Subsidiaries;
- (o) no proceedings or other steps have been taken (unless these have been discharged) nor threatened for the winding-up of PPP Co. or for the appointment of a receiver, administrative receiver, administrator, examiner, liquidator, trustee or similar officer in relation to any of its assets or revenues;
- (p) all necessary returns have been delivered by or on behalf of PPP Co. to the relevant taxation authorities and PPP Co. is not in default in the payment of any taxes, and no Claim is being asserted with respect to taxes which has not been disclosed to the Authority;
- (q) each of the audited consolidated financial statements of the Groups of which the Shareholders, D&C Co., and O&M Co. are members for the year ended [ ● ] have been prepared on a proper and consistent basis and in accordance with the Companies Acts 1963-2005 and accounting principles, practices and standards which are generally accepted in Ireland and give a true and fair view of the consolidated assets, liabilities (including contingent liabilities), commitments and financial position and the state of affairs of each such Group and are unqualified for the accounting period in question;
- (r) there has been no material adverse change in the financial condition of:
  - (i) PPP Co. since incorporation; and

- (ii) the Shareholders, since the date of their latest audited consolidated accounts that might adversely impact upon PPP Co.'s ability to enter into this Project Agreement and/or perform any obligation in this Project Agreement or the Project Documents;
- (s) the financial terms set out in the Funding Agreements are the terms upon which PPP Co. will finance the Project;
- (t) the copies of the Required Documents which PPP Co. has delivered are true and complete copies of such documents, and there are not in existence any other agreements or documents replacing, amending or relating to any of the Required Documents which affect the interpretation or enforceability of any of the Required Documents;
- (u) no person is entitled to acquire any interest in PPP Co. other than as contemplated in the Project Agreement, the Project Documents and the Funding Agreements;
- (v) all written information furnished by or on behalf of PPP Co. in connection with the negotiation of this Project Agreement or any of the other Project Documents or delivered by or on behalf of PPP Co. to the Authority pursuant to this Project Agreement or any of the other Project Documents was true and accurate in all material respects when given and continues to be true and accurate in all material respects to the extent not subsequently expressly superseded by further written information furnished by or on behalf of PPP Co., and there are no other facts or matters of which PPP Co. is aware, after due and careful enquiry, the omission of which would have made or would make any such statement or information contained therein misleading, inaccurate or untrue in any material respect, and all expressions of expectation, intention, belief and opinion contained therein were honestly made on reasonable grounds after due and careful enquiry;
- (w) PPP Co. is not aware of any material facts or circumstances that have not been disclosed to the Authority and which might, if disclosed, materially adversely affect the decision of a prudent person considering whether or not to enter into this Project Agreement with PPP Co. For the purposes of this Clause 5.2(w) (PPP Co. Warranties), PPP Co. will be deemed to be aware of such material facts and circumstances as it, its Contracting Associates and the Shareholders are aware;
- (x) it has inspected, tested and satisfied itself in relation to the Ground Conditions of the Site to the extent necessary to comply with and perform all obligations under this Project Agreement and it accepts entire responsibility (including any financial or other consequences which result whether directly or indirectly) for the ascertainment of and dealing with the effect of Ground Conditions; and

**[This assume a transfer of ground condition risk to the private sector. This must be adapted on a project specific basis – See footnote 6 and discussion re. Clause 6.2 in User Notes.]**

### 5.3 PPP Co. Undertakings

PPP Co. undertakes with the Authority as follows:

- (a) PPP Co. will:
  - (i) design, construct, complete and commission the Works;
  - (ii) operate and maintain the Project Facility; and
  - (iii) finance the activities referred to in this Project Agreement,at its own cost and risk and without recourse to funds or support from the Authority other than as expressly set out in this Project Agreement;
- (b) it will upon becoming aware that any litigation, arbitration, adjudication or mediation proceedings before or of any court, arbitrator or Relevant Authority may be threatened or pending and immediately after the commencement of proceedings (or within twenty (20) Business Days of becoming aware the same may be threatened or pending or with twenty (20) Business Days after the commencement of proceedings where the litigation or arbitration or administrative or adjudication or mediation proceedings is against a Sub-Contractor) give the Authority notice of 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, PPP Co.'s ability to perform its obligations under this Project Agreement;
- (c) 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 the whole or any part of its business or assets which would materially affect the ability of PPP Co. to perform its obligations under this Project Agreement;
- (d) it will not cease to be resident in Ireland or transfer in whole or in part its undertaking, business or trade outside Ireland;
- (e) it will not without the written consent of the Authority (such consent not to be unreasonably withheld or delayed) incorporate any company or purchase or acquire or subscribe for any shares in any company save where necessary for the provision of the Services or Works;
- (f) it will not without the written consent of the Authority (such consent not to be unreasonably withheld or delayed) make any loans or grant any credit or give any guarantee or indemnity to or for the benefit of

any person or otherwise voluntarily or for consideration assume any liability (whether actual or contingent) in respect of any obligation of any other person except in the ordinary course of business and/or as contemplated by the Project Documents and/or Funding Agreements;

- (g) it will not change nor cease its business nor start any other business which is materially different from that to be carried on by it under this Project Agreement;
- (h) to the extent not procured before the Commencement Date, it will procure that all Necessary Consents required in connection with the entry into, performance, validity and enforceability of this Project Agreement and any other Project Documents for which PPP Co. is responsible will be obtained in a timely manner and, to the extent that it is within the control of PPP Co., it will procure that all Necessary Consents remain in full force and effect and it will comply and will procure compliance with the terms and requirements of each of such Necessary Consents; and
- (i) PPP Co. will, and will use all reasonable endeavours to procure that each Contracting Associate will, perform its obligations under and observe all of the terms of the Project Documents to which it is a party and will not (and will use all reasonable endeavours to procure that no Contracting Associate will):
  - (i) once a Project Document to which it is a party has come into full force and effect:
    - (A) terminate it or permit its termination; or
    - (B) in any material respect waive, or fail to enforce, any rights it may have under such Project Document (including the form of any Project Document in Agreed Form);

without the prior consent of the Authority pursuant to Clause 50 (Sub-Contracting),

- (ii) make or agree to any amendment to, or variation of, any Project Document other than in accordance with the Review Procedure (including the form of any Project Document in the Agreed Form) unless PPP Co. informs the Authority's Representative of a proposal to make such an amendment or variation and the Authority's Representative considers that such an amendment or variation is immaterial and does not warrant consideration under the Review Procedure;
- (iii) enter into any agreements other than the Funding Agreements or amend the Funding Agreements:

- (A) to raise additional or substitute finance or financial facilities of any description (or, in the case of any Contracting Associate, in connection with the Project); or
- (B) relating to the rescheduling of its indebtedness or the re-financing of the Project; or
- (C) for the amendment to, or variation of, any Funding Agreements, other than in accordance with the express provisions of this Project Agreement,

unless the relevant document or proposed course of action has received approval in accordance with the Review Procedure.

#### 5.4 Disclosure by PPP Co.

PPP Co. will be under no liability in respect of any Claim under the PPP Co. Warranties to the extent that the facts or circumstances giving rise thereto have been fully, fairly and accurately disclosed to the Authority in the Disclosure Letter set out at Schedule 25. Without prejudice to the preceding sentence of this clause, PPP Co. may not invoke the Authority's knowledge (whether actual, constructive or implied) of a fact or circumstance not included in the Disclosure Letter, which might make a PPC Co. Warranty untrue, inaccurate, incomplete or misleading as a defence to a claim for breach of a PPP Co. Warranty.

#### 5.5 Authority Warranties<sup>4</sup>

The Authority warrants the following:

- (a) [Employee Information];
- (b) [Title];
- (c) [Any other project-specific data].

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<sup>4</sup> The Authority should be very careful in warranting any information it provides. Warranties, to the extent given, should not extend beyond information on which PPP Co. must rely for its bid. Accordingly, the Authority should seek to minimise the extent of any warranties, unless:

- ♦ the Authority is the sole source of such information or such information cannot be verified by PPP Co. at reasonable cost;
- ♦ the Authority is confident in the accuracy of such information or is able to confirm its accuracy without significant expense (e.g. through surveys, in-house checks or inspections); and
- ♦ the Authority will obtain better value for money as a result (taking into account the overall risk allocation).

If the criteria listed above are satisfied and the Authority gives certain warranties, this will reduce PPP Co.'s costs. An example of where warranties are likely to be appropriate is where employees are being transferred by the Authority to PPP Co. or particular known risks exist in relation to a building (such as asbestos content).

An alternative to giving a warranty as to Employee Information is to agree to a price adjustment where the employee information turns out to be wrong. The Authority may warrant title or it may simply warrant the accuracy of its replies. This must be looked at on a project specific basis. The real debate usually centres on who takes the risk on undisclosed adverse little interests.



## **5.6 Disclosed Data and Disclaimer**

- (a) The Authority has made available to PPP Co. the Disclosed Data. The Authority Warranties are qualified by the facts and circumstances fully, fairly and specifically disclosed in the Disclosed Data.
- (b) Neither the Authority nor any of its agents, officers or employees will be liable to PPP Co. in contract, tort (including negligence or breach of statutory duty), statute or otherwise as a result of:
  - (i) any inaccuracy, omission, unfitness for purpose, or inadequacy of any kind whatsoever in the Disclosed Data; or
  - (ii) any failure to make available to PPP Co., any materials, documents, drawings, plans or other information relating to the Project.
- (c) Nothing in this Clause 5.6 (Disclosed Data and Disclaimer) will exclude any liability which the Authority or any of its agents or employees would otherwise have to PPP Co. in respect of any statements made fraudulently before the date of this Project Agreement.

## **5.7 Acknowledgement by PPP Co.**

- (a) PPP Co. acknowledges and confirms that:
  - (i) it is fully aware that the Authority warrants only the information set out at Clause 5.5 (Authority Warranties) and it has not relied on any other warranty or representation or undertaking of the Authority and that, save in the case of fraudulent statements provided for in Clause 5.6(c), all other representations, warranties and undertakings of the Authority, its agents, officers and employees, whether express or implied, statutory or otherwise, are expressly excluded;
  - (ii) it has satisfied itself as to the nature and extent of the Assets to be provided under this Project Agreement together with the nature and extent of the risks assumed by it under this Project Agreement and any other Project Documents;
  - (iii) it has gathered all information that it considers necessary to perform its obligations under this Project Agreement and other obligations assumed under any other Project Documents including:
    - (A) information as to the nature, location (including means of access to and from) and Ground Condition of the Site; and

- (B) information relating to areas of archaeological, scientific or natural interest, local conditions and facilities and the quality of existing structures;
  - (iv) it has satisfied itself as to the character, quality and quantity of the labour, materials, equipment and facilities needed for the Works, wage levels, industrial relations conditions, safety requirements, environmental matters, availability of utilities, legal and regulatory requirements and approvals and all other matters which may affect the satisfactory provision of the Works and/or the Services; and
  - (v) it has gathered all information it considers necessary about any other factors which would affect its decision to enter into this Project Agreement or the terms upon which it would do so.
- (b) Subject to Clause 5.6(c) (Fraudulent Statements) and Clause 5.5 (Authority Warranties), PPP Co. will not in any way be relieved from any obligation under this Project Agreement nor will 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 will make its own enquiries about the accuracy and adequacy of that information.
  - (c) All warranties, representations, undertakings, indemnities and other obligations made, given or undertaken by PPP Co. in this Project Agreement are cumulative and none will be given a limited construction by reference to any other.

## PART 4 - LAND ISSUES AND THE SITE

### 6. LAND ISSUES AND THE SITE

#### 6.1 Licence<sup>5</sup>

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<sup>5</sup> The Landlord and Tenant (Amendment) Act 1980 (the "1980 Act") gives rise to the possibility of a PPP Co. which is granted a lease by an Authority acquiring statutory rights after five years' continuous occupation and therefore being entitled to a renewal of a lease granted to him or to compensation in lieu of a new lease. The 1980 Act would not apply in this way to a licence but there is the possibility that even if a licence is granted, the courts might construe the relationship between the local authority and PPP Co. as having the characteristics of a lease and may therefore grant a renewal of the terms of the "lease" to PPP Co at the end of the operation period. In other words, it is the existence of a particular relationship with certain characteristics that determines the existence of a lease as opposed to any formal grant of a lease.

Irish case law on the lease/licence distinction and the key elements that distinguish a lease is not entirely satisfactory. *Irish Shell and B.P. Limited v John Costello* [1981] ILRM 66 remains the sole Supreme Court case on the lease/licence distinction but it is a confusing and inconsistent judgement. Griffin J in the Supreme Court held the agreement to be a lease despite the fact that it was expressly described as a licence agreement. Griffin J stated that:-

"Whether the transaction is a licence or a tenancy does not depend on the label which is put on it. It depends on the nature of the transaction itself".

However, in subsequent dicta, Griffin J also placed importance on the intention of the parties, quoting from Lord Denning in *Shell-Mex v Manchester Garages* as follows:-

"One must look at the transaction as a whole and whether there are any indications that one finds in the terms of the contract between the two parties to find out whether in fact it is intended to create a relationship of landlord and tenant or that of licensor and licensee".

- (a) The Authority hereby grants PPP Co. a non-exclusive licence to occupy the Site for the sole purpose of allowing PPP Co. to perform its obligations under this Project Agreement (the “**Licence**”) subject to any right of access of the Authority or any other person under this Project Agreement or Law **[AMEND AS APPROPRIATE TO REFER TO THIRD PARTY ACCESS]**.
- (b) The Licence granted under Clause 6.1(a) (**Licence**) will subsist for the sole purpose of enabling PPP Co. to perform its obligations under this Project Agreement and to enable the Funders (and/or their nominees) to procure such performance and for no other purposes and will not operate nor be deemed to operate as a demise of the Site or any part of it nor will PPP Co. have or be entitled to any estate, right, title or interest in it and PPP Co. and those authorised by it will enter the Site only as licensee of the Authority.
- (c) The Licence will commence on the Commencement Date and will immediately terminate upon the earlier of the Expiry Date or Termination of this Project Agreement.

## 6.2 Site Risk<sup>6</sup>

- (a) The Authority will ensure that at the time of granting the Licence, PPP Co. will have unimpeded access to the Site.
- (b) Following grant of the Licence, the condition of the Site will be the sole risk and responsibility of PPP Co. Accordingly (and without prejudice to Clause 5.5(b) (Title) or Clause 5.7 (Acknowledgement by PPP Co.) or any other obligation of PPP Co. under this Project Agreement), PPP Co. will be deemed to have satisfied itself and will

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In the High Court case of *National Maternity Hospital v McGouran* [1994] ILRM 521 Morris J was required to apply *Irish Shell* to an agreement whereby a hospital allowed an individual to occupy part of the building for the purposes of the use of a coffee shop. The agreement was stated to be a licence and it was expressly laid down that there was no exclusive possession; the hospital administrators were entitled to come into the coffee shop whenever they wished. However, in practice Mrs McGouran was the sole keyholder to the coffee shop.

Morris J took the clause negating exclusive possession at face value. According to this clause there was no exclusive possession, therefore under the first principle laid down in *Irish Shell* the agreement could not have been a lease. He did not need to go on to consider the second issue in *Irish Shell*. In *Kenny Homes v Lennard* (unreported, High Court, Costello P, 11th December 97; affirmed by Supreme Court, unreported, Supreme Court 18th June 98) which involved an agreement to occupy a petrol station, the High Court held this Project Agreement to be a licence. The agreement had been carefully drafted to avoid any of the pitfalls which had led to the agreement in *Irish Shell* being treated as a lease. In particular there was a clause negating exclusive possession. As in *McGouran*, the occupier was the sole keyholder; the owner did not have a key and had in fact not entered the site for many years. However the High Court did not care to go into the question of whether the clause negating exclusive possession was ever intended to be enforced; in practice the agreement was held to be a licence. Since *McGouran* we have had *Noel Smith v CIE (HC, October 2002)*.

Whilst the case law is not entirely satisfactory, it seems that, at least in the High Court, the intention of the parties may be taken into account. The best solution is to draft a licence omitting as many key elements of a lease as possible e.g. exclusive possession. There is obviously still a residual risk of a business tenancy being created in favour of PPP Co. but in the absence of legislation this is the best option.

<sup>6</sup> It is often the case with accommodation projects that the public sector provides the site on which the Project Facility is to be built. This also achieves best value for money for the public sector. The TPA is drafted with this assumption i.e. that the site is provided by the public sector with outline planning permission. However, the public sector normally passes the risk associated with the condition of the site (being the risk that adverse ground conditions could cause increases in cost and/or construction delays) to PPP Co. and this is the position reflected in the TPA. PPP Co. will in turn pass the risk to D&C Co. D&C Co. will mitigate its loss by way of due diligence on the site and site surveys to ensure an appropriate construction bid is compiled. If the information turns out to be wrong, then the risk of increased costs or delays lies with D&C Co., who would also indemnify the PPP Co. against any impact of delay including liquidated damages.

assume all risk (including costs arising from and any other financial consequence arising) in relation to:

- (i) the means of access to and through the Site, boundaries of the Site and the possibility of interference by persons of any description whatsoever (including without limitation, protestors and trespassers), 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;
- (ii) the precautions and the times and methods of working at the Site necessary to prevent any nuisance, whether public or private, to any third parties;
- (iii) the Ground Conditions of the Site;
- (iv) the collection and analysis of all data it requires in relation to the Site, the conducting, commissioning and analysis of all surveys, reports and investigations it considers appropriate to comply with its obligations under this Project Agreement;
- (v) Utilities including but not limited to:
  - (A) responsibility for determining the location of Utilities at the Site and for the connection of the Project Facility to all necessary Utilities so as to comply with the Output Specification;
  - (B) entering or procuring that its Sub-Contractors enter such agreements as may be necessary with the suppliers of Utilities for lawfully diverting, disconnecting, connecting or otherwise carrying out works in respect of Utilities to the extent required to carry out the Works to comply with the Output Specification.

**[NOTE: PAYMENT OF UTILITY USE DURING THE TERM TO BE DISCUSSED ON A PROJECT SPECIFIC BASIS]**

- (c) PPP Co. will promptly provide to the Authority copies of all reports, surveys and investigations commissioned and obtained in relation to the Site and will inform the Authority of all steps which it intends to carry out in response to these.

### 6.3 Archaeology

#### (a) Archaeological Requirements

PPP Co. will comply with the Archaeological Requirements set out in Part [ ● ] of Schedule 3 (D&C Requirements)<sup>7</sup> and will not restrict the access of any Relevant Authority [including the Project Archaeologist] to the Site at all reasonable times to carry out any archaeological survey or inspections of the Site and will comply with any instructions of such Relevant Authorities [including the Project Archaeologist].

#### (b) Ownership

As between the Authority and PPP Co., all Archaeological Objects will be the property of the Authority.

#### (c) Treatment

PPP Co. will prevent the removal of, or damage to, any Archaeological Objects. PPP Co. will immediately inform [the Project Archaeologist and] all Relevant Authorities of the discovery of any Archaeological Objects and await and carry out instruction from the Authority regarding their examination and treatment in accordance with the Archaeological Requirements.

#### (d) Archaeological Event

PPP Co. will make all reasonable efforts to mitigate any delays and/or increased costs caused by the discovery and removal of any Archaeological Objects including, without limitation, rearranging and re-programming construction activities. Subject to the foregoing, if discovery and removal of any Archaeological Objects results in a delay to the date on which the Construction Programme is then scheduled to complete in excess of [two (2) weeks,] PPP Co. will notify the Authority of the delay, providing evidence of the reasons for such delay and an estimate of its anticipated duration. If the Authority is satisfied (acting reasonably) that such delay is justified, it will be deemed an Archaeological Event and will be a Relief Event.

#### (e) Cost-sharing

Where PPP Co. incurs costs due to the discovery and removal of Archaeological Objects in excess of [€ ● ], then any such reasonably incurred and accurately verified costs will be treated as an Authority Change in accordance with Schedule 20 (Variations).

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<sup>7</sup> The Archaeological Requirements are detailed instructions as to the procedures to be carried out by PPP Co. in terms of initial excavation and then procedures if any Archaeological Object is discovered. It will depend entirely on the nature and location of the Site and must be considered on a project-specific basis.

A Project Archaeologist will not be necessary on all projects – this will depend on the nature of the Site.

## PART 5 – DESIGN AND CONSTRUCTION<sup>8</sup>

8

### 8.1 INTRODUCTION

- (a) Once the Project Agreement is signed and in force, there is usually a construction or development phase during which PPP Co. carries out its construction or development obligations and puts in place the service procedures which it believes will meet the Output Specification.
- (b) During this period, the Authority naturally wants to know if PPP Co. is going to deliver the Service on time and in a way which meets all the Authority's contracted requirements. PPP Co. will not wish to be unnecessarily hampered by the Authority, but it will also want to be reassured that what it is developing will meet the Authority's requirements.
- (c) The key issue here is the extent to which the Authority should be involved during this phase and what rights, if any, the Authority should have to approve or monitor PPP Co.'s progress before Service Commencement Date.
- (d) There must be a clear limit to the extent of the Authority's participation as involvement to a greater extent than is appropriate may lead to the Authority taking back both a risk which it is paying PPP Co. to accept and a management role it is paying PPP Co. to deliver. It will not be appropriate for the Authority to adopt the type of overseeing role it might traditionally expect to have when procuring stand-alone construction or development services.

### 8.2 AUTHORITY'S ROLE – GENERAL

- (a) PPP Co. is responsible for the design, construction, integration, installation, testing, commissioning, operation, maintenance and ultimate performance of any asset procured or developed for the purposes of meeting the requirements of the Output Specification. The Authority should not (save in exceptional circumstances) take any responsibility for these risks. Correspondingly, PPP Co. should be afforded the freedom to manage its activities without interference from the Authority. It is PPP Co.'s risk whether the design and development it has carried out and the Service procedures it has put in place are capable of satisfying the Authority's service requirements. The Authority should not, save in exceptional circumstances (for example, those giving rise to Authority step-in), agree to any role before or following Service Commencement which involves the Authority taking back any part of PPP Co.'s risk. In this context, the Authority should not make payments against construction milestones nor should it have a right of termination for failure by D&C Co. to meet a construction milestone.
- (b) The Authority should not confirm to PPP Co. that proposals will meet the service requirement. In practice, however, the Authority should be confident before signing the Project Agreement that PPP Co.'s proposals will be capable of delivering the Service once fully developed and implemented. The Authority should also ensure that PPP Co.'s basic design proposal is incorporated into the Project Agreement.

(NOTE: The UK Department of Health has issued guidance on how NHS Trusts should deal with design sign-off on PFI Projects. This is instructive on health projects.) See The Design Development Protocol for PFI Schemes – Jan 2001.)

- (c) The Authority's role after signature of the Project Agreement and before Service Commencement will normally include:
  - reviewing and commenting upon PPP Co.'s designs, maintenance and Service procedures as they are developed;
  - viewing and observing tests of any equipment being developed;
  - administering the agreed process for either PPP Co. or itself to propose and implement changes to the output requirements, constraints on inputs or PPP Co.'s proposals;
  - following the agreed procedure by which PPP Co. demonstrates to the Authority that Service Commencement can be accepted;
  - following the agreed procedure in relation to a failure to meet the Service Commencement Date and agreeing with PPP Co. the measures to be taken and the financial consequences; and
  - auditing PPP Co.'s activities in accordance with an acceptable Quality Management Systems regime.
- (d) The Authority should require only as much management information to be reassured that the delivery timetable is on track and any overriding safety issues are being satisfactorily addressed. This will involve having access to the site.
- (e) The Authority should not, for example, retain any rights to approve or accept interim stages such as practical completion of construction or detailed design before acceptance of Service Commencement, as this may dilute any risk transfer (unless, of course, the Authority takes the risk of commissioning as the NHS does for clinical services in relation to the technical interface in hospital projects). This is different from the point made below in relation to accepting Service Commencement before all construction requirements are completed.

### 8.3 SUBMISSION OF DESIGNS AND INFORMATION TO THE AUTHORITY

- (a) Although PPP Co. is responsible for the design development, the Authority knows its own service requirement and the means by which it has been delivered in the past and this should not be lost to the development process. Consultation with the Authority and subsequent adoption of any comment made by the Authority must, however, remain firmly at PPP Co.'s risk. PPP Co. and its Funders should accept that it is not in the Authority's interests to watch without comment as a design is developed and implemented which it knows will not be able to deliver the Service. The procedure for submitting and commenting on design issues should be capable of giving all parties the reassurance they need.
- (b) The Project Agreement should therefore set out a mechanism for:
  - PPP Co. to submit designs and information to the Authority and its representatives. Such designs should be in a package and format and submitted to a timetable to be agreed between the Parties;

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- PPP Co. to submit minor design changes which do not have any impact on cost or the Service and which the Authority can accept without the change in Service mechanism having to be implemented;
  - the Authority to comment (if it wishes) on such submissions within an agreed time period; and
  - the discussion of and, if appropriate, adoption by PPP Co. of any comments by the Authority.
- 8.4 ACCEPTANCE AND SERVICE COMMENCEMENT
- (a) Before Service Commencement and at points during the Project where the service changes significantly (for example on the introduction of a new asset or new Service procedures), PPP Co. should be under an obligation to demonstrate that the arrangements put in place will meet the Output Specification in the Project Agreement. The method of demonstration by PPP Co. will be dependent on each situation but may take the form of:
- a completion inspection of any asset built or developed with demonstration of principal facilities and services;
  - completion of acceptance trials for new services; and
  - other performance tests or inspections.
- (b) The Project Agreement should set out in detail:
- the form of the tests, inspections or demonstrations (“Tests”) to be carried out by PPP Co.;
  - the timetable for the Tests – it may be appropriate to undertake partial Tests over a period rather than a single Test;
  - the consequences of a failure to pass a Test;
  - the notice procedure for the Tests to be followed by PPP Co. – this is particularly important if the Authority has to roster staff and resources to participate. If it is essential for the Authority to attend the Tests, then PPP Co. should specify a time period for the Authority to respond to the notice and, to the extent that the Authority does not respond in time, a Compensation Event will have occurred (see Clause 41 (Compensation Events)) although the Authority can still attend once it has responded. The TPA provides that attendance by the Authority is not essential;
  - the responsibility for the cost and organisation of resources for the Tests. Again this is particularly important if the Authority’s staff and resources are to be involved (also consider the responsibility for costs if Tests have to be repeated);
  - means of access for the Authority to witness the Tests (if the Authority does not control the site);
  - the documentation required by the Authority as evidence of the results of the Tests;
  - who is responsible for assessing satisfaction of the Tests.
  - the timing and procedure for acceptance of Service Commencement if the results of the Tests are satisfactory.
- (c) The Authority should not accept stages of work (e.g. by signing off milestones) before the Service Commencement Date and delivery of the full Service as this dilutes risk transfer. In certain projects, however, it may be appropriate for the Authority to commence payment before a complete service is available.
- In accommodation projects, the Authority may accept Service Commencement where certain minor aspects of the construction works are incomplete but which are not integral to PPP Co.’s ability to provide the main Service – this may be done by specifying particular areas (e.g. landscaping works) or through more generic descriptions (e.g. “de minimis defects, shrinkages or faults”). In schools projects, demolition of old buildings could be classified as “post completion works” which would have a separate incentivisation mechanism to ensure they are completed. Whether it is agreed before or after signature of the Project Agreement, the Authority must ensure that PPP Co. remains incentivised through the payment mechanism to complete the outstanding works. The Authority’s technical adviser should advise on what aspects of the works can be completed after Service Commencement.
- (d) In projects where Service Commencement is phased, there are two clear alternatives available to the Authority:
- to stipulate that full Service Commencement will only be accepted when all phases in the scheme reach the required Output Specification level, which would incentivise PPP Co. to bring them all up to the Output Specification standard as quickly as possible. This would mean, however, that the Authority would receive the full Output Specification level of service for some phases without paying for it; or
  - to accept full Service Commencement as each phase reaches the Output Specification standard, so that payments reflect the service received. This is likely to be the case with most grouped school schemes. A slight variant to this that may be adopted in very large grouped schemes, where it would be administratively cumbersome to have phase by phase Service Commencement, would be to accept Service Commencement in batches as full service availability is confirmed. If this approach is adopted, some of the incentive effect of the first alternative above can still be achieved if payment is not increased pro rata as phases reach the Output Specification, so that there is in effect an amount retained or abated until the last phase reaches Service Commencement.
- (e) The overall time period until the planned completion and service commencement of the last phase is likely to have a significant impact on the relative value for money of these two alternatives – the longer the period, the more reluctant PPP Co. is likely to be to accept the delayed payment involved in the first alternative in (d) above.
- (f) For example, an educational establishment may want to start using the new facilities outside full term times, and preferably in the long summer break. The Authority should make clear its requirements in this respect in the Invitation to Negotiate.
- 8.5 EXISTING SERVICES

## 7. THE WORKS

### 7.1 Carrying out the Works

PPP Co. will carry out the design, construction, completion, commissioning and testing of the Works so that the Services can be provided from the Service Commencement Date in accordance with:

- (a) the terms of this Project Agreement;
- (b) the D&C Requirements;
- (c) the O&M Requirements;

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(a) The approval/acceptance procedure raises other issues if PPP Co. is taking over existing services as well as undertaking additional services. The Authority should structure the payment mechanism and any termination compensation so as to incentivise PPP Co. to start delivery of the new service on time, so that it cannot simply choose to provide the existing service only. This is the case even where provision of the existing service is more important to the Authority from an Service perspective than provision of the new service.

(b) The first question to address is, when does PPP Co. take over full or partial responsibility for service delivery? Authorities should recognise that any TUPE transfers of staff that may arise are likely to take effect from the time at which PPP Co. takes over provision of the relevant service. There are therefore three options open to the Authority:

- handover responsibility for all sites in the Project Agreement to PPP Co. following financial close, commonly after a brief mobilisation period. This provides a clean start and minimises ambiguity about responsibilities of the Authority and PPP Co., and is therefore the recommended approach. However, in some cases, for example where there are particular concerns or uncertainty about the condition of the buildings, this approach may require PPP Co. to take on risks that are unacceptable to it at a realistic price, and so not provide value for money;
- phase the handover so that PPP Co. takes over responsibility for the sites when it has planned to start works on them to bring them up to the full Output Specification standard. This would leave the Authority responsible for some sites between financial close and the programmed start date of PPP Co.'s work on site. For a large grouped scheme this may well complicate management arrangements throughout the transitional phase from financial close to the point at which all of the sites have reached full Service Commencement, but is recommended where the first approach above does not provide value for money; and
- handover the sites to PPP Co. once they have been brought up to the full Output Specification standard. This would cause an additional complexity as the pre-contract arrangements, involving in-house provision or a separate contractor, would continue in relation to facilities management (if relevant) and operation of the accommodation, whilst PPP Co. was carrying out works to bring the sites up to the Output Specification standard. The possibility of disputes about who is responsible for problems that arise suggest that this would not be an attractive option, and it is therefore not recommended.

In some cases, the existing conditions of buildings may be such that there is a risk (however remote) of criminal prosecution, for example under Health and Safety legislation. The Output Specification will generally require the buildings to be in a condition that complies with all applicable law. In some schemes prospective shareholders of PPP Co. will be understandably nervous about taking on such a risk for the period before Service Commencement. In such circumstances, Authorities should consider retaining legal responsibility for the buildings until planned Service Commencement, and so any existing services provided by PPP Co. may be dealt with in a maintenance and/or O&M Contract.

(c) In relation to the first two options, a specification will be needed for the service level that is expected for the period while PPP Co. is responsible for each site, but has not yet reached full Service Commencement. The specification should include requirements in relation to individual O&M Services that PPP Co. will be required to provide (if relevant), and a reactive and responsive maintenance and repair service that at least keeps the sites open to the standard they are when the Project Agreement starts. It is important for all parties that there is a common understanding of the service required during this period. This will assist in minimising disputes if under-performance occurs. There are generally two options available to the Authority:

- use the Output Specification that will apply from Service Commencement for the transitional period as well, albeit with a relaxed payment and performance regime (including default termination thresholds). However, this may lead to regular performance failures due to the pre-existing condition of the buildings and cause disputes between the parties; or
- tailor a bespoke specification for the transitional period which sets out the Authority's requirements and is realistic in terms of delivery. In relation to some individual service requirements however, the Project Agreement Output Specification may be relevant and sufficient for the transitional period (e.g. response and rectification periods, or if it is reasonable to expect individual "soft" O&M Services to be provided to the Output Specification standard from the award of the Project Agreement). However, where the Output Specification for the Service Period cannot be met by PPP Co. during the transitional period, bespoke outputs will need to be tailored.



- (d) Law and any Necessary Consents; and
- (e) PPP Co.'s Proposal.

## **7.2 Independent Obligations**

For the avoidance of doubt, the obligations in sub-Clauses 7.1(a), 7.1(b) and 7.1(c) (Carrying out the Works) are independent obligations. In particular compliance with the D&C Requirements or O&M Requirements is not a defence to a breach of this Project Agreement.

## **7.3 Discrepancy between Documents**

Without prejudice to Clause 7.2 (Independent Obligations), should it be found that there is some discrepancy with or ambiguity between the documents referred to in Clause 7.1 (Carrying out the Works), the discrepancy or ambiguity will be resolved by the Authority in its absolute discretion. PPP Co. will at its own expense promptly amend the relevant document and carry out the Works or Services in accordance with the amended document.

## **7.4 Standard of design and workmanship**

In carrying out the Works, PPP Co. will or will procure that D&C Co. will:

- (a) use, the degree of skill and care in the design of the Project Facility that would reasonably be expected of a competent professional designer experienced in carrying out design activities of a similar nature, scope and complexity to those comprised in the Works;
- (b) carry out the Works in accordance with the terms of this Project Agreement using good quality materials and equipment which are new (or recycled) and of satisfactory quality and in a good and workmanlike manner;
- (c) carry out the Works in accordance with all Necessary Consents and will comply with all relevant Law in completing the Project Facility; and
- (d) not specify or use in the Works (or in connection with any future maintenance of the Project Facility) any goods or materials which, in accordance with Good Industry Practice, are known to be or reasonably suspected to be:
  - (i) deleterious, either by themselves or when used in conjunction with any other materials or in any particular situation or location;

- (ii) deleterious with the passage of time;
- (iii) likely to cause damage to the Project Facility;
- (iv) a potential hazard to health or safety;
- (v) capable of posing a threat to the stability, integrity or performance of the Works or Project Facility or any part of the Works or Project Facility; and/or
- (vi) capable of reducing the normal life expectancy of the Works or Project Facility or any part of the Works or Project Facility.

## 7.5 Signs

PPP Co. will not permit the Site to be used for the display of advertisements or other boards, notices or signs except such usual developers' and contractors' signs and other signs relating to and indicating the nature of the Works and the identity of PPP Co., D&C Co. and the Professional Team provided that such sign or signs has or have previously been approved in writing by the Authority's Representative (which approval will not be unreasonably withheld or delayed).

## 7.6 Authority Access

Subject to any Health and Safety requirements imposed by Law and without prejudice to Clause 6 (Land Issues and the Site), PPP Co. will procure that:

- (a) the Authority and any persons nominated by them will have unrestricted access to the Site and/or the Project Facility at all reasonable times during the Term without the need to give notice;
- (b) the Authority will be entitled to enter upon any property used by PPP Co. to perform the Works or Services, to inspect the construction, operation and maintenance of the Project Facility and to monitor compliance by PPP Co. with its obligations; and
- (c) the Authority will be entitled at all times to enter upon any property used by PPP Co. or any Sub-Contractor as training or workshop facilities and places where work is being prepared or materials being obtained for the Project.

## 7.7 Early Commencement<sup>9</sup>

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<sup>9</sup> BONUS PAYMENTS FOR EARLY SERVICE COMMENCEMENT

9.1 It is sometimes proposed that "bonus payments" should be paid for early Service Commencement, particularly where the Authority has required protections against late Service Commencement. The term "bonus payment" can be misleading, however, so it is important to understand what is envisaged and how it ties in with the implications of early Service Commencement.

- (a) The Certificate of Commencement may only be issued between [INSERT DATE] and the Target Commencement Date in which case the provisions of Clause 7.7(b) (Early Commencement) will apply.
- (b) If the Certificate of Commencement is issued before the Target Commencement Date in accordance with Clause 7.7(a) (Early Commencement Date), the Expiry Date will be the [twenty-fifth] anniversary of [the Early Commencement Date] or [the Target Commencement Date] and the Unitary Charge will be paid from such earlier date.

## 8. DESIGN REVIEW PROCEDURE

### 8.1 Obligation to Finalise Design

PPP Co. will develop and finalise the design and specification of the Works and the Authority may review the Reviewable Design Data in accordance with the Review Procedure set out in Schedule 5 (Review Procedure) and the provisions of this Clause 8 (Design Review Procedure).

### 8.2 Submission of Reviewable Design Data

PPP Co. will submit the Reviewable Design Data to the Authority's Representative for review under the Review Procedure.

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- 9.2 The key point for the Authority is that it should not be under an obligation to accept early Service Commencement unless it has specifically agreed to be. It should only accept early Service Commencement and payment of any relevant bonus if it offers value for money. Early Service Commencement may clearly prove good value for money if there is a critical demand for the Service or if it would benefit the Authority financially. This might be the case, for example, if the early start date meant the Project generated additional third party revenue, or PPP Co. made savings, in which the Authority shared. Any benefit to the Authority should be assessed on a case by case basis. There is unlikely to be an advantage to early Service Commencement in the case of a School where the Authority is working to fixed term times.
  - 9.3 There may be budgetary problems for some Authorities (such as local authorities) in accepting and paying for early Service Commencement. These are likely to be surmountable if sufficient warning is given by PPP Co. of early commencement, particularly as the Authority would in many cases be sharing in extra revenue or savings.
  - 9.4 If the Authority decides to accept early Service Commencement, PPP Co.'s revenue stream will commence earlier than originally planned. The Authority will have the choice between bringing the Expiry Date forward to retain the length of the original Service Period or retaining the original Expiry Date, thereby extending the original Service Period. This is where the "bonus" payment concept is relevant since:
    - if the Authority retains the original Expiry Date, PPP Co. will receive a "bonus" amount of revenue through the Unitary Charge payable in respect of the longer Service Period;
    - if the Authority brings the Expiry Date forward, the Authority may either simply pay the Unitary Charge for the same length of Service Period (i.e. essentially what it would have paid originally), which involves a "bonus" element (as payment is being received earlier) or it may pay PPP Co. a "bonus payment" equivalent to the additional amount PPP Co. would have received if the original Expiry Date had instead been retained. The difference between this approach and the alternative outlined in the first bullet point is that this bonus would not be subject to deductions as a result of unavailability or poor performance. It would also be likely to be paid as a lump sum;

The Authority may alternatively simply opt to make a "bonus payment" which is unrelated to the length of the Service Period or any additional amounts of revenue which PPP Co. may expect to receive due to its early Service Commencement. Such a bonus would typically be an agreed fixed amount.
  - 9.5 The TPA permits early completion within a defined timeframe but this is very project specific and is offered only as one possibility.

### 8.3 **Approved RDD**

With effect from the date on which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with the Review Procedure, PPP Co. may proceed with the construction of the relevant part or parts of the Works (subject to the need to submit any associated Reviewable Design Data for review) in accordance with that Approved RDD Item.

### 8.4 **Review of Design Data**

PPP Co. will allow the Authority's Representative to view any items of Design Data, which will be made available to the Authority's Representative as soon as reasonably practicable following receipt of any written request from the Authority's Representative.

### 8.5 **Design Database**

- (a) PPP Co. will procure that D&C Co. establishes and maintains a computerised design database which the PPP Co.'s Representative and the Authority's Representative may access remotely by computer to view drawings comprised within the Design Data (including Reviewable Design Data) and electronically store and print copies of such Design Data.
- (b) All liability attaching to the design of the Works (whether pursuant to Law, the provisions of this Project Agreement or otherwise) will remain with PPP Co. and will not in any way be affected by the agreement to or approval of the design or any element of the design by the Authority in accordance with the Review Procedure.

## 9. **QUALITY ASSURANCE**

### 9.1 **Quality Management Systems**

PPP Co. will procure that all aspects of the Works and Services are the subject of quality management systems.

### 9.2 **Quality Plans**

PPP Co.'s quality management systems will be reflected in appropriate quality plans, the standard of which will be consistent with 900001 or 900002 (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them) ("**Quality Plans**").

### 9.3 **Review of Quality Plans**

PPP Co. will procure that the Works and Services are carried out in compliance with the Quality Plans. All Quality Plans or any material

changes to such Quality Plans will be submitted to the Authority's Representative in accordance with Schedule 5 (Review Procedure) and PPP Co. will not be entitled to implement or procure the implementation of any Quality Plan unless PPP Co. is entitled to proceed with such implementation pursuant to Schedule 5 (Review Procedure).

#### **9.4 Compliance by Sub-Contractors**

PPP Co. will ensure that the Principal Sub-Contractors and the Sub-Contractors comply with the Quality Plans.

#### **9.5 Quality Manuals and Procedures**

If any Quality Plan refers to, relies on or incorporates any quality manual or procedure, then such quality manual or procedure or the relevant parts of it will be submitted to the Authority's Representative at the time that the relevant Quality Plan or part of (or change to) a Quality Plan is submitted in accordance with Schedule 5 (Review Procedure), and the contents of such quality manual or procedure will be taken into account in the consideration of the relevant Quality Plan or part of (or change to) a Quality Plan in accordance with Schedule 5 (Review Procedure).

#### **9.6 Right of Audit**

The Authority's Representative may carry out audits of PPP Co.'s quality management system (including all relevant Quality Plans and any quality manuals and procedures) at approximate intervals of three (3) months and may carry out other periodic monitoring spot checks and auditing of PPP Co.'s quality management systems. PPP Co. will procure that the Authority's Representative will have the same right in respect of the quality assurance systems under the D&C Contract and the O&M Contract. PPP Co. will co-operate and will procure that any Sub-Contractor co-operates with the Authority's Representative in connection with his rights under this Clause 9.6 (Right of Audit).

### **10. CONSTRUCTION PROGRAMME**

#### **10.1 Target Commencement Date**

PPP Co. will carry out and complete the Works in accordance with this Project Agreement including the Construction Programme before the Target Commencement Date. Without prejudice to the termination provisions in this Project Agreement, the Authority will not be entitled

to claim general or liquidated damages in respect of any delay in reaching the Target Commencement Date<sup>10</sup>.

## **10.2 The Construction Programme**

Any Construction Programme submitted in accordance with the provisions set out below will be prepared in accordance with Good Industry Practice and will be in sufficient detail so as to enable the Authority's Representative to monitor the progress of the Works including all commissioning activities and likely future progress of the Works.

## **10.3 Changes to the Construction Programme**

The Construction Programme is set out at Schedule 4 (Construction Programme). Any change to the Construction Programme will only be made in accordance with this Clause and Schedule 5 (Review Procedure). PPP Co. will promptly submit to the Authority's Representative a copy of any version of the Construction Programme varied in accordance with this Clause and Schedule 5 (Review Procedure).

## **10.4 PPP Co. Falling Behind Construction Programme**

If it appears to the Authority's Representative at any time that the progress of the Works has significantly fallen behind the Construction Programme, then the Authority's Representative will be entitled to require PPP Co. to submit to the Authority's Representative a report identifying the reasons for the delay and require PPP Co. to produce and submit to the Authority's Representative in accordance with Schedule 5 (Review Procedure) a revised Construction Programme showing the timetable and the manner in which the Works will be carried out to ensure completion.

# **11. INDEPENDENT TESTER<sup>11</sup>**

## **11.1 Appointment**

The Parties will appoint a suitably qualified and experienced consultant to act as the Independent Tester under this Project Agreement upon the terms of the Agreed Form Independent Tester Contract set out at Schedule 22 (Independent Tester Contract).

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<sup>10</sup> The TPA does not impose liquidated (i.e. pre-quantified) damages for late completion. Provisions of that nature should only be inserted if there are project specific reasons for requiring them and the Authority can demonstrate that PPP Co. pricing this risk represents value for money. Liability for general damages for late completion has been excluded on the same basis.

<sup>11</sup> In the case of a School where there are limited windows for moving in, it may be necessary to incentivise PPP Co. to deliver on time – See also Clause 7.7 re. early completion which again must be considered in the context of term times for Schools projects.

### **11.2 Changes to terms of appointment**

Neither the Authority nor PPP Co. will without the other's prior written approval (not to be unreasonably withheld or delayed):

- (a) terminate, repudiate or discharge the Independent Tester Contract or treat it as having been terminated, repudiated or otherwise discharged;
- (b) waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Tester; nor
- (c) vary the terms of the Independent Tester Contract or the service performed or to be performed by the Independent Tester.

### **11.3 Compliance with Independent Tester Contract**

The Parties will comply with and fulfil their respective duties and obligations arising under or in connection with the Independent Tester Contract.

### **11.4 Co-Operation**

The Parties agree to co-operate with each other in relation to all matters within the scope of or in connection with the Independent Tester Contract. All instructions and representations issued or made by either of the Parties to the Independent Tester will be simultaneously copied to the other and both parties will be entitled to attend all inspections undertaken by or meetings involving the Independent Tester.

### **11.5 Replacement**

- (a) In the event of the Independent Tester's appointment being terminated otherwise than for full performance, as soon as reasonably practicable the Parties will liaise and co-operate with each other in order to appoint, in accordance with this Clause, a replacement consultant to act as the Independent Tester. The replacement will be as agreed by the Parties and the terms of his appointment will, unless otherwise agreed, be as set out in the Independent Tester Contract.
- (b) If the parties fail to agree the identity and/or terms of a replacement Independent Tester in accordance with Clause 11.5 (Replacement), within ten (10) Business Days of the original Independent Tester's appointment being terminated, then such Dispute will be referred for resolution in accordance with Clause 44 (Dispute Resolution Procedure).

## 12. COMMISSIONING AND COMPLETION<sup>12</sup>

### 12.1 Agreeing Final Commissioning Programme

Not less than [ ● ] months before the anticipated Certification Date, PPP Co. will provide the Authority's Representative and the Independent Tester with a draft of the Final Commissioning Programme as developed by PPP Co. in accordance with the provisions of Clause 12.2 (Standard of Final Commissioning Programme). The Authority's Representative and the Independent Tester will provide PPP Co. with comments on the draft Final Commissioning Programme submitted to them no later than [ ● ] months after its receipt. The Parties and the Independent Tester will, within [ ● ] Business Days of receipt by PPP Co. of the Authority's Representative's and the Independent Tester's comments agree the terms of the Final Commissioning Programme. If the Parties are unable to agree the Final Commissioning Programme the matter will be referred for determination in accordance with the Fast Track Procedure. If the Authority's Representative and/or the Independent Tester do not issue comments within the required [ ● ] months period, the draft Final Commissioning Programme will be deemed to be accepted.

### 12.2 Standard of Final Commissioning Programme

The Final Commissioning Programme will be of a standard consistent with Good Industry Practice and will be consistent with the Tests on Completion.

### 12.3 Commissioning Procedure

- (a) PPP Co. will give to the Authority's Representative and the Independent Tester [ ● ] Business Days' notice in writing of the date when it will be ready to commence activities under the Final Commissioning Programme. The Authority's Representative and the Independent Tester will be entitled to attend all such activities and PPP Co. will notify the Authority's Representative of the time and place for the carrying out of such activities. On successful completion of the activities described in the Final Commissioning Programme, PPP Co. will supply the results of all of the relevant tests, commissioning and inspections to the Authority's Representative and the Independent Tester.
- (b) The Authority's Representative and the Independent Tester will within [ ● ] Business Days of any inspection made pursuant to this Clause 12.3 (Commissioning Procedure) notify PPP Co. of any outstanding matters (including without limitation, the repetition of any activities which are required to be carried out and passed in accordance with the

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<sup>12</sup> The concept of "Independent Tester" is used extensively in the UK but not in Ireland. For discussion.



Final Commissioning Programme) which in the reasonable opinion of the Authority's Representative and the Independent Tester are required to be attended to before the Works can be considered to be complete in accordance with this Project Agreement. PPP Co. will attend to such matters and will, if necessary, give the Authority's Representative and Independent Tester further notices in accordance with this Clause 12.3 (Commissioning Procedure) but dealing only with matters raised in the notification under this Clause 12.3(b) (Commissioning Procedure) so that the procedures in this Clause 12.3 (Commissioning Procedure) are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Works are attended to. All reasonable and proper costs to which the Authority and the Independent Tester may be put by the carrying out of any such repeated inspection, testing or otherwise will be due and payable forthwith from PPP Co. to the Authority and the Independent Tester as a debt.

#### **12.4 Certificate of Commencement**

Under the Independent Tester Contract, the Parties will procure that the Independent Tester will, when he is satisfied that completion has occurred in accordance with this Project Agreement, issue a Certificate of Commencement stating that the Project Facility has been completed in accordance with the Project Agreement and that the Services can commence on the Service Commencement Date.

#### **12.5 Snagging Matters**

- (a) The Independent Tester will issue the Certificate of Practical Commencement notwithstanding that there are Snagging Matters. Where there are Snagging Matters, the Parties will procure that the Independent Tester will, at the same time as issue of the Certificate of Practical Commencement, issue a Snagging Notice which will specify the Snagging Matters.
- (b) Following the issue of a Snagging Notice, PPP Co. will, in consultation with the Authority's Representative and in such manner as to cause as little disruption as reasonably practicable to the Authority's use of the Project Facility, rectify all Snagging Matters within [ ● ] Business Days of the issue of the Snagging Notice or such longer period as the Authority and PPP Co. may agree.
- (c) If, within [ ● ] Business Days of the issue of the Snagging Notice PPP Co. has failed to rectify the Snagging Matters specified in the Snagging Notice the Authority may by itself (or engage others to) carry out the works necessary to rectify the Snagging Matters, at the risk and cost of PPP Co.

## 12.6 Defects

The issue of the Certificate of Practical Commencement will in no way affect the obligations of PPP Co. under this Project Agreement including in respect of any Defects.

## 12.7 As-built specification

As soon as it is available and in any event within [ ● ], after the issue of the Certificate of Practical Commencement, PPP Co. will provide to the Authority a copy of the as-built building specification, together with all [drawings relating to the Works].<sup>13</sup>

## 12.8 Certificate of Commencement

When the Independent Tester has issued the Certificate of Practical Completion [and the Authority has received the warranties referred to in Clause 14.1(d) (Appointment of D&C Co. and Professional Team)], PPP Co. will be entitled to issue the Certificate of Commencement which will state the Certification Date.

## 12.9 Disputes

Any Dispute regarding the Certificate of Commencement will be referred to the Fast Track Procedure.

## 12.10 Liability of Authority

Any approval, agreement, opinion expressed by the Authority or the Independent Tester, inspection, witnessing of tests, waiver of requirement or other involvement of the Authority or the Independent Tester in the Final Commissioning Programme or in any activities leading to Certification will be entirely without prejudice to PPP Co.'s obligations under this Project Agreement and will not prevent or be deemed to prevent the Authority from alleging at a later date that the Works have not been or were not completed in accordance with this Project Agreement and will in no way affect the obligations of PPP Co. under this Project Agreement in respect of any Defects.

## 12.11 Service Manuals<sup>14</sup>

As soon as possible following Certification and throughout the remainder of the Term, PPP Co. will at all reasonable times make available on the Site to the Authority's Representative all operation and maintenance manuals [**AUTHORITY TO LIST ANY OTHER MANUALS REQUIRED**].

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<sup>13</sup> To be specified on a project specific basis. Documents might include, for example, the appropriate section of any health and safety file, as-built drawings and maintenance manual or results of technical commissioning.

<sup>14</sup> To be amended on a project-specific basis. For example, Service manuals may need to be made available at an earlier date depending on the timing of commissioning activities.

### 13. HEALTH AND SAFETY

- 13.1 PPP Co. will be responsible for the security, stability and safety of its operations on Site and at the Project Facility and will comply (and will ensure compliance by each of the Sub-Contractors) with the Project Documents, all Necessary Consents and all applicable Law relating to health and safety in the carrying out of any of the Works or the provision of any of the Services.
- 13.2 PPP Co. represents, warrants and undertakes that it and its sub-contractors have the competence to comply with the provisions of this Clause 13 (Health and Safety) and will allocate adequate resources to facilitate such compliance.
- 13.3 Unless otherwise agreed, PPP Co. will (or, where relevant, will procure) from the Commencement Date until the Certification Date:
- (a) provide suitable fencing, lighting and security for the Works;
  - (b) provide suitable temporary roadways, footways, guards and fences which may be necessary for the accommodation and protection of owners and occupiers of adjacent property, the public and others; and
  - (c) take all reasonable steps to protect the environment on and off the Site and to avoid damage and nuisance to persons or to property resulting from pollution including, without limitation, noise, dust or other causes arising as a consequence of the execution of the Works.
- 13.4 Without prejudice to the generality of Clause 13.1 (Health and Safety), PPP Co. will comply with all safety Law including The Safety, Health & Welfare at Work Act, 1989 and any subordinate legislation made thereunder (including without limitation, The Safety, Health & Welfare at Work (Construction) Regulations, 2001 and 2003 (the “**Construction Regulations**”) and the Safety, Health & Welfare at Work (General Application) Regulations 1993).
- 13.5 To the extent that the Authority is or may be regarded as “client” pursuant to the Construction Regulations, PPP Co. will procure on behalf of the Authority the appointment of PPP Co.’s nominee as the project supervisor for the Design Stage and the Construction Stage (as such terms are defined in the Construction Regulations). PPP Co. will procure that its nominee will do everything necessary to enable the Authority to comply with its obligations as “client” under the Construction Regulations.
- 13.6 In the event that the provisions of Clause 13.5 (Health and Safety) take effect PPP Co. represents, warrants and undertakes to the Authority that:
- (a) its nominee is competent to perform the functions and obligations of the project supervisor for both the Design Stage and the Construction Stage pursuant to the Construction Regulations; and
  - (b) in the performance of its obligations under the Construction Regulations its nominee will exercise all the reasonable skill and care

to be expected of properly qualified and competent design and build contractor experienced in carrying out the functions of a project supervisor for the Design Stage and the Construction Stage on projects of a similar size, scope, complexity and purpose to the Project.

- 13.7 On request, PPP Co. will, or will procure that its nominee will provide to the Authority two copies of its:
- (a) Safety Statement (as defined in and pursuant to Section 12 of the Safety, Health & Welfare at Work Act, 1989); and
  - (b) developed Health and Safety Plan (as defined in the Construction Regulations).

#### **14. BUILDING CONTRACT AND PROFESSIONAL TEAM**

##### **14.1 Appointment of D&C Co. and Professional Team**

- (a) PPP Co. will employ D&C Co. to carry out the Works on the terms of the D&C Contract.
- (b) [The Authority hereby consents to the appointment of the members of the Professional Team named in Part 1 of Schedule 9 (Professional Team) under the terms of Part 2 of Schedule 9 (Professional Team).]
- (c) [The identity of any other members of the Professional Team and of any replacements or of any further appointments to the Professional Team will be approved by the Authority's Representative before their appointment (such approval not to be unreasonably withheld or delayed and in any event not to be withheld or delayed on grounds other than the technical ability, competence, experience or financial strength of the proposed member of the Professional Team).]
- (d) Before [Certification], [the Commencement Date] PPP Co. will procure and will deliver warranties (in the Agreed Form) in favour of the Authority in respect of performance from all Sub-Contractors with any material responsibility for [piling, structural steel, mechanical and/or electrical engineering, curtain walling, pre-cast concrete, roof glazing, cladding, roofing systems and lifts].
- (e) PPP Co. will procure that all Principal Sub-Contractors enter into direct agreements with the Authority in the Agreed Form which will include duty of care obligations to the Authority and in addition afford to the Authority step-in rights to allow the Authority to take over the Project in the event of termination. The terms of such step-in rights will be no less advantageous to those granted to the Funder under the direct agreements to which it is a party but the Authority acknowledges that there will be a period where the Funder's option to exercise its step-in rights and rights to bring claims against the Principal Sub-

Contractors will have priority over the Authority's step-in rights and rights to bring claims.

#### **14.2 Termination of Building Contract and Professional Team Appointments**

- (a) PPP Co. will not without the prior written approval of the Authority's Representative (such approval not to be unreasonably withheld or delayed) do or omit to do any act or thing which would immediately or upon the expiry of notice entitle any D&C Co. or any member of the Professional Team to regard as terminated any D&C Contract or relevant Professional Appointment (as the case may be).
- (b) PPP Co. will not without the prior written consent of the Authority's Representative (such approval not to be unreasonably withheld or delayed) terminate any D&C Contract or any of the Professional Appointments, nor appoint another D&C Co. in addition to or in substitution for any D&C Co., nor appoint any professional in addition to or in substitution for the Professional Team, or any of them. The Authority will not withhold such consent on grounds other than the technical ability, competence or financial strength of the proposed D&C Co. or proposed Professional Team member.

#### **15. NECESSARY CONSENTS**

- 15.1 PPP Co. will be responsible for obtaining (at its own cost) all Necessary Consents which may be required for the performance by it of the Project and implementing each such Necessary Consent within the period of its validity in accordance with its terms.
- 15.2 Without prejudice to the generality of Clause 15.1 (Necessary Consents), PPP Co. will apply for or otherwise seek and will obtain (to the extent not already obtained) all Necessary Consents (including, without limitation, fire certificates) which are necessary for carrying out the Works pursuant to this Project Agreement and PPP Co. will implement the same in accordance with the terms of such permissions and this Project Agreement.
- 15.3 PPP Co. will provide the Authority with a copy of any application for any Necessary Consents and other relevant documents relating to them. PPP Co. will notify the Authority of any decision by the Relevant Authority on an application for any Necessary Consent (including, without limitation, fire certificates) as soon as it is known and will at any time and from time to time at its own cost provide to the Authority such other information with respect to progress in obtaining any Necessary Consent as the Authority may reasonably require.

## 16. **EQUIPMENT<sup>15</sup>**

### 16.1 **PPP Co. Equipment**

PPP Co. will procure, deliver to and where necessary construct, install, commission and maintain at the Project Facility, the PPP Co. Equipment set out in Part 2 of Schedule 13 (Equipment).

- (a) PPP Co. represents, warrants and undertakes to the Authority that in so procuring, delivering, constructing, installing, commissioning and maintaining the PPP Co. Equipment it will:
  - (i) comply with Good Industry Practice, the Output Specification, Law and all Necessary Consents;
  - (ii) comply with its obligations under Clause 18 (Maintenance of the Project Facility); and
  - (iii) without limiting its other obligations under this Project Agreement, replace any item of PPP Co. Equipment before it becomes unreliable, unsafe, has significant deterioration from the condition it should have been in or becomes unsuitable for its intended purpose or unable to properly operate and function.
- (b) PPP Co. will not remove any PPP Co. Equipment from the Project Facility during the Term, (except for such temporary removal as may be required for maintenance and repair agreed in advance with the Authority's Representative) without the consent of the Authority's Representative (such consent not to be unreasonably withheld or delayed).
- (c) PPP Co. Equipment will have the benefit of any warranties available from manufacturers and/or suppliers and which are included in the price of the PPP Co. Equipment. PPP Co. will use all reasonable endeavours to procure such warranties.
- (d) Any interest of any third party in any PPP Co. Equipment will be notified to the Authority as soon as reasonably practicable after PPP Co. is or should be aware of any such interest. No third party will have any interest in any PPP Co. Equipment which would or might act to the detriment of the Authority in exercising their rights under this Project Agreement.

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<sup>15</sup> It is difficult to provide standard drafting for the area of Equipment as it is very project specific. Some projects, such as schools, will have large amounts of furniture, sports equipment and possible lab equipment but nothing very high-tech or sensitive. In such circumstances, it is probably good value for the Authority to transfer risk entirely to PPP Co. as PPP Co. can make a good estimate of the life of a piece of furniture and will factor replacement at a given time into the Project Costs. There is very little risk premium involved. An oncology unit will involve large pieces of extremely costly medical equipment and issues of installation, maintenance, technology refresh, etc are paramount to obtaining value for money. While the drafting in the TPA might be suitable for a school or an office building where PPP Co. provides much of the furniture and equipment with some coming from the Authority's existing stores, we do not believe that it is possible to offer standard drafting where very high-tech and expensive equipment is involved. The issue of IT should be considered on a project specific basis.

- (e) PPP Co. will ensure that any Leased Equipment will be leased on terms which allow Clause 40 (Handback) to have effect at no cost over that which is included in the Base Case.

## **16.2 Authority Equipment**

### **(a) Installation of Authority Equipment**

PPP Co. will relocate the Authority Equipment set out in Part 1 of Schedule 13 (Equipment) from [ ● ] to the Project Facility so that it is available for use in accordance with the Output Specification, the O&M Requirements and the terms of this Project Agreement from the Service Commencement Date.

### **(b) Maintenance of Authority Equipment**

Authority Equipment will at all times remain in the ownership of the Authority [School] [Hospital] [Clinic] and PPP Co. will not be responsible for its maintenance and replacement unless agreed in writing between PPP Co. and the Authority or unless otherwise provided for in this Project Agreement.

## **PART 6 – OPERATION AND MAINTENANCE**

### **17. SERVICES**

#### **17.1 Appointment of O&M Co.**

- (a) PPP Co. will employ O&M Co. to carry out the Services on the terms of the O&M Contract.
- (b) PPP Co. will procure that O&M Co. enters into direct agreements with the Authority in the Agreed Form which will include duty of care obligations to the Authority and in addition afford to the Authority step-in rights to allow the Authority to take over the Project in the event of termination. The terms of such step-in rights will be no less advantageous to those granted to the Funder under the direct agreements to which it is a party but the Authority acknowledges that there will be a period where the Funder's option to exercise its step-in rights and rights to bring claims against O&M Co. will have priority over the Authority's step-in rights and rights to bring claims.

#### **17.2 Termination of O&M Contract**

- (a) PPP Co. will not, without the prior written approval of the Authority's Representative (such approval not to be unreasonably withheld or delayed), do or omit to do any act or thing which would immediately or upon the expiry of notice entitle any O&M Co. to regard as terminated any O&M Contract.

- (b) PPP Co. will not without the prior written consent of the Authority's Representative (such approval not to be unreasonably withheld or delayed) terminate any O&M Contract, nor appoint another O&M Co. in addition to or in substitution for any O&M Co. The Authority will not withhold such consent on grounds other than the technical ability, competence or financial strength of the proposed O&M Co.

### **17.3 Provision of Services**

From the Service Commencement Date PPP Co. will provide the Services to the Authority at the Project Facility in accordance with:

- (a) the Output Specification;
- (b) Good Industry Practice;
- (c) all Necessary Consents;
- (d) Law; and
- (e) the provisions of this Project Agreement.

### **17.4 Compliance with Guidance**

Subject to Schedule 20 (Variations) and Schedule 21 (Change in Law), PPP Co. will comply with all Guidance which is in existence at the date of this Project Agreement to the extent that the Authority provides copies of such Guidance to PPP Co.

PPP Co. will comply with all future Guidance of which it is informed by way of the Liaison Procedure and which is consistent with the Output Specification, Good Industry Practice and PPP Co.'s obligations under this Project Agreement. Where such Future Guidance is inconsistent with the Output Specification, Good Industry Practice or PPP Co.'s obligations under this Project Agreement, it will be treated as an Authority Change and the provisions of Schedule 20 (Variations) will apply.

### **17.5 Necessary Consents**

Subject to Schedule 20 (Variations) and Schedule 21 (Change in Law), PPP Co. will secure the grant or renewal, expansion or modification of each Necessary Consent which is required by PPP Co. in connection with the performance of PPP Co.'s obligations under this Project Agreement and the Authority will provide all reasonable assistance required by PPP Co. in obtaining and maintaining such Necessary Consents provided that the Authority will not be required to incur any expense in so doing.



## 17.6 Services audit

The Authority will, at its own cost, and at reasonable intervals and having given reasonable notice to PPP Co. be entitled to audit the performance of the Services at any time or times during the Term, but in so doing the Authority will not obstruct PPP Co. in the performance of the Services. PPP Co. will ensure the reasonable co-operation of all relevant Staff in such audits including the prompt provision of information reasonably requested by the Authority.

## 18. MAINTENANCE OF THE PROJECT FACILITY<sup>16</sup>

### 18.1 General Maintenance Obligation

PPP Co. will, at all times during the Term, at its own expense, maintain or procure the maintenance, repair, refurbishment and renewal of the Project Facility to ensure that:

- (a) the Services are continuously available in accordance with the terms of the Output Specification and the terms of this Project Agreement;
- (b) it can maintain the design life of the Assets to achieve their full working life; and

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#### MAINTENANCE

- 15.1 PPP Co. will base its costings on a forecast capital replacement programme of plant, machinery, equipment, fixtures, fittings and furniture designed to maintain the building environment at the specified output standards. PPP Co. will also consider the means of funding this expenditure throughout the life of the Project. The risk associated with assessing what will need replacing, when and how much this will cost, is one that PPP Co. should take and therefore the Authority should not attempt to be prescriptive in this respect.
- 15.2 Bidders should be allowed to develop their own proposals which may, for example, incorporate alternative programmes of maintenance where assets with longer life are used or used differently. An Authority should not attempt to impose its own system of asset replacement on bidders.
- 15.3 PPP Co. should, however, produce a planned preventative maintenance programme so that both parties know when parts of the Service are permitted to be "unavailable" without any payment deductions being made. The Project Agreement should also contain a mechanism by which either party can propose reasonable alterations to the planned programme (i.e. alterations which will not adversely affect the delivery of the Service).
- 15.4 The Unitary Charge will usually be made on a broadly level basis in accordance with the Authority's budget, whereas the need for capital replacement will only occur at intervals (although exceptional payments may be sculpted to give a non level profile to the Unitary Charge). The Unitary Charge will accordingly include amounts to cover PPP Co.'s anticipated future expenditure on maintenance, such as servicing plant and other more major refit maintenance.
- 15.5 PPP Co. will therefore usually build up a sinking fund over some years, in anticipation of significant capital expenditure in future periods. It will usually be required to do so by its funders, particularly where the maintenance risk is left with PPP Co. and not passed to Sub-Contractors. The sums involved could be considerable.
- 15.6 The Authority must consider, in the context of the Project what rights it requires over any sinking fund established by PPP Co. A change will not necessarily be required. But, for example if, however, the size of the Project (including associated maintenance obligations) is comparatively large in relation to the financial resources of a PPP Co. which is not relying on third party Senior Debt financing, the Authority may want to consider requiring a sinking fund over which it has secured rights. Similarly, if the term of the Senior Debt is significantly shorter than the Term, the Authority may wish to have secured rights over a sinking fund once the Senior Debt has been repaid in full.
- 15.7 To protect themselves in the event of PPP Co. Default, the Senior Lenders will have a charge over the sinking fund as security. PPP Co. should look to its own resources first to repay its Senior Lenders, and so any compensation payable to PPP Co. by the Authority on a termination should be reduced by all cash held by PPP Co., including amounts in sinking funds.

- (c) the Project Facility is handed back to the Authority on the Expiry Date or Termination Date in a condition complying with the requirements of Clause 40 (Handback).

## 18.2 **Planned Maintenance Programme**

- (a) Not later than [ ● ] months before the Certification Date and before each subsequent anniversary of the Certification Date (each a **“Planned Maintenance Programme Submission Date”**), PPP Co. will submit to the Authority’s Representative a draft Planned Maintenance Programme for the next Contract Year for agreement in accordance with the Review Procedure set out in Schedule 5 (Review Procedure). Each Planned Maintenance Programme will contain the following information:
  - (i) 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; and
  - (ii) details of any effect of the Programmed Maintenance on the delivery of any of the Services.
- (b) Any revisions to the Planned Maintenance Programme other than in the case of an Emergency or works of a de minimis nature (**“Unprogrammed Maintenance Work”**) will also be agreed in accordance with the provisions of Schedule 5 (Review Procedure).
- (c) If, as a result of an Emergency, the need arises for Unprogrammed Maintenance Works, PPP Co. may carry out such Unprogrammed Maintenance Works provided that PPP Co. will notify the Authority’s Representative as soon as possible of the occurrence of the Emergency, of the extent of the necessary Unprogrammed Maintenance Works and the reasons for them. PPP Co. will take all reasonable steps to minimise the duration of such Unprogrammed Maintenance Works and will carry them out so as to minimise disruption to the provision of the Service [and the conduct of [Education Services], [Clinical Services], etc [AMEND AS APPROPRIATE].

## 18.3 **Maintenance Surveys**

- (a) The Authority may conduct surveys of the Project Facility so as to determine the state of maintenance of the Project Facility, at such intervals as the Authority will reasonably determine (**“Maintenance Survey”**). The Authority will give PPP Co. at least [fifteen (15)] Business Days notice of such a survey.
- (b) If, following a survey of the Project Facility in accordance with Clause 18.3(a) the condition of the Project Facility is such that it demonstrates a breach of Clause 18.1 (General Maintenance Obligation), the Authority will be entitled, by notice in writing to PPP Co., (the

**“Repair Notice”**), to require PPP Co. to carry out such works (the **“Essential Works”**) at PPP Co.’s expense as are necessary to bring the Project Facility up to the standard it should have been in if PPP Co. had fully complied with Clause 18.1 (General Maintenance Obligation) within such period of time as the Authority will reasonably require.

- (c) If PPP Co. fails to carry out the Essential Works within the period of time specified in the Repair Notice then the Authority will be entitled to carry out or procure the carrying out of the Essential Works and PPP Co. will, within [twenty (20)] Business Days of the Authority’s invoice, fully reimburse the Authority’s reasonable and proper costs in carrying out the Essential Works (including the Authority’s reasonable and proper administration costs).

## 19. **AUTHORITY STEP-IN<sup>17</sup>**

### 19.1 **Reasons for Step-In**

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

- (a) because a serious risk exists to the health or safety of persons or property or to the environment; and/or
- (b) to discharge a statutory duty; and/or
- (c) because in the reasonable opinion of the Authority’s Representative the circumstances constitute an Emergency; and/or

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- 16.1 In some circumstances, the Authority may wish to take action itself in relation to the Services if there is a need to prevent or mitigate a serious risk to health, safety (person or property) or the environment or to discharge a statutory duty. Such a right may arise due to matters outside the scope of the work of PPP Co. or may arise due to PPP Co. being in breach of obligations under the Project Agreement.
- 16.2 Such a right of the Authority is often referred to as “step-in” (and this is the terminology used here for that reason), as it involves the Authority taking over some or all of the obligations of PPP Co. for a period. It should, however, be viewed as being entirely different in nature and purpose from a step-in by Senior Lenders under a direct agreement and separate from the PPP Co. Default provisions. Essentially, the focus of the right is a serious short term problem that can or must be solved quickly, where the Authority is in a better position to do this than PPP Co. The Authority should not in any situation be obliged to step-in.
- 16.3 If there has been no breach by PPP Co. in the circumstances set out above the Authority should notify PPP Co. that it plans to step-in and the extent of such step-in. To the extent the Authority steps in, it will be effectively removing any obligations affected by such step-in from PPP Co. and performing them itself.
- 16.4 During its step-in, if the Authority needs to act for reasons external to PPP Co., the Authority should pay for the Service as if the Service had been fully performed, subject only to any deductions to be made in respect of parts of the Service still provided by PPP Co. (e.g. to reflect performance on that part) and unaffected by the Authority’s step-in. Payment should be conditional upon PPP Co. agreeing to provide reasonable assistance to the Authority at this time.
- 16.5 The Authority should bear all its own costs incurred by stepping-in in this circumstance.
- 16.6 If PPP Co. breach gives rise to a need for the Authority to step-in in the circumstances set out above and PPP Co. has failed to remedy the breach within the agreed time period, the Authority should have the right to step-in and carry out such rectification itself (for example, using a third party) at PPP Co.’s expense.
- 16.7 Where the Authority steps-in upon PPP Co.’s breach, the Authority should continue to pay PPP Co. as where there is no breach. The Authority should, however, be entitled to set off any costs it incurs in stepping-in in such circumstances (i.e. for both costs of work and advice and for time devoted to running the operations) against the Unitary Charge payable to PPP Co.

- (d) due to the failure of PPP Co. to provide the Services in accordance with the Project Agreement where such failure is materially prejudicial to the ability of the Authority to provide [Educational] or [Clinical, etc] Services,

then the Authority will be entitled to take action in accordance with Clauses 19.2 (Notification of Step-In) and 19.3 (Required Action).

#### 19.2 Notification of Step-In

If Clause 19.1 (Reasons for Step-In) applies and the Authority wishes to take action, the Authority will notify PPP Co. in writing giving details of the following:

- (a) the action it wishes to take;
- (b) the reason for such action;
- (c) the date it wishes to commence such action;
- (d) the time period which it believes will be necessary to carry out such action; and
- (e) to the extent practicable, the effect on PPP Co. and its obligations to provide the Services during the period such action is being taken.

#### 19.3 Required Action

Following service of such notice, the Authority will take such action as notified under Clause 19.2 (Notification of Step-In) and any consequential additional action as they reasonably believe is necessary (together, the “**Required Action**”) and PPP Co. will give all reasonable assistance to the Authority while it is taking the Required Action.

#### 19.4 Authority Step-In Without PPP Co. Breach

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

- (a) PPP Co. will be relieved from its obligations to provide such part of the Services; and
- (b) in respect of the period in which the Authority is taking the Required Action, and provided that PPP Co. provides the Authority with reasonable assistance (such assistance to be at the expense of the Authority to the extent that additional costs are incurred by PPP Co.), that part of the Unitary Charge attributable to the Services affected by the Required Action will be paid in full to PPP Co. as if it were

satisfying all its obligations in respect of those Services and the provisions of Schedule 15 (Payment Mechanism) will apply to all other Services.

#### **19.5 Authority Step-In On PPP Co. Breach**

If the Required Action is taken as a result of a breach of the obligations of PPP Co. under this Project Agreement then:

- (a) PPP Co. will be relieved from its obligations to provide that part of the Services it is prevented from providing as a result of the Required Action; and
- (b) In respect of the period in which the Authority is taking the Required Action, that part of the Unitary Charge attributable to the Services affected by the Required Action will be paid in full to PPP Co. as if it were satisfying all its obligations in respect of those Services and the provisions of Schedule 15 (Payment Mechanism) will apply to all other Services less an amount equal to the Authority's reasonable and proper costs in taking the Required Action.

#### **19.6 Step-In Duty of Care**

The Authority acknowledges that in the event of it stepping-in under Clause 19 (Authority Step-In), the Authority owes PPP Co. a duty of care and to the extent that PPP Co. suffers Losses and such Losses arise out of or in connection with any breach of such duty of care, any such breach will be treated as a Compensation Event for the purposes of this Project Agreement.

#### **19.7 Step-Out**

Upon the expiry of the circumstances which gave rise to the step-in by the Authority, the Authority will promptly step-out and refrain from taking any further Required Action in respect of such circumstances.

### **PART 7 – RELATIONSHIPS AND MONITORING**

#### **20. REPORTS**

##### **20.1 Required Reports**

PPP Co. will submit to the Authority's Representative the reports specified in Part 1 of Schedule 14 (Reports and Records), in such numbers and at such times as provided therein (the "**Required Reports**"). The Reports will, at the Authority's Representative's request, be accompanied by a copy of such report or any part of it on computer diskette or other electronic storage device in such form and compatible with such software as the Authority's Representative will reasonably require.

## **20.2 Form of Reports**

The form of the Required Reports will be agreed with the Authority's Representative.

## **20.3 Further Information**

PPP Co. will at any time and from time to time at its own cost give the Authority's Representative such information (including any copy correspondence) concerning the Project as the Authority's Representative may reasonably require.

## **20.4 Objections to Reports**

- (a) If the Authority's Representative acting reasonably considers that any Required Report either has not been compiled in accordance with the provisions of this Project Agreement or has been based on erroneous information or data, then he may serve a notice to that effect on PPP Co. within twenty (20) Business Days of receipt of such Report objecting to such Report.
- (b) If any such objection has not been resolved by agreement between the Authority's Representative and PPP Co. within (10) Business Days after the service of such notice, then either of them may refer the matter to the Dispute Resolution Procedure in accordance with Clause 44 (Dispute Resolution Procedure).

## **20.5 Revisions to Reports**

If the resolution (whether by agreement or determination under the Dispute Resolution Procedure) of any objection made pursuant to Clause 20.4(a) (Objections to Reports) requires any revision or adjustment to any Required Report, then PPP Co. will, as soon as practicable, issue revised versions of each affected Required Report and such revised Required Report will for all purposes of this Project Agreement take the place of the original Required Report.

# **21. RECORDS**

## **21.1 Required Records**

PPP Co. will maintain and update those records relating to the Project set out in Part 2 of Schedule 14 (Reports and Records).

## **21.2 Audit**

The records referred to in Clause 21.1 (Required Records) will be kept in good order and in such form as to be capable of audit (including by electronic means) by the Authority. PPP Co. will make such records

available for inspection by or on behalf of the Authority at all reasonable times.

### **21.3 Copies**

The Authority will be entitled to take copies of all such records at PPP Co.'s cost and for that purpose to use such copying facilities as are maintained at the place where the records are kept.

### **21.4 Retention of Records**

- (a) Without prejudice to any legal requirement, all Required Records will be retained for no less than the period specified in respect of such records in Part 2 of Schedule 14 (Reports and Records) or, if no such period is specified, a period of seven (7) years after the end of the year to which such records relate.
- (b) Where the period for the retention of any records (as set out against the relevant class of records in Part 2 of Schedule 14 (Reports and Records) has expired, then PPP Co. will notify the Authority as to what it intends to do with such records. If it intends to dispose of them or subsequently decides to dispose of them, PPP Co. will notify the Authority, and if within forty (40) days of such notice the Authority elects to receive those records or any part of them PPP Co., at its own cost, will deliver such records to the Authority in the manner and at such location as the Authority reasonably specifies.
- (c) At the end of the Term, PPP Co. will, at its own cost, deliver to the Authority, in the manner and at such location as the Authority reasonably specifies, all Required Records which are in existence (or, where those records are required by Law to remain with PPP Co., copies of them) or such part of such records as the Authority may by notice to PPP Co. specify.
- (d) PPP Co. will retain in safe storage at a location to be identified by PPP Co. and agreed by the Authority's Representative for a period of not less than [ ● ] years following Expiry or Termination of this Project Agreement all such records as are referred to in Clause 21.4(c) (Retention of Records) which the Authority does not require to be delivered to it. The costs of retaining those records in safe storage will be borne:
  - (i) by PPP Co. in the event of Termination for PPP Co. Default;
  - (ii) by the Authority in the event of Termination for Authority Default; and
  - (iii) in cases other than 21.4(d)(i) and (ii) (Retention of Records) above, by PPP Co. and the Authority equally.

## 21.5 Computer Records

To the extent that the records of PPP Co. are to be created or maintained on a computer or other electronic storage device, then PPP Co. will agree with the Authority's Representative a procedure for back-up and adjacent storage for copies of such records and will adhere to such agreed procedure and will procure that the Sub-Contractors implement and adhere to such agreed procedure.

## 21.6 Operating Accounts

- (a) In addition to the records set out in Part 2 of Schedule 14 (Reports and Records), PPP Co. will at all times:
  - (i) maintain a full set of records detailing the costs of performing the Services including those relating to the design, construction, maintenance, operation and finance [until Termination or Expiry of this Project Agreement];
  - (ii) when requested by the Authority, provide a summary of any of the costs referred to in Clause 21.6(a)(i) (Operating Accounts), including details of any funds held by PPP Co. specifically to cover such costs, in such form and details as the Authority may reasonably require to enable the Authority to monitor the performance by PPP Co. of its obligations under this Project Agreement; and
  - (iii) at the request of the Authority, give the Authority any information PPP Co. gives the Senior Lenders during the Term.
- (b) Compliance with the above will require PPP Co. to keep (and where appropriate procure that the Principal Sub-Contractors will keep) books of accounts in accordance with best accountancy practice with respect to the Project Agreement showing in detail:
  - (i) administrative overheads;
  - (ii) payments made to the Principal Sub-Contractors;
  - (iii) capital and revenue expenditure;
  - (iv) such other items as the Authority may reasonably require to conduct costs audits,

and PPP Co. will have (and procure that the Principal Sub-Contractors will have) the books of accounts evidencing the items listed in Clauses 21.6(b)(i) - (iv) (Operating Accounts) available for inspection by the Authority (and any expert) upon reasonable notice, and will present a report of those to the Authority as and when requested.



## 22. LIAISON PROCEDURE

### 22.1 Liaison Procedure

- (a) PPP Co. and the Authority agree to liaise with each other during the Term in accordance with this Clause 22 (Liaison Procedure) to facilitate communication between the Parties and to achieve, inter alia, a more efficient delivery of the Services in accordance with this Project Agreement.
- (b) The Liaison Procedure set out in this Clause 22 (Liaison Procedure) will be applied by PPP Co. and the Authority in relation to all matters arising under this Project Agreement other than Disputes in which case the provisions of Clause 44 (Dispute Resolution Procedure) will apply.

### 22.2 Liaison Committee

- (a) Within [ ● ] months of the date of this Project Agreement a liaison committee, ("**Liaison Committee**"), will be established and will consist of the following persons:
  - (i) the Authority's Representative;
  - (ii) one (1) person nominated by the Authority; and
  - (iii) two (2) persons nominated by PPP Co.
- (b) PPP Co. and the Authority will each be entitled to change any of its nominees by giving written notice of such change to PPP Co. and the Authority (as applicable) as soon as reasonably practicable and before any meeting of the Liaison Committee.

### 22.3 Liaison Committee Meetings

The Authority and PPP Co. will use their reasonable endeavours to ensure that:

- (a) persons suitably qualified to consider the matters on any agenda circulated pursuant to Clause 22.3(c) (Liaison Committee Meetings) attend the relevant Liaison Committee meetings;
- (b) meetings of the Liaison Committee are called at least every three (3) months and additional meetings of the Liaison Committee are called at the request of either Party;
- (c) an agenda of any proposed Liaison Committee meeting is prepared by PPP Co. in consultation with the Authority and circulated in sufficient time before any meeting to enable all Liaison Committee members to attend the meeting well-prepared;

- (d) minutes are taken of Liaison Committee meetings by PPP Co. and a report (based on the minutes) is prepared (**“Liaison Committee Report”**), setting out in detail all matters discussed by the Liaison Committee at any Liaison Committee meeting and, in particular, indicating any matters which have been discussed and agreed and/or disputed. Should any matter be disputed, the Liaison Committee Report should indicate what steps the Liaison Committee propose to take to settle the relevant matter, including whether the recommendation of the Liaison Committee is that the matter should be referred to the Dispute Resolution Procedure; and
- (e) Liaison Committee Reports are circulated within five (5) Business Days of any Liaison Committee meeting to the Liaison Committee members and to such additional persons as may be proposed by the Authority and PPP Co.

## 23. REPRESENTATIVES

### 23.1 PPP Co.’s Representative

- (a) PPP Co. will appoint a contract manager as PPP Co.’s Representative for the purposes of carrying out the Works and Services under this Project Agreement the identity of whom will be subject to the prior approval of the Authority, such approval not to be unreasonably withheld or delayed. PPP Co. will ensure that PPP Co.’s Representative, or a competent deputy duly authorised to act on PPP Co.’s behalf is available for consultation with the Authority twenty-four (24) hours a day during the Term.

- (b) **Authority of PPP Co.’s Representative**

PPP Co.’s Representative will have full authority to act on behalf of PPP Co. for all purposes of this Project Agreement. The Authority and the Authority’s Representative will be entitled to treat any act of PPP Co.’s Representative in connection with this Project Agreement as being expressly authorised by PPP Co. (save where PPP Co. has notified the Authority in writing that such authority has been revoked) and the Authority will not be required to determine whether any express authority has in fact been given.

- (c) **Appointment of Successor PPP Co. Representative**

Termination of the appointment of PPP Co.’s Representative and appointment of a successor must be carried out in accordance with the Review Procedure.

## **23.2 Authority's Representative<sup>18</sup>**

- (a) The Authority will appoint a contract manager as the Authority's Representative for the purposes of this Project Agreement. The Authority will ensure that the Authority's Representative or a competent deputy duly authorised to act on the Authority's behalf is available for consultation with PPP Co. [24 hours a day]. The Authority will from time to time notify PPP Co. of the identity of the Authority's Representative and any authorised deputies whom the Authority wishes to appoint. The Authority will promptly notify PPP Co. of any subsequent replacement for the Authority's Representative and any deputies. The removal or replacement of the Authority's Representative or any deputies will not invalidate or otherwise affect any actions or decisions of such a person in such capacity before removal or replacement.

- (b) **Authority of Authority's Representative**

The Authority's Representative will have full authority to act on behalf of the Authority for all purposes of this Project Agreement. PPP Co. will be entitled to treat any act of the Authority's Representative in connection with this Project Agreement as being expressly authorised by the Authority (save where the Authority has notified PPP Co. that such authority has been revoked) and PPP Co. will not be required to determine whether any express authority has in fact been given.

## **PART 8 – PAYMENT**

### **24. PAYMENT**

#### **24.1 Calculation of Unitary Charge**

Payment for the Services will be calculated and made in accordance with the provisions of Schedule 15 (Payment Mechanism) and this Clause 24 (Payment).

#### **24.2 Payment Commencement Date**

- (a) The Unitary Charge will be paid from the Service Commencement Date.
- (b) The Authority will pay or procure the payment to PPP Co. of sums due from the Authority to PPP Co. under this Project Agreement.

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<sup>18</sup> Definition of Authority Representative to be defined on a project specific basis. The Authority's Representative is sometimes different during the construction and services period. For a grouped schools project, there may be more than one Authority Representative, for example there may be delegated authority provided to each head of a School. If so, appropriate amendments will be required. The Authority may wish to provide for deputies to cover illness and holidays of the designated Authority Representative.

- (c) The Parties agree to comply with their respective obligations under the European Communities (Late Payment in Commercial Transactions) Regulations 2002.

#### **24.3 Payable Monthly in Arrears**

- (a) The Unitary Charge will be claimed in accordance with Part [ ● ] of Schedule 15 (Payment Mechanism), by means of a valid invoice, in the form of the pro-forma set out in Part [ ● ] of Schedule 15 (Payment Mechanism), together with such other documentation as the Authority may reasonably require to enable them to verify the amounts claimed.
- (b) The invoice submitted by PPP Co. in accordance with Clause 24.3(a) (Payable Monthly in Arrears) will include an accurate breakdown of the Unitary Charge clearly indicating the portion of the Unitary Charge which is chargeable to VAT at each applicable rate or VAT exempt.

#### **24.4 Payment following invoice**

Payment will be due in accordance with Part [ ● ] of Schedule 15 (Payment Mechanism), following the presentation by PPP Co. of each valid and accurate monthly invoice in accordance with Clause 24.3 (Payable Monthly in Arrears).

#### **24.5 Interest**

If the Unitary Charge or any part of it or any other amount due and payable by either Party to the other under this Project Agreement is not paid on the date due then:

- (a) if such unpaid sum is undisputed, interest will accrue on the sum at the Default Interest Rate from (and including) the date the sum became due and payable to (but excluding) the date the sum is paid; and
- (b) if such unpaid sum is disputed and referred to the Dispute Resolution Procedure, interest will accrue on such of the sum as is determined to be the proper sum due and payable (1) at the Interest Rate from (and including) the date the disputed sum became due and payable (or would have been due and payable had the sum not been disputed) to (but excluding) the date on which the sum is determined to be due and payable and (2) at the Default Interest Rate from (and including) that date of determination to (but excluding) the date on which the sum determined to be the proper sum is paid.

#### **24.6 Payment Currency**

All payments under this Project Agreement will be made in euro (€), by electronic transfer of funds.

## 24.7 Disputed Invoices

- (a) The Authority's Representative will inform PPP Co. in writing if he disputes in good faith the amount specified in any invoice delivered pursuant to Clause 24.3 (Payable Monthly in Arrears) ("**Disputed Amount**"), within [ ● ] Business Days of receipt of the relevant invoice, providing details of the amount disputed and the grounds for the Dispute. If the Authority's Representative gives such notice to PPP Co., the provisions of Clause 24.7(b) (Disputed Invoices) will apply. Any failure by the Authority's Representative to give such notice will be without prejudice to the right of the Authority's Representative to give such notice at any later date within six (6) months following receipt of the relevant invoice, and may withhold payment of the Disputed Amount pending agreement or determination of PPP Co.'s entitlement to the Disputed Amount. If, within a period of six (6) months of submission, it subsequently transpires that the amount of the invoice is incorrect by reason of a genuine error, PPP Co. may submit a revised invoice or credit note to the Authority (specifying what the error was), and providing a complete corrected statement and information as required by Clause 24.3 (Payable Monthly in Arrears).
- (b) If the Authority's Representative disputes the amount specified in any invoice in accordance with Clause 24.7(a) (Disputed Invoices) the Authority will pay the undisputed part of the invoice in accordance with Clause 24.4 (Payment Following Invoice) but will be entitled to withhold the balance remaining pending resolution of the Dispute.
- (c) The Parties will negotiate in good faith in an attempt to resolve such Dispute. If the Authority's Representative and PPP Co. are unable to resolve the Dispute within ten (10) Business Days from the date the Dispute was notified by the Authority's Representative under Clause 24.7(a) (Disputed Invoices) either may refer the Dispute for resolution under the Fast Track Procedure.
- (d) Save as expressly set out in this Project Agreement, an amount properly payable by one Party to the other under this Project Agreement will be due and payable twenty (20) Business Days following receipt of a valid invoice in respect of that amount.

## 24.8 Indices

- (a) If any sum is to be Indexed and the information required is not published before the date on which it is required then the adjustment will be made using the last available version of the Index until such time as the Index is published and, upon the Index being published, the Authority will pay any underpayment (if any) or be credited with any overpayment (if any) together with interest at the Interest Rate and such underpayment or overpayment is due and payable on the next succeeding due date for payment of the Unitary Charge.

- (b) If the Index ceases to be published, then such alternative index or information which the Parties agree produces as nearly as possible the same result or gives the same information will be substituted for it, and if the reference date used in the compilation of the Index, (or such other index or information), will change for the purposes of this Project Agreement the relevant figure will be the figure which would have been shown in the Index, (or the other index or information) if the original reference date had been retained.
- (c) If there has been a material change in the basis of information from which the Index (or such other index or information as referred to in Clause 24.8(b)) (Indices) is compiled which produces a significant change to the indexation provisions contained in this Project Agreement or it becomes impossible, by reason of any change after the date hereof in the method used to compile the Index or any such index or information or for any other reason whatsoever, to calculate the amounts by which the sums payable hereunder should be adjusted by reference to the Index or any alternatives thereto, the Parties will agree such alternative method of adjusting the amount payable under this Project Agreement as most closely reflects the intent of this Project Agreement.

#### **24.9 Set off**

- (a) **PPP Co. Set-Off**

PPP Co. will not be entitled to retain any amount due to the Authority by it.

- (b) **Authority Set-Off**

The Authority may retain or set off any amount owed to it by PPP Co. under this Project Agreement which has fallen due and payable against any amount due to PPP Co. under this Project Agreement.

- (c) **Disputes**

If the payment or deduction of any amount referred to in Clause 24.9(b) (Authority Set-Off) is disputed, then any undisputed element of that amount will be paid and the disputed element will be dealt with in accordance with Clause 44 (Dispute Resolution Procedure).

- (d) **Set-Off on Termination**

Except where expressly stated otherwise in this Project Agreement, the Authority is not entitled to set off any amount against any Compensation Payment (other than Compensation on Termination for PPP Co. Default) save to the extent that after such an amount has been set off, the termination payment made would be in an amount greater than or equal to the [Base Senior Debt Termination Amount or the

Revised Senior Debt Termination Amount, as the case may be at that time].

#### 24.10 Incomplete Months

- (a) Where the Service Commencement Date is not the first day of a calendar month the Unitary Charge for the period between the Service Commencement Date and the end of the month in which the Service Commencement Date falls will be equal to the Unitary Charge pro-rated according to the number of days in that month falling on or after the Service Commencement Date.
- (b) Where the Termination Date or Expiry Date does not occur on the final day of any month, the Unitary Charge for the period between the first day of the month in which the date of Termination or Expiry will be equal to the Unitary Charge pro-rated according to the number of days in that month occurring before the Termination or Expiry of the Term.

### 25. MARKET TESTING AND BENCHMARKING<sup>19</sup>

#### 25.1 Benchmarking

- (a) PPP Co. will undertake the Benchmarking Exercise at its own cost six (6) months before any Market Testing Review Date in relation to the Testable Services. If PPP Co. does not think that it is possible to carry out a Benchmarking Exercise, it must inform the Authority [ ● ] months before any Market Testing Review Date. If the Authority

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#### 1. BENCHMARKING AND MARKET TESTING OF OPERATING COSTS

Generally, only soft services are appropriate for either benchmarking or market testing. "Soft Services" means services such as facilities management services in an accommodation project (typically those such as catering, cleaning and security) to the extent they do not involve a significant capital outlay in their performance or affect the value of any capital asset under the Project Agreement. This definition is used because the prices charged must be comparable with those of a potential alternative Sub-contractor and, to the extent capital costs have been incurred by a Sub-contractor it is not realistic to expect a price including those capital costs to be competitive with a bidder whose costs do not include those costs. Services such as building "re-fit" or life-cycle maintenance should not be benchmarked or market tested.

#### 2. BENCHMARKING

- 2.1 The term "benchmarking" is used to mean the process by which PPP Co. compares either its own costs or the cost of its Sub-contractors providing soft services against the market cost of such services. If the relevant costs are higher than market costs, a reduction in the price charged to the Authority should be made on an agreed cost-sharing basis to reflect the differential. If costs are lower than market costs, any price increase must be justified by PPP Co. For example, an increase may be required to restore PPP Co.'s base case return.

- 2.2 The Authority should specify in the Invitation to Negotiate when the first benchmarking exercise will take place. There should be a longer initial period (well into the Service Period) before such provisions are implemented, to ensure that bidders do not set a deliberately low initial price which they then try to increase through the review. An excessively long initial period may, however, expose the Authority to an unreasonable price premium for transferring this risk for a longer term. Alternatively, the first benchmarking exercise should be capable of resulting in decrease in price only or a capped increase in price.

#### 3. MARKET TESTING

- 3.1 In this guidance, "market testing" means the re-tendering on the market by PPP Co. of the relevant Sub-contractor's soft services to test the value for money of that service. Any increase or decrease in the cost of such services as a result of market testing requirements in the Project Agreement which result in the replacement of a Sub-contractor should be reflected by an adjustment in the price charged to the Authority.
- 3.2 This should generally only be undertaken where the parties have failed to agree on the results of a benchmarking exercise and there is a real prospect of competition. Market testing is likely to be more disruptive to PPP Co. (and, therefore, possibly the Authority) than benchmarking as it may require replacement of a sub-contractor.

disagrees, the matter may be referred by either party to the Dispute Resolution Procedure.

- (b) Each Benchmarking Exercise will be undertaken to ascertain the relative quality, cost and competitiveness of the Testable Services in question as against Comparable Services and will be undertaken in good faith by PPP Co. or on its behalf by O&M Co.
- (c) With a view to agreeing with the Authority the appropriate adjustments to the Unitary Charge on the basis set out in Clause 25.5 (Adjustments to Unitary Charge), PPP Co. will make the results of any Benchmarking Exercise available to the Authority by the date occurring three (3) months before the relevant Market Testing Review Date. The results will indicate the extent to which (if at all) the costs of such Comparable Services after having been adjusted to take account of the Adjustment Factors (“**Market Costs**”) differ (in percentage terms) from the element within the Financial Model as the costs of providing the Testable Services in question (as such element may have been indexed or changed as a result of previous adjustments made pursuant to this Clause 25 or otherwise in accordance with the terms of this Project Agreement (Market Testing and Benchmarking) (the “**Latest Service Element**”).)
- (d) Where the Market Costs are between 95-105 per cent of the Latest Service Element, no change will be made to the Unitary Charge. Where the Market Costs are less than 95 per cent or more than 105 per cent of the Latest Service Element, or a Benchmarking Exercise cannot be carried out, the Parties will endeavour to agree any change to the Unitary Charge or if no agreement is reached by 3 (three) months and ten (10) Business Days from the Market Testing Review Date, the Authority will, at its discretion, either refer the matter to the Dispute Resolution Procedure or require PPP Co. to undertake Market Testing.

## 25.2 Market Testing Review Dates

Subject to Clause 25.1 (Benchmarking) the Testable Services will be subject to Market Testing by PPP Co. on Market Testing Review Dates.

## 25.3 Conditions for Market Testing

PPP Co. will not be required to undertake Market Testing on any Market Testing Review Date unless:

- (a) any Benchmarking Exercise carried out pursuant to Clause 25.1 (Benchmarking) indicates that there is a cost difference between the Latest Service Element and Market Costs as defined in Clause 25.1 (Benchmarking) of more than five per cent; or



- (b) the parties cannot agree an adjustment to the Unitary Charge following a Benchmarking Exercise;
- (c) the parties agree or it is determined in Dispute Resolution that a Benchmarking Exercise cannot be carried out due to the absence of suitable Benchmarking Data; or
- (d) PPP Co. fails to carry out or procure the carrying out of a Benchmarking Exercise.

#### 25.4 Market Testing Procedure

If this Project Agreement requires Market Testing, the following procedure will apply:

- (a) at least three (3) months before each Market Testing Review Date the parties will meet together as often as may be necessary to consider to agree:
  - (i) the number and identity of prospective tenderers that will be invited to prepare and submit tenders for the Testable Services in question provided that any prospective tenderer will possess an appropriate degree of skill, resources, reputation and financial standing relative to the provision of the Testable Services in question (and any dispute as to the selection of a prospective tenderer will be determined in accordance with the Dispute Resolution Procedure);
  - (ii) the appropriate manner of advertising the Testable Services;
  - (iii) the identity of members of the evaluation panel 50% of which may be comprised of Authority representatives;
  - (iv) any changes to the Testable Services in question; and
  - (v) the form and contents of the tender documents (which will include a Testable Services specification) relevant to the Services to be delivered to prospective tenderers (the “**Testable Services Tender Documents**”) which will be incorporated into an agreed document (the “**Market Testing Procedure**”).
- (b) If the parties are unable to agree any of the matters set out in the Market Testing Procedure either Party may refer the matter to the Dispute Resolution Procedure.
- (c) PPP Co. will manage the Market Testing tendering process in accordance with the Market Testing Procedure.

- (d) The evaluation panel will select the most economically advantageous tender based on the evaluation criteria agreed in the Market Testing Procedure and will not be obliged to accept the lowest tender.
- (e) Where the evaluation panel fails to agree which of the tenders is the most economically advantageous within thirty (30) Business Days following the expiry of the tender period, any dispute will be determined in accordance with the Dispute Resolution Procedure.
- (f) PPP Co. will procure that O&M Co. appoints all tenderers selected in accordance with the Market Testing Procedure as its sub-contractors in respect of the relevant Testable Service(s) as soon as reasonably practicable having regard to:
  - (i) the terms of the contract with the current provider of the Testable Services;
  - (ii) the terms of the contract applicable to the new provider of the relevant part or parts of the Testable Services; and
  - (iii) any consultation or other timescales which have to be observed under the Transfer Regulations.

## 25.5 Adjustments to Unitary Charge

- (a) Where the tender price of a sub-contractor appointed by O&M Co. pursuant to Clause 25.4 (Market Testing Procedure) (the “**Successful Tenderer**”) is lower than the Latest Service Element, then the cost difference between the Successful Tenderer’s tender price and the Latest Service Element will be deducted from the Latest Service Element with effect from the date of the appointment of the Successful Tenderer (which will not be before the relevant Market Testing Review Date) and the Unitary Charge will be adjusted accordingly.
- (b) Where the tender price of the Successful Tenderer is higher than the Latest Service Element then the cost difference between the Successful Tenderer’s tender price and the Latest Service Element will be added to the Latest Service Element with effect from the date of the appointment of the Successful Tenderer (which will not be before the relevant Market Testing Review Date) and the Unitary Charge will be adjusted accordingly.

## 25.6 Co-operation and Compliance with Law

- (a) In carrying out the Benchmarking Exercise and any Market Testing Procedure, the parties will:
  - (i) co-operate fully with each other and act in good faith, and (subject to the provisions of this Project Agreement) will

provide each other with all requisite documents and information in relation thereto; and

- (ii) comply with the Law, in particular public procurement law.
- (b) PPP Co. will procure that O&M Co. co-operates with the Authority and provides such documents and other requisite information as necessary.

#### **25.7 Costs**

The costs incurred by PPP Co. in performing its obligations under this Clause 25 (Market Testing Procedure) will be payable as follows:

- (a) by the PPP Co. where the Successful Tenderers' price is lower than the Latest Service Element;
- (b) by the Authority where the Successful Tenderers' price is higher than the Latest Service Element;
- (c) by both parties equally where the Successful Tenderers' price is equal to the Latest Service Element.

For the purpose of this Clause 25.7 (Costs), differences of less than [ ● ]% will be disregarded.

#### **25.8 Indemnity**

Without prejudice to Clauses 25.5 (Adjustments to Unitary Charge) and 25.7 (Costs), PPP Co. will indemnify the Authority from and against all and any Claim and/or Loss which may arise out of, or in the course of, the Benchmarking Exercise and/or Market Testing, except where such Claim or Loss is solely and directly caused by an act or omission of the Authority and/or the Authority's Representative.

## **PART 9 – TAXES<sup>20</sup>**

### **26. TAXES**

#### **26.1 Deductions and Withholdings from Payments**

- (a) All payments by either Party under this Project Agreement will be made free and clear of any and all present Taxes except to the extent otherwise required by Law [or as PPP Co. or the Authority (as appropriate) is expressly entitled under this Project Agreement/the Project Documents]. If any withholding or deduction is made for or on account of Tax, the Party making such withholding or deduction will account to the Revenue Commissioners<sup>21</sup> for the appropriate amount and will provide to the other Party within a reasonable period of time the appropriate certificate or other suitable evidence of that Party accounting to the Revenue Commissioners which the other Party may require in order to obtain any repayment, credit or relief in respect of the withholding or deduction. Any Party that is aware that it is required to make any withholding or deduction for or on account of any Tax from any payment yet to be made will notify the other Party no later than [ten (10)] Business Days in advance of the making of such payment [and the intended recipient of such payment can instruct the intended payer of such payment to delay such payment until further notified by the intended recipient]<sup>22</sup>.
- (b) Without prejudice to the generality of Clause 26.1(a) (Deductions and Withholdings from Payments), the Authority may make any of the deductions or withholdings as are required by Chapter 2 of Part 18 of the Taxes Act (Payments to sub-contractors in certain industries), unless the PPP Co. produces to the Authority at least [twenty (20)] Business Days before the date of the payment by the Authority a valid certificate of authorisation required to enable the Authority to make the payment without a withholding or deduction (currently a C2 certificate and a valid relevant payments card (RCT 47)) which cover the payment in question and for the avoidance of doubt, the Parties do not intend such deductions and withholdings to be an exhaustive list of all circumstances in which a deduction or withholding may arise, but this Clause 26.1(b) (Deductions and Withholdings from Payments) will govern Chapter 2 of Part 18 of the Taxes Act (Payments to sub-contractors in certain industries).

#### **26.2 Tax Clearance Certificates in relation to Public Sector Contracts.**

PPP Co. will comply with all relevant obligations referred to in Section 1095 of the Taxes Act (Tax clearance certificates in relation to public

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<sup>20</sup> The taxation and rating of PPP Projects has been the subject of separate Guidance which should be consulted in respect of each Project. The following drafting must be looked at on a project specific basis.

<sup>21</sup> [Not Used]

<sup>22</sup> To give the PPP Co. the chance to sort out the problem, if it wishes.

sector contracts), will provide the Authority with an appropriate Tax Clearance Certificate referred to in that Section and will comply with all relevant obligations under the scheme referred to in that Section.

### **26.3 Payments to Sub-contractors**

PPP Co. will comply with its obligations under Chapter 2 of Part 18 of the Taxes Act and any regulations thereunder and will procure that all other Sub-Contractors to whom payments are made in relation to activities contemplated by this Project Agreement will also so comply.

### **26.4 Tax Equalisation of Compensation Payments**

- (a) Where a Compensation Payment is to be made to PPP Co. and PPP Co. has a Relevant Tax Liability (other than Compensation on Termination for PPP Co. Default) in respect of such Compensation Payment, the Authority will increase it so as to ensure that PPP Co. is in the same position (after account is taken of the Relevant Tax Liability) as it would have been in had it not been for such Relevant Tax Liability. The amount of the Relevant Tax Liability will be computed without double counting (and in a case where withholding tax and related underlying tax arise on the same payment, one only of the two will be accounted for) in the calculation of the increase in any Compensation Payment.
- (b) In determining whether PPP Co. has a Relevant Tax Liability and/or the amount of any Relevant Tax Liability relating to a Compensation Payment, it will be assumed that any Tax Reliefs derived from the Project which are available to PPP Co. (or would have been so available but for a surrender by PPP Co. of such Tax Reliefs by way of Group or consortium relief) for offset or credit against the Compensation Payment, or against Tax in relation to the same, have been so offset or credited to the maximum extent permitted by Law.
- (c) PPP Co. will keep the Authority fully informed of all negotiations with the Revenue Commissioners in relation to any Relevant Tax Liability in respect of a Compensation Payment. PPP Co. will not agree, accept or compromise any claim, issue or dispute relating to such Relevant Tax Liability without the prior consent of the Authority (such consent not to be unreasonably withheld, conditioned or delayed). The Authority may, if it considers in good faith that such action is justified having regard to the likely costs and benefits, direct PPP Co. to resist, appeal, defend or otherwise dispute the Relevant Tax Liability in respect of the Compensation Payment, provided that the cost of any such dispute (including any interest or penalties incurred) will be at the Authority's expense. Where any resistance, appeal, defence or other mode of dispute results in a more beneficial position in relation to the Relevant Tax Liability, an adjustment will be made to the amount payable under Clause 26.4(a) (Tax Equalisation of Compensation Payments) to reflect such outcome.

- (d) Any increase in the amount of a Compensation Payment which is payable under Clause 26.4(a) (Tax Equalisation of Compensation Payments) will be paid on the later of five (5) Business Days after a demand therefore (together with evidence in reasonably sufficient detail for the Authority to satisfy itself of the Relevant Tax Liability and its calculation) is made by PPP Co. and:
  - (i) in the case of an Actual Liability, five (5) Business Days before the date on which the Actual Liability must be paid to the Revenue Commissioners in order to avoid incurring interest and/or penalties; and
  - (ii) in the case of a Deemed Liability, five (5) Business Days before the date on which the Actual Liability to which the Deemed Liability relates would have been required to have been paid to the Revenue Commissioners in the absence of any Tax Relief other than a Tax Relief derived from the Project in order to avoid incurring interest or penalties and, for the purposes of determining when the Deemed Liability would otherwise have been utilised, Tax Reliefs will be regarded as utilised in the order in which they arise.
- (e) The Authority will have the right to pay the amount payable under Clause 26.4(a) (Tax Equalisation of Compensation Payments) in respect of an Actual Liability only direct to the Revenue Commissioners in satisfaction of the Actual Liability tax due by PPP Co. and if the Authority does so, it will notify PPP Co. forthwith.

## **27. VALUE ADDED TAX**

### **27.1 Application of VAT**

- (a) The Unitary Charge together with any other payments due pursuant to this Project Agreement will be exclusive of VAT, and all payments to be made under this Project Agreement will be regarded as exclusive of VAT properly chargeable thereon. The recipient of any supply for VAT purposes under this Project Agreement will pay to the supplier, a sum equal to the VAT chargeable on the value of such supply, upon presentation of a VAT invoice in accordance with Part [ ● ] of Schedule 15 (Payment Mechanism). Any overpayment by the recipient of any such amount in respect of VAT to the supplier will be a sum of money recoverable for the purposes of Clause 24 (Payment).
- (b) PPP Co. will, if so requested by the Authority, furnish such information as may be reasonably required by the Authority as to the amount of VAT chargeable in respect of any supply made under this Project Agreement.
- (c) If the Unitary Charge is increased or decreased, or if a sum of money will become due for payment by or to the Authority, any monies

thereby payable will have added to them a sum equal to any appropriate adjustment in respect of VAT so as to ensure that the net amount actually paid in respect of VAT is such amount as is properly chargeable by reference to the final value of the goods and/or services supplied under this Project Agreement. The Parties will co-operate fully in achieving this objective, including by way of the issue of appropriate valid credit notes and the issue of further valid VAT invoices.

## 27.2 [Change in assumed scope of VAT

If any supply under this Project Agreement is an exempt supply for VAT purposes and, as a result, one Party suffers an amount of irrecoverable input VAT in respect of the Project, then the other Party will pay compensation to the Party that suffers irrecoverable input VAT as if the irrecoverable input VAT arose as a result of a Qualifying Change in Law.<sup>23]</sup>

## 27.3 Determination of VAT Status

- (a) Not less than [eighty (80)] Business Days before the anticipated date for payment of VAT referred to in Clause 27.1(a) (Application of VAT), PPP Co. will consult with the Revenue Commissioners to agree the approach to be taken by the Revenue Commissioners for the purposes of calculation of VAT. PPP Co. will liaise with the Authority following such consultation.
- (b) To the extent that the Authority disagrees or otherwise objects to the approach, or decision of the Revenue Commissioners, PPP Co. will provide all necessary assistance and support (at no additional cost to the Authority) to the Authority in liaising and meeting with the Revenue Commissioners with a view to amending such decision/approach to the satisfaction of the Authority.

## 27.4 Ruling from the Revenue Commissioners

- (a) If either Party (the “**First Party**”) will consider that any VAT which the other Party (the “**Second Party**”) claims to be properly chargeable

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<sup>23</sup> The VAT status of the supplies made under the Agreement will depend on the nature and structure of each project. It is assumed for the purposes of this draft that all of the supplies under this Project Agreement and the Project Documents will be VATable (i.e. will not be exempt) and that all VAT incurred by PPP Co. will be recoverable. As any VAT charged (whether payable by the Authority to PPP Co., and remitted by PPP Co. to the Revenue, or irrecoverable VAT payable by PPP Co.) is ultimately paid to the Government, whatever the VAT treatment of supplies under the Project Agreement, there is no overall cost to the Government. If risk in such irrecoverable VAT is left with PPP Co., then this will be priced into the Unitary Charge. Accordingly, it may prove value for money if this “risk” is passed to the Authority (as it is not a risk from a Government perspective) irrespective of whether it arises as a result of a Change in VAT or as a result of a pre-existing Law/practice. An alternative approach is to restrict the compensation to a Change in VAT Law concept, but this leaves residual risk in PPP Co. and may result in an increased Unitary Charge even if such risk does not arise. It depends on the nature of the supplies. If it has a minimal impact on the bid it will probably be taken care of in benchmarking in any event. However, if it has a significant impact on the bid, consideration should be given to retaining the risk.

Clause 27.3 provides for the VAT status of the various supplies made under the Project Agreement to agreed with Revenue in advance of the supply being made and for the Authority to be a party to that discussion. Clause 27.4 provides for a ruling to be applied for from Revenue. Clause 27.5 permits the Authority to have conduct of any appeal against such Ruling and any assessment of VAT on PPP Co. Thus, the Government and the Authority have both the “risk” and the conduct of the matter.

to the First Party in connection with this Project Agreement is not in fact properly so chargeable, the First Party will be entitled to require the Second Party to obtain a ruling (the “**Ruling**”) from the Revenue Commissioners as to the VAT (if any) properly so chargeable. The Second Party will forthwith request the Revenue Commissioners to issue the Ruling and both the First Party and the Second Party will at all times use their best endeavours to facilitate the issue of the Ruling. To the extent that the Revenue Commissioners issue a Ruling that the relevant VAT is chargeable in relation to a particular supply, the First Party will bear the costs incurred by both parties in connection with the Revenue Commissioners’ ruling on the matter. To the extent that the Revenue Commissioners issue a Ruling that the relevant VAT is not chargeable in relation to a particular supply, the Second Party will bear the costs incurred by both parties in connection with the Revenue Commissioners’ ruling on the matter.

- (b) Before submitting its request for the Ruling or any further communication to the Revenue Commissioners in connection with the Ruling, the Second Party will first obtain the agreement of the First Party to the contents of such request and any such further communication (such agreement not to be unreasonably withheld, conditioned or delayed);
- (c) The Second Party will provide to the First Party copies of all communications received from the Revenue Commissioners in connection with the application for the Ruling as soon as practicable after receipt.
- (d) The Second Party will use all reasonable efforts (including without limitation the provision of such additional information as the Revenue Commissioners may require) to obtain such Ruling as soon as reasonably practicable following the initial request.
- (e) Pending receipt of the Ruling, the First Party will not be obliged to pay the VAT so claimed by the Second Party. In the event of the receipt of a Ruling which states that a sum of VAT (the “**VAT Sum**”) is properly so chargeable, then subject to Clause 27.5 (Disagreement), the First Party will pay the VAT Sum to the Second Party together with any penalties or interest thereon on receipt of a VAT Invoice.

## **27.5 Disagreement**

- (a) In the event that the First Party disagrees with any Ruling issued by the Revenue Commissioners, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs, penalties, surcharges, interest and expenses which it may incur in relation thereto) will take such lawful action and give such information and assistance to the First Party as the First Party may require to challenge such ruling or otherwise to resist or avoid the imposition of VAT on the relevant supply and:



- (i) the action which the First Party will be entitled to require the Second Party to take will include (without limitation) contesting any assessment for VAT or other relevant determination of the Revenue Commissioners before the Appeal Commissioners or court of competent jurisdiction and appealing any judgment or decision of the Appeal Commissioners or such Court;
- (ii) in the event that the Second Party will be required to pay to or deposit with the Revenue Commissioners a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal or taking any other action the Second Party requires it to take under this Clause 27.5(a) (Disagreement), the First Party will, at its election, either pay such sum to the Revenue Commissioners on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with the Revenue Commissioners the First Party will pay such sum to the Second Party;
- (iii) save as specifically provided in Clause 27.5(a)(ii) (Disagreement), the First Party will not be obliged to pay to the Second Party any sum in respect of the VAT in dispute or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and
- (iv) the Second Party will pay to the First Party any amounts received by the Second Party as a result of taking any action it is required it to take under this Clause 27.5 (Disagreement) (including any costs awarded on any appeal (to the extent that such costs have been discharged by the First Party) and including any sum paid to or deposited with the Revenue Commissioners in accordance with Clause 27.5(a)(ii) (Disagreement) which is repaid to the Second Party and for any interest to which the Second Party is entitled in respect of such sums) in each case on an after-Tax basis.

## 28. **RATES**<sup>24</sup>

[Any rates arising or payable in connection with compliance with any obligations under this Project Agreement are payable by PPP Co.]

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<sup>24</sup> The suggested drafting is one possible solution. Whether it represents value for money to transfer this risk to the private sector, must be looked at on a project specific basis.

## **PART 10 – CHANGE**

### **29. VARIATION PROCEDURE**

#### **29.1 Authority Changes**

Clause 1 of Schedule 20 (Variations) will have effect in respect of changes proposed by the Authority.

#### **29.2 PPP Co. Changes**

Clause 2 of Schedule 20 (Variations) will have effect in respect of changes proposed by PPP Co.

#### **29.3 Small Works**

- (a) PPP Co. will carry out Small Works at the request of the Authority.
- (b) [ ● ] days before the Service Commencement Date and the commencement of each subsequent Contract Year, PPP Co. will propose a schedule of rates to be agreed with the Authority (the “**Small Works Rates**”), such agreed rates to be applied in respect of any request from the Authority for Small Works to be completed during that Contract Year. The value of any Small Works will be calculated on the basis that:
  - (i) the labour element will be calculated in accordance with the Small Works Rates or, where such rates are not applicable, in accordance with rates which are fair and reasonable; and
  - (ii) the materials element will be charged at the cost of the materials to PPP Co. or to the contractor carrying out the work (net of all discounts) plus [ ● ]%.
- (c) PPP Co. and the Authority will agree the timing of the Small Works, so as to minimise inconvenience or disruption to the Services. PPP Co. will take all reasonable steps to minimise the duration of any Small Works.

29.4 Any dispute between the parties relating to the Small Works will be determined in accordance with Clause 44 (Dispute Resolution Procedure).

### **30. CHANGE IN LAW**

Schedule 21 (Change in Law) will have effect in respect of Change in Law during the Term.

## **PART 11 – EMPLOYMENT ISSUES**

### **31. TRANSFERRING EMPLOYEES**

#### **31.1 Transfer Regulations**

- (a) It is agreed between the parties that this Project Agreement will give rise to a relevant transfer or relevant transfers to which the Transfer Regulations apply and that the Employees are assigned wholly or mainly to the relevant undertaking or part of an undertaking for the purposes of the Transfer Regulations. It is agreed further that the Employees will transfer to the employment of PPP Co. (or the relevant contractors or sub-contractors) on the Transfer Date other than those Employees, if any, who object in writing to the transfer of their employment to PPP Co.
- (b) Save where the Employees have resigned and/or formally objected to the transfer of their employment, PPP Co. will employ the Employees (the “Transferring Employees”) (and procure the employment of the Transferring Employees by the relevant contractors or sub-contractors) on and after the Transfer Date on the same terms and conditions of employment as those in force immediately before the transfer of their employment under this Project Agreement.

#### **31.2 Recruitment by Authority**

The Authority will consult with PPP Co. before appointing any person after the Commencement Date who will be employed wholly or mainly to carry out tasks which will be performed by PPP Co. or any of its Sub-contractors in relation to the Project and unless such appointment is to fill an existing vacancy on directly comparable terms and conditions the Authority will obtain PPP Co.’s prior consent to the appointment, such consent not to be unreasonably withheld or delayed and having regard to historical or seasonal fluctuation.

#### **31.3 Details of New Employees**

The Authority will promptly notify PPP Co. in writing of any appointment made in accordance with Clause 31.2 (Recruitment by Authority) above giving the commencement date, name and age of the new employee and details of the terms and conditions of employment. The employee will thereafter be regarded as an Employee for the purposes of this Project Agreement.

#### 31.4 Indemnities

- (a) PPP Co. will be liable for and will indemnify and keep indemnified the Authority against any and all Claims, Losses and/or other consequences of the Employees transferring to the employment of PPP Co. or any of its Sub-contractors or the termination of their employment by PPP Co. or any of its Sub-contractors or any breach of the terms of this Project Agreement relating to Employees including, without limitation, any Claim by or on behalf of an Employee in relation to the terms of employment of any individual because of the transfer effected by or under this Project Agreement or for any reason connected with it or otherwise provided always that such indemnity will not apply to any Claim or Loss relating to a matter arising before the Transfer Date.
- (b) PPP Co. will be liable for and will indemnify and keep indemnified the Authority against any and all Claims and/or Losses arising out of any claim by a member of Staff or a third party claiming to be an employee or former employee of PPP Co. or of any of its Sub-contractors relating to or arising out of his/her employment or non-employment or engagement or non-engagement by PPP Co. or by any Sub-contractors which arises out of an act or omission of PPP Co. or of any of its Sub-contractors including, without limitation, a claim:
  - (i) for breach of contract, wrongful dismissal, unfair dismissal, loss of office, redundancy, loss of earnings or otherwise;
  - (ii) for which the Authority is or may be liable by reason of the operation of the Transfer Regulations following the Termination Date and/or the transfer of all or part of the Project to the Authority, or any other party; or
  - (iii) of whatsoever nature by any third party against the Authority for which the Authority is or may be liable by virtue of the Transfer Regulations.
- (c) The Authority holds the benefit of this indemnity for itself and in trust for any third party to which the Project is transferred at the end of the Term (the “**Replacement PPP Co.**”).
- (d) The Authority for the purposes of this Clause 31.4 (Indemnities) will include any Sub-contractors appointed by the Authority and each Replacement PPP Co.
- (e) PPP Co. agrees that when requested to do so by the Authority it will execute an indemnity in similar terms in favour of the Replacement PPP Co.

- (f) PPP Co. agrees, to the extent that it is entitled to do so by Law and when requested to do so by the Authority to disclose to the Authority (for itself and as trustee for the Replacement PPP Co.) all material terms of any contract of employment (whether written or oral) in effect within the period of [ ● ] years before the end of the Term together with such other details regarding employees or others engaged to provide services to PPP Co. as the Authority will require.
- (g) The Authority will be liable and will indemnify and keep PPP Co. indemnified against any and all Claims and/or Losses arising out of any claim against it by or on behalf of an Employee, Trade Union or representative of an Employee arising out of any act or omission of the Authority before the Transfer Date provided that PPP Co. has complied with its obligations under the Transfer Regulations and this Project Agreement, in particular Clause 31.1(b) (Transfer Regulations) and provided that this indemnity will not apply where the said act or omission of the Authority was due wholly or in part to the act or omission of PPP Co. or of any of its Sub-Contractors.

### **31.5 Apportionment**

All salaries and other emoluments referable to any period before the Transfer Date including holidays, tax and Pay Related Social Insurance payments, contributions to retirement benefit schemes and bonus and commission arrangements relating to the Employees will be borne by the Authority up to the relevant Transfer Date and by PPP Co. on and thereafter and all necessary apportionments will be made.

### **31.6 Pensions<sup>25</sup>**

[ ]

## **32. STAFF DURING OPERATION**

### **32.1 Sufficient trained and competent Staff**

PPP Co. will provide sufficient trained, competent and suitable Staff with the necessary qualifications, skills and experience to perform all tasks and obligations associated with the Project and ensure that such tasks and obligations are provided at all times with reasonable skill and care in accordance with the terms of this Project Agreement.

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<sup>25</sup> To be negotiated on a Project Specific Basis.

### 32.2 **Employment Conditions**

- (a) PPP Co. will comply and will procure that each of its Staff will comply with all relevant legislation from time to time in force relating to employment and health and safety at work.
- (b) PPP Co. will pay and will procure that each of its Sub-Contractors will pay rates of wages and provide pension benefits and observe hours of employment which are not less favourable than those laid down by the relevant joint industrial council and set out in a registered employment agreement. The expressions “**joint industrial council**” and “**registered employment agreement**” will have the meanings set out in the Industrial Relations Acts 1946 to 2001.

### 32.3 **Ongoing Training**

PPP Co. will provide or procure the provision of such ongoing training for Staff as may be required by Law and may be reasonably necessary to enable them to carry out the tasks and obligations associated with the Project with reasonable skill and diligence.

### 32.4 **Training of Authority Staff**

PPP Co. will, at its own cost, provide training for key nominated employees of the Authority in the use of the Project Facility when requested by the Authority.

### 32.5 **Employment Policies**

PPP Co. will use all reasonable endeavours to ensure that all Staff involved in carrying out the Project have adequate knowledge of and training in respect of all relevant policies of the Authority which are disclosed to PPP Co. including, without limitation, health and safety and fire safety policies and that such Staff comply with all reasonable directions of the Authority in relation to the subject matter of those policies. The Authority will use all reasonable endeavours to communicate such policies to PPP Co. promptly upon commencement of this Project Agreement and upon any subsequent change in policy.

### 32.6 **Supervision**

PPP Co. will ensure that:

- (a) the Staff will be appropriately managed and supervised at all times in connection with the carrying out of the Project;
- (b) the Staff will carry out their duties in an orderly manner;

- (c) appropriate work wear will be provided at PPP Co.'s expense;
- (d) appropriate safety gear and equipment will be provided at PPP Co.'s expense and used when required; and
- (e) the Staff will wear identity badges [and uniforms] as required by the Authority which will be provided at PPP Co.'s expense.

### **32.7 Emergency Arrangements**

- (a) PPP Co. acknowledges that in respect of the carrying out of the Project there may be a requirement for Staff to work outside normal working hours and will make arrangements to provide out of hours Emergency cover (at no cost to the Authority).
- (b) Where an Emergency occurs during normal working hours Staff should be diverted from their normal duties (at not cost to the Authority) to deal with it but PPP Co. will procure that the carrying out of the Project is not thereby affected.

### **32.8 Disciplinary Action**

- (a) The Authority's Representative may (acting reasonably) instruct PPP Co. to procure that appropriate disciplinary action is taken against any employee of PPP Co. or any its Sub-contractors (in accordance with the terms and conditions of employment of the employee concerned) who misconducts himself/herself or is incompetent or negligent in his/her duties or his/her presence or conduct on the Site or at work is otherwise considered by the Authority's Representative (acting reasonably) to be undesirable. The Authority's Representative will co-operate with any such disciplinary proceedings and will be advised in writing by PPP Co. of the outcome.
- (b) PPP Co. will procure that there are set up and maintained by it and by all Sub-contractors, personnel policies and procedures governing all relevant matters (including without limitation discipline, grievances, equality and health and safety). PPP Co. will procure that the terms and the implementation of such policies and procedures comply with Law and Good Industry Practice.

### **32.9 Industrial Action**

In the event of any industrial action by Employees, Staff or others which inhibits, prevents or otherwise impedes the carrying out of the Project, PPP Co. will consult with the Authority's Representative with a view to the continuation of the Project in a timely, efficient and productive manner and will use its best endeavours to ensure that such continued performance is in accordance with its obligations under this

Project Agreement. The occurrence of any such industrial action will not entitle PPP Co. to an extension of time and/or relief from its obligations under this Project Agreement save to the extent (if at all) that same constitutes a Relief Event in which case the provisions of Clause 42 (Relief Events) will apply.

#### 32.10 Employee Information and Changes to the Workforce

- (a) Where notified in writing by the Authority to do so, PPP Co. will provide Employee Information to the Authority within ten (10) Business Days of such notice.
- (b) PPP Co. will ensure that before such disclosure it has complied, and has procured compliance by any Staff, with the Data Protection Act 1988 and any other legislation in force from time to time regarding disclosure of personal information about employees and will obtain such consent from employees to the disclosure as may be required by Law.
- (c) Where Employee Information has been provided, PPP Co. will:
  - (i) inform the Authority of any change to the information provided or provide any new Employee Information not previously provided;
  - (ii) use its best endeavours to clarify any matter upon which clarification is requested by the Authority; and
  - (iii) use its best endeavours to co-operate with any other reasonable request made by the Authority concerning the Employee Information or concerning PPP Co.'s employees or the employees of its Sub-contractors,within ten (10) Business Days of any such change, discovery of new information, or receipt of such request.
- (d) Unless required by Law to do so, the Authority will not disclose Employee Information (or any part of that information) to any other person other than its employees, agents, advisers and consultants associated with the Project provided that the Authority must obtain appropriate confidentiality undertaking from any such party to whom it discloses Employee Information.
- (e) For the purposes of this Clause 32 (Staff During Operation), **“Employee Information”** means written details of:
  - (i) the total number of employees employed by PPP Co. or by any of its contractors and sub-contractors (of any tier) whose work (or any part of it) is work undertaken for the purposes of this Project Agreement;



- (ii) in relation to each employee who falls within the scope of Clause 32.10(e)(i) (Employee Information and Changes to the Workforce) above:
  - (A) the employee's date of birth and the terms of any pension scheme of which the employee is a member (so that appropriate pension entitlements can be calculated and provided for); and
  - (B) the employee's remuneration (including salary and all benefits and perquisites) job description, normal working hours, length of service, notice period, any pay settlement covering future dates which has already been agreed by the employee's employer, any gratuitous payment which has been agreed by the employee's employer in connection with the actual or proposed termination or variation of any contract of employment and any redundancy entitlement whether under statute or established by custom and practice;
- (iii) any relevant information relating to or connected with the employment of employees falling within the scope of Clause 32.10(e)(i) (Employee Information and Changes to the Workforce) above, including but not limited to details of:
  - (A) terms and conditions of employment including terms incorporated from any collective agreement or arising out of any custom or practice;
  - (B) any outstanding or potential liability for past breaches of such contracts;
  - (C) any employee who is on sick, maternity or other statutory or contractual leave (other than normal holiday leave) whether paid or unpaid;
  - (D) any outstanding or potential statutory liability (for example, any Claim for unfair dismissal or discrimination); and
- (iv) such other information as the Authority may reasonably require in relation to PPP Co.'s employees or the employees of its Sub-contractors (other than the name or other details which enable any employee to be identified unless both the employee's employer and the

employee have consented in writing to the provision of such details).

### **32.11 Changes to the Workforce**

During the [●] months preceding the Expiry Date or where a Termination Notice has been served, PPP Co. will not:

- (a) materially amend or offer, promise or agree to amend the terms and conditions of employment of any employee falling within the scope of Clause 32.10 (Employee Information and Changes to the Workforce) including without limitation the rates of remuneration or hours to be worked by any Staff, including holidays;
- (b) replace any of the individuals providing services under this Project Agreement or deploy any person other than those already providing services under this Project Agreement to perform the Services under this Project Agreement other than, (in either case), in pursuance of its continuing obligations under this Project Agreement without in each case the prior written agreement of the Authority's Representative, such agreement not to be unreasonably withheld or delayed; or
- (c) In Clause 32.11(a) (Changes to the Workforce) above, what is material;
  - (i) for the purposes of the phrase "materially amend" will be determined by considering the individual contract of employment as a whole; or
  - (ii) for the purposes of the phrase "materially increase" will be determined by considering this Project Agreement as a whole.

### **32.12 [Employee Transfer Guarantee]**

On a date that is no later than the date that is three (3) years before the Expiry Date, PPP Co. will procure that a guarantee is provided to the Authority, by a bank or other institution approved by the Authority, and in a form and substance approved by the Authority guaranteeing the performance of the obligations of PPP Co. pursuant to Clause 31.4 (Indemnities).]

## **PART 12 – TERMINATION**

### 33. TERMINATION FOR PPP CO. DEFAULT<sup>26</sup>

#### 33.1 PPP Co. Default

**“PPP Co. Default”** means one of the following events:

- (a) the occurrence of a Persistent Breach;
- (b) the occurrence of an Insolvency Event, where “Insolvency Event” means the occurrence of any of the following: -
  - (i) the inability of PPC Co. to pay its debts as they fall due within the meaning of sections 213 and 214 of the Companies Act, 1963, or the admission by the Company of its inability to pay its debts as they fall due;
  - (ii) the presentation of a petition or the granting of an order by a court for the winding up or examinership of PPP Co. or the passing of a resolution for the voluntary winding-up of PPP Co. otherwise than in the context of a solvent reconstruction or amalgamation which has been previously approved in writing by the Authority.
  - (iii) the granting of an order by a court for the appointment of a liquidator, receiver, administrative receiver, administrator, examiner or the like over the whole or any part of the assets and undertaking of PPP Co. or the presentation of a petition for such an order or the taking of possession or on behalf of any creditor of any property that is the subject of a mortgage, charge or other Encumbrance or security interest; or
  - (iv) the proposal, sanction or approval of any composition in satisfaction of the debts of PPP Co., or scheme of arrangement of its affairs, or compromise or arrangement between it and its creditors or members or any class of its creditors or members.
  - (v) a request by the directors of PPP Co. for the appointment of a liquidator, trustee in bankruptcy, judicial custodian, compulsory manager, receiver,

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<sup>26</sup> TERMINATION FOR PPP CO. DEFAULT

The Project Agreement must deal comprehensively with the possibility of early termination due to PPP Co. default. It must achieve a fair balance between the Authority’s desire to be able to terminate for inadequate service provision, even if caused by relatively minor defaults (a right which Authorities are used to having in conventional service contracts) and PPP Co.’s and its Funder’ interest in restricting termination to the severest of defaults, when all other reasonable alternative options have been exhausted, including a reasonable rectification period procedure and a direct agreement. It should be the Authority’s last resort to exercise rights of termination.

The Project Agreement should specify the events of PPP Co. Default which may lead to termination. As far as practicable, these should be objective, clear and provide for reasonable tolerances, bearing in mind the undesirable consequences of termination.

administrative receiver, administrator, examiner, or the like;

- (c) the occurrence of an event analogous to, or having a substantially similar effect to, an Insolvency Event by reference to the laws of any applicable jurisdiction other than Ireland;
- (d) a breach of Clause 50 (Sub-Contracting);
- (e) a breach by PPP Co. of its obligations under Clause 48 (Assignment);
- (f) Abandonment or repudiation by PPP Co. of the whole of the Project Agreement or a material obligation on the part of PPP Co. under this Project Agreement;
- (g) failure to achieve the Service Commencement Date by the Long-Stop Date;
- (h) the accumulation of [ ● ] or more Performance Deductions or [ ● ] Availability Deductions in any Contract Year;
- (i) subject to Clause [ ● ] (Uninsurable Risks) a breach by PPP Co. of its obligation to take out and maintain Required Insurance;
- (j) a breach by PPP Co. of its obligations under Clause 49 (Change in Ownership);
- (k) a failure by PPP Co. to reinstate the Project Facility or any part thereof in accordance with Clause 45 (Insurance);
- (l) a breach by PPP Co. of Clause 39.3 (Changes to Funding Agreements); and
- (m) a breach by PPP Co. of any of its obligations under this Project Agreement which materially and adversely affects the provision or performance of the Works or Services.

### 33.2 Persistent Breach<sup>27</sup>

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<sup>27</sup> TERMINATION FOR PERSISTENT BREACH BY PPP CO.

The Project Agreement should incentivise PPP Co. in some way in respect of any breach by PPP Co., however minor. There are various means to deal with the persistent occurrence of minor defaults. The recommended approach is to impose performance points in respect of all types of minor defaults. This is a particularly effective means of incentivising PPP Co. when coupled with a right to terminate the Project Agreement if the total number of performance points accrued exceeds a certain level.

It may not be feasible in every case to negotiate an all-encompassing performance points regime. This could leave the Authority exposed to a situation in which minor breaches are occurring persistently or being left unremedied, but as they have no effect on the Unitary Charge, the Authority will have little ability to influence PPP Co. to perform. It may in fact be cheaper for PPP Co. not to perform and suffer the (inaccurately calibrated) deductions. If such circumstances are likely to exist, the Authority should retain a right to terminate the Project Agreement for Persistent Breach rather than trigger termination following accrual of a certain number of performance points. PPP Co. and its Funders will be anxious to avoid a “hair trigger” default and will wish to ensure the mechanics relating to this default are as objective as possible. As payment and performance mechanisms develop and are seen to work well in established sectors, there will be less of a need for such a provision.

- (a) If a particular breach of this Project Agreement has occurred more than three times within the preceding [ ● ] month period, then the Authority may serve a notice, (a **“Warning Notice”**), on PPP Co.:
  - (i) specifying that it is a formal Warning Notice;
  - (ii) specifying the relevant provisions of this Project Agreement and giving reasonable details of the breach; and
  - (iii) stating that such breach is a breach which, if it recurs or continues, may result in a Termination of this Project Agreement.
- (b) If, following service of a Warning Notice, the breach specified in the Warning Notice has continued or recurred more than within [ ● ] days after the date of service of the Warning Notice, then the Authority may serve a further notice, (**“Final Warning Notice”**), on PPP Co.:
  - (i) specifying that it is a Final Warning Notice;
  - (ii) stating that the breach specified has been the subject of a Warning Notice served within the [ ● ] month period before the date of service of the Final Warning Notice; and
  - (iii) stating that if such failure continues or recurs [ ● ] times within the [ ● ] month period after the date of service of the Final Warning Notice, this Project Agreement may be terminated.
- (c) A Warning Notice may not be served in respect of any breach in respect of which a separate Warning Notice has already been served until a period of [ ● ] months has elapsed since the date of service of the previous Warning Notice.

### 33.3 Notification of PPP Co. Default

PPP Co. will notify the Authority promptly on becoming aware of a PPP Co. Default or any event which, with the giving of notice and/or lapse of time and/or making of any determination, would constitute a PPP Co. Default.

### 33.4 Rectification<sup>28</sup>

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The Project Agreement should therefore include a warning procedure which provides that PPP Co. is served a formal preliminary notice that a certain type of breach has been persistently occurring during the Service Period. If such breach continues to occur persistently following such notice (allowing a short rectification period), a final notice is served. This then gives PPP Co. the opportunity to remedy.

<sup>28</sup> RECTIFICATION

- (a) If a PPP Co. Default falling within Clauses 33.1(d), 33.1(e), 33.1(f), 33.1(i), 33.1(j), 33.1(k) or 33.1(m) (PPP Co. Default) (“**Rectifiable PPP Co. Defaults**”) has occurred and the Authority wishes to terminate the Project Agreement, it must serve a notice (“**Rectification Notice**”) on PPP Co.
- (b) The Rectification Notice must specify:
  - (i) the type and nature of PPP Co. Default that has occurred, giving reasonable details; and
  - (ii) that the Project Agreement will Terminate on the day falling sixty (60) days after the date PPP Co. receives the Rectification Notice, unless PPP Co. puts forward a rectification programme acceptable to the Authority acting reasonably (the “**Rectification Programme**”) within thirty (30) days or rectifies the PPP Co. Default within [sixty (60)] days or the provisions of the Funder Direct Agreement apply to prevent Termination.
  - (iii) If PPP Co. either rectifies the PPP Co. Default within [sixty (60)] days or implements the Rectification Programme in accordance with its terms, the Rectification Notice will be deemed to be revoked and the Project Agreement will continue.
  - (iv) If PPP Co. fails to rectify the PPP Co. Default within [sixty (60)] days or in accordance with the Rectification Programme, the Rectification Notice will be deemed to be a Termination Notice and the Project Agreement will, subject to the terms of the Funder Direct Agreement, terminate forthwith.
- (c) If a PPP Co. Default falling within Clauses 33.1(a) to 33.1(b)(v) inclusive, 33.1(g) or 33.1(h) (PPP Co. Default) (“**Non-Rectifiable PPP Co. Defaults**”) has occurred, the Authority may, subject to the Funder Direct Agreement, serve a Termination Notice on PPP Co. specifying:
  - (i) the type and nature of PPP Co. Default that has occurred;
  - (ii) that the Project Agreement will terminate on the day falling [sixty (60)] days after the date on which PPP Co. receives the Termination Notice unless the provisions of

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The Authority should afford PPP Co. the opportunity of remedying any breach capable of remedy and/or financially compensating the Authority for the effects of the breach. Termination should only be used as a last resort. Accordingly, the Project Agreement should set out a mechanism allowing PPP Co. the opportunity to remedy breaches which are capable of remedy to avoid termination. Rectification will not be appropriate in respect of all types of breach. Some breaches may not be capable of remedy (for example, failure to complete construction by the Long-Stop date) and some events may only qualify as termination events after some kind of grace has already been given (e.g. after the accrual of a specified level of Performance Deductions or because of the tolerances contained in the Persistent Breach concept).

the Funder Direct Agreement apply to prevent Termination.

- (d) In the event of Termination for PPP Co. Default:
  - (i) the provisions of Part 1 of Schedule 17 (Compensation on Termination) will apply; and
  - (ii) PPP Co. will comply with the provisions of Clause 40 (Handback).

#### 34. **TERMINATION FOR AUTHORITY DEFAULT<sup>29</sup>**

34.1 “**Authority Default**” means one of the following events:

- (a) an expropriation, sequestration or requisition of a material part of the Assets and/or shares of PPP Co. by the Authority or any other Relevant Authority;
- (b) a failure by the Authority to make payment of any amount of money exceeding whether singularly or in aggregate €[ ● ] (Indexed) that is due and payable by the Authority under this Project Agreement within [thirty (30)] Business Days of service of a formal written demand by PPP Co., where that amount fell due and payable [two (or more)] months before the date of service of the written demand;
- (c) a breach by the Authority of its obligations under this Project Agreement which substantially frustrates or renders it impossible for PPP Co. to perform its obligations under this Project Agreement for a continuous period of two months; or
- (d) a breach by the Authority of Clause 48 (Assignment).

#### 34.2

- (a) If an Authority Default has occurred and PPP Co. wishes to terminate the Project Agreement, it must serve a Termination

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<sup>29</sup> PPP Co. should be allowed the right to terminate the Project Agreement where the Authority acts in a way which renders their contractual relationship untenable or completely frustrates PPP Co.’s ability to deliver the Service. A minor breach will not fall into this category and even a material breach of itself is likely to be insufficient if the Authority’s actions do not have the effect described above.

Other than the circumstances listed in the TPA, the circumstances in which PPP Co. is permitted to terminate for Authority Default must be considered on a project by project basis. The Authority needs to examine the nature of its obligations during the Project and should only extend the list of Authority Default events to include breaches of other obligations which will render the contractual relationship untenable or completely frustrate PPP Co.’s ability to deliver the Service.

Termination by PPP Co. should be a last resort and it is important to ensure that there are no “hair triggers” which could put the Authority at risk of termination before it has had an opportunity to remedy its default. There can be no question of reciprocity with the defaults that trigger a PPP Co. Default as the obligations of the Authority are principally payment obligations and approval rights, rather than detailed performance or other credit related obligations.

PPP Co. should bear in mind that a failure by the Authority to comply with the provisions of the Project Agreement before the Service Commencement Date (for example issuing approvals) and sometimes after that date, can in most cases be adequately dealt with by way of a Compensation Event. In addition, any failure by the Authority to pay sums when due should give rise to interest on late payment and so a reasonable grace period for non-payment should be built into the Project Agreement and so neither of these should trigger termination.

Notice on the Authority within [forty-five (45)] days of becoming aware of the Authority Default.

- (b) The Termination Notice must specify the type of Authority Default which has occurred entitling PPP Co. to terminate and give such other information as the Authority will reasonably require to verify and/or rectify the Authority Default.
- (c) The Project Agreement will terminate on the day falling [forty-five (45)] days after the date the Authority receives the Termination Notice, unless the Authority rectifies the Authority Default within [thirty (30)] Business Days of receipt of the Termination Notice.

34.3 In the event of Termination for Authority Default:

- (a) the provisions of Schedule 17 (Compensation on Termination for Authority Default) will apply; and
- (b) PPP Co. will comply with the provisions of Clause 40 (Handback).

## **35. VOLUNTARY TERMINATION BY THE AUTHORITY<sup>30</sup>**

35.1 The Authority may terminate the Project Agreement at any time on or before its Expiry Date by complying with its obligations under Clauses 35.2, 35.3 and 35.4 (Voluntary Termination by the Authority).

35.2 If the Authority wishes to terminate the Project Agreement under this Clause, it must give a Termination Notice to PPP Co. stating:

- (a) that the Authority is Terminating the Project Agreement under this Clause 35 (Voluntary Termination by Authority);
- (b) that the Project Agreement will terminate on the date falling [thirty (30)] Business Days after the date of receipt of the Termination Notice.

35.3 The Project Agreement will terminate on the date falling [thirty (30)] days after the date of receipt of the Termination Notice referred to in Clause 35.2 (Voluntary Termination by Authority) above.

35.4 In the event of Voluntary Termination by the Authority:

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<sup>30</sup> VOLUNTARY TERMINATION BY AUTHORITY

The intention of all parties to a Project Agreement should be that it will run its full course. There may be circumstances, however, in which the Authority is no longer able to continue the relationship it has with PPP Co. under a Project Agreement. For example, there may be a policy change which makes further provision of the Service redundant. In order to cater for such circumstances, the Authority may wish to retain the right to terminate the contract voluntarily.

PPP Co. should not object to the Authority having such a right provided that it is compensated in full if such right is exercised.

PPP Co. should receive a termination payment which leaves it in the position it would have been in had the Project Agreement run its full course.



- (a) the provisions of Schedule 17 (Compensation on Termination for Voluntary Termination by the Authority) will apply; and
- (b) PPP Co. will comply with the provisions of Clause 40 (Handback).

**36. TERMINATION FOR FORCE MAJEURE, CHANGE IN LAW AND UNINSURABLE RISKS UNINSURABLE<sup>31</sup>**

**36.1 Force Majeure**

- (a) No party will be entitled to bring a claim for a breach of obligations under the Project 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 it is prevented from carrying out obligations by that Force Majeure Event.
- (b) Nothing in Clause 36.1(a) above will affect any entitlement to make Performance Deductions or Availability Deductions or any Performance Deductions or Availability Deductions made as a result of Schedule 15 (Payment Mechanism) in the period during which the Force Majeure Event is subsisting. However, such Performance Deductions and Availability Deductions will not be aggregated for the purposes of the termination triggers in Clause 33.1(h) (PPP Co. Default).
- (c) On the occurrence of a Force Majeure Event, the Affected Party will notify the other party as soon as practicable. The notification will 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.
- (d) As soon as practicable following such notification, the Parties will 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 the Project Agreement.
- (e) If no such terms are agreed on or before the date falling [one hundred and twenty (120)] 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

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<sup>31</sup> TERMINATION ON FORCE MAJEURE

The Project Agreement should define the Force Majeure Events that can lead to termination and determine the rights of the relevant Parties if this occurs. If a Force Majeure Event occurs and the parties cannot agree a solution within a specified period (six (6) months is typical), either party is entitled to terminate the Project Agreement with compensation payable to PPP Co. as set out in Part 3 of Schedule 17 (Compensation on Termination). The Project Agreement should, however, give the Authority the right to prevent Termination by paying the PPP Co. as if the Service were being fully provided after such period. In such circumstances the Authority should specify a fixed period for which it will make such payment, before reconsidering the situation, so that PPP Co. can plan accordingly.

under this Project Agreement for a period of more than 180 days, then, subject to Clause 36.1(f) (Termination for Force Majeure) below, either Party may terminate the Project Agreement by serving a Termination Notice to the other party, giving [thirty (30)] days notice of Termination.

- (f) If the Project Agreement is Terminated under Clause 36.1(e) (Termination for Force Majeure) above or Clause 36.1(g) (Termination for Force Majeure) below:
  - (i) compensation will be payable by the Authority in accordance with Schedule 17 (Compensation on Termination); and
  - (ii) PPP Co. will comply with the provisions of Clause 40 (Handback).
- (g) If PPP Co. gives notice to the Authority under Clause 36.1(e) (Termination for Force Majeure) above that it wishes to terminate the Project 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)] days after the date of its receipt stating that it requires the Project Agreement to continue. If the Authority gives PPP Co. such notice, then:
  - (i) the Authority will pay to PPP Co. the Unitary Charge from the day after the date on which PPP Co. would have terminated under Clause 36.1(e) (Apportionment) as if the Service was being fully provided; and
  - (ii) the Project Agreement will not terminate until expiry of written notice (of at least [thirty (30)] Business Days) from the Authority to PPP Co. that it wishes the Project Agreement to terminate.
- (h) The Parties will 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 PPP Co. will 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.
- (i) The Affected Party will 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 Project Agreement. Following such notification the Project Agreement will continue to be performed on the terms existing immediately before the occurrence of the Force Majeure Event.

## **36.2 Termination for Uninsurable Risk**

- (a) In the event that a risk becomes Uninsurable, the Authority may terminate this Project Agreement by written notice to PPP Co. having immediate effect.
- (b) In the event of Termination pursuant to Clause 36.2(a) above:
  - (i) the provisions of Schedule 17 (Compensation on Termination) will apply; and
  - (ii) PPP Co. will comply with the provisions of Clause 40 (Handback)

### **36.3 Termination for Change in Law**

- (a) In the event of a Change in Law which renders illegal or impossible (but not merely more expensive) all or substantially all of PPP Co.'s obligations or rights under this Project Agreement, the Parties will consult with each other in good faith and act reasonably in attempting to mitigate the effects of such Change in Law. If the Parties are unable to agree proposals to mitigate the effects of the Change of Law within ninety (90) days or such period as the Authority may in its absolute discretion determine, then either Party may terminate this Project Agreement by written notice to the other Party having immediate effect.
- (b) In the event of Termination pursuant to Clause 36.3(a) above,
  - (i) the provisions of Schedule 17 (Compensation on Termination) will apply; and
  - (ii) PPP Co. will comply with the provisions of Clause 40 (Handback)

## **37. TERMINATION FOR BREACH OF THE REFINANCING PROVISIONS<sup>32</sup>**

If PPP Co. wilfully breaches Clause 47 (Refinancing) then the Authority may terminate the Project Agreement at any time on or before its Expiry Date by complying with its obligations under Clauses 37.1 to 37.3 (Termination for Breach of the Refinancing Provisions) below.

- 37.1 If the Authority wishes to terminate the Project Agreement under this Clause 37 (Termination for Breach of Refinancing Provisions), it must serve a Termination Notice on PPP Co. stating:

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<sup>32</sup> TERMINATION FOR BREACH OF THE REFINANCING PROVISIONS

The Project Agreement must deal comprehensively with termination as a result of a breach of the refinancing provisions by PPP Co.

A balance must be struck between the Authority's proper desire to incentivise PPP Co. to be open and transparent in relation to refinancing, and the Senior Lenders' fear of losing their funding for reasons beyond their control due to the actions of PPP Co.

- (a) that the Authority is terminating the Project Agreement under this Clause 37 (Termination for Breach of the Refinancing Provisions); and
- (b) that the Project Agreement will terminate on the date falling [thirty (30)] days after the date of receipt of the Termination Notice.

37.2 In the event of Termination in accordance with this Clause 37 (Termination for Breach of Refinancing Provisions),

- (a) the provisions of Schedule 17 (Compensation on Termination) will apply and;
- (b) PPP Co. will comply with the provisions of Clause 40 (Hand-back).

37.3 The Project Agreement will terminate on the date falling [30] days after the date of receipt of the Termination Notice referred to in paragraph 37.1(b) (Termination for Breach of the Refinancing Provisions) above.

## 38. **TERMINATION FOR CORRUPT GIFTS AND FRAUD<sup>33</sup>**

38.1 PPP Co. warrants that in entering the Project Agreement it has not committed any Prohibited Act.

38.2 (a) If PPP Co., a Principal Sub-Contractor or any other 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 will be entitled to act in accordance with Clauses 38.2(b) to (f) (Termination for Corrupt Gifts and Fraud) below.

(b) If a Prohibited Act is committed by PPP Co. or by an employee not acting independently of PPP Co., then the Authority may Terminate this Project Agreement by serving a Termination Notice on PPP Co. giving thirty (30) Business Days notice to PPP Co.

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<sup>33</sup> TERMINATION ON CORRUPT GIFTS AND FRAUD

The Project Agreement must deal comprehensively with termination as a result of corrupt acts or fraud involving PPP Co., any Sub-contractor and any servant or agent of the Authority.

A balance must be struck between the Authority's proper desire for the right to free itself from a corrupt or fraudulent partner and the funders' fear of losing their funding for reasons beyond their control due to the corrupt actions of PPP Co. or third parties or an individual within either of them.

The corrupt gifts and fraud provision is aimed at all types of bribery, corruption and fraudulent acts perpetrated against the Authority, in connection with the procurement of the Project Agreement and the ongoing contractual relationship.

As the Authority's ultimate sanction to terminate for such acts is severe, the recommended approach allows PPP Co. the opportunity to avoid termination where the act has been carried out by a Sub-contractor or employee acting on his own. Within a specified reasonable time period, PPP Co. has to ensure that any relationship with the relevant party is terminated and, if applicable, a replacement procured for such party.

- (c) If the Prohibited Act is committed by an employee of PPP Co. acting independently of PPP Co., then the Authority may serve a Termination Notice on PPP Co. giving [thirty (30)] days' notice to PPP Co. of Termination and this Project Agreement will Terminate, unless within [ ● ] Business Days of receipt of such Termination Notice PPP Co. terminates the employee's employment and (if necessary) procures the performance of such part of the Works and/or the Service by another person.
- (d) 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 serve a Termination Notice on PPP Co. which provides that the Project Agreement will terminate, unless within [thirty (30)] Business Days of receipt of such notice PPP Co. terminates the relevant Project Document and procures the performance of such part of the Works and/or the Service by another person.
- (e) If the Prohibited Act is committed by an employee of a Sub-Contractor acting independently of that Sub-Contractor, then the Authority may serve a Termination Notice on PPP Co. which provides that the Project Agreement will terminate, unless within [thirty (30)] 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 Works and/or the Service by another person.
- (f) If the Prohibited Act is committed by any other person not specified in Clause 38.2(b) to (d) (Termination for Corrupt Gifts and Fraud) above, then the Authority may serve a Termination Notice on PPP Co. which provides that the Project Agreement will terminate unless within [thirty (30)] Business Days of receipt of such notice, PPP Co. procures the Termination of such person's employment and of the appointment of their employer (where not employed by PPP Co. or the Sub-Contractors) and (if necessary) procures the performance of such part of the Works and/or the Service by another person.
- (g) Any Termination Notice under this Clause 38 (Termination for Corrupt Gifts and Fraud) will specify:
  - (i) the nature of the Prohibited Act;
  - (ii) the identity of the party whom the Authority believes has committed the Prohibited Act; and
  - (iii) the date on which the Project Agreement will terminate, in accordance with the applicable provision of this Clause 38 (Termination for Corrupt and Gifts and Fraud)

38.3 In the event of Termination in accordance with the provisions of this Clause 38(Termination for Corrupt Gifts and Fraud).

(a) The provisions of Schedule 17 (Compensation on Termination) will apply; and

(b) PPP Co. will comply with the provisions of Clause 40 (Handback)

39. **COMPENSATION ON TERMINATION**

39.1 The provisions of Schedule 17 (Compensation on Termination), will govern Termination Payments in accordance with Part 12 of this Project Agreement.

39.2 Subject to Clause 58 (Costs and Expenses) the provisions of Schedule 17 (Compensation on Termination) contain PPP Co.'s sole entitlement to payment in the event of Termination. Any such Termination will have the effect of Terminating PPP Co.'s engagement and the Authority's obligations to accept and pay for PPP Co.'s further performance of the Project Agreement and the provisions of Clause 40 (Handback) will apply.

39.3 **Changes to Funding Agreements.**

PPP Co. will not, nor will it permit anyone else to amend, waive or exercise a right under any Funding Agreement would have the effect of increasing the Authority's liabilities on early termination of the Project Agreement unless:

(a) PPP Co. has obtained the prior written consent of the Authority; or

(b) it is a Permitted Borrowing.

39.4 **Method of Payment**

(a) The Authority will pay to PPP Co. the Termination Sum, on or before the date falling 60 days after the Notice Date unless it elects to pay in accordance with paragraph (b) below.

(b) The Authority may elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount (as relevant) element of the Termination Sum:

(i) in instalments, on the dates ("**Instalment Dates**") and in the amounts that PPP Co. would have been required to pay principal to the Senior Lenders (under the terms of the Senior Funding Agreements) had the Termination date not occurred; or

(ii) as the Parties may agree.

- (c) From the Notice Date until the date of payment, interest will accrue on any unpaid element of the Termination Sum at the Senior Debt Rate and be payable on the next occurring Instalment Date.
- (d) If the Authority has elected to pay in accordance with paragraph (b) above, it may (on 28 days prior written notice to PPP Co.) elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination sum in full on any Instalment Date.
- (e) If the Authority:
  - (i) fails to make a payment to PPP Co. in accordance with paragraphs (a) and/or (b) above; or
  - (ii) breaches Clause 48 (Assignment),

PPP Co. may issue a notice to the Authority declaring any unpaid and outstanding element of (as applicable) the Adjusted Estimated Fair Value of the Contract, the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum to be immediately due and payable.

- (f) The Authority will be entitled to rely on the certificate of the Senior Lenders Agent as conclusive as to the amount for the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount outstanding at any relevant time. The receipt of the Senior Lenders' Agent will discharge the Authority's obligation to pay any element of compensation due to PPP Co. that is equal to the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant).

### **39.5 Full and Final Settlement**

Any Termination Payment will be in full satisfaction of any claim which can be made against the Authority by PPP Co. in relation to Termination of this Project Agreement or any Project Document (and the circumstances leading to such termination). Any Termination Payment will be the sole remedy of PPP Co. in respect of such Termination.

### **39.6 Costs**

The costs and/or expenses to be taken into account in the calculation of any Termination Payment must be reasonable and proper and PPP Co. must take all reasonable steps to mitigate such costs and/or expenses.

## 39.7 Dispute

Any dispute relating to a Termination Payment will be determined in accordance with the Dispute Resolution Procedure.

## 40. HANDBACK<sup>34</sup>

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### <sup>34</sup> TREATMENT OF ASSETS ON EXPIRY OF SERVICE PERIOD

#### 31.1 Introduction

- (a) A distinction can be drawn between:
- ♦ Projects where the Project Facility will remain in the ownership of Authority at the end of the Term; and
  - ♦ Projects where residual value of the Project Facility is best transferred to PPP Co. These are generally generic Assets which have alternative use outside the public sector and for which there is no clear long-term public sector need (for example, office accommodation in areas where there is demand from other users, generic information technology systems and alternative land use).
- (b) “**Residual value**” means in the context of a PPP Project, the market value of the Assets associated with the Project at the time it expires. When the Project Agreement is signed, the residual value of the assets is not known. “Residual value risk” refers to the uncertainty as to what the residual value will prove to be. There will usually be some estimate of the approximately residual value to be expected, which may be factored into the overall financing structure of the Project.

#### 31.2 Assets where the Authority retains Residual Value on Expiry

- (a) In most PPP projects, the Authority’s long-term objectives will be best served by retaining ownership of the Project Facility and granting a licence only to PPP Co. for the sole purpose of performing its obligations under the Project Agreement. The TPA is drafted on the basis that the Project Facility remains in the ownership of the Authority. This may be because:
- ♦ the potential for renewal of a business lease under the Landlord and Tenant (Amendment) Act 1980. (See footnote 5 at Clause 6.1).
  - ♦ legal constraints prevent any practical alternative option, for example the private sector cannot be a roads authority so roads must revert to the public sector Authority;
  - ♦ contracts which involve Project Facilities, such as hospitals and schools, are specifically designed to cater for a particular service. In these sectors, the Project Facilities have a useful economic life if retained by the Authority but there is no realistic alternative use for the Project Facility. These may be only limited scope for alternative use on expiry of the Term and conversion is likely to be costly;
  - ♦ the Authority requires long-term use of the asset for the continued provision of its services; or
  - ♦ bidders are likely to discount the residual value of the assets.
- (b) Where the Authority remains the owner of the Project Facility at the end of the Term, the Authority should consider the extent to which it has recourse to PPP Co. if the condition of the Project Facility reveals that PPP Co. has not carried out all its contractual (for example, maintenance) obligations. This would not be necessary if Assets had reached the end of their useful economic life (as may be the case, for example, in equipment based projects).

#### 31.3 Transfer of Residual Value Risk

- (a) If the Authority does not need to own the Project Facility at the end of the Term and if transfer of residual value risk will enhance value for money, the Authority can pay a Unitary Charge which does not enable PPP Co. to cover the complete cost of financing its investment through the service payments it receives during the Term. PPP Co. instead has to rely on value being left in the Project Facility remaining on the Expiry Date or Termination Date to recover all such cost. This leaves some real risk with PPP Co. in relation to the residual value at the end of the Term.
- (b) The options exercisable by the Authority on the Expiry Date or Termination Date in relation to a Project Facility with an alternative use where PPP Co. is taking the residual value risk are:
- ♦ to take over the Project Facility, in which case a payment should be made to PPP Co.;
  - ♦ to retender the Service, in which case the successful contractor in the retendering exercise should make a payment to PPP Co. reflecting the value of the Project Facility; or
  - ♦ if the Authority has no further use for the Assets, to walk away at no further cost, leaving PPP Co. to realise their value.
- (c) Each option has real economic value to the Authority, as the NPV of the total payments made under the Project Agreement should be lower than if the residual value risk had been retained.

#### 31.4 Valuation of Terminal Payment on Expiry where Residual Value Risk has been Transferred



40.1 (a) **Handback Requirements**

On the Expiry Date, the Project Facility and all Assets that comprise the Project Facility will be in a condition which is:

- (i) consistent with compliance by PPP Co. with the terms of this Project Agreement; and
- (ii) consistent with the Project Facility and all Assets that comprise the Project Facility having been designed and constructed in accordance with the applicable design life requirements set out in Part [ ● ] of Schedule 3 (D&C Requirements),

together referred to as (the "**Handback Requirements**").

**ALTERNATIVELY, A SEPARATE DOCUMENT COMPRISING THE HANDBACK REQUIREMENTS MAY BE INCLUDED.**

(b) **First Handback Inspection**

Not less than [ ● ] before the Expiry Date, PPP Co. and the Authority's Representative will conduct a joint inspection of the Project Facility (the "**First Handback Inspection**").

(c) **Handback Work, Programme and Amount**

Within [ ● ] Business Days after the completion of the First Handback Inspection, if it is found that any element of the Project Facility is not in a condition consistent with the Handback Requirements, PPP Co. will forthwith provide to the Authority's Representative in accordance with Schedule 5 (Review Procedure):

(i) **Handback Works**

PPP Co.'s proposal as to the maintenance works (if any) (the "**Handback Works**") required to be carried out in respect of the Project Facility in order to procure that

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- (a) The two main options for determining amounts payable at the expiry of the Term in respect of Assets with an alternative use are:
    - ♦ the market value of the Assets in their existing use; and
    - ♦ an amount bid by PPP Co. when negotiating the original Project Agreement indexed through the duration of the Term.
  - (b) The market value of the Assets is the more valid basis for a payment to be made at the end of the Term. If, however, there is a possibility of an extraordinary increase in market value during the duration of the Project and the Assets are critical to the Authority's needs (i.e. the Service cannot be obtained without them) then a cap on the amount payable may be prudent (for example, to guard against excessively inflated property prices).
  - (c) The mechanism for arriving at the market value must be specified in the Project Agreement to avoid a dispute over the valuation. The final amount will reflect the condition of the Assets.

they will, on the Expiry Date, satisfy the Handback Requirements;

(ii) **Handback Programme**

PPP Co.'s proposal as to the programme (the "**Handback Programme**") for the carrying out of the Handback Works over the remainder of the Term; such programme will describe the total works to be carried out and the method of carrying out such works during the overall period in which the Handback Works are to be executed; and

(iii) **Handback Amount**

PPP Co.'s estimate of the cost of carrying out the Handback Works (the "**Handback Amount**").

40.2 The Authority's Representative may, within [ ● ] Business Days after receipt of the details set out in Clause 40.1(c) (Handback Requirements) from PPP Co., raise comments in accordance with Clause 3 of Schedule 5 (Review Procedure) on PPP Co.'s proposals and estimate referred to in Clause 40.1 (Handback Requirements) above.

40.3 (a) On agreement, or determination in accordance with Clause 44 (Dispute Resolution Procedure), of the Handback Works, the Handback Programme and/or the Handback Amount, PPP Co. will procure that the Handback Works are carried out in accordance with the Handback Programme.

(b) Within [ ● ] Business Days of the agreement (or determination in accordance with Clause 44 (Dispute Resolution Procedure)) envisaged in Clause 40.3 (Handback Requirements), [PPP Co. will procure the provision of a bond (the "Handback Bond") in favour of the Authority for an amount equal to the Handback Amount from a bank or insurance company authorised to carry out business in the United Kingdom] or [the Authority will deduct the Handback Amount from the remaining instalments of the Unitary Charge payable after such date in equal instalments and pay such amount into an interest bearing account (the "Retention Fund Account") until the Expiry Date].

(c) PPP Co. will carry out the Handback Works to the satisfaction of the Authority's Representative in accordance with Good Industry Practice and in accordance with the Handback Programme so as to meet the Handback Requirements.

40.4 (a) Not later than [ ● ] Business Days before the Expiry Date, PPP Co. and the Authority's Representative will conduct a joint inspection of the Project Facility. Such inspection will confirm

whether or not the condition of the Project Facility is in accordance with Clause 40.1(a) above (the “**Second Handback Inspection**”).

- (b) On, or within [ ● ] Business Days after, the Second Handback Inspection, the Authority's Representative will either:
  - (i) issue to PPP Co. a Handback Certificate [and return the Handback Bond to PPP Co.]; or [and reimburse PPP Co. the Handback Amount by withdrawing Funds from the Retention Fund Account; if the amount in the Retention Fund Account is insufficient to cover PPP Co.'s costs PPP Co. will bear the balance of its costs itself];
  - (ii) notify PPP Co. of its decision not to issue the Handback Certificate stating the reasons for such decision.
- (c) Any notice given by the Authority's Representative in accordance with Clause 40.4(b)(ii) (Handback Requirements) will set out each respect in which the Handback Works have not been completed or the Project Facility does not comply with the Handback Requirements and will state the Authority's Representative's estimate of the cost of procuring that the Project Facility complies in all respects with the Handback Requirements.
- (d) PPP Co. may, within [ ● ] Business Days after receipt of the notice given in accordance with Clause 40.4(b)(ii) (Handback Requirements) by notice to the Authority's Representative, object to any matter set out in the Authority's Representative's notice. The notice from PPP Co. will give details of the grounds of such objection and will set out PPP Co.'s proposals in respect of such matters.
- (e) If no agreement is reached between PPP Co. and the Authority's Representative as to any matter referred to in PPP Co.'s notice given in accordance with Clause 40.4(d) (Handback Requirements) within [ ● ] Business Days of receipt of that notice by the Authority's Representative, then either PPP Co. or the Authority's Representative may refer the matter for determination in accordance with Clause 44 (Dispute Resolution Procedure) as to:
  - (i) whether the Project Facility complies in all respects with the Handback Requirements; and
  - (ii) the estimated cost of procuring that the Project Facility complies in all respects with the Handback Requirements.

40.5 If it is agreed or determined in accordance with Clause 44 (Dispute Resolution Procedure) that the Handback Works have not been completed, at the Expiry Date, PPP Co. will pay to the Authority an amount equal to the estimated cost of completing such Handback Works [less the sum in the Retention Fund account] or [less such amount recoverable from the Handback Bond]. Such payment will be made not later than [ ● ] Business Days after the estimated cost has been agreed or determined and, upon such payment being received by the Authority, the Authority's Representative will issue the Handback Certificate [and return the Handback Bond to PPP Co].

40.6

(a) On or before a date falling [ ● ] months before the Expiry Date, the Authority will notify PPP Co. in writing whether it wishes:

(i) to retender the provision of the Services; or

(ii) PPP Co. to transfer all of its rights, title and interest in and to the Assets to the Authority.

(b) If the Authority wishes PPP Co. to transfer all of its rights, title and interest in and to the Assets to the Authority, PPP Co. will:

(i) vest or procure the vesting in the Authority (or in such third party as the Authority may nominate) of the legal and beneficial ownership in all PPP Co. Equipment (but excluding any Leased Equipment);

(ii) vest or procure the vesting in the Authority, (or in such third party as the Authority may nominate), of the legal and beneficial ownership in any stocks of consumables, spare parts or like materials used or intended to be used in the performance of any Service;

(iii) PPP Co. will not remove and will ensure and/or procure that no Sub-Contractor will remove any PPP Co. Equipment or other items referred to in Clause 40.6(b)(ii) (Handback Requirements) before the expiry of the period for serving a notice pursuant to Clause 40.6 (Handback Requirements) or following the service of such notice. Upon such notice being served, PPP Co. will use its best endeavours to procure that the benefit of all material documentation, including, without limitation, guarantees, warranties and service agreements relating to the PPP Co. Equipment is assigned to the Authority (or such third party as the Authority may nominate).

(iv) Any assets or rights which are to transfer or be assigned under this Clause 40.6(b)(i) or (ii) (Handback

Requirements) will be transferred or assigned free from all charges, mortgages, pledges, liens, Encumbrances or other securities in favour of third parties;

- (v) If the Authority does not serve a notice under Clause 40.6(b)(ii) (Handback Requirements), the relevant items will be made available for collection by PPP Co. within sixty (60) days of the date of the termination of this Project Agreement and if not removed within that period may be sold or otherwise disposed of by the Authority and the Authority will be the exclusive agent of the Operator empowered to sell all such items in the ownership of PPP Co. for that purpose;
  - (vi) In relation to any Leased Equipment the Authority will have the rights following service of a notice under Clause 40.6(b)(ii) (Handback Requirements) to require PPP Co. to transfer to the Authority (or such third party as the Authority may nominate), the benefit and burden of any or all of the leases or other agreements under which any Leased Equipment is used, subject to the Authority or such third party complying with all obligations arising to be performed thereunder following such assignment (save any arising or made more onerous by any failure to perform any obligation to be performed thereunder before such assignment). Such right will be exercisable by one or more written notices served by the Authority on PPP Co. provided such notice or notices is/are served within thirty (30) Working Days following termination of this Project Agreement.
- (c) (i) If the Authority wishes to retender the provision of the Services then:
- (A) the retendering will be carried out on the basis that the Authority will contract with a successor operator to provide the Services on and from the Expiry Date; and
  - (B) PPP Co. will do all necessary acts (including any and all of the acts referred to in Clause 40.6(b) (Handback Requirements) to ensure that the successor contractor obtains all of its rights, title and interest in and to the Assets from the Expiry Date.
- (ii) Subject to Clause 52 (Confidentiality) and in order to assist the Authority with the retendering process, PPP Co. will give the Authority full access to such of its records and books of account as the Authority will

reasonably request and will permit third parties duly authorised by the Authority reasonable access to inspect and view the Project Facility.

- (d) PPP Co. will bear its own costs incurred under all parts of this Clause 40 (Handback) including, without limitation, all fees, costs or other expenses payable so as to enable PPP Co. to perform its obligations under this Clause 40 (Handback).

## **PART 13<sup>35</sup> – COMPENSATION EVENTS, RELIEF EVENTS AND FORCE MAJEURE**

### **41. COMPENSATION EVENTS**

41.1 If as a direct result of the occurrence of a Compensation Event:

- (a) PPP Co. is unable to achieve Service Commencement on or before the Target Commencement Date; and/or
- (b) PPP Co. is unable to comply with its obligations under this Project Agreement; and/or
- (c) PPP Co. believes that it should be compensated for any Losses, it may have suffered or incurred;

then PPP Co. is entitled to apply for an extension of the Target Completion Date and/or relief from its obligations and/or compensation under this Project Agreement.

41.2 If PPP Co. claims relief or compensation or an extension of time under Clause 41.1 above, it must:

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<sup>35</sup> PPP Co. undertakes to ensure Service Commencement usually by a particular fixed date and to continue to provide the Service for the duration of the Project Agreement. There may, however, be circumstances in which PPP Co. should fairly be relieved from liability for failure to commence or provide the Service. A balance must be struck between encouraging PPP Co. to manage the risk and protecting the Authority from non-performance.

Supervening events for which some relief is appropriate should be divided into three categories:

- Compensation Events – i.e. events which are clearly at the Authority's risk and in respect of which PPP Co. should be compensated;
- Relief Events – i.e. events which are best managed by PPP Co. (although not necessarily in its control) and for which PPP Co. bears the financial risk, but in respect of which no rights of termination should arise; and
- Force Majeure Events – a limited set of events which arise through no fault of either Party, which are best managed by PPP Co. (although not in its control) and in respect of which rights of termination can arise.

The distinction between Compensation Events and Relief Events is sometimes expressed as being the difference between PPP Co. being given 'time and money' and 'time' only.

Certain events may be dealt with differently in specific projects, depending on the nature of the Project, the likelihood of the event occurring and the value for money obtainable if PPP Co. prices the risk of such event occurring into its price. Given the effect on the Authority of adding risks to Compensation Events, this should only be done after careful consideration in specific cases. For example, in a project in which the Authority use means that delays during the construction phase are a high risk, the Authority may accept that the event leading to such increased risk should be a Compensation Event. In a project where such risks do not exist, the Parties may agree that a Relief Event is the way to deal with that risk. An alternative way of dealing with the risk of discovery of fossils or antiquities during the construction phase, which lies somewhere between the Compensation Event and Relief Event approach, is for PPP Co. to bear a pre-determined initial level of loss (both financial and in terms of delays to the construction timetable), as defined in the Project, with further losses above that prescribed level being shared by the Parties in accordance with an agreed formula.

- (a) as soon as practicable, and in any event within twenty-one (21) days of it becoming aware that the Compensation Event has caused or is likely to cause delay and/or breach of an obligation and/or Loss to PPP Co., give to the Authority a notice of its claim for an extension of the Target Completion Date, relief from its obligations, and/or payment of compensation and will provide sufficient details of the Compensation Event to enable the Authority to identify the nature and extent of the Compensation Event; and
  - (b) within fourteen (14) days after the notice referred to in Clause 41.2(a) (Compensation Events), give full details of the Compensation Event and the extension and/or any Estimated Increased Project Costs claimed and demonstrate to the reasonable satisfaction of the Authority that:
    - (i) the Compensation Event was the direct cause of the Estimated Increased Project Costs and/or any delay in the progress of the Works; and
    - (ii) the Estimated Increased Project Costs, the time lost and/or breach of PPP Co.'s obligations could not reasonably be expected to be mitigated or recovered by PPP Co. acting in accordance with Good Industry Practice.
- 41.3 Subject to PPP Co. complying with Clause 41.2 (Compensation Events) and such matters being agreed or otherwise being determined by the Dispute Resolution Procedure then:
- (a) the Target Completion Date will be extended by such time as will be reasonable in respect of such a Compensation Event, taking into account the likely effect of delay;
  - (b) the Authority will not be entitled to exercise its rights in respect of the Compensation Event to terminate this Project Agreement under Clause 33 (Termination for PPP Co. Default);
  - (c) the Authority will give PPP Co. such relief from its obligations under this Project Agreement as is reasonable for such a Compensation Event; and
  - (d) the Authority will pay to PPP Co. an amount equal to the Estimated Increased Project Costs within [thirty (30)] days of such costs being incurred or such losses being suffered and upon receipt of a written demand by PPP Co. supported by all relevant information.
- 41.4 In the event that the notice is received after the date in Clause 41.2(a) (Compensation Event) or the information is provided after the date in Clause 41.2(b) (Compensation Event) then PPP Co. will not be entitled

to any extension of time, payment or relief from its obligations under this Project Agreement in respect of the period during which the notice or information (as appropriate) was not provided.

- 41.5 If the Parties cannot agree the Estimated Increased Project Costs, an appropriate extension of the Target Completion Date or the extent of the relief required, or the Authority does not agree that a Compensation Event has occurred, (or its consequences), the Parties will resolve the matter in accordance with Clause 44 (Dispute Resolution Procedure).

## 42. **RELIEF EVENTS**<sup>36</sup>

- 42.1 If as a direct result of the occurrence of a Relief Event:

- (a) PPP Co. is unable to achieve Service Commencement of the Works on or before the Target Commencement Date; or
- (b) PPP Co. is unable to comply with its obligations under this Project Agreement,

then PPP Co. is entitled to apply for an extension to the Target Commencement Date and/or (subject to Clause 42.4 (Relief Event)) relief from its obligations under this Project Agreement.

- 42.2 If PPP Co. claims relief under Clause 42.1 (Relief Event), it must:

- (a) as soon as practicable, and in any event within fourteen (14) days of it becoming aware that the Relief Event has caused or is likely to cause delay and/or a breach of an obligation, give to the Authority a notice of its claim for an extension of the Target Commencement Date and/or relief from its obligations and provide sufficient details of the Relief Event to enable the Authority to identify the nature and extent of the Relief Event; and
- (b) within five (5) Business Days after the notice referred to in Clause 42.2(a) (Relief Event) above give full details of the Relief Event, the date of its occurrence and its likely duration and demonstrate to the reasonable satisfaction of the Authority that:

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<sup>36</sup> Relief Events are events which prevent performance by PPP Co. of its obligations at any time, in respect of which PPP Co. bears the financial risk in terms of increased costs and reduced revenue but for which it is given relief from termination for failure to provide the full Service. The events listed in the TPA may be outside PPP Co.'s control, but that is not the appropriate measure of whether an event should appear on the list, as many events beyond a person's control at the time they occur could in fact have been prevented by proper precautions (e.g. fire). In fact, the list of events has been arrived at because the risk of the events concerned occurring is better borne by PPP Co. as it is in a better position than the Authority to mitigate and manage the consequences. In some cases this will be with insurance, in other with a combination of insurance and proper planning and in others still, by risk management and planning (i.e. the events can be worked around for the period they exist).

It is clear in most cases that termination should not follow a Relief Event. This is because any replacement PPP Co. would be similarly affected and so the Authority's position would not be improved by Termination. Relief Events do not, however, require the same treatment as Force Majeure Events as their consequences are not likely to be as severe and will usually only last for a finite period.



- (i) PPP Co. (and/or any of its Sub-contractors) could not reasonably have foreseen the occurrence or consequences of the relevant Relief Event and could not reasonably have avoided such occurrence by steps which it might reasonably be expected to have taken without incurring material expenditure;
- (ii) the Relief Event directly caused the delay in achieving Certification before the Target Commencement Date or the breach by PPP Co. of its obligations under this Project Agreement; and
- (iii) the time lost and/or breach of the PPP Co.'s obligations could not reasonably be expected to be mitigated or recovered by PPP Co. acting in accordance with Good Industry Practice without it incurring material expenditure; and
- (iv) PPP Co. is using all reasonable endeavours to perform its obligations under this Project Agreement.

42.3 Subject to complying with the notice requirement in Clause 42.2(a) (Relief Event), PPP Co. demonstrating the matters set out in Clause 42.2(b) (Relief Event) then:

- (a) (if relevant) the Target Commencement Date will be extended by such time as will be reasonable for such a Relief Event, taking into account the likely effect of delay;
- (b) the Authority will not be entitled to exercise its rights to terminate this Project Agreement under Clause 33 (Termination for PPP Co. Default); and/or
- (c) subject to Clause 42.4 (Relief Event), PPP Co. will have such relief from its obligations under this Project Agreement as is reasonable for such a Relief Event.

42.4 Nothing in Clause 42.3 (Relief Event) above will affect any entitlement of the Authority to make Performance Deductions and/or Availability Deductions provided that Performance Deductions and/or Availability Deductions that arise due to Relief Events will not be aggregated for the purposes of calculating the termination triggers in Clause 33.1(h) (PPP Co. Default).

42.5 In the event that the notice or information required under Clauses 42.2(a) (Relief Event) and 42.2(b) (Relief Event) respectively is provided after the date referred to in such paragraphs then PPP Co. will not be entitled to any relief in respect of the period during which the notice or information (as appropriate) was delayed.

- 42.6 If the Parties cannot agree the period of time by which the Target Completion Date will be postponed or the extent of the relief required, or the Authority does not agree that a Relief Event has occurred, (or its consequences), the Parties will resolve the matter in accordance with Clause 44 (Dispute Resolution Procedure).

43. **FORCE MAJEURE<sup>37</sup>**

The provisions of Clause 36 (Termination for Force Majeure) will apply on the occurrence of a Force Majeure Event.

**PART 14 – DISPUTE RESOLUTION**

44. **DISPUTE RESOLUTION PROCEDURE**

- 44.1 Any Dispute arising in relation to any aspect of this Project Agreement or the Project will, except where otherwise specifically provided, be subject to the provisions of this Clause 44 (Dispute Resolution Procedure).

44.2 **Resolution through Liaison**

- (a) If a Dispute arises in relation to this Project Agreement or the Project, PPP Co. and the Authority (being represented by their Representatives) will use their best endeavours to resolve the Dispute within ten (10) Business Days.
- (b) If any Dispute is resolved by the Representatives pursuant to Clause 44.2(a) (Resolution through Liaison) a written memorandum, (a “**Memorandum of Resolution**”), will be prepared jointly and signed by both Representatives. The Memorandum of Resolution will confirm that the resolution is in full and final settlement of the Dispute and will record all matters in issue and all material factual details of the Dispute and the terms of resolution and a copy will be supplied to both PPP Co. and the Authority.
- (c) If the Representatives fail to resolve any Dispute pursuant to Clause 44.2(a) (Resolution through Liaison) with ten (10) Business Days of the referral of the Dispute for resolution under Clause 44.2(a) (Resolution through Liaison), either Party may refer the Dispute to an adjudicator (the “**Adjudicator**”) appointed in accordance with Clause 44.3 (Adjudication), (the “**Adjudication Referral**”). The referral will be in the form of a memorandum, (a “**Memorandum of Referral**”), prepared jointly and signed by the Representatives. If the

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<sup>37</sup> The purpose of force majeure provisions is to give the Affected Party relief from liability and, if the event continues for a certain period, to give the parties an opportunity to terminate the Project Agreement. The definition of Force Majeure Event should only include events which, unlike Relief Events, are likely to have a catastrophic effect on either Party’s ability to fulfil its obligations under the Project Agreement. In practice, such events are highly unlikely to occur. As neither party is likely to be in a better position than the other to manage either the occurrence or the effects of force majeure, and the events may continue for a long period of time, such events are given a different treatment from Relief Events and the financial consequences shared.

Representatives are unable to agree the form of the Memorandum of Referral within five (5) Business Days of the date upon which they failed to resolve the relevant Dispute either or both of them may submit a Memorandum of Referral pursuant to this Clause 44.2 (Resolution through Liaison). The Memorandum of Referral will record all matters in issue and the material factual details of the Dispute.

#### 44.3 **Adjudication**

- (a) As soon as reasonably practicable and before the longstop dates referred to in this Clause 44.3(a)(i) to (iv) (Adjudication), the Parties will jointly appoint a panel of experts, (the **“Adjudication Panel”**), which will be comprised of four (4) experts, one (1) of whom will be competent to adjudicate in relation to matters of a construction nature, (the **“Construction Expert”**), one (1) of whom will be competent to adjudicate upon matters concerning Service issues, (the **“Service Expert”**), one (1) of whom will be competent to adjudicate upon matters relating to financial matters, (the **“Financial Expert”**), and one (1) who will be competent to adjudicate upon legal matters, (the **“Legal Expert”**). The Parties will ensure that:
  - (i) the Construction Expert is appointed within sixty (60) days from the Commencement Date;
  - (ii) the Service Expert is appointed before the Certification Date;
  - (iii) the Financial Expert is appointed within eighty (80) days from the Commencement Date;
  - (iv) the Legal Expert is appointed within eighty (80) days from the Commencement Date; and
  - (v) in the event that the Parties will fail to appoint any expert to the Adjudication Panel on or before the relevant dates referred to in this Clause 44.3(a) (Adjudication), the matter will be referred to the Chairman for the time being of the Chartered Institute of Arbitrators - Irish Branch, who will nominate the required expert(s). The Parties will then appoint such nominee(s) to the Adjudication Panel.
- (b) Each member of the Adjudication Panel will:
  - (i) be wholly independent of PPP Co., the Authority and any relevant Sub-Contractor;

- (ii) be appointed in writing and confirmation of his agreement to act in accordance with this Clause 44.3 (Adjudication) will be secured in writing;
  - (iii) if any member of the Adjudication Panel resigns, dies or becomes seriously ill or unavailable for any significant period at any time during the course of his appointment, PPP Co. and the Authority will jointly appoint a replacement expert to the Adjudication Panel as soon as practicable; and
  - (iv) if the Authority and PPP Co. are unable to agree on the identity of any replacement expert to be appointed to the Adjudication Panel or as to whether any Adjudication Referral should be made to the Construction Expert, the Service Expert, the Financial Expert or the Legal Expert, then the expert will be appointed by the Adjudication Panel or a determination made by the Adjudication Panel as to which expert is the most appropriate to adjudicate the Adjudication Referral, within twenty (20) Business Days of a written request by either Party.
- (c) Within five (5) Business Days of his appointment in relation to any Dispute the Adjudicator will require the Parties to submit in writing their respective arguments. The Parties in making their claims will in their response to the Adjudicator provide all supporting evidence relating to the Dispute. The Adjudicator will, in his absolute discretion, decide whether a hearing is necessary in order to resolve the Dispute. The Adjudicator will be master of his own proceedings and will have the power to call for such additional documents and evidence from the Parties as he will, in his absolute discretion, require.
- (d) In any event, the Adjudicator will provide to both Parties his written decision on the Dispute, within twenty (20) Business Days of the relevant Adjudication Referral, (or such other period as the Parties may unanimously agree). The Adjudicator will state his reasons for his decision at the same time that he provides the Parties with his written decision.
- (e) Unless and until the Dispute is finally determined by arbitration or by a written agreement between the Parties, the Adjudicator's decision will be binding on both Parties, who will forthwith give effect to the decision. If either Party does not comply with the Adjudicator's decision, the other may bring legal proceedings to secure such compliance.
- (f) The Adjudicator's costs arising out of any Adjudication Referral will be borne as the Adjudicator will specify or, in default, equally by the Parties. Save where otherwise

determined by the Adjudicator, each Party will bear its own costs arising out of the Adjudication Referral, including legal costs and costs and expenses of any witnesses.

- (g) The Adjudicator will be deemed not to be an arbitrator but will render his decision as an expert and the provisions of the Arbitration Acts 1954 to 1998 and the law relating to arbitration will not apply to the Adjudicator or his determination or the procedure by which he reached his determination.
- (h) The Adjudicator will act impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator will have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Project Agreement. He may use his own knowledge and experience. He may visit the Site or the Project Facility. He may, (acting reasonably), require the Parties to submit any information, or to conduct tests, and the Parties will do so. He may, having first notified the Parties as to likely costs, obtain from other persons information and advice, including information and advice on relevant legal and technical matters.
- (i) All information, data or documentation disclosed or delivered by a Party to the Adjudicator or to another party in consequence of or in connection with the appointment of the Adjudicator will be treated as confidential, but may be offered as evidence in any subsequent court proceedings. The Adjudicator will not, save as permitted by Clause 52 (Confidentiality) of this Project Agreement, disclose to any person, (other than the Parties), any such information, data or documentation and all such information, data or documentation will remain the property of the Party disclosing or delivering the same and all copies will be returned to such Party on completion of the Adjudicator's work. All communications between the Adjudicator and a Party will be copied to the other Party.
- (j) The Adjudicator will not be held liable for anything done or omitted in the discharge or purported discharge of his function as adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator will be similarly protected from liability.

#### **44.4 Consideration of Sub-Contractor Disputes**

- (a) If any Dispute arising under this Project Agreement raises issues which relate to:
  - (i) any Dispute between PPP Co. and D&C Co. arising under the D&C Contract or otherwise affects the

relationship or rights of PPP Co. and/or D&C Co. under the D&C Contract, (**“D&C Contract Dispute”**);

- (ii) any Dispute between PPP Co. and O&M Co. arising under the O&M Contract or otherwise affects the relationship or rights of PPP Co. and/or O&M Co. under the O&M Contract, (an **“O&M Contract Dispute”**);

then PPP Co. may include as part of its submissions made to the Adjudicator pursuant to the Adjudication Referral, submissions made by D&C Co. or O&M Co., as appropriate.

- (b) Any submissions made pursuant to Clause 44.4(a) (Consideration of Sub-Contractor Disputes) will:

- (i) be made within the time limits applicable to the delivery of submissions by PPP Co.; and
- (ii) concern only those matters which relate to the Dispute between the Authority and PPP Co. under this Project Agreement or the Project.

- (c) In any Adjudication Referral where submissions include submissions made by D&C Co. or O&M Co., the Adjudicator's costs will be borne, (as between PPP Co. and the Authority) as the Adjudicator will specify, or in default, one half by the Authority and one half by PPP Co. Save where otherwise determined by the Adjudicator, each Party will bear its own costs arising out of the Adjudication Referral, including legal costs and costs and expenses of any witness.

- (d) The Authority will have no liability to any D&C Co. or O&M Co. arising out of or in connection with any decision of the Adjudicator pursuant to any Adjudication Referral or in respect of the costs of any D&C Co. or O&M Co. in participating in the resolution of any Dispute under this Project Agreement.

- (e) PPP Co. will not allow any D&C Co. or O&M Co. access to any document relevant to the issues in Dispute between the Authority and PPP Co. save where:

- (i) the document is relevant also to the issues relating to the D&C Contract Dispute or the O&M Contract Dispute as the case may be; and
- (ii) the evidence able to be presented by the D&C Co. or O&M Co. relating to such document is relevant to the issues which are the subject of the Dispute between PPP Co. and the Authority; and

- (iii) PPP Co. has delivered to the Authority a written undertaking from D&C Co. or O&M Co., (as appropriate), addressed to the Authority that they will not use any such document otherwise than for the resolution of the relevant Dispute pursuant to this Clause 44.4 (Consideration of Sub-Contractor Dispute) and that they will not disclose such documents or any information contained therein to any person other than the Adjudicator or any professional adviser engaged by D&C Co. or O&M Co., (as appropriate), to advise in connection with the Dispute.

#### **44.5 Final resolution**

- (a) Unless the Parties have agreed that the Adjudicator's decision will be final, either Party may refer the Dispute to arbitration in accordance with Clause 44.5(d) below (Final Resolution).
- (b) If the Parties have agreed that the Adjudicator's decision will be final, or if neither Party refers the Dispute to arbitration in accordance with Clause 44.5(d) (Final Resolution) the Adjudicator's decision will be final and binding on both Parties.
- (c) If a Dispute is referred to arbitration under Clause 44.5(d) (Final Resolution) the Adjudicator's or Parties' costs which either Party has incurred in the preceding Adjudication Referral will be open to the arbitrator to redetermination as the arbitrator thinks fit.
- (d) At any time, within 15 Business Days after both Parties have received the decision of the Adjudicator together with his reasons pursuant to Clause 44.3(d) (Adjudication), the Dispute may be referred by either Party, on notice to such effect in writing to the other Party, for determination by a person with appropriate expertise as the Parties may agree to appoint as arbitrator, or failing agreement within ten (10) Business Days of the date of such notice, to a person with appropriate expertise as may be appointed at the request of either Party by the Chairman called for the time being of the Chartered Institute of Arbitrators, Irish Branch.
- (e) Any such dispute referred to arbitration pursuant to Clause 44.5(d) (Final Resolution) will be deemed to be a submission to arbitration in accordance with the Arbitration Acts, 1954 - 1998 or any Act amending same. The award of the arbitrator will be final and binding on the Parties, and will be the sole and exclusive remedy between the Parties regarding any claims, counterclaims, issues, or accountings presented to the arbitrator except the following cases:

- (i) where there has been misconduct by the arbitrator;
  - (ii) where there has been an error on the face of an award;
  - (iii) where the arbitrator has made a mistake in drawing up his award;
  - (iv) where new substantial relevant evidence was discovered after the making of the award;
  - (v) where it is considered to be inequitable to allow the award to take effect without some further consideration;  
or
  - (vi) where the arbitrator or award has been improperly procured.
- (f) Judgement upon any award may be entered in any court having jurisdiction. The arbitrators' costs and the Parties' cost will be borne as the arbitrator will specify or, in default, the arbitrators' costs will be borne equally by the Parties and each Party will bear its own costs including legal costs and costs and expenses of any witnesses.
- (g) This Project Agreement and the rights and obligations of the Parties will remain in full force and effect pending the award in any arbitration proceeding hereunder.
- (h) If the Dispute to be referred to arbitration under this Project Agreement raises issues which are substantially the same as or connected with issues raised in related disputes between any Party to this Project Agreement and any other person and if the related dispute has already been referred for determination to an arbitrator, the Parties agree that the arbitrator appointed under this Project Agreement will have power to make such directions and all necessary awards in the same way as if the procedure of the High Court as to joining one or more Defendants or co-joining Defendants or Third Parties was available to the Parties and to him.

#### **44.6 Continuing obligations**

The Parties will continue to comply with their respective obligations in accordance with this Project Agreement without interruption during any Adjudication or arbitration proceedings.

#### **44.7 Fast Track Procedure**

- (a) If the Fast Track Procedure applies:
  - (i) Clause 44.2 (Resolution through Liaison) will not apply;



- (ii) either Party may immediately refer the matter to an Adjudicator by issuing a Memorandum of Referral as set out in Clause 44.2 (Resolution through Liaison); and
  - (iii) the Dispute will be dealt with pursuant to Clause 44.3 (Adjudication) except that references to 20 Business Days will be replaced by 10 Business Days.
- (b) The Fast Track Procedure will apply to any Dispute contemplated under the following provisions/schedules of this Project Agreement (**AMEND AS APPROPRIATE TO The PROJECT**):
  - (i) Clause 12.1 (Final Commissioning Programme);
  - (ii) Clause 12.8 (Certificate of Commencement);
  - (iii) Clause 18.2 (Planned Maintenance Programme)
  - (iv) Clause 24.7 (Disputed Invoices);
  - (v) Schedule 15 (Payment Mechanism)
  - (vi) Clause 8 (Design Review Procedure); and
  - (vii) Clause 47.6 (Refinancing); and
  - (viii) any other provision which expressly provides for the Fast Track Procedure to apply or where either Party request that the Fast Track Procedure should be used and the other Party consents, such consent not be unreasonably withheld or delayed.

## **PART 15 – INSURANCE, INDEMNITIES AND REFINANCING**

### **45. INSURANCE**

#### **45.1 Insurance - General<sup>38</sup>**

- (a) PPP Co. will, prior to the Service Commencement Date, take out and maintain or procure the maintenance of the insurances described in Part 1 of Schedule 23 (Required Insurance) and any other insurances as may be required by law. The Required Insurances must be effective in each case not later than the date on which the relevant risk commences.
- (b) PPP Co. will during the Service Period take out and maintain or procure the maintenance of the insurances described in Part 2

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<sup>38</sup> Clause 45.1(a) and (b) will need to be amended where there is retained estate or in the case of transitional periods and such circumstances will also need to be reflected in Schedule 23.

of Schedule 23 (Required Insurance) and any other insurances as may be required by law.

- (c) No party to this Project Agreement will take any action or fail to take any reasonable action, or (insofar as it is reasonably within in 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 additional insured person.
- (d) With the exception of any insurances required by Law and [Employers Liability Insurance<sup>39</sup>] the Required Insurance will:
  - (i) subject to Clause 45.1(e) below, name PPP Co. as co-insured with any other party maintaining the relevant Required Insurance;
  - (ii) provide for non-vitiation protection in respect of any claim made by the Authority as co-insured in accordance with Endorsement 2 in Part 3 of Schedule 23;
  - (iii) contain a clause waiving the insurers' subrogation rights against the Authority, its employees and agents in accordance with Endorsement 2 in Part 3 of Schedule 23;
  - (iv) provide for thirty (30) days prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with Endorsement 1 in Part 3 of Schedule 23 to the extent that the Authority has an insurable interest; and
  - (v) in respect of the Physical Damage Policies provide for payment of any proceeds to be made by insurers in accordance with Clause 45.2 (Reinstatement).
- (e) Wherever possible, and where stipulated in Schedule 23 (Required Insurances) the Required Insurance will name the Authority as a co-insured for its separate interest.
- (f) PPP Co. will provide to the Authority:
  - (i) copies on request of all Required Insurance policies referred to in paragraphs 45.1(a) or 45.1(b) (together with any other information reasonably requested by the Authority relating to such insurance policies) and the

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<sup>39</sup> Insurances that are normally required by law will be provided by way of existing insurance arrangements of the PPP Co., the principal sub-contractors and the Professional Team. This may also be the case in respect of Employers Liability Insurance and should be reflected in the drafting on a project by project basis.]

Authority will be entitled to inspect them during ordinary business hours; and

- (ii) 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 requirement of this Clause 45 (Insurance) and Schedule 23 (Required Insurance).
- (g) Evidence of renewal of policies in relation to the Required Insurance which is satisfactory to the Authority will be forwarded to the Authority as soon as possible but in any event on or before the renewal date.
- (h) If PPP Co. is in breach of Required Insurance, the Authority may pay any premiums required to keep such insurance in force or itself procure such insurance and may in either case recover any premiums and other reasonable costs from PPP Co. on written demand.
- (i) PPP Co. will give Authority notification within 30 days after any claim in excess of €[ <sup>40</sup> ] on any of the insurance policies referred to in this Clause accompanied by full details of the incident giving rise to the claim.<sup>41</sup>
- (j) Neither failure to comply nor full compliance with the insurance provisions of this Project Agreement will limit or relieve PPP Co. of its liabilities and obligations under this Project Agreement.
- (k) The Required Insurance will be effected with insurers which have been approved in advance by the Authority, such approval not to be unreasonably withheld or delayed.
- (l) The insurance premiums and the payment of deductibles in respect of the Required Insurance will be the responsibility of PPP Co., subject to Clause 45.7 (Insurance Premium Risk-Sharing).

#### 45.2 Reinstatement

- (a) All insurance proceeds received under Physical Damage Policies will be applied to repair, reinstate and replace each part

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<sup>40</sup> To be determined by Authority on a project by project basis.

<sup>41</sup> The claims de minimis should reflect a level considered material for the project but should pay cognisance to the Maximum Deductibles in Schedule 23. There may be circumstances (e.g. for reputational reasons) where the Authority may wish to be advised of all death/injury claims and all property damage claims above a de minimis. Equally there may be circumstances where the Authority, for contract management purposes, would wish to be supplied with claims details and reports (e.g. quarterly). The clause should be amended as required subject to project specific circumstances.

or parts of the assets in respect of which the proceeds were received.

- (b) All insurance proceeds paid under any Physical Damage Policy in respect of a single event (or a series of related events) in an amount in excess of €[minimum level]<sup>42</sup> (Indexed) will be paid into the Joint Insurance Account.
- (c) Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the (“**Relevant Incident**”)) in an amount in excess of €[the same figure as in paragraph 45.2(b) above] (Indexed):
  - (i) PPP Co. will deliver as soon as practicable and in any event within 28 days after the making of the claim, a plan prepared by PPP Co. for the carrying out of the works necessary (“**Reinstatement Works**”) to repair, reinstate or replace (the “**Reinstatement Plan**”) the assets which are the subject of the relevant claim or claims in accordance with paragraph (d) below. The Reinstatement Plan will set out:
    - (A) if not D&C Co., the identity of the person proposed to effect the Reinstatement Works, which will be subject to the prior written approval of the Authority; and
    - (B) the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which will be subject to the prior written approval of the Authority which approval will not be unreasonably delayed;
  - (ii) provided that the Authority is satisfied that the Reinstatement Plan will enable PPP Co. to comply with paragraph (d) below within a reasonable timescale:
    - (A) the Reinstatement Plan will be adopted;
    - (B) PPP Co. will enter into contractual arrangements approved by the Authority to effect the Reinstatement Works with the person identified in the approved Reinstatement Plan;

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<sup>42</sup> The Reinstatement Plan and Joint Account threshold should reflect a material and significant property damage loss. This will need to be determined on a project by project basis with due regard to the sums insured at risk and Maximum Deductible levels in Schedule 23. This also applies to Clauses 45.2(b) and 45.2(c).

- (C) prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Joint Insurance Account (the “**Relevant Proceeds**”) (together with any interest accrued) may be withdrawn by PPP Co. from the Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in paragraph (ii)(B) above, and to meet any other reasonable costs and expenses of PPP Co. for the sole purposes of funding the Reinstatement Works and the Parties will operate the signatory requirements of the Joint Insurance Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Authority may withdraw amounts standing to the credit of the Joint Insurance Account for the purposes of funding any Reinstatement Works;
  - (D) the Authority agrees and undertakes that, subject to compliance by PPP Co. with its obligations under this Clause 45.2 (Reinstatement), and provided that PPP Co. procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in paragraph (ii) (B), it will not exercise any right which it might otherwise have to terminate this Project Agreement by virtue of the Relevant Incident;
  - (E) the Authority undertakes to use reasonable endeavours to assist PPP Co. in carrying out the Reinstatement Plan;
  - (F) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with paragraph (d) below the Authority will permit withdrawal by PPP Co. of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under paragraph (ii)(C) above, in respect of the Relevant Incident, together with any interest accrued; and
  - (G) subject to the provisions of Clause 46 (Indemnities) PPP Co. will be solely responsible for the payment of any deficiency.
- (d) Where insurance proceeds are to be used, in accordance with this Project Agreement, to repair, reinstate or replace any Asset,

PPP Co. will carry out the work in accordance with the D & C Requirements so that on completion of the work, the provisions of the Project Agreement are complied with.

#### **45.3 Unavailable Terms and Conditions**

- (a) If, upon the renewal of any Required Insurance which the PPP Co is required to maintain or to procure the maintenance of pursuant to this Project Agreement:
  - (i) any Insurance Term is not available to PPP Co. in the worldwide insurance market with reputable insurers of good standing; and/or
  - (ii) 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 Ireland, (other than, in each case, by reason of one or more actions by PPP Co. and/or any Sub-Contractor) if it is agreed or determined that Clause 45.3(a) applies then the Authority will waive PPP Co.'s obligations in Clause 45.1 (Insurance – General) and/or Schedule 23 (Required Insurance) in respect of that particular Insurance Term and PPP Co. will not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Project Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in Clause 45.3(a) continue to apply to such Insurance Term.
- (b) 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 PPP Co. in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address PPP Co.'s inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in Ireland are (at such time) generally prepared to pay, PPP Co. will maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition. Notwithstanding any other provision of this Project Agreement, the costs of such insurance will be subject to the premium costs sharing mechanism set out at Clause 45.7 (Insurance Premium Risk-Sharing).
- (c) PPP Co. will notify the Authority as soon as reasonably practicable and in any event within five days of becoming

aware that Clause 45.3(a)(i) and/or Clause 45.3(a)(ii) 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). PPP Co. will provide the Authority with such information as the Authority reasonably requests regarding the unavailability of the Insurance Term and the Parties will meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.

- (d) In the event that Clause 45.3(a)(i) and/or Clause 45.3(a)(ii) apply in respect of an Insurance Term, (irrespective of the reasons for the same) PPP Co. will approach the insurance market at least every four months to establish whether Clause 45.3(a)(i) and/or Clause 45.3(a)(ii) remain applicable to the Insurance Term. As soon as PPP Co. is aware that Clause 45.3(a)(i) and/or Clause 45.3(a)(ii) has ceased to apply to the Insurance Term, PPP Co. will take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Project Agreement.

#### **45.4 Risk that became uninsurable**

Nothing in this Clause 45.4 will oblige PPP Co. 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 PPP Co. or any Sub-Contractor.

- (a) If a Risk usually covered by [construction “all risks” insurance, delay in start up insurance (but not loss of profits), construction third party liability insurance, property damage “all risks” insurance, business interruption insurance (but not loss of profits), third party public/products liability insurance, employers liability insurance or statutory insurance]<sup>43</sup> in each case required under this Project Agreement becomes Uninsurable then:
  - (i) PPP Co. will notify the Authority on becoming aware of such Uninsurability but in any event, at least five (5) Business Days before the expiry or cancellation of any existing insurance in respect of that Risk; and
  - (ii) if both Parties agree, or it is determined in accordance with Clause 44 (Dispute Resolution) that the Risk is Uninsurable and that:

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<sup>43</sup> The extent of uninsurability relief will need to be reviewed on a project by project basis depending on the Required Insurances for each project.

- (A) the Risk being Uninsurable is not caused by the actions or omissions of PPP Co. or any Sub-Contractors; and
- (B) PPP Co. has demonstrated to the Authority that PPP Co. and a prudent board of directors of a company operating the same or substantially similar PPP businesses in Ireland [and elsewhere in the European Union]<sup>44</sup> to that operated by PPP Co. would in similar circumstances (in the absence of the type of relief envisaged by this clause) 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 Risk occurring (if it has not already occurred), the financial consequences for such company if such Risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company,

the Parties will meet to discuss the means by which the Risk should be managed (including considering the issue of self-insurance by either Party).

- (b) If the requirements of paragraph (a) are satisfied, but the Parties cannot agree as to how to manage the Risk, then:
  - (i) in respect of third party liability insurance only the Authority will (at the Authority's option) either pay to PPP Co. an amount equal to the amount calculated in accordance with the Compensation on Termination set out in Part 3 of Schedule 17 (Compensation on Termination for Force Majeure, Uninsurable Risk and Change in Law) and the Project Agreement will terminate, or elect to allow the Project Agreement to continue and paragraph (ii) below will thereafter apply in respect of such Risk; and
  - (ii) in respect of [contractors "all risks" insurance, property damage "all risks" insurance, third party liability insurance (if the Authority elects to allow the Project Agreement to continue in accordance with Clause 45.4(b)(i)), delay in start up and business interruption insurance (but not loss of profits), employers liability

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<sup>44</sup> The extent of the applicable market will require to be considered on a project by project basis.



insurance or statutory insurances]<sup>45</sup> the Project Agreement will continue and on the occurrence of the risk (but only for as long as such Risk remains Uninsurable) the Authority will (at the Authority's option) either pay to PPP Co. an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and the Project Agreement will continue, or an amount equal to the amount calculated in accordance with the Compensation on Termination set out in Part 3 of Schedule 17 (Compensation on Termination for Force Majeure, Uninsurable Risk and Change in Law) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable to PPP Co. whereupon the Project Agreement will terminate.

- (c) Where pursuant to Clauses 45.4(b)(i) and/or Clause 45.4(b)(ii) this Project Agreement continues then the Unitary Charge will be reduced in each year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by PPP Co. in respect of the relevant Risk in the year prior to it becoming Uninsurable (Indexed from the date that the Risk becomes Uninsurable). Where the risk is Uninsurable for part of a year only the reduction in the Unitary Charge will be pro rated to the number of months for which the risk is Uninsurable;
- (d) Where pursuant to Clauses 45.4(b)(i) and/or Clause 45.4(b)(ii) this Project Agreement continues PPP Co. will approach the insurance market at least every four months to establish whether the Risk remains Uninsurable. As soon as PPP Co. is aware the Risk is no longer Uninsurable, PPP Co. will take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Project Agreement;
- (e) If, pursuant to Clause 45.4(b)(ii) the Authority elects to seek to terminate the Project Agreement and as a result of which election would become liable to pay to PPP Co. Compensation on Termination in accordance with Part 3 of Schedule 17 (Compensation on Termination for Force Majeure, Uninsurable Risk and Change in Law) (the "Relevant Payment"), PPP Co. will have the option (exercisable in writing within (20) 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 relevant Risk not become

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<sup>45</sup> See footnote 43.

Uninsurable, in which case the Project Agreement will continue (and the Relevant Payment will not be made by the Authority), and PPP Co.'s payment will 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.

- (f) In respect of any period between the Authority receiving notification in accordance with Clause 45.4(a)(i) that a third party liability risk has become Uninsurable and the Authority notification to PPP Co in accordance with Clause 45.4(b)(ii) in respect of such Risk, then provided it is ultimately agreed or determined that the requirements of 45.4(a)(ii) are satisfied in respect of the Uninsurable third party liability Risk and subject to 45.4(e) above, Clause 45.4(b)(ii) shall apply in respect of occurrences of the Uninsurable third party liability Risk during such period unless the parties otherwise agree how to manage the Risk during this period; and
- (g) Clause 45.4(f) shall only apply provided PPP Co does not unreasonably or materially delay:
  - (i) agreement and/or determination in accordance with the Dispute Resolution Procedure as to whether the requirements of Clause 45.4(a)(ii) are satisfied in respect of the Uninsurable third party liability Risk; and/or
  - (ii) meeting with the Authority to discuss the means by which the Risk should be managed.

#### **45.5 Savings**

Neither failure to comply nor full compliance with the insurance provisions of this Project Agreement will limit or relieve PPP Co. of its liabilities and obligations under this Project Agreement and in particular PPP Co.'s obligation to hold the Authority harmless in compliance with any indemnity provisions contained in this Project Agreement.

#### **45.6 Broker's Letter of Undertaking**

Prior to or on the Commencement Date, PPP Co. will procure and furnish to the Authority a letter of undertaking, substantially in the form of the letter of undertaking contained in Part 4 of Schedule 23 (Required Insurance), addressed to the Authority and signed by a reputable broker appointed by PPP Co. in connection with the procurement of the Required Insurances. PPP Co. will similarly procure and furnish to the Authority such a letter of undertaking from any replacement broker appointed by PPP Co. during the Term.

#### **45.7 Insurance Premium Risk-Sharing**

- (a) The Insurance Review Procedure will be used to determine whether the Authority will bear any increase or benefit from any decrease in Relevant Insurance costs.
- (b) PPP Co.'s insurance broker will prepare a report on behalf of both PPP Co. and the Authority (the "**Joint Insurance Cost Report**"). The Joint Insurance Cost Report is to be prepared at PPP Co.'s expense, and should, as a minimum, contain the following information for the relevant Insurance Review Period:
  - (i) a full breakdown of the Actual Relevant Insurance Cost;
  - (ii) a full breakdown of the Base Relevant Insurance Cost;
  - (iii) a spreadsheet (the "**Insurance Summary Sheet**") detailing separately:-
    - (A) the sum(s) insured / limit of indemnity (i.e. rateable factor) for each of the Relevant Insurances;
    - (B) the premium rate for each of the Relevant Insurances;
    - (C) the net premium paid (or to be paid) for each of the Relevant Insurances (i.e. excluding both insurance premium levy and brokers fees and commissions);
    - (D) the deductible(s) for each Relevant Insurance;
    - (E) details of any claims (paid or reserved) including incident date, type and quantum;
  - (iv) an assessment and quantification of each Project Insurance Change together with the reasons therefore;
  - (v) full details of any Portfolio Cost Saving;
  - (vi) any other reasons that PPP Co. believes may have caused a change (by way of increase or decrease relative to the Base Relevant Insurance Costs) in the Actual Relevant Insurance Cost;
  - (vii) the opinion of PPP Co.'s insurance broker as to the reasons why the Actual Relevant Insurance Cost has varied from the Base Relevant Insurance Cost, specifying the impact of each of the factors and quantifying the amount attributable to each factor specified above;

- (viii) the calculation of the Insurance Cost Differential and any Exceptional Cost of Exceptional Saving arising from this calculation; and
  - (ix) evidence satisfactory to the Authority (acting reasonably) of any changes to circumstances generally prevailing in the Relevant Insurance Market that are claimed to account for the Insurance Cost Differential; and
  - (x) details of movements in the CBS Private Capital non marine index<sup>46</sup> plus, if available from other appropriate sources, details of changes in insurance cost across the PPP and PFI market as a whole.
- (c) PPP Co. will procure that its insurance broker, no later than the date which is ten (10) Business Days after the Insurance Review Date, delivers to the Authority, at the same time as it delivers to PPP Co., at least two copies of the Joint Insurance Cost Report. Following receipt of the Joint Insurance Cost Report, the Authority will notify PPP Co. in writing within fifteen (15) Business Days whether or not it accepts the Joint Insurance Cost Report including full details of any disagreement. If the Authority does not provide such notification and/or details of any disagreement to PPP Co. within fifteen (15) Business Days, the Authority will be deemed to have accepted the Joint Insurance Cost Report. If the Authority disagrees with any item in the Joint Insurance Cost Report, the Parties will use their respective reasonable endeavours acting in good faith to agree the contents of the Joint Insurance Cost Report. If the Parties fail to agree the contents of the Joint Insurance Cost Report within thirty five (35) Business Days from the date it was delivered to the Authority, the matter will be resolved pursuant to Clause 44 (Dispute Resolution Procedure).
- (d) If, following completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Cost, the Authority will within thirty (30) days of completion of the Insurance Review Procedure make a one-off lump-sum payment to PPP Co. equal to 85% of the Exceptional Cost.
- (e) If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is an

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<sup>46</sup> CBS Private Capital (CBSPC) is a Lloyd's members' agent, specialising in the provision of advisory and administrative services to private and corporate capital providers underwriting in the Lloyd's insurance market. CBSPC uses syndicate analysts to undertake market research and, as part of its activities, maintains an index of insurance cost changes across the main asset classes. The CBSPC Market Rate Index was the first index of its kind, specifically focusing on the Lloyd's insurance market. It was started in 1994 and tracks the rate movements in the four main Lloyd's markets. The index was re-launched in 2005 when it was rebased to 1997, enabling investors to gauge where they are in the insurance cycle. The CBSPC non marine index may be assessed via the following web address:- <http://www.cbs-lloyds.co.uk/cgi-bin/mri/FileReader.pl>

Exceptional Saving, PPP Co. will within thirty (30) days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Authority equal to 85% of the Exceptional Saving.

- (f) Following the completion of the Insurance Review Procedure, if it is agreed or determined that there is neither an Exceptional Cost nor an Exceptional Saving, any Insurance Cost Differential will be borne by or benefit PPP Co.

#### 45.8 [Professional Indemnity Insurance]<sup>47</sup>

Except for Clause 45.1 (Insurance – General) the previous provisions of this Clause 45 (Insurance) shall not apply to professional indemnity insurance (“**PI Insurance**”) and in respect of PI Insurance the PPP Co. undertakes to, (and agrees to procure the D&C Co. and members of the Professional Team undertake to) from the Commencement Date:

- (a) provide evidence satisfactory to the Authority (as and when reasonably required by the Authority) of the PI Insurance being in full force and effect from the Commencement Date until the date [twelve (12)] years from and including the [Final] Services Commencement Date (such evidence to include details of the cover) including confirmation of territorial limits, indemnity limit which shall be a minimum limit of cover of €[ ● ] million for an occurrence or series of occurrences arising out of each and every event in respect of the Professional Team members and a minimum limit of cover of € [● ] million [for each and every occurrence] [in the aggregate, on an annual basis] respect of D&C Co;
- (b) provide the Authority with copies of all notices under the PI Insurance relevant to the Project;
- (c) provide the Authority with notice of:
  - (i) any cancellation of the PI Insurance not less than twenty (20) Business Days prior to the relevant cancellation date;
  - (ii) any material changes to or suspension of cover relevant to the Project not less than twenty (20) Business Days prior to the relevant change or suspension;
  - (iii) any relevant of which it becomes aware, or of which it could reasonably be expected to become aware, which may vitiate the PI Insurance;

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<sup>47</sup> The extent to which Professional Indemnity Insurance should be a compulsory insurance (as opposed to a Required Insurance) and the terms thereof will need to be determined on a project by project basis and relevant to the breach of professional duty exposure of the PPP Co. and/or Principal sub-contractors or Professional Team.

- (iv) any act, omission or event which may adversely affect the terms and scope of the PI Insurance relevant to the Project or invalidate or render it unenforceable;
- (d) provide such information to the Authority as the Authority may reasonably require in relation to any claim or circumstance notified to it under the PI Insurance in respect of the Project and any potential breach of the aggregate limit of the policy;
- (e) disclose to the relevant insurers:
  - (i) any matters which could reasonably be expected to be material in the context of the Project; and
  - (ii) any of the other insurances required to be maintained under this Clause 45 (Insurance);
- (f) include the interests (if any) of the Authority in any claim or circumstances notified under the PI Insurance relevant to the Project and provide a copy of such notification to the Authority

#### 46. **INDEMNITIES**

46.1 PPP Co. will, subject to Clause 46.2, be responsible for, and will release and indemnify the Authority, its employees, agents and contractors on demand from and against, all liability for:

- (a) death or personal injury;
- (b) loss of or damage to property (including property belonging to the Authority or for which it is responsible "Authority Property");
- (c) breach of statutory duty; and
- (d) actions, claims, demands, costs, charges and expenses (including legal

expenses on an indemnity basis),

which may arise out of, or in consequence of, the design, construction, operation or maintenance of the Assets or the performance or non-performance by PPP Co. of its obligations under this Project Agreement or the presence on the Authority's property of PPP Co., a Sub-Contractor, their employees or agents.

46.2 PPP Co. will not be responsible or be obliged to indemnify the Authority for:

- (a) any of the matters referred to in Clauses 46.1(a) to (d) above which arises as a direct result of PPP Co. acting on the instruction of the Authority;
- (b) any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Authority, its employees, agents or contractors or by the breach by the Authority of its obligations under this Project Agreement; or
- (c) any claims made under Clause 46.1(b) in excess of [ ● ].

#### **46.3 Savings**

PPP Co.'s liability to the Authority arising under any indemnity in this Project Agreement will be without prejudice to any other right or remedy available to the Authority and will be without limitation to any indemnity by PPP Co. under any other provision of this Project Agreement.

#### **46.4 Conduct of Claims Subject to PPP Co.'s Indemnities**

- (a) If the Authority receives any notice, demand, letter or other document concerning any Claim from which it appears that the Authority is or may become entitled to indemnification under this Project Agreement, the Authority will give notice in writing to PPP Co. as soon as reasonably practicable.
- (b) Subject to the following provisions of this Clause 46.4, on the giving of a notice pursuant to Clause 46.4(a), PPP Co. will be entitled to and will resist the Claim in the name of the Authority at its own expense and will have the conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations, and the Authority will give PPP Co. all reasonable co-operation, access and assistance for the purposes of considering and resisting such Claim.
- (c) With respect to any Claim being resisted by PPP Co. in accordance with Clause 46.4(b):
  - (i) PPP Co. will keep the Authority fully informed and consult with it about the conduct of the Claim;
  - (ii) to the extent that the Authority is not entitled to be indemnified by PPP Co. for all of the liability arising out of the act or omission which is the subject of the Claim, no action will be taken pursuant to Clause 46.4(b) which will increase the amount of any payment to be made by the Authority in respect of that part of the Claim which is not covered by the indemnity from PPP Co.; and

- (iii) PPP Co. will not pay or settle such Claim without the consent of the Authority (such consent not to be unreasonably withheld), provided that such consent will not be required to the settlement of any action if the amount of the Claim to issue does not exceed €[ ● ] (ten thousand euro) Indexed.
- (d) Subject to complying with the provisions of the relevant Required Insurance, the Authority will be free to pay or settle any Claim on such terms as it may, in its absolute discretion, think fit and without prejudice to its rights and remedies under this Project Agreement (including, without limitation, Clause 46.1)
  - (i) within 20 (twenty) Business Days of the issue date of the notice from the Authority under Clause 46.4(a) PPP Co. fails to notify the Authority of its intention to dispute the Claim; or
  - (ii) PPP Co. fails to comply in any material respect with the provisions of Clause 46.4(c)
- (e) Subject to complying with the provisions of the relevant Required Insurance, the Authority will be free at any time to give notice to PPP Co. that it is taking over the conduct of any defence, dispute, compromise or appeal of any Claim subject to Clause 46.4(b) or of any incidental negotiations. Upon receipt of such notice PPP Co. will promptly take all steps necessary to transfer the conduct of such Claim to the Authority and will provide to the Authority all reasonable co-operation, access and assistance for the purposes of considering and resisting such Claim. If the Authority gives any notice pursuant to this Clause 46.4(e), then PPP Co. will be released from its indemnity in respect of such Claim save where such notice was given as a consequence of the failure of PPP Co., in the opinion of the Authority (acting reasonably), to deal properly with any such Claim.

## 47. **REFINANCING**<sup>48</sup>

- 47.1 PPP Co. will obtain the Authority's prior written consent to any Qualifying Refinancing and both the Authority and PPP Co. will at all times act in good faith with respect to any Refinancing.
- 47.2 The Authority will be entitled to receive a 50 per cent share of any Refinancing Gain arising from a Qualifying Refinancing in relation to Senior Funding Agreements and a [ ● ]% share of any Refinancing Gain arising from a Qualifying Refinancing in relation to Junior Debt Documents.

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<sup>48</sup> PPP to bid refinancing share in respect of Junior Debt subject to a floor of 50%.



- 47.3 The Authority will not withhold or delay its consent to a Qualifying Refinancing to obtain a greater than 50 per cent share of the Refinancing Gain arising in relation to Senior Funding Agreements and/or a [ ● ]% share of any Refinancing Gain arising in relation to Junior Debt Documents.
- 47.4 PPP Co. will promptly provide the Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Authority will (before, during and at any time after the Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with that Refinancing (whether that Refinancing is a Qualifying Refinancing or not).
- 47.5 The Authority will have the right to elect to receive its share of any Refinancing Gain as:
- (a) a single payment;
  - (b) a reduction in the Unitary Charge over the remaining Term; or
  - (c) a combination of any of the above.
  - (d) such other form as may be agreed between the Parties.
- 47.6 The Authority and PPP Co. will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Authority's share of the Refinancing Gain (taking into account how the Authority has elected to receive its share of the Refinancing Gain under Clause 47.5 above). If the Parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Authority's share, the dispute will be determined in accordance with Clause 44 (Dispute Resolution).
- 47.7 The Refinancing Gain will be calculated after taking into account the reasonable and proper professional costs that each party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Authority will be paid to the Authority by PPP Co. within 20 Business Days of any Qualifying Refinancing.

## **PART 16 – ASSIGNMENT, CHANGE IN OWNERSHIP AND SUB-CONTRACTING**

### **48. ASSIGNMENT**

- 48.1 Subject to Clause 48.2 (Assignment) no Party may assign, novate or transfer or create or allow to subsist any encumbrance, trust or interest in the benefit and burden of the Project Agreement without the prior consent in writing of the other Party, provided that such consent will

not be required where any assignment is by way of security to the Funder pursuant to and in accordance with the Funding Agreements.

48.2 The Authority may transfer the benefit and burden of this Project Agreement to any Minister of State or to any local, regional or state authority which has the legal capacity and credit status (either alone or with evidenced government financial support) sufficient to enter into and meet the obligations under this Project Agreement as they fall due.

48.3 To the extent that the transferee under Clause 48.2 (Assignment) is not a Minister of the State, the Authority will provide details of the proposed transferee together with supporting information in relation to its legal capacity and credit status. The benefit and burden of this Project Agreement may be transferred to the proposed transferee notwithstanding that there may be a dispute regarding its legal capacity or credit status pursuant to Clause 48.2 (Assignment). Pending agreement or determination of the legal capacity or credit status of the transferee in such circumstances the Authority will be responsible for ensuring that the payment obligations of the transferee pursuant to this Project Agreement are met.

#### 49. **CHANGE IN OWNERSHIP**

##### 49.1 **PPP Co. Warranty**

PPP Co. warrants and represents to the Authority that the legal and beneficial ownership of the Shareholders at the Commencement Date is as set out in Schedule 19 (PPP Co. and its Shareholders).

##### 49.2 **Prior Authority Consent Required**

PPP Co. will procure that save where the prior written consent of the Authority has been obtained there will be no:

- (a) Change in Ownership any time prior to issue of the Certificate of Commencement; or
- (b) Restricted Share Transfer at any time during the Term of this Agreement.

##### 49.3 **Prior Authority Consent not Required**

Prior written consent of the Authority is not required for any Change in Ownership after Service Commencement unless it is a Restricted Share Transfer. PPP Co. must, however, inform the Authority of any Change in Ownership within [ ● ] Business Days of such change.

49.4 For the purpose of this Clause 49 (Change in Ownership), the following will be disregarded:

- (a) any change in beneficial or legal ownership of any shares that are listed on a recognised stock exchange (being for this purpose, the Irish Stock Exchange Limited, London Stock Exchange plc, or such other stock exchange as may be agreed from time to time by the Parties);
- (b) any transfer of shares or of any interest in shares by a person to its Associated Company;
- (c) any transfer of shares or of any interest in shares by way of security pursuant to the Funding Agreements or by way of enforcement of such security; and
- (d) a re-organisation for bona fide fiscal purposes where the ultimate control of PPP Co. does not change provided the Authority has been given prior notice in writing of such re-organisation.

49.5 For the purposes of a Change in Control under this Clause 49 (Change in Control), shareholdings of persons under common control or who, in the reasonable opinion of the Authority, are acting in concert, may be disregarded by the Authority.

## 50. SUB-CONTRACTING

50.1 The Authority hereby consents to PPP Co. sub-contracting to the Principal Sub-Contractors on the terms of the Principal Sub-Contracts.

50.2 Subject to Clause 25.4 (Market Testing Procedure), PPP Co. will not replace any of the Principal Sub-Contractors nor appoint any person to provide the whole or any part of any Service which is the subject of any Principal Sub-Contract without the prior written consent of the Authority. Such consent must be given within ten (10) Business Days of the Authority's Representative receiving sufficient information to make an informed decision on the matter. Such consent must not be withheld on grounds other than that the Authority's Representative reasonably believes that:

- (a) the appointment of the proposed substitute Principal Sub-Contractor will breach or is likely to bring about a breach of any Law; and/or
- (b) the proposed substitute Principal Sub-Contractor does not have legal capacity or credit status sufficient to enter into and meet the obligations under this Project Agreement as they fall due; and/or
- (c) the appointment would be regarded by a Relevant Authority or by the public at large as detrimental to users of the Project Facility (and [students] [patients] [in-mates] in particular),

and in any event such proposed substitute Principal Sub-Contractor must enter into a direct agreement with the Authority substantially in the form of the Collateral Agreements.

- 50.3 PPP Co. will remain responsible to the Authority for all its obligations under this Project Agreement and no consent given by the Authority to the appointment of any Principal Sub-Contractor will relieve PPP Co. from its obligations under this Project Agreement.
- 50.4 PPP Co. will use its best endeavours to ensure that all Sub-Contractors undertake to comply with the Equal Status Act, 2000 and to comply with the Employment Equality Act, 1998 (as amended by the Equal Status Act, 2000) and are not unqualified persons as defined in the Employment Equality Act, 1998.
- 50.5 PPP Co. will be responsible to the Authority for the management and supervision of all Sub-Contractors (whether employed directly or indirectly by it) including the Principal Sub-Contractors and for the acts, omissions and neglects of its Sub-Contractors (whether employed directly or indirectly by it) or their employees and agents as if they were the acts, omissions and neglects of PPP Co. (irrespective of whether any Sub-Contractor has entered into any direct agreement with the Authority).
- 50.6 All Principal Sub-Contracts to which the Authority gives its consent pursuant to Clause 50.2 (Sub-Contracting) will include terms for their assignment and/or novation to the Authority or to the Authority's nominee (in either case at the Authority's election) on Termination of this Project Agreement.
- 50.7 PPP Co. will deliver to the Authority within ten (10) Business Days of the same having been signed or otherwise executed by the relevant parties thereto a copy of each Principal Sub-Contract and of any material amendment (made in accordance with this Project Agreement) of any of the Principal Sub-Contracts.
- 50.8 PPP Co. will not without the prior written consent of the Authority, (such consent not to be unreasonably withheld or delayed), make any material alteration or amendment to any Principal Sub-Contract or other Project Document (other than to reflect a Change).
- 50.9 PPP Co. will ensure that the terms of the Principal Sub-Contracts are such that the provisions of such Principal Sub-Contracts will not contain any terms which would have the effect of depriving the Authority (or any nominee pursuant to the D&C Direct Agreement or the O&M Direct Agreement) of all or a substantial part of the benefit of any such novated or transferred contract, and further, will not contain any terms imposing on the Authority (or any nominee pursuant to the D&C Direct Agreement or the O&M Direct Agreement) obligations which are more onerous than those imposed on PPP Co.

- 50.10 PPP Co. will procure that, before their appointment, the Principal Sub-Contractors, together with every Sub-Contractor of every tier, has provided to PPP Co. evidence that they hold and maintain Tax Clearance Certificates. The Authority's Representative will be entitled to inspect and make copies of all such evidence.
- 50.11 PPP Co. will fully indemnify the Authority against all Losses arising as a result of any failure by PPP Co. to comply with Clause 50.9 (Sub-Contracting), including any claims made against the Authority by any counterparties to any such Principal Sub-Contracts concerning any breach by PPP Co. of such Principal Sub-Contracts, where such breach occurred before the effective date of novation or transfer (as the case may be) of such Principal Sub-Contracts.

## **PART 17 – MISCELLANEOUS**

### **51. VISITORS**

- 51.1 PPP Co. will be responsible for the safety and protection of all visitors to the Project Facility, and for the maintenance of security in the Project Facility when visitors are given access to the Project Facility for whatever purpose.
- 51.2 The Authority reserves the right, acting reasonably, to refuse to admit any visitor whose presence is deemed not to be in the interests of the Authority.

### **52. CONFIDENTIALITY**

- 52.1 Each Party will treat as confidential all information obtained as a result of entering into or performing this Project Agreement which relates to:
- (a) the provisions of this Project Agreement;
  - (b) the tender procedure negotiations relating to this Project Agreement;
  - (c) [CONSIDER ON A PROJECT SPECIFIC BASIS INFORMATION THAT NEEDS TO BE PROTECTED – STUDENT INFO, PATIENT INFO, EMPLOYEE INFO, ETC];
  - (d) the other Party.

This clause will not apply in the circumstances described in Clause 52.2 (Confidentiality).

- 52.2 Either Party may disclose information which would otherwise be confidential:
- (a) if and to the extent required by Law or for the purpose of any judicial inquiry or proceedings;

- (b) if and to the extent required by any securities exchange or regulatory or governmental body to which that Party is subject, wherever situated, including (amongst other bodies) the Irish Stock Exchange, whether or not the requirement for information has the force of law;
- (c) if and to the extent necessary or desirable to enable a determination to be made under Clause 44 (Dispute Resolution Procedure);
- (d) to its professional advisers, auditors and bankers;
- (e) if and to the extent the other party has given prior written consent to the disclosure; or
- (f) if and to the extent the information has come into the public domain through no fault of that Party.
- (g) any provision of information to the Funder or the Funder's professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to PPP Co. to enable it to carry out its obligations under this Project Agreement, to that person but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- (h) any registration or recording of any Necessary Consents and property registration.

52.3 Where disclosure is permitted under Clause 52.2 (Confidentiality), PPP Co. will ensure the recipient of the information will be subject to the same obligation of confidentiality as that contained in this Project Agreement.

52.4 The restrictions contained in this clause will continue to apply for a period of [five years] after the termination of the Project Agreement.

### **53. PUBLIC RELATIONS AND PUBLICITY**

53.1 Subject to the provisions of Clause 52 (Confidentiality), the Authority reserves the right to publish information about the Project (other than financial and/or economic information which PPP Co. and/or the Funder (acting reasonably) indicates is confidential or commercially sensitive information) as they may deem appropriate from time to time. The Authority will also be entitled to provide copies and details of the Project Agreement to any Relevant Authority for the purpose of compiling precedents.

53.2 PPP Co. will not, by itself, its servants, agents or Sub-Contractors, communicate with the press, television, radio or other media on, or otherwise use information on, any matter concerning the Project

without the prior approval of the Authority, (not to be unreasonably withheld or delayed).

- 53.3 No facilities to photograph or film upon any property used in relation to the Project will be given or permitted by PPP Co. unless the Authority have given their prior written approval.

**54. NO AGENCY**

PPP Co. will at all times be an independent contractor, and nothing in this Project Agreement will be construed (and PPP Co. will not hold out its relationship) as constituting a partnership, joint venture, representation, agency or employer and employee relationship between the Authority and PPP Co. or any of PPP Co.'s or Sub-Contractors' employees.

**55. NOTICES**

- 55.1 Subject to Clause 55.2 (Notices), any notice or other communication under this Project Agreement will only be effective if it is in writing.

- 55.2 Communication by electronic mail or other electronic methods of writing will not be effective under this Project Agreement unless confirmed within twenty four (24) hours by fax or other hard copy.

- 55.3 Each notice given or made by PPP Co. to the Authority must be unconditional and signed by PPP Co. Representative.

- 55.4 Any notice or other communication given or made under this Project Agreement will be addressed as provided in Schedule 12 (Representatives) and, if so addressed, will, in the absence of earlier receipt, be deemed to have been duly given or made as follows:

- (a) if sent by personal delivery, on delivery at the address of the relevant party;
- (b) if sent by pre-paid post, two clear Business Days after the date of posting;
- (c) if sent by facsimile, when transmitted.

- 55.5 Any notice or other communication given or made, or deemed to have been given or made, outside Business Hours will be deemed not to have been given or made until the start of the next period of Business Hours.

- 55.6 A Party may notify the other Party of a change to its notice details. That notification will only be effective on:

- (a) any effective date specified in the notification; or
- (b) if no effective date is specified or the effective date specified is less than five (5) clear Business Days after the date when notice

is received, the date falling five (5) clear Business Days after the notification has been received.

55.7 Notwithstanding any other provisions of this Clause 55 (Notices), the following notices may only be served by hand and the server must obtain a signed receipt:

- (a) Rectification Notice;
- (b) Termination Notice;
- (c) [ ● ]; and
- (d) [ ● ].

## **56. CUSTODY OF THE FINANCIAL MODEL**

56.1 Immediately on execution of this Project Agreement, two copies of the Financial Model and two copies of the Financial Model CD-Rom will be lodged by PPP Co. (after verification of the identity of the Financial Model on behalf of the Authority) with the Custody Holder to be held in custody upon the terms set out in the Custody Agreement.

56.2 The parties will agree the identity of the Custody Holder, the terms of the Custody Agreement and the identity of a substitute custodian in the event that the Custody Holder ceases to act, failing which either Party may refer the matter for resolution in accordance with the provisions of Clause 44 (Dispute Resolution Procedure).

56.3 PPP Co. will promptly lodge with the Custody Holder (or the substitute custodian) two copies of any revisions to the Financial Model in accordance with the terms of this Project Agreement, to be held in custody upon the terms set out in the Custody Agreement.

56.4 The cost of these custody arrangements will be met by PPP Co.

## **57. DATA PROTECTION**

57.1 In relation to all Personal Data, the Parties will at all times comply with their respective obligations under the Data Protection Acts 1988 and 2003, as a data controller if necessary, including maintaining a valid and up-to-date registration under the Data Protection Acts 1988 and 2003 covering the data processing to be performed in connection with the Works and Services or the obligations of each Party under this Project Agreement.

57.2 The Authority, PPP Co. and any Sub-Contractor will only undertake processing of Personal Data reasonably required in connection with the Works and Services and in compliance with Law and none of these shall process any personal data for any other purpose.



- 57.3 Neither Party will disclose Personal Data to any third parties other than:
- (a) to employees and Sub-Contractors to whom such disclosure is reasonably necessary in order for PPP Co. to carry out the Works and Services; or
  - (b) to the extent required under a court orders provided that disclosure under Clause 57.3(a) (Data Protection) is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this Clause 57 (Data Protection) and that PPP Co. will give notice in writing to the Authority of any disclosure of Personal Data it or a Sub-Contractor is required to make under Clause 57.3(b) (Data Protection) immediately it is aware of such a requirement.
- 57.4 Each Party will bring into effect and maintain all reasonable technical and organisational security measures necessary to comply with Section 2 of the Data Protection Acts 1988 and 2003 so as to prevent unauthorised or unlawful processing of Personal Data and accidental loss or unauthorised alteration or destruction of, or damage to, Personal Data including, but not limited to, taking reasonable steps to ensure the reliability of Staff having access to the Personal Data.
- 57.5 Each Party may, at reasonable intervals, request a written description of the measures employed by the other referred to ensure compliance with Clause 57.4 (Data Protection). Within twenty (20) Business Days of such a request, the relevant Party will supply written particulars of all such measures detailed to a reasonable level such that the receiving Party can determine whether or not, in connection with the Personal Data, the other Party is complying its obligations.
- 57.6 Where a data subject exercises his or her rights under the Data Protections Acts 1988 and 2003 in respect of Personal Data processed by a Party pursuant to this Agreement or where a party acting as a data controller is required to deal or comply with any assessment, enquiry, notice or investigation by the Data Protection Commissioner, then the other Parties will co-operate as requested by the data controller in question to enable the data controller to comply with all obligations of the data controller which arise as a result of the exercise of such rights or as a result of such assessment, notice or investigation.
- 57.7 Each Party will indemnify and keep indemnified the other Party against all Losses incurred by it in respect of any breach of this Clause 57 (Data Protection) by that Party and/or any act or omission of any Sub-Contractor or that Party.

## **58. COSTS AND EXPENSES**

Except as otherwise expressly stated in this Project Agreement, each Party will pay its own costs and expenses in relation to the negotiation, preparation,

execution and implementation of this Project Agreement and all other Project Documents.

**59. FINANCIAL STANDING OF PPP CO.**

**59.1 PPP Co.'s Sole Remedy**

PPP Co.'s sole remedy (whether under contract, at common law or equity) for breach or termination of this Project Agreement will be a Compensation Payment.

**59.2 Authority's Sole Remedy**

Subject to:

- (a) any express right of the Authority under this Project Agreement; and
- (b) the Authority's right to claim, on or after termination of this Project 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 Project Agreement by PPP Co., save to the extent that the same has already been recovered by the Authority pursuant to this Project Agreement or has been taken into account in the calculation of a Compensation Payment;
- (c) the Authority's sole remedy for failure by PPP Co. to provide the Services in accordance with the Project Agreement will be through the Operation of Schedule 15 (Payment Mechanism).

**60. WAIVER**

60.1 No delay or omission by any party to this Project Agreement in exercising any right, power or remedy provided by law or under this Project Agreement will:

- (a) affect that right, power or remedy; or
- (b) operate as a waiver of it.

60.2 The exercise or partial exercise of any right, power or remedy provided by law or under this Project Agreement will not preclude any other or further exercise of it or the exercise of any other right, power or remedy.

**61. SEVERABILITY**

If at any time any provision of this Project Agreement is or becomes illegal, invalid or unenforceable in any respect under Law, that will not affect or impair the legality, validity or enforceability of any other provision of this Project Agreement.

**62. ENTIRE AGREEMENT**

- 62.1 For the purposes of this clause, “Pre-contractual Statement” means a draft agreement, undertaking, representation, warranty, promise, assurance or arrangement of any nature whatsoever, whether or not in writing, relating to the Project made or given by a party to the Project Agreement or any other Project Documents or any other person at any time before the Commencement Date.
- 62.2 The Project Agreement and [CONSIDER OTHER DOCUMENTS ON A PROJECT SPECIFIC BASIS] constitutes the whole and only agreement between the parties relating to the Project.
- 62.3 Except to the extent repeated in and incorporated into this Project Agreement, the Project Agreement and [CONSIDER OTHER DOCUMENTS ON A PROJECT SPECIFIC BASIS] supersedes and extinguishes any Pre-contractual Statement.
- 62.4 Each Party acknowledges that in entering into this Project Agreement and [ ● ] it is not relying upon any Pre-contractual Statement which is not incorporated into this Project Agreement and [ ● ].
- 62.5 No Party will have any right of action against any other Party to this Project Agreement arising out of or in connection with any Pre-contractual Statement (except in the case of fraud) except to the extent repeated in or incorporated into this Project Agreement and [ ● ].

**63. VARIATION**

This Project Agreement may only be varied in writing (excluding electronic methods of writing) signed by each of the Parties.

**64. LANGUAGE**

- 64.1 Each notice, demand, request, statement, instrument, certificate or other communication under or in connection with this Project Agreement will be:
- (a) in English; or
  - (b) if not in English, accompanied by an English translation made by a translator, and certified by an officer of the party giving the notice to be accurate.
- 64.2 The receiving party will be entitled to assume the accuracy of and rely upon any English translation of any document provided pursuant to Clause 64.1(b) (Language).

**65. COUNTERPARTS**

65.1 This Project Agreement may be executed in any number of counterparts, and by the parties on separate counterparts, but will not be effective until each Party has executed at least one counterpart.

65.2 Each counterpart will constitute an original of this Project Agreement, but all the counterparts will together constitute but one and the same instrument.

**66. GOVERNING LAW**

This Project Agreement will be governed by and construed in accordance with the laws of Ireland.

**67. JURISDICTION**

67.1 Each of the Parties to this Project Agreement irrevocably agrees that the courts of Ireland are to have exclusive jurisdiction to settle any dispute arising out of or in connection with this Project Agreement and, for such purposes, irrevocably submits to the exclusive jurisdiction of such courts. Any proceeding, suit or action arising out of or in connection with this Project Agreement (the "Proceedings") will therefore be brought in the courts of Ireland.

67.2 Each of the Parties to this Project Agreement irrevocably waives any objection to Proceedings in the courts referred to in Clause 67.1 (Jurisdiction) on the grounds of venue or on the grounds of forum non-coveniens.

**68. WAIVER OF IMMUNITY**

If the Authority or its assets are entitled to any immunity from service of process or other documents relating to Proceedings, or to any immunity from jurisdiction, suit, judgment, execution, attachment or legal process, this is irrevocably waived to the fullest extent permitted. The Authority also irrevocably agrees not to claim any such immunity for itself or its assets.

IN WITNESS of which this document has been executed and delivered as a deed on the date which [first] appears on page [ ● ] above.

***Company Incorporated in Ireland***

The Common Seal of [ ● ]  
was affixed in the presence of:

\_\_\_\_\_  
Director

\_\_\_\_\_  
Director/Secretary

Signature of witness:

\_\_\_\_\_

Name:

\_\_\_\_\_

Address:

\_\_\_\_\_

\_\_\_\_\_

Occupation:

\_\_\_\_\_

***Attorney (under Power of Attorney)***

Signed, sealed and delivered by  
[ ● ] as attorney of [donor] and  
in exercise of a power of attorney  
under the hand and seal of [donor]  
dated [ ● ] in the presence of:

\_\_\_\_\_

Signature of witness:

\_\_\_\_\_

Name:

\_\_\_\_\_

Address:

\_\_\_\_\_

\_\_\_\_\_

Occupation:

\_\_\_\_\_

***NDFA signing as Agent of [the relevant Minister, or other relevant public body.]<sup>49</sup>***

The Seal of the NDFA, acting as  
Agent for and on behalf of [the  
Minister/other relevant public  
body]

was affixed in the presence of:

\_\_\_\_\_  
Director

\_\_\_\_\_  
Director

Signature of witness:

\_\_\_\_\_

Name:

\_\_\_\_\_

Address:

\_\_\_\_\_

\_\_\_\_\_

Occupation:

\_\_\_\_\_

<sup>49</sup> It is intended that the NDFA will enter into the Project Agreement as Agent of the Minister or other public body that will be the ultimate beneficiary if the project.

## SCHEDULE 1 - DEFINITIONS

**“Abandonment”** means that no progress (other than any trivial or incidental construction activities), has been made in relation to the Works for a continuous period of [sixty (60)] days (other than by reason of a Force Majeure Event, Compensation Event or Relief Event) at any time before the Target Completion Date;

**“Actual Completion Date”** means the date on which the Works are completed in accordance with this Project Agreement as such date will be stated in the Certificate of Practical Completion or, in the event of Dispute, as such date may be determined in accordance with Clause 44 (Dispute Resolution Procedure);

**Actual Relevant Insurance Cost”** means the aggregate of the [annual]<sup>50</sup> insurance premiums reasonably incurred by PPP Co. to maintain the Relevant Insurance during the Insurance Review Period but excluding insurance premium tax and all broker’s fees and commissions;

**“Actual Liability”** means PPP Co.’s liability for Taxation within Ireland as a consequence of or in respect of a Compensation Payment;

### **“Additional Permitted Borrowing”**

means on any date, the amount equal to any amount of principal outstanding under the Senior Funding Agreement in excess of the amount of principal scheduled under the Senior Funding Agreements at Financial Close to be outstanding at that date,

but only to the extent that:

- (a) this amount is less than or equal to the Additional Permitted Borrowing Limit; and
- (b) in respect of any Additional Permitted Borrowing the Senior Lenders’ Agent is not in material breach of its obligations under Clause [ ● ] of the Funder Direct Agreement as it applies to such Additional Permitted Borrowing; and
- (c) any such excess amount of principal which has been drawn down in connection with the funding of any Variation will not be counted as Additional Permitted Borrowing

### **“Additional Permitted Borrowing Limit”**

means an amount equal to:

- (a) 10% of the Original Senior Debt for any Additional Permitted Borrowing subsisting in the period from the date of Financial Close to the date on which the amount outstanding under the

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<sup>50</sup> This will depend on the frequency of payment of insurance premiums.

Senior Funding Agreements is reduced to 50% or less of the Original Senior Debt and thereafter;

- (b) the higher of:
  - (i) 5% if the Original Senior Debt; and
  - (ii) the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in (a);

**“Adjudication Panel”** has the meaning given to it in Clause 44.3(a) (Adjudication);

**“Adjudication Referral”** has the meaning given to it in Clause 44.2(c) (Resolution through Liaison);

**“Adjudicator”** has the meaning given to it in Clause 44.2(c) (Resolution through Liaison);

**“Adjusted Estimated Fair Value of the Contract”** means the Estimated Fair Value of the Contract, less an amount equal to the aggregate of:

- (a) [the Post Termination Service Amounts (if a positive number)']
- (b) the Tender Costs; and
- (c) amounts that the Authority is entitled to set off or deduct under Clause 24.9 (Set-Off),

**plus** an amount equal to the aggregate of:

- (i) all credit balances on any bank accounts held by or on behalf of PPP Co. on the date that the Estimated Fair Value of the Contract is calculated;
- (ii) any insurance proceeds and other amounts owing to PPP Co. (and which PPP Co. is entitled to retain), to the extent not included in (i); and
- (iii) the Post Termination Service Amounts (if a negative number),

to the extent that:

- (a) (i), (ii) and (iii) have not been directly taken into account in calculating the Estimated Fair Value; and

the Authority has received such amounts in accordance with the Project Agreement or such amounts are standing to the credit of the Joint Insurance Account.

**“Adjusted Highest Compliant Tender Price”** means the Highest Compliant Tender Price less the aggregate of:



- (a) any Post Termination Service Amounts paid to PPP Co. to date;
- (b) the Tender Costs; and
- (c) amounts that the Authority is entitled to set off or deduct under Clause 24.9 (Set-off)

**plus** an amount equal to the aggregate of:

- (a) all credit balances on any bank accounts held by or on behalf of PPP Co. on the date that the highest priced Compliant Tender is received;
- (b) any insurance proceeds and other amounts owing to PPP Co., to the extent not included in (i); and
- (c) the Post Termination Service Amounts (if a negative number)

to the extent that:

- (i) and (ii) and (iii) have not been directly taken into account in that the Complaint Tender; and

the Authority has received such amounts in accordance with the Project Agreement

**“Adjustment Factors”** means in respect of Comparable Services each of the following:

- (a) the employee and pension liabilities of the provider of the Comparable Services and all its sub-contractors in respect of employees involved in the provision of the Comparable Services;
- (b) the terms and conditions of contract (including the length of contract) relating to the Comparable Services including (in the case of Comparable Services by reference to the United Kingdom, the terms and conditions of collateral warranties and direct agreements with banks and/or awarding authorities under the UK Government’s Private Finance Initiative);
- (c) the age, nature and condition of the facilities in which the Comparable Services are provided;
- (d) the geographical location where the Comparable Services are being performed relative to the Services;
- (e) the quality standards to which the Comparable Services are delivered;
- (f) the reasonable and proper adjustment to the number of Sub-contractors employed in providing the Services at the time of the Benchmarking Exercise;

- (g) any other differences in the Comparable Services when compared with the Tested Services and which would be material to the price charged or the service outputs delivered in respect of the Comparable Services;

**“Affected Party”** will have the meaning given to it in the definition of “Force Majeure”;

**“Agreed Form”** means, in relation to a document referred to as such in this Project Agreement, in a form agreed by the Parties, such agreement of the Parties to be evidenced by PPP Co. and the Authority initialling the cover page of the relevant document;

**“Annual Services Report”** has the meaning given to it in Part 1 of Schedule 14 (Reports and Records);

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

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

**“Archaeological Event”** means a delay in the Construction Programme of more than [two (2) weeks] caused by the discovery of an Archaeological Object and justifiable in the opinion of the Authority pursuant to Clause 6.3(d);

**“Archaeological Object”** means all fossils, human remains, articles of value or antiquity, structures or other remains or things of particular geological, historical or archaeological interest discovered on the Site;

**“Archaeological Requirements”** are the detailed provisions relating to the archaeological treatment of the Site, set out in Part [ ● ] of Schedule 3 (D&C Requirements);

**“Architect”** means at the date hereof the person identified as such in Schedule 9 (Professional Team);

**“Architect’s Opinion of Compliance”** means the Opinion of Compliance with Building Regulations and Planning Permission issued by the Architect in the form set out in Schedule 6 (Certificates);

**“Area”** has the meaning given to it in Part [ ● ] of Schedule 15 (Payment Mechanism)

**“Assets”** means all assets and rights to enable the Authority or a successor contractor to own, operate and maintain the Project Facility in accordance with this Project Agreement, including any land or buildings, roads and pathways, fixtures, fittings, Equipment, books and records (including operating and maintenance manuals, health and safety manuals and other know-how), spare parts, tools and other assets (together

with any warranties in respect of assets being transferred), revenues and any other contractual rights and intellectual property rights;

**“Associated Company”** means in respect of a company, a company which is a Subsidiary, a Holding Company or a company which is a Subsidiary of a Holding Company and in the case of PPP Co. will include each of the Shareholders, D&C Co., O&M Co. and any company which is a Subsidiary, a Holding Company or a Subsidiary of a Holding Company of a Shareholder, D&C Co. or O&M Co.;

**“Authority”** means [ ● ];

**“Authority Change”** has the meaning given to it in Clause 1.1 of Schedule 20 (Variations);

**“Authority Default”** means one of the events set out in Clause 34.1 (Termination for Authority Default);

**“Authority Equipment”** means the equipment set out in Part 1 of Schedule 13 (Equipment);

**“Authority Notice of Change”** has the meaning given to it in Clause 1 of Schedule 20 (Variation);

**“Authority’s Representative”** means such person as may be appointed by the Authority for the time being in accordance with the provisions of Clause 12 (Representative);

**“Availability Deductions”** has the meaning given to it in Part [ ● ] of Schedule 15 (Payment Mechanism);

**“Base Case”** means the “base case” for the purposes of the Financial Model at the date hereof as the same may be amended from time to time in accordance with the provisions of this Project Agreement;

**“Base Case IRR”** means [ ● ];

**“Base Cost”** means € [ ● ] being the amount as agreed at the Bid Date<sup>51</sup> and set out in the Financial Model which represents the insurance costs (which excludes amounts in respect of insurance premium tax and all brokers’ fees and commissions) which are proposed to be incurred to maintain the Relevant Insurance in each year following the Service Commencement Date, expressed in real terms as at the Bid Date;

**“Base Relevant Insurance Cost”** means, the aggregate of the Base Costs which were (at Bid Date) projected to be incurred to maintain the Relevant Insurance during the

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<sup>51</sup> The Bid Date is the date on which PPP Co has fixed its price prior to appointment as Preferred Tenderer. The Base Cost in bidders’ models should be set at a long run median level such that the probabilities of the outturn costs being higher or lower in the future (after adjusting for Indexation) are the same. There is to ensure that the approach is consistent with the symmetrical sharing of Insurance Cost Differentials (i.e. +/- thresholds etc.) Furthermore, the median level should be held constant in real terms (year on year) and not profiled, as this will help to ensure that the symmetrical cost sharing band works as intended. Authorities and their advisers must take care to avoid accepting artificially depressed Base Cost figures which will underestimate the outturn unitary charge payment profile and simply lead to the Authority paying compensation above the upper 30% threshold during the Contract term. Conversely, they should not rely on the sharing of future costs reductions, below the lower 30% threshold, as justification for an overestimated Base Cost still representing value for money.

Insurance Review Period Indexed from the Bid Date up to the dates on which the Relevant Insurance was placed or renewed either immediately before or during the Insurance Review Period (as applicable in respect of the year in question) less any Base Relevant Insurance Reduction;

**“Base Relevant Insurance Reduction”** the reduction to be made to the Base Relevant Insurance Cost in respect of a risk which has become Uninsurable or a term or condition which is no longer available and will be an amount that is either:

- (a) the amount by which the Base Relevant Insurance Cost would have been a lesser amount had such a risk been Uninsurable or such a term or condition been unavailable at the Bid Date (which amount, for the avoidance of doubt, can be zero; or
- (b) if it is impossible to determine an amount pursuant to paragraph (a) above, an amount that is reasonable to be deducted from the Base Relevant Insurance Cost having due regard to:
  - (i) the amount by which the Actual Relevant Insurance Cost is less than it would have been as a result of the risk becoming Uninsurable, or the term or condition becoming unavailable (the “Actual Reduction”);
  - (ii) the size of the Actual Reduction as a percentage of the Actual Relevant Insurance Cost immediately prior to the risk becoming Uninsurable, or the term or condition becoming unavailable, and
  - (iii) the effects of Indexation since the Bid Date;

**“Base Senior Debt Termination Amount”**<sup>52</sup> means:

- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from PPP Co., to the Senior Lenders under the Senior Funding Agreements<sup>53</sup> and in respect of Permitted Borrowing; and
- (b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by PPP Co. to the Senior Lenders as a result of a payment under the Senior Funding Agreements<sup>54</sup> and in respect of Permitted Borrowings subject to PPP Co. and the Senior Lenders mitigating all such costs to the extent reasonably possible;

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<sup>52</sup> This definition may need to be amended in the case of bond and/or EIB Funding to refer to principal outstanding and the early redemption price mechanism.

<sup>53</sup> This is intended to cover all net breakage costs if the compensation is not paid on an interest payment date.

<sup>54</sup> This is intended to cover all net breakage costs if the compensation is not paid on an interest payment date.

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

- (i) all credit balances<sup>55</sup> on any bank accounts (but excluding the Joint Insurance Account)<sup>56</sup> held by or on behalf of PPP Co.<sup>57</sup> on the Termination Date;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to PPP Co. as a result of prepayment of amounts outstanding under the Senior Funding Agreements and in respect of Permitted Borrowing;
- (iv) any Additional Permitted Borrowing and any interest and Default Interest on such Additional Permitted Borrowing; and
- (v) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to PPP Co. as a result of enforcing any other rights they may have;

**“Benchmarking Data”** means the data collected pursuant to the Benchmarking Exercise;

**“Benchmarking Exercise”** means the exercise undertaken by PPP Co. pursuant to Clause 25.1 (Benchmarking) in relation to the Testable Services;

**“Bid Date”** means [ ● ]; (SEE FOOTNOTE 44)

**“Business Day”** means a day when banks in Dublin are open for normal business;

**“Business Hours”** means 9.00am to 5pm on a Business Day;

**Business Interruption Cover”** will bear the meaning ascribed to it in Schedule 23 (Required Insurance);

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<sup>55</sup> Such references should also cover such credit balances whether they are held as cash (as with revenue accounts) or in the form of investments (as with reserve accounts).

<sup>56</sup> Any proceeds standing to the credit of the Joint Insurance Account will continue to be used for reinstatement after the Termination Date.

<sup>57</sup> This recognises that these balances will, in the ordinary course, be charged to the Senior Lenders as security and so on a termination can be set off by them against outstandings. It is sensible, therefore, not to pay such amounts, rather than to pay and subsequently recover such amounts. To the extent any accounts are not charged to Senior Lenders, they should be excluded from (i).

**“Capital Expenditure”** means any expenditure which falls to be treated as capital expenditure in accordance with generally accepted accounting principles in Ireland from time to time;

**“Certificate of Commencement”** means the certificate issued by the Independent Tester in accordance with Clause 12.4 (Certificate of Commencement);

**“Certificate of Practical Completion”** means the certificate issued by the Independent Tester in accordance with Clause 12.4 (Certificate of Practical Completion);

**“Certification”** means the issue of the Certificate of Commencement;

**“Certification Date”** means the date on which the Certificate of Commencement is issued;

**“Change in Control”** means a change in the direct or indirect legal or beneficial ownership of more than [ ● ]% of the issued share capital or of the loan capital (if it is convertible into shares) of the Shareholders [and/or PPP Co.] and/or means the transfer, issue or redemption of shares in any Shareholder [and/or PPP Co.] where the completion of the transfer, issue or redemption would result in a person and any Connected Person acquiring control of any Shareholder [and/or PPP Co.] and for this purpose (i) **“Connected Person”** means a person who would be connected with another person for the purposes of Section 26 of the Companies Act, 1990 if that other person was a director of a company) and (ii) **“control”** means the right to appoint the majority of the board of directors or other management body of the body corporate];

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

- (a) any Law, other than any legislation which on the Commencement Date has been published:
  - (i) in a draft Bill which has been presented before the Dáil for approval;
  - (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 judgement of a court of law in Ireland which changes a binding precedent,
- (d) which was not foreseeable at the Commencement Date by an experienced D&C Co., O&M Co. or PPP Co.;

**“Claim”** means any claim, demand, proceedings, liability, action, costs, charges and expenses (including legal expenses on an indemnity basis) made by any person who is not a party to this Project Agreement;

**“Collateral Agreements”** means the D&C Direct Agreement, the O&M Direct Agreement and the Professional Team Collateral Warranties together with relevant supporting parent company guarantees on terms mutatis mutandis to those (if any) which may have been provided to the Funder or PPP Co.;

**“Collateral Warranties”** means the warranties set out in Part 3 and 4 of Schedule 9 (Professional Team);

**“Commencement Date”** means the date of execution of this Project Agreement;

**“Commercially Sensitive Information”** means any information which is agreed by the Parties from time to time as being commercially sensitive;

**“Comparable Services”** means outputs delivered to the same or comparable standards to the Tested Services and carried out and performed on substantially the same commercial terms under agreements between parties in [the United Kingdom and/or] Ireland and/or outputs the same as or comparable to the Tested Services which are provided to the Project Facility or similar institutions within, [the United Kingdom and/or] Ireland by reputable organisations possessing similar degrees of skill, human resources, financial status and reputation as O&M Co. (as at the date of this Project Agreement);

**“Compensation Date”** means either:

- (a) in paragraph 2 of Part 1 of Schedule 17 (Rendering Procedure) applies, the earlier of:
  - (i) the date that the New Contract is entered into; and
  - (ii) the date on which the Authority pays the Adjusted Highest Compliant Tender Price to PPP Co., or
- (b) if paragraph 3 of Part 1 of Schedule 17 (No Retendering Procedure) applies, the date that the Adjusted Estimated Fair Value of the Contract has been agreed or determined;

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

**“Compensation on Termination Payment”** means any payment by the Authority to PPP Co. in accordance with the terms of Schedule 17 (Compensation on Termination);

**“Compensation Payment”** means a Compensation on Termination Payment or a payment to be made by the Authority to PPP Co. pursuant to the following provisions of this Project Agreement:

- (a) Clause 41 (Compensation Event); compensation payable following a Compensation Event;
- (b) Schedule 20 (Variation); a payment to be made by the Authority to PPP Co. following an Authority Change;
- (c) Schedule 21 (Change in Law); a payment to be made by the Authority to PPP Co. following a Qualifying Change in Law;
- (d) [Uninsurable Risk].

**“Compliant Tender”** means any tender submitted by a Compliant Tenderer that meets the qualification criteria notified under paragraph 2.3 of Part 1 of Schedule 17 (Compensation on Termination)

**“Compliant Tenderer”** means a tenderer who is a Suitable Substitute Contractor (as defined in the Funder Direct Agreement)

**“Construction Expert”** will have the meaning given to it in Clause 44.3(a) (Adjudication);

**“Construction Period”** means the period commencing on the Commencement Date and ending on the Certification Date;

**“Construction Period Insurance”** means the Required Insurance in respect of the period from the Commencement Date to the Service Commencement Date as set out in Part 1 of Schedule 23, Required Insurances;

**“Construction Programme”** means the programme for the carrying out of the Works set out in Schedule 4 (Construction Programme) and as amended in accordance with the provisions of Clause 10 (Construction Programme);

**“Construction Regulations”** has the meaning give to it in Clause 13.4 (Health and Safety);

**“Contingent Funding Liabilities”** means [to be completed when Preferred Tenderer is appointed] <sup>58</sup>

**“Contracting Associate”** means D&C Co., O&M Co., PPP Co. and any Associated Company of PPP Co. which performs any function in connection with this Project Agreement or the Project or is a party to any Project Document;

**“Contract Year”** means each twelve (12) month period during the Term commencing on the [Service] Commencement Date; **[This must tie in with the Payment Mechanism – review on a Project Specific basis]**

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<sup>58</sup> These will be any contingent liabilities of the shareholders in respect of financial obligations owed to PPP Co. and/or lenders under the Funding Agreements in relation to the Project which are triggered as a result of or in relation to the termination of the Project Agreement. For example, guarantees or letters of credit in respect of deferred equity, subordinated debt or obligations to fund reserve accounts. This will not include any guarantees or letters of credit issued in support of the sub-contractors' obligations under the relevant sub-contracts.



**“Custody Agreement”** means the agreement for custody of the Financial Model CD-ROM dated on or about the Commencement Date between PPP Co., the Authority and the Custody Holder;

**“CPI”** has the same meaning as Index;

**“Custody Holder”** means a firm which is registered with 1994 ISO 9002 Registration (specific to records management), the identity of which will be agreed between the Parties or determined in accordance with Clause 44 (Dispute Resolution Procedure);

**“D&C Co.”** means [ ● ], a company incorporated under the laws of [ ● ] with registered number [ ● ] whose registered office is at [ ● ] or such replacement as permitted in accordance with the provisions of Clause 50 (Sub-Contracting) of this Project Agreement;

**“D&C Contract”** means the contract to be entered into between PPP Co. and D&C Co. for the carrying out of the Works;

**“D&C Contract Dispute”** has the meaning given to it in Clause 44.4 (Consideration of Sub-Contractor Disputes);

**“D&C Co. Direct Agreement”** means the agreement entered into between the Authority, D&C Co. and PPP Co.;

**“days”** means calendar days;

**“Deemed Liability”** means the circumstances in which PPP Co. would have had an Actual Liability, but for the utilisation of a Tax Relief [other than a Tax Relief derived from the Project];

**“Deemed New Contract”** means an agreement on the same terms and conditions as this Project Agreement, as at the Termination Date, but with the following amendments:

- (a) if this Project Agreement is terminated prior to the Service Commencement Date, then the Service Commencement Date will be extended by a period to allow a New Contractor to achieve Service Commencement;
- (b) any accrued Performance Points will be cancelled; and
- (c) the term of such agreement will be for a period equal to the term from the Termination Date to the Expiry Date;

**“Default Interest Rate”** means:

- (a) in the case of the Authority the rate of penalty interest fixed from time to time for the purposes of the European Communities (Late Payment in Commercial Transactions) Regulations 2002; and
- (b) in the case of PPP Co., [three (3)] percent above EURIBOR;

**“Defect”** means any defect or deficiency in the Project Facility or any part of it which arises due to the failure to design and/or construct the Project Facility in accordance with this Project Agreement including any failure of the D&C Co. Specification to meet the requirements of the Output Specification;

**“Design and Construction Requirements”** or **“D&C Requirements”** means the relevant specifications, standards, procedures and other requirements for the design and construction of the Project Facility as set out in Schedule 3 (D&C Requirements);

**“Design Data”** means all calculations, designs, design or construction information, standards, specifications, plans, drawing, graphs, sketches, models and other materials, including all eye readable or computer or other machine readable data, used, prepared or to be prepared by or on behalf of PPP Co. or the Authority relating to the Project including any development of, supplement to or amendment of such documents made in accordance with the provisions of this Project Agreement;

**“Design Review Procedure”** has the meaning given to it in Clause 8 (Design Review Procedure);

**“Disclaimer”** has the meaning given to it in Clause 5.

**“Disclosed Data”** has the meaning given to it in Clause 5.

**“Disclosure Letter”** has the meaning given to it in Clause 5.4 (Disclosure by PPP Co.);

**“Dispute”** means any disagreement between the Parties relating to this Project Agreement or the Project;

**“Disputed Amount”** will have the meaning given to it in Clause 24.7(a) (Disputed Invoices);

**“Dispute Resolution Procedure”** means the procedure for resolving any Dispute as set out in Clause 44 (Dispute Resolution Procedure);

**“Distribution”** means:

- (a) Whether in cash or in kind, any:
  - (i) dividend or other distribution in respect of share capital;
  - (ii) reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
  - (iii) payments under the Junior Debt Documents (whether of principle, interest, breakage costs or otherwise);
  - (iv) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms;

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

**“Early Completion Date”** has the meaning given to it in Clause 7.7;

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

**“Employee”** means a person who immediately before the Transfer Date was employed and assigned to carry out tasks which will be performed by PPP Co. in carrying out the Project under this Project Agreement;

**“Employee Information”** means the information relating to the Employees set out in Part [ ● ] to Schedule 24 (Employee Transfer Agreement);

**“Employee Transfer Agreement”** means the employee transfer agreement relating to the transfer of contracts of employment between PPP Co., the Authority and [ ● ] to be entered into on the date hereof in the form set out in Schedule 24 (Employee Transfer Agreement);

**“Emergency”** means extraordinary circumstances or the occurrence of major incidents where the scope or nature or manner of execution of the Services required is beyond that envisaged by the O&M Requirements;

**“Encumbrance”** means any mortgage, charge, pledge, lien, hypothecation, option, restriction, right of first refusal, right of pre-emption, third party right or interest, any other encumbrance or security interest of any kind whether unconditional or not and whether relating to existing or to future assets, and any other type of preferential arrangement (including, without limitation, set off, title transfer and retention arrangements) having a similar effect;

**“Equipment”** means the Authority Equipment and the PPP Co. Equipment, details of which are set out in Schedule 13 (Equipment);

**“Equity IRR”** means the projected blended rate of return to the Shareholders over the Term having regard to Distributions made and projected to be made.

**“Essential Works”** has the meaning given to it in Clause 18.3(b) (Maintenance Surveys);

**“Estimated Change in Project Costs”** means the aggregate of any estimated increased construction costs, operating costs and financing costs less the aggregate of any reduced construction costs, operating costs and financing costs taking into account the matters set out in Schedule 20 1(d) and in particular any change in revenue that results from the change;

**“Estimated Fair Value of the Contract”** means the amount determined in accordance with paragraph 3.3 of Part 1 of Schedule 17 Compensation on Termination) that a third party would pay to the Authority as the market value of the Deemed New Contract;

**“EURIBOR”** means, in relation to any sum denominated in euro and any specified period:

- (a) the annual rate of interest which appears on Reuters page EURIBOR01, or any equivalent successor to any such page, as appropriate, (as determined by the Authority) (each a **“Reuters Screen”**) at or about 11.00am Dublin time on the Quotation Date for such specified period as being the rate offered in the euro interbank market for the offering of deposits in euro for the specified period; or
- (b) (if the relevant rate does not appear on the appropriate Reuters Screen for the purpose of paragraph (a)), the rate per annum determined by the Authority to be equal to the arithmetic mean (rounded upwards, if necessary, to four decimal places) of the rate per annum quoted to leading banks in the European interbank market for deposits in euro equivalent to the relevant amount and for the specified period by at least 3 (three) Reference Banks, as notified to the Authority, on the Quotation Date for such specified period,

and for the purposes of this definition **“Specified period”** means the period in respect of which EURIBOR falls to be determined in relation to such sum;

(a) the percentage rate per annum equal to the offered quotation which appears on the page of the Telerate Screen which displays an average rate of the Banking Federation of the European Union for the euro (currently page [2480]) for *[insert period]* at 11.00am (Brussels time) on the quotation date or, if such page or service ceases to be available, such other page or other service for the purpose of displaying an average rate of the Banking Federation of the European Union agreed by the parties; or (b) if no quotation for the relevant period is displayed and the parties have not agreed an alternative service on which a quotation is displayed, the arithmetic mean (rounded upwards to four decimal places) of the rates at which each of the Reference Banks was offering to prime banks in the European interbank market deposits in the euro of an equivalent amount for such period at 11.00am (Brussels time) on the quotation date;

**“euro”** or **“EUR”** means the currency unit of the participating Member States of the European Union as defined in Recital (2) of Council Regulation 974/98/EC on introduction of the Euro;

**“Exceptional Cost”** means, for an Insurance Review Period, the extent to which there is an Insurance Cost Increase which exceeds in amount 30% of the Base Relevant Insurance Cost for that Insurance Review Period;

**“Exceptional Saving”** means, for an Insurance Review Period, the extent to which there is an Insurance Cost Decrease which exceeds in amount 30% of the Base Relevant Insurance Cost for that Insurance Review Period;

**“Exempt Refinancing”** means:

- (a) any Refinancing that was fully taken into account in the calculation of the Unitary Charge;
- (b) a change in taxation or change in accounting treatment;
- (c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of;
  - (i) breach of representations and warranties or undertakings;
  - (ii) movement of monies between the Project Accounts in accordance with the terms of the Senior Funding Agreements as at Financial Close;
  - (iii) late or non-provision of information, consents or licenses;
  - (iv) amendments to Principal Sub-Contracts;
  - (v) approval of revised technical and economic assumptions for financial model runs
  - (vi) runs [to the extent required for forecasts under the Financing Agreements]
  - (vii) restrictions imposed by the Senior Lenders on the dates at which the Senior Debt Amount can be advanced to PPP Co. under the Senior Funding Agreements and/or amounts released from the [Escrow Account] during the [Initial Availability Period], each as defined in the Senior Funding Agreements<sup>59</sup> and which are given as a result of any failure by PPP Co. to ensure that the Works are performed in accordance with the Programme and which are notified in writing by PPP Co. or the Senior Lenders to the Authority prior to being given;
  - (viii) changes to milestones for drawdown and/or amounts released from the [Escrow Account] during the [Initial Availability Period] set out in the Senior Funding Agreements and which are given as a result of any failure by PPP Co. to ensure that Works are performed in accordance with the Programme and which are

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<sup>59</sup> These definitions should follow those contained in the Senior Funding Agreements – the Initial Availability Period being the construction phase drawdown period

notified in writing by PPP Co. or the Senior Lenders to the Authority prior to being given;

- (ix) failure by PPP Co. to obtain any consent by statutory bodies required by the Senior Funding Agreements; or
- (x) voting by the Senior Lenders and the voting arrangements between the Senior Lenders in respect of the levels of approval required by them under the Senior Funding Agreements;
- (d) any amendment, variation or supplement of any agreement approved by the Authority as part of any Variation under this Project Agreement;
- (e) any sale of shares in PPP Co. by the Shareholders or securitisation of the existing rights and/or interests attaching to shares in PPP Co.;
- (f) any Qualifying Bank Transaction.

**“Expiry Date”** means the [ ● ] anniversary of the Service Commencement Date provided that where Clause 7.7(b) (Early Completion) applies it will include such additional period;

**“Fair Value”** means the amount at which an asset or liability could be exchanged in an arms length transaction between informed and willing parties, other than in a forced or liquidation sale;

**“Fast Track Procedure”** means the procedure for fast track resolution of any Dispute as provided for pursuant to Clause 44.7 (Fast Track Procedure);

**“Final Commissioning Programme”** means the programme to be developed in accordance with Clause 12 (Commissioning and Completion);

**“Final Warning Notice”** has the meaning given to it in Clause 33.2 (Persistent Breach);

**“Financial Close”** means the date of execution of this Project Agreement <sup>60</sup>

**“Financial Expert”** has the meaning given to it in Clause 44.3(a) (Adjudication);

**“Financial Model”** means the assumptions and methodologies that have been agreed between the Parties as at the Commencement Date to compute various amounts (such amounts which at the Commencement Date are more particularly contained in the spreadsheet set out in Schedule 16 (Financial Model)) arising in connection with this Project Agreement as may be revised from time to time under this Project Agreement;

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<sup>60</sup> This is the same as the Commencement Date as the Standard Project Agreement assumes that there are no Conditions Precedent and therefore no delay between execution of the Project Documents and Commencement. Where there is such a delay the definitions of Commencement date and Financial Close may need to be varied but the drafting should be correct throughout hence the use of two different terms.

**“Financial Model CD-ROM”** means the compact discs containing the Financial Model and which are to be lodged with the Custody Holder on the terms set out in the Custody Agreement.

**“First Handback Inspection”** has the meaning given to it in Clause 40.1(a) (Handback Requirements);

**“First Insurance Review Date”** means the first Business Day following the first anniversary of the Relevant Insurance Inception Date;<sup>61</sup>

**“First Majeure Termination Sum”** has the meaning given to it in Paragraph 1.1 of Part 3 of Schedule 17 (Compensation on Termination)

**“Force Majeure Event”** means the occurrence after the date hereof of:

- (a) war, civil war, riot or armed conflict or terrorism arising in or affecting Ireland;
- (b) nuclear, chemical or biological contamination unless the source or cause of the contamination is the result of actions of PPP Co. or any Sub-Contractor; or
- (c) pressure waves caused by devices travelling at supersonic speeds,

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

**“Funder Direct Agreement”** means an agreement in Agreed Form set out in Schedule 18 (Funder Direct Agreement) entered into on or before the Commencement Date between, inter alia, the Authority, PPP Co. and the Funder;

**“Funders”** means any or all of the persons who provide funding in respect of the Project under the Funding Agreements;

**“Funding Agreements”** means all or any of the agreements and documents specified in Part 3 of Schedule 11 (Required Documents) and any amendments to such documents from time to time made in accordance with the provisions of this Project Agreement and any agreements entered into by PPP Co. which are entered into pursuant to Clause 47 (Refinancing) or Schedules 20 (Variations) or 21 (Change in Law);

**“General Change in Law”** means a Change in Law which is not a Qualifying Change in Law;

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<sup>61</sup> The first insurance review takes place 12 months and one day following the Relevant Insurance Inception Date. The costs considered at the time of the first review will be:

the insurance premium payable to cover the first year of operation; and

the insurance premium payable to cover the second year of operation.

With the exception of the last review, which depending on the Term may also occur after a shorter period, all other reviews will take place biennially.

**“General PPP Co. Equipment”** means the equipment listed at Schedule 13 Part 2A (General PPP Co. Equipment);

**“Good Industry Practice”** means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably be expected from a skilled and experienced operator [who is] engaged in [the UK or] Ireland to carry out services or works similar to the Services or Works, as the case may be, seeking in good faith to comply with its contractual obligations, complying with all applicable laws, codes of professional conduct, relevant codes of practice, Irish, European and other relevant standards, building regulations, all conditions of planning and other consents and in respect of Defects, Good Industry Practice will be measured by reference to the factors stated above and to the standard applicable in accordance with best custom and practice for estates and property repair and maintenance including (for the avoidance of doubt), but not limited to, that normally expected in the institutional commercial property sector in Ireland. For the avoidance of doubt, the concept of Good Industry Practice will not be restricted by reference to the same type of undertaking as the Project Facility;

**“Ground Conditions”** means in relation to the Site, any and every condition under, over, on, beside the Site that impacts upon it in any way including, but not limited to, hydrological, geological, geotechnical, subsurface, climatic, ecological, the presence of any man-made obstacles such as utilities, concrete, pipes, cables and conduits, the ground to be built upon and its load bearing and other relevant properties, and the migration of any matter to or from the Site including but without limitation, gas migration and flooding whether or not any or all of such conditions referred to above would have been foreseeable by an experienced contractor;

**“Group”** means, in relation to any company, its Holding Company and each company which would be regarded as a Subsidiary of that Company or the ultimate Holding Company;

**“Guidance”** means any guidelines, recommendations, policies or instructions of the Authority or [INSERT RELEVANT PARTIES SUCH AS THE HSE, SCHOOL AUTHORITY, ETC] or any equivalent bodies with which the Authority or PPP Co. (as appropriate) are obliged to comply in relation to the Project Facility or the Services;

**“Handback Amount”** has the meaning given to it in Clause 40.1(c)(iii) (Handback Amount);

**“Handback Programme”** has the meaning given to it in Clause 40.1(c)(ii) (Handback Programme);

**“Handback Requirements”** has the meaning given to it in Clause 40.1(a) (Handback Requirements);

**“Handback Works”** has the meaning given to it in Clause 40.1(c)(i) (Handback Works);



**“Highest Compliant Tender Price”** means the price offered by the Compliant Tenderer (if any) with the highest tender price and, if no Complaint Tenders are received, zero;

**“Holding Company”** has the meaning given to it in Section 155 of the Companies Act, 1963. This definition will remain the same during the Term of this Project Agreement and will not change with any amendment to the definition of “holding company” in the Companies Acts 1963 to 2001;

**“Independent Tester”** means [ ● ] or such substitute independent tester as may be permitted pursuant to this Project Agreement.

**“Independent Tester Contract”** has the meaning given to it in Clause 11.1 (Appointment);

**“Index”** means the Consumer Price Index (all items) of Ireland published by the Central Statistics Office;

**“Indexation Date”** means the date of the anniversary of the Service Commencement Date.

**“Indexed”** means the adjustment to any amount referred to in this Project Agreement by a percentage equivalent to the percentage adjustment to the Index occurring after the Indexation Date.

**“Information”** means all materials, documents and data relating to the proposed design or construction of the Works, the operation and maintenance of the Project Facility and other matters relevant thereto and the obligations to be undertaken by PPP Co. under this Project Agreement including, without limitation, information as to the activities carried on by the Authority, its assets, contractual arrangements, employees, the Site, and further including, without limitation, all such materials, documents, data and other information as were provided to the Shareholders and/or their advisers and consultants in connection with pre-qualification for the Project and/or the Invitation to Negotiate or BAFO relating to the procurement of the Project;]

**“Insurance Cost Decrease”** means the Insurance Cost Differential if the value thereof is less than zero, multiplied by minus one;<sup>62</sup>

**“Insurance Cost Differential”** will, subject to the Insurance Review Procedure, be determined as follows:-

$$\text{Insurance Cost Differential} = (\text{ARIC} - \text{BRIC}) - (\pm \text{PIC})^{63}$$

Where:

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<sup>62</sup> The Insurance Cost Decrease is always a positive sum (if not zero).

<sup>63</sup> In accordance with the definition of Project Insurance Change, the PIC may have either a positive or a negative value. In the event that the PIC is positive then the PIC is subtracted from the difference of the ARIC and the BRIC. If the PIC is negative, then the double negative means that the value of the PIC (ignoring the negative sign) is added to the difference of the ARIC and the BRIC.

ARIC is the Actual Relevant Insurance Cost  
BRIC is the Base Relevant Insurance Cost  
PIC is any Project Insurance Change

**“Insurance Cost Increase”** means the Insurance Cost Differential if the value thereof is greater than zero;<sup>64</sup>

**“Insurance Review Date”** means the First Insurance Review Date and, thereafter, each date falling on the second anniversary of the previous Insurance Review Date, except where such date lies beyond the end of the Term, in which case the Insurance Review Date will be the last renewal date of the Relevant Insurance prior to the end of the Term;

**“Insurance Review Period”** means a two year period from the Relevant Insurance Inception Date and each subsequent two year period commencing on the second anniversary of the Relevant Insurance Inception Date except where the end of such period lies beyond the end of the Term, in which case the Insurance Review Period will be the period from the end of the penultimate Insurance Review Period to the last day of the Term;

**“Insurance Review Procedure”** means the procedure set out in Clause 45.7 (Insurance Premium Risk Sharing);

**“Insurance Term”** means any terms and/or conditions required to be included in a Required Insurance policy but excluding any Risk;

**“Insurance Undertaking”** has the meaning given in the Insurance Act 1989

[**“Intellectual Property Rights”** means patents, trade marks, service marks, rights in semiconductor chip topographies, design rights (whether registrable or otherwise), applications for any of the foregoing, copyright, know-how and other similar rights or obligations whether registrable or not in any country, (including, but not limited to Ireland);]

**“Interest Rate”** means, in respect of any period, EURIBOR;

**“Joint Insurance Account”** means a bank account in the name of the Authority and PPP Co. and into which, subject to the terms of Clause 45 (Insurance), proceeds paid by insurers of the policies referred to in paragraphs [ ● ] and [ ● ] of Part [ ● ] of Schedule 23 (Required Insurance) are to be paid;<sup>65</sup>

**“Joint Insurance Cost Report”** has the meaning given to it in Clause 45.7(b) (Insurance Premium Risk-Sharing);

**“Junior Debt”** means an amount equal to the outstanding nominal amount of the loan stock, loan notes or subordinated debt of PPP Co. issued to the Shareholders or any Associated Company of the Shareholders or of PPP Co. to finance or refinance the

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<sup>64</sup> The Insurance Cost Increase is always a positive sum (if not zero).

<sup>65</sup> To be determined in relation to Schedule 23. These are the Physical Damage e.g. Contractors “All Risks” Insurance and Property Damage Insurance Required Insurances.

Project together with accrued and unpaid interest thereon in accordance with the terms and conditions for the Junior Debt Documents and as shown in the Financial Model.

**“Junior Debt Documents”** means [ ● ] at the Commencement Date or as amended with the prior written approval of the Authority.

**“Junior Lenders”** means a person providing finance under a Junior Debt Document.

**“Latest Service Element”** has the meaning given to it in Clause 25.1(c) (Benchmarking);

**“Law”** means any law applicable in Ireland and will include without limitation, common law, statutes, statutory instruments, bylaws, rules, codes, regulations, decisions, proclamations, notices, directives, constitutions, instruments, rules of court, delegated or Junior legislation and Guidance ;

**“Leased Equipment”** means any PPP Co. Equipment which is subject to a lease with any third party which is set out in Schedule 13, Part 2B (Leased PPP Co. Equipment);

**“Legal Expert”** has the meaning given to it in Clause 44.3(a) (Adjudication);

**“Liaison Committee”** has the meaning given to it in Clause 22.2 (Liaison Committee);

**“Liaison Committee Report”** has the meaning given to it in Clause 22.3 (Liaison Committee Meetings);

**“Liaison Procedure”** means the liaison procedure set out in Clause 22 (Liaison Procedure);

**“Licence”** has the meaning given to it in Clause 6.1 (Licence);

**“Liquid Market”** means that there are sufficient willing parties (being at least two parties, each of whom is capable of being a Suitable Substitute Contractor) in the market for PPP contracts or similar contracts for the provision of services (in each case the same as or similar to the Project Agreement) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value;

**“Longstop Date”** means the date [six (6)] months after the Target Completion Date;  
**[Negotiate on project specific basis]**

**“Losses”** means 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 judgements, proceedings, internal costs or demands but excluding loss of profit for work not executed, loss of income or indirect or consequential loss;

**“Maintenance Surveys”** has the meaning given to them in Clause 18.3 (Maintenance Surveys);

**“Market Costs”** has the meaning given to it in Clause 25.1(c) (Benchmarking);

**“Market Testing Procedure”** means the procedure undertaken by PPP Co. pursuant to Clause 25.4 in relation to the Testable Services;

**“Market Testing Review Dates”** means the [ ● ], [ ● ], [ ● ] and [ ● ] anniversaries of the Service Commencement Date and “Marketing Testing Review Date” will be construed accordingly;

**“Market Value Availability Deduction Amount”** means for any month or part of a month, an amount equal to the Availability Deduction that was made to the Unitary Charge in the month immediately preceding the Termination Date, less an amount equal to any Availability Deduction that was made for an Area which was unavailable at the Termination Date but which has subsequently become Available whether as a result of the Authority incurring Rectification Costs or otherwise;

**“Maximum Unitary Charge”** means, in respect of a month, the Unitary Charge payable during that month before any Deductions but allowing for Indexation;

**“Memorandum of Referral”** has the meaning given to it in Clause 44.2(c) (Resolution through liaison);

**“Memorandum of Resolution”** has the meaning given to it in Clause 44.2(b) (Resolution through liaison);

**“Month”** means a calendar month;

**“Monthly Design and Construction Report”** has the meaning given to it in Part 1 of Schedule 14 (Reports and Records);

**“Monthly Services Report”** has the meaning given to it in Part 1 of Schedule 14 (Reports and Records);

**“Necessary Consents”** means all permissions (including planning permissions), building regulation approvals, certificates (including fire certificates), licences, permits, regulations and consents necessary from time to time for the carrying out of the Works and/or the provision of Services other than [ ] which will be the responsibility of the Authority;

**“Net Present Value”** means the aggregate of the discounted values, calculated as of the estimated date of a Refinancing, of each of the relevant projected Distributions, in each case discounted using the Base Case Equity IRR;

**“New Contract”** means an agreement on the same terms and conditions as this Project Agreement at the Termination Date, but with the following amendments:

- (a) if this Project Agreement is terminated prior to the Service Commencement Date, then the Service Commencement Date will be extended by a period to allow a New Contractor to achieve Service Commencement;
- (b) any accrued Performance Points and/or Warning Notices will be cancelled;

- (c) the term of such agreement will be equal to the term from the Termination Date until the Expiry Date; and
- (d) any other amendments which do not adversely affect PPP Co.;

**“New Contractor”** means the person who has entered or who will enter into the New Contract with the Authority;

**“Non-Rectifiable PPP Co. Defaults”** has the meaning given to it in Clause 33.4(c) (Rectification);

**“Notice Date”** means the later of the Termination Date and (if applicable) the date that the Adjusted Estimated Fair Value of the Contract is agreed between the Parties pursuant to Paragraph 3.4 of Part 1 of Schedule 17 (Compensation on Termination).

**“O&M Co.”** means [ ● ], a company incorporated under the laws of [ ● ] with registered number [ ● ] and having its registered office at [ ● ] or such replacement as permitted in accordance with the provisions of Clause 50 (Sub-Contracting) of this Project Agreement;

**“O&M Contract”** means the contract to be entered into on or before the Commencement Date between PPP Co. and O&M Co. in respect of the Services;

**“O&M Contract Dispute”** has the meaning given to it in Clause 44.4 (Consideration of sub-contractor Disputes);

**“O&M Direct Agreement”** means an agreement entered into on or before the Commencement Date between the Authority, PPP Co. and O&M Co.;

**“Operation and Maintenance Requirements”** or **“O&M Requirements”** means the document setting out the Authority's requirements relating to the Services set out at Schedule 10 (O&M Requirements);

**“Service Expert”** has the meaning given to it in Clause 44.3(a) (Adjudication);

**“Optimisation Procedure”** means the procedure used at Financial Close, which takes into account all of the inputs to the Financial Model (e.g. equity contributions, funding from Funders and construction costs) to determine the outputs of the Financial Model, including without limitation, [ ● ], and which will be used to revise the Financial Model to ensure that PPP Co. [cover ratios, shareholder return risk transfer and gearing] are maintained at the levels determined at the Commencement Date following any [Variation, Qualifying Change in Law or Refinancing];

**“Option Period”** has the meaning given to it in Clause 45.4(e) (Uninsurable Risk);

**“Original Senior Debt”** means the amount committed under the Senior Funding Agreements as at the Commencement Date (as adjusted to take account of any Variation).

**“Output Specification”** means the O&M Requirements and the D&C Requirements;

**“Parties”** means PPP Co. and the Authority and the term **“Party”** will mean any of them as the case may be;

**“Performance Deductions”** has the meaning given to it in Part [ ● ] of Schedule 15 (Payment Mechanism);

**“Permitted Borrowing”** means, without double counting, any;

- (a) [advance to PPP Co. under the Senior Funding Agreements, provided that such advance is not made under any committed standby facility];
- (b) Additional Permitted Borrowing; and
- (c) [advance to PPP Co. under the committed stand-by facility which is made solely for the purposes of funding any costs overruns, increased expenses or loss of revenue which PPP Co. incurs, provided that such funds are not used in substitution for other sources of committed funding designated for these purposes]<sup>66</sup>
- (d) interest and, in respect of the Funding Agreements only (prior to any subsequent amendment), other amounts accrued or payable under the terms of the Senior Funding Agreements;
- (e) except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment at a Default Interest Rate on any Additional Permitted Borrowing.

**“Persistent Breach”** means a continuous or recurring breach of this Project Agreement that does not result in Performance Deductions or Availability Deductions which becomes a PPP Co. Default pursuant to Clause 33.2 (Persistent Breach);

**“Personal Data”** means personal data as defined in the Data Protection Act 1988 which is supplied by one Party to the other or obtained by a Party pursuant to the terms of or in the course of performing this Project Agreement;

**“Physical Damage Policies”** means the policies referred to at [paragraph 1 of Part 1]<sup>67</sup> and [paragraph 1 of Part 2]<sup>68</sup> of Schedule 23 (Required Insurance);

**“Planned Maintenance Programme”** means the annual programme for maintenance, repair, refurbishment and replacement of the Project Facility prepared by PPP Co. in accordance with Clause 18.2 (Planned Maintenance Programme);

**“Planned Maintenance Programme Submission Date”** has the meaning given to it in Clause 18.2 (Planned Maintenance Programme);

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<sup>66</sup> To be deleted if PPP Co. has no such Facility at Financial close.

<sup>67</sup> Subject to the particulars of Schedule 23 for each project.

<sup>68</sup> As above.

**“Portfolio Cost Saving”** means any insurance cost saving which arises from PPP Co. changing the placement of the Required Insurance from being on a stand-alone project-specific basis assumed at Financial Close and reflected in the Base Cost, to being on the basis of a policy (or policies) also covering risks on other projects or other matters which are outside the scope of the Project so as to benefit from portfolio savings. A Portfolio Cost Saving is defined to be a positive sum and cannot be less than zero;<sup>69</sup>

**“Post Termination Service Amount”** means for the purposes of paragraph 2 of Part 1 (Retendering Procedure) of Schedule 17 (Compensation on Termination), for the whole or any part of a month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Unitary Charge which would have been payable in that month under the Project Agreement had the Project Agreement not been terminated, less an amount equal to the aggregate of:

- (a) the Market Value Availability Deduction Amount for that month;
- (b) the Rectification Costs incurred by the Authority in that month; and
- (c) (where relevant), the amount by which the Post Termination Service Amount for the previous month was less than zero;

**“PPP Co.”** means [ ● ];

**“PPP Co. Change”** has the meaning given to it in Clause 2 of Schedule 20 (Variations);

**“PPP Co. Default”** means one of the events set out in Clause 33.1 (PPP Co. Default);

**“PPP Co. Equipment”** means the equipment to be supplied and maintained by PPP Co., details of which are set out in Part 2 of Schedule 13 (Equipment) and includes General PPP Co. Equipment set out in Schedule 13, Part 2A and Leased PPP Co. Equipment set out in Schedule 13, Part 2B;

**“PPP Co. Notice of Change”** has the meaning given to it in Clause 2 of Schedule 20 (Variations);

**“PPP Co. Related Party”** means PPP Co.’s agents and contractors (including without limitation the Principal Sub-Contractor and Sub-Contractors and its or their directors, officers, employees and workmen in relation to the Project and any person on or at any of the [sites] at the express or implied invitation of PPP Co. (other than the Authority);

**“PPP Co.’s Representative”** means such person as may be appointed by PPP Co. for the time being in accordance with the provisions of Clause 12 (Representatives);

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<sup>69</sup> The Authority may not be compelled to join a portfolio solution which places it in a worse position than if insurance is placed on a separate stand-alone basis.

**“PPP Co. Warranties”** means the representations and warranties of PPP Co. set out in Clause 5.2 (PPP Co. Warranties);

**“Pre-Refinancing Equity IRR”** means the nominal post-tax Equity IRR calculated immediately prior to a Refinancing.

**“Principal Sub-Contract”** means the D&C Contract and/or the O&M Contract;

**“Principal Sub-Contractors”** means D&C Co. and/or O&M Co.;

**“Professional Appointment”** means each agreement in the form of the professional appointment set out in Part 2 of Schedule 9 (Professional Team);

**“Professional Team”** means the professional team identified as such in Part 1 of Schedule 9 (Professional Team);

**“Professional Team Collateral Warranties”** means the collateral warranties set out at Part 3 of Schedule 9 (Professional Team);

**“Programmed Maintenance”** means the maintenance, repair, refurbishment and replacement activities scheduled to be undertaken pursuant to the Planned Maintenance Programme;

**“Prohibited Act”** means:

- (a) offering, giving or agreeing to give to any person 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 Project 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 Project Agreement or any other contract with the Authority;
- (b) entering into this Project Agreement or any other contract with the Authority in connection with which commission has been paid or has been agreed to be paid by PPP Co. 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;
- (c) committing any common law or statutory offence of fraud or any offence under the Prevention of Corruption Acts 1889-2001 or the Ethics in Public Office Act 1995;
- (d) defrauding or attempting to defraud or conspiring to defraud the Authority;



**“Project”** means the design, development, construction and financing of the Works and the management and provision of the Project Facility and the Services during the Term in accordance with the terms of this Project Agreement;

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

**“Project Agreement”** means this Project Agreement together with the Schedules and Appendices to such Schedules (including any amendment made to them from time to time);

[**“Project Archaeologist”** means the archaeologist to be appointed by the Authority in accordance with the Archaeological Requirements;]<sup>70</sup>

**“Project Documents”** means those documents specified in Part 2 of Schedule 11 (Required Documents);

**“Project Facility”** means [INSERT DESCRIPTION OF THE SCHOOL, OFFICE BUILDING OR OTHER FACILITY THAT IS THE SUBJECT OF THE PROJECT] which [is/are] to be designed, constructed, financed, operated and maintained by PPP Co. in accordance with the terms of this Project Agreement;

**“Project Insurances”** has the meaning given to it in Clause 45 (Insurance);

**“Project Insurance Change”** means any net increase or net decrease in the Actual Relevant Insurance Cost relative to the Base Relevant Insurance Cost, arising from:

- (a) the claims history or re-rating of PPP Co. or PPP Co. Related Party;
- (b) the effect of any change in deductible unless the following applies:-
  - (i) such change is attributable to circumstances generally prevailing in the Relevant Insurance Market; and
  - (ii) the deductible, further to such change, is either greater than or equal to the maximum<sup>71</sup> in Schedule 23 (Required Insurance Schedule);<sup>72</sup>

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<sup>70</sup> A project archaeologist will not be necessary in every project – this will depend on the nature of the site.

<sup>71</sup> The Authority, in conjunction with its advisors, should set the maximum deductibles in the Required Insurance Schedule at the highest acceptable level.

<sup>72</sup> The effect of this clause is to incentivise PPP Co. to manage and optimise the trade-off between insurance premium and deductible levels for deductible levels below the maximum stipulated within the Authority Required Insurances, whilst providing protection in two specific circumstances: the first is where, due to circumstances generally prevailing in the Relevant Insurance Market, the cost of maintaining deductibles at the maximum stipulated in the Required Insurance Schedule has increased; and the second is where, due to circumstances generally prevailing in the Relevant Insurance Market, the Required Insurances can only be purchased with deductible levels above the maximum stipulated in the Schedule, wherein two principles apply: (a) PPP Co. is given relief from breach by virtue of the provisions which deal with terms and conditions that become unavailable and (b) the additional cost of purchasing insurances even at these increased deductible levels is eligible as an Insurance Cost Differential.

- (c) any other issue or factor other than circumstances generally prevailing in the Relevant Insurance Market, except for any Portfolio Cost Saving.<sup>73</sup>

For the purpose of determining the Insurance Cost Differential, in the event that there is a net increase, the Project Insurance Change will have a positive value. In the event that there is a net decrease the Project Insurance Change will have a negative value.

**“Qualifying Bank”** means a bank that is authorised by the Central Bank Act 1971 to carry on banking

**“Qualifying Bank Transactions”** means:

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

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<sup>73</sup> This means that in addition to portfolio cost savings, changes which are attributable to a general movement in insurance costs across the *entire* PPP market will be taken into account.

which the prior written consent of the Authority has been given;

**“Qualifying Change in Law”** means:

- (a) any Change in Law the effect of which is to discriminate against:
  - (i) the Project in relation to other similar Project Facilities procured on a PPP basis;
  - (ii) the provision of services similar to the Services;
  - (iii) the holding of shares in companies whose main business is providing services similar to the Services;
  - (iv) persons engaged in PPP in relation to other persons; or
  - (v) PPP Co. and not other persons;
- (b) any General Change in Law which comes into effect during the Services Period and which involves Capital Expenditure above €[ ] (PPP to bid);

**“Qualifying Institution”** means:[ ● ] <sup>74</sup>

- (A) require an expert determination in accordance with Paragraph 3 below;
- (b) The Authority will be entitled to retender the provision of the Services in accordance with Paragraph 2 below (Retendering Procedure) if:
  - 1. the Authority notifies PPP Co. on or before the date falling 20 Business Days after the Termination Date; and
  - 2. there is a Liquid Market, and either:
    - (a) the Senior Lenders have not exercised their rights to step-in under Clause [ ● ] of the Funder Direct Agreement; or
    - (b) the PPP Co. or Senior Lenders have not procured the transfer of PPP Co.’s rights and liabilities under this Project Agreement to a Suitable Substitute Contractor (as defined in the Funder Direct Agreement) and have failed to use all reasonable efforts to do so.

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<sup>74</sup> If there are particular institutions which for particular reasons do not come within the other heads of Qualifying Bank Transaction, bidders may propose to the Authority that such institutions be included as Qualifying Institutions. In the light of the broad drafting of the other provisions in the definition of Qualifying Bank Transaction, the Authority would expect any such proposal to be specific and limited. Broad group definitions will not be entertained.

But otherwise the Authority will not be entitled to tender the provision of the Services and Paragraph 3 below (No Retenders Procedures) will apply

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

**“Quality Plans”** means the quality plans for the provision of the Works and Services referred to in Clause 9.2 (Quality Plans);

**“Rectifiable PPP Co. Defaults”** has the meaning given to it in Clause 33.4(a) (Rectification);

**“Rectification Costs”** means, for the purposes of any Termination Date that occurs during the Service Period, and amount equal to the reasonable and proper costs incurred by the Authority in a particular month or part of a month in ensuring that the Service is available;

**“Rectification Notice”** means a notice from the Authority to PPP Co. requiring rectification of a PPP Co. Default pursuant to Clause 33.4 (Rectification);

**“Rectification Programme”** has the meaning given to it in Clause 33.4(b)(ii);

**“Refinancing”** means:

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

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

- (A) the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the

Refinancing) to be made to each Relevant Person over the remaining Term following the Refinancing;

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

**“Regulated Collective Investment Scheme”** means a collective investment scheme established as an investment company, unit trust, common contractual fund or investment limited partnership which has been authorised by the Irish Financial Services Regulatory Authority pursuant to either the UCITS or Non-ICITS Notices, as appropriate;

**“Reinstatement Plan”** has the meaning given to it in Clause 45.2(c)(i) (Reinstatement)

**“Reinstatement Works”** has the meaning given to it in Clause 45.2(c)(i) (Reinstatement)

**“Relevant Assumptions”** means the assumptions that the sale of PPP Co. is on the basis that there is no default by the Authority, that the sale is on a going concern basis, that no restrictions exist on the transfer of share capital, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of PPP Co. and the Project is taken into account;

**“Relevant Authority”** means any person, government agency, government department, local or other authority who, pursuant to Law has any authority, jurisdiction or right in relation to the carrying out of all or any part of the Project;

**“Relevant Incident”** has the meaning given to it in Clause 45.2(e) (Reinstatement);

**“Relevant Insurance”** means the Required Insurance and any other insurances as may be required by law other than;

- (a) Construction Period Insurance;<sup>75</sup>

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<sup>75</sup> This is assumed to be covered under fixed-price arrangements and so not subject to variation. This position needs to be reviewed on a project by project basis depending upon the timing and length of any Contract Works.

- (b) Business Interruption Cover except to the extent that it relates to Unavoidable Fixed Costs<sup>76</sup>; and
- (c) [any ancillary insurances]<sup>77</sup>;

**“Relevant Insurance Inception Date”** means the date on which the Relevant Insurance is first providing active insurance cover to PPP Co., being a date no earlier than the Service Commencement Date;

**“Relevant Insurance Market”** means the insurance market which insures the majority of all PPP and PFI projects across all of the PPP and PFI sectors in Ireland and the European Union;

**“Relevant Payment”** has the meaning given to it in Clause 45.4(e) (Uninsurable Risk);

**“Relevant Person”** means a Shareholder and any of its Associated Companies;

**“Relevant Proceeds”** has the meaning given to it in Clause 45.2(c)(ii)(C);

**“Relevant Tax Liability”** means an Actual Liability or Deemed Liability in respect of a Compensation Payment;

**“Relief Event”** means:

- (a) the occurrence of an Archaeological Event;
- (b) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent that it does not constitute a Force Majeure Event), earthquakes, riot and civil commotion;
- (c) failure by any statutory undertaker, utility company, local authority or like body to carry out works or provide services;
- (d) any accidental loss or damage to the Works or the roads servicing the Works;
- (e) any failure or shortage of power, fuel or transport;
- (f) any blockade or embargo falling short of a Force Majeure Event;
- (g) exceptionally adverse weather conditions;
- (h) any Qualifying Change in Law;

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<sup>76</sup> In addition to senior debt service costs, PPP Co may incur other unavoidable costs if the cost of the Service Period is delayed or in the event of an interruption to the operation of the project e.g. any fixed costs for the provision of utilities. These will vary on a project by project basis.

<sup>77</sup> If the Required Insurance contains any supplementary i.e. (non-standard) insurances for which Insurance Premium Risk Sharing is not being provided, these must also be referred to here. These will need to be reviewed on a project by project basis depending on the insurable risk profile.

- (i) any modifiable disease that requires closure of the Project Facility;
- (j) any official or unofficial strike, lock-out, go slow or other industrial action generally affecting the construction and/or facilities management industry or a significant sector thereof (hereinafter referred to as “Industrial Action”);
- (k) any delay by a Relevant Authority in completion of any works required under detailed planning permission;
- (l) industrial action by [teachers, doctors, radiologists, etc] which inhibits, prevents or otherwise impedes the provision of the services by PPP Co.; and
- (m) [environmental contamination],

unless any of the events listed in paragraphs (a) – (m) inclusive arise, directly or indirectly as a result of any wilful default or wilful act of PPP Co. or any Sub-Contractor;

**“Re-Optimise”** means to revise the Financial Model to take into consideration any Change resulting from application of Schedule 20 (Variations) or Schedule 21 (Change in Law) or to revise the Financial Model to calculate the Refinancing Benefit in accordance with Clause 47 (Refinancing) and **“Re-Optimising”** and **“Re-Optimisation”** and **“Re-Optimised”** will be interpreted accordingly;

**“Repair Notice”** has the meaning given to it in Clause 18.3 (Maintenance Surveys);

**“Replacement PPP Co.”** has the meaning given to it in Clause 31.4(c) (Indemnities);

**“Representatives”** means the Authority’s Representative and the PPP Co. Representative;

**“Required Action”** will bear the meaning ascribed to it in Clause 19.3 (Required Action);

**“Required Documents”** means the documents set out in Schedule 11 (Required Documents);

**“Required Insurance”** means those insurances set out in Parts 1 & 2 of Schedule 23;

**“Required Records”** has the meaning given to it in Clause 21.1 (Required Records);

**“Required Reports”** has the meaning given to it in Clause 20.1 (Required Reports);

**“Restricted Share Transfer”** means a transfer of shares in PPP Co. or its Shareholders to any person who:

- (a) is engaged with or has substantial interests in:
  - (i) [gambling or gaming;]

- (ii) [the manufacture or sale of arms and weapons;]
- (iii) [the production or sale of alcohol;]
- (iv) [the production or sale of tobacco;]
- (b) has been convicted of a criminal offence relating to the conduct of its business or profession;
- (c) has committed an act of grave misconduct in the course of its business or profession;
- (d) has failed to comply with material obligations relating to the payment of taxes or social security contributions;
- (e) has made serious misrepresentations in the procurement process for a significant contract;
- (f) in the reasonable opinion of the Authority is not a suitable shareholder in a company which operates and maintains a [School], [Hospital], [Prison, etc];

**“Revenue”** is defined as the projected Unavoidable Fixed Costs and Senior Debt Service Costs of PPP Co.

**“Revenue Commissioners”** means the Revenue Commissioners as contemplated in the Taxes Act and any enactments in relation to VAT, stamp duties, capital acquisitions tax or any other taxes which may arise in Ireland and any successor entity or body;

**“Review Procedure”** means the procedure set out in Schedule 5 (Review Procedure);

**“Reviewable Design Data”** means the plans, drawings, documents and information relating to the Works listed in Appendix 1 to Schedule 5 (Review Procedure);

**“Revised Senior Debt Termination Amount”** means:

- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from PPP Co. to the Senior Lenders under the Senior Funding Agreements including in respect of Permitted Borrowing other than any such amounts that are in respect of Additional Permitted Borrowing;
- (b) all amounts of Additional Permitted Borrowing including interest but excluding Default Interest outstanding at the Termination Date, including such Additional Permitted Borrowing accrued at that date; and
- (c) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by PPP Co. to the Senior Lenders as a result of a prepayment



under the Senior Funding Agreements including in respect of Permitted Borrowing, subject to PPP Co. and the Senior Lenders mitigating all such costs to the extent reasonably possible,

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

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account held by or on behalf of PPP Co.) on the Termination Date;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to PPP Co. as a result of prepayment of amounts outstanding under the Senior Funding Agreements including in respect of Permitted Borrowing;
- (iv) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to PPP Co. as a result of enforcing any other rights they may have; and
- (v) all APB Distributions

**“Risk”** means a peril, danger or incident which could be the proximate cause for a loss and against which insurance is to be effected and maintained in accordance with Clause 45 and Schedule 23 (Required Insurance);

**“Second Handback Inspection”** has the meaning given to it in Clause 45.7(Second Handback Inspection);

**“Senior Debt Amount”** means [ ● ];

**“Senior Debt Rate”** means [incorporate the non-default interest rate definition from the Senior Loan Agreement] or such other lower rate as the Parties may agree;

**“Senior Debt Service Costs”** means interest and debt service costs incurred in respect of the Senior Funding Agreements less:

- (a) sums which are in arrears;
- (b) all sums reserved by PPP Co. and which PPP Co. is entitled to use to make such payments, without breaching the Senior Funding Agreements.

**“Senior Funding Agreements”** means [ ● ] as at the date of this Project Agreement or as amended with the prior written approval of the Authority;

**“Senior Lenders”** means the providers of senior debt to PPP Co. under the Senior Loan Agreement, being [ ● ] at the date of this Project Agreement;

**“Senior Lenders’ Agent”** means the person appointed as agent for the Senior Lenders under the Senior Loan Agreement and authorised to act on behalf of the Senior Lenders.

**“Senior Loan Agreement”** means that one of the Funding Agreements entered into on or before the Commencement Date and identified by the title [ ● ] being in the Agreed Form;

**“Service Period”** means the period commencing on the Service Commencement Date and ending on the Expiry Date or the Termination Date;

**“Service Commencement Date”** means the date which occurs on the first Business Day after the Certification Date in respect of the Project Facility;

**“Service Period Insurances”** means those Insurances set out in Part [ ● ] of Schedule 23 (Required Insurance)

**“Services”** means all of the services to be provided by PPP Co. so as to satisfy the Output Specification as more particularly set out in the O&M Requirements;

**“Shareholders”** means any person from time to time holding share capital in PPP Co. or its Holding Company being at the date of this Project Agreement those persons listed in Schedule 19 (PPP Co. and its Shareholders);

**“Shareholders Agreement”** means an agreement between the Shareholders dated on or about the date of this Project Agreement;

**“Site”** means the land on which the Project Facility is to be located as the same is more particularly described in Schedule 8 (Site);

**“Small Works”** means any change to the Works requested by the Authority after the Service Commencement Date having an individual cost not exceeding €5,000 (Indexed), or as otherwise agreed from time to time, except for any request which will (if implemented) increase the likelihood of the Service not complying with the Output Specification or materially and adversely affect the PPP Co.’s ability to perform its obligations under this Project Agreement and which will be carried out in accordance with the provisions of Clauses 29.3 and 29.4 (Small Works);

**“Small Works Rates”** has the meaning given to it in Clause 29.3(b) (Small Works);

**“Snagging Matters”** means minor items of outstanding work (including in relation to landscaping) which would not materially impair the Authority’s use and enjoyment of the Project Facility or the carrying out by the Authority of the [Clinical or Educational, etc] Services or the performance of the Services by PPP Co.;

**“Snagging Notice”** means the notice to be issued by the Independent Tester in accordance with Clause 12 (Commissioning and Completion);

**“Staff”** means the employees, independent contractors and agents of PPP Co. and of any Sub-Contractor engaged in connection with the Project;

**“Sub-Contract”** means a contract between a Sub-Contractor and PPP Co. relating to the carrying out of the Works or the provision of Services;

**“Sub-Contractor”** means a sub-contractor appointed or to be appointed by PPP Co. in connection with the carrying out of the Works or the provision of the Services and for the avoidance of doubt includes the Principal Sub-Contractor;

**“Sub-Contractor Breakage Costs”** means Losses that have been or will be reasonably and properly incurred by PPP Co. as a direct result of the termination of this Project Agreement, but only to the extent that:

- (a) the Losses are incurred solely in connection with the Project and in respect of the provision of Services or the completion of Works, including:
  - (i) any materials or good 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 or the completion of works 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; and
- (b) the Losses are incurred under arrangements and/or agreements entered into by PPP Co. in connection with its obligations in relation to the Project on terms that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms at arms’ length; and
- (c) PPP Co. and the relevant Sub-Contractor has each used its reasonable endeavours to mitigate the Losses; and
- (d) the Losses have not arisen as a result of the breach of this Project Agreement or any sub-contract by PPP Co. relating to the Project;

**“Submitted Item”** has the meaning given to it in Clause 1 of Schedule 5 (Review Procedure);

**“Subsidiary”** has the meaning given to it in Section 155 of the Companies Act 1963. This definition will remain the same during the Term of this Project Agreement and

will not change with any amendment to the definition “subsidiary” in the Companies Acts 1963 to 2001;

**“Target Completion Date”** means [INSERT DATE] as such date may be varied in accordance with the terms of this Project Agreement;

**“Taxation”** means all forms of tax, duties, imposts, levies or other charge including (but without limitation) income tax, corporation tax, corporation profits tax, advance corporation tax, capital gains tax, capital acquisitions tax, rates, residential property tax, VAT, customs and other import and export duties, excise duties, stamp duty, capital duty, social insurance, social welfare or other similar contributions and other amounts corresponding thereto and any interest, surcharge, penalty or fine in connection therewith, in force at the Commencement Date or which come into force at any time during the Term and whether imposed by a local, governmental or other Relevant Authority in Ireland the words **“Taxation”**, **“taxation”**, **“Taxes”**, will be construed accordingly;

**“Tax Clearance Certificate”** means a clearance certificate issued by the Irish Revenue Commissioners or in the case of non-resident entities a statement from the Irish Revenue Commissioners confirming suitability to be awarded the relevant contract;

**“Taxes Act”** means the Taxes Consolidation Act, 1997;

**“Tax Relief”** means any relief allowance, set-off or deduction in computing income, profit or gains or a credit granted by or pursuant to Law or otherwise relating to Taxation;

**“Tender Costs”** means the reasonable and proper costs of the Authority incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Contract;

**“Tender Process”** means the process by which the Authority requests tenders from any parties interested in entering into a New Contract, evaluates the responses from those interested parties and enters into a New Contract with a new service provider, in accordance with paragraph 2 or Part 1 (Retendering Procedure) of Schedule 17 (Compensation on Termination);

**“Tender Process Monitor”** means a third party appointed by PPP Co. under paragraph 2.5 of Part 1 of Schedule 17 (Compensation on Termination);

**“Tender Proposal”** means PPP Co.’s Tender proposal as set out in Schedule 26 (Tender Proposal);

**“Term”** means the term of this Project Agreement as set out in Clause 3 (Term of Project Agreement);

**“Termination”** means termination of this Project Agreement in accordance with the provisions of Clauses 33 (Termination for PPP Co. Default) to 38 (Termination for Corrupt Gifts and Fraud) (inclusive);

**“Termination Date”** means any date of early Termination of this Project Agreement in accordance with Clauses 33 (Termination for PPP Co. Default) to 38 (Termination for Corrupt Gifts and Fraud) (inclusive);

**“Termination Date Discount Rate”** means [ ● ];

**“Termination Payment”** means a payment on Termination in accordance with the provisions of Clause 33 (Termination for PPP Co. Default), Clause 34 (Termination for Authority Default), Clause 35 (Voluntary Termination by the Authority), Clause 36 (Termination for Force Majeure), Clause 37 (Termination for breach of the Refinancing Provisions) and Clause 38 (Termination for Corrupt Gifts and Fraud)

**“Termination Sum”** means any Termination Payment excluding the Adjusted Highest Compliant Tender Price and any Compensation payable as a result of Termination for Authority Default.

**“Testable Services”** means those Services listed in Appendix [ ● ] to Schedule 10 (O&M Requirements);

**“Testable Services Tender Documents”** has the meaning given to it in Clause 25.4(a)(v) (Market Testing Procedure);

**“Tests on Completion”** means those tests set out in Schedule 7 (Tests on Completion) to be carried out before the issue of the Certificate in accordance with Clause 12 (Commissioning and Completion);

**“Threshold Equity IRR”** means [ ● ]%<sup>78</sup>.

**“Transfer Date”** means in relation to each Employee’s contract of employment, the date on which PPP Co. undertakes the obligation to perform that part of the Project to which the Employee is assigned;

**“Transfer Regulations”** means the European Communities (Protection of Employees’ Rights on Transfer of Undertakings) Regulations, 2003 (SI No. 131 of 2003);

**“Unavoidable Fixed Costs”** means the fixed costs incurred by PPP Co. which first fall due for payment by PPP Co. during the period of indemnity but excluding:-

- (a) costs which could have reasonably been mitigated or avoided by PPP Co.;
- (b) payments to PPP Co.’s Associated Companies;
- (c) payments which are not entirely at arm’s length;
- (d) payments to holders of equity in PPP Co., Junior Lenders and any other financing costs other than Senior Debt Service Costs;

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<sup>78</sup> This is the nominal post-tax (i.e. post tax with respect to PPP Co, pre-tax with respect to the Shareholders) Equity IRR set out in the Base Case, which excludes the effects of any anticipated refinancing.

- (e) indirect losses suffered or allegedly suffered by any person;
- (f) fines, penalties or damages for unlawful acts, breaches of contract or other legal obligations;
- (g) payments PPP Co. can recover under contract or in respect of which PPP Co. has a remedy against another person in respect of the same liability;
- (h) payments to the extent that PPP Co. has available to it
  - (i) reserves which PPP Co. can draw upon without breaching the Senior Funding Agreement;
  - (ii) standby or contingent facilities or funds of Senior Debt or equity which PPP Co. is entitled to have available;
- (i) payments representing any profits of the Project (to the extent not already excluded in (e) above).

**“Uninsurable”** means in relation to a Risk, either that:

- (a) insurance is not available to PPP Co. 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 generally not being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in Ireland.

**“Unitary Charge”** has the meaning given to it in Part [ ● ] of Schedule 15 (Payment Mechanism);

**“Unprogrammed Maintenance Work”** will have the meaning given to that term in Clause 18.2 (Planned Maintenance Programme);

**“Utilities”** means all utilities and services necessary to procure and provide the Project Facility and the Services in accordance with the Output Specification and the terms of this Project Agreement including all conduits, cables, ducting tanks and all supporting media necessary for the continuous supply of such utilities;

**“Variation”** means an Authority Change or a PPP Co. Change, as the case may be, in accordance with Schedule 20 (Variations)

**“VAT”** means value added tax within the meaning of the Value Added Tax Act, 1972 (as amended) or any Tax similar to or replacing same;

**“VAT Invoice”** means an invoice in the form of the Proforma Invoice set out in Part [ ● ] of Schedule 15 (Payment Mechanism), or such other form as is agreed by the Parties from time to time and will contain all appropriate information required for it to be a VAT invoice in compliance with Law;

**“Warning Notice”** has the meaning given to it in Clause 33.2 (Persistent Breach);

**“Works”** means all of the works to be undertaken and completed by PPP Co. in order to satisfy the Output Specification and as more particularly described in the D&C Requirements including all ancillary, incidental and temporary works.

## **SCHEDULE 2 – HANDBACK REQUIREMENTS**



### **SCHEDULE 3 – D&C REQUIREMENTS**

## **SCHEDULE 4 – CONSTRUCTION PROGRAMME**

## SCHEDULE 5 – REVIEW PROCEDURE

### 1. REVIEW PROCEDURE

- (a) The provisions of this Schedule will apply whenever any item, documents or course of action are required to be reviewed, approved or otherwise processed in accordance with the Review Procedure.
- (b) Each submission under the Review Procedure will be accompanied by a copy of the document to be reviewed (including, where applicable, any Reviewable Design Data) or a statement of the proposed course of action (the entire contents of a submission being referred to in the Schedule as a “**Submitted Item**”). In relation to each Submitted Item, the following procedure will apply:
  - (i) as soon as possible and, if the Submitted Item comprises:
    - (A) an item of Reviewable Design Data;
    - (B) a revised Construction Programme; or
    - (C) a document or proposed course of action submitted in the case of an Emergency,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 will return one (1) copy of the relevant Submitted Item to PPP Co. endorsed “no comment” or (subject to and in accordance with Clause 1(c)) “comments” as appropriate; and
  - (ii) subject to Clause 1(d), 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 Clause 1(b), 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 will be deemed to have returned the Submitted Item to PPP Co. endorsed “no comment”.
- (c) If the Authority’s Representative raises comments on any Submitted Item in accordance with this Clause 1(c) he will 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, or fails to comply with the provisions of this paragraph, PPP Co. will request written clarification

of the basis for such comments and, if clarification is not received within five (5) Business Days of such request by PPP Co., refer the matter for determination in accordance with the Dispute Resolution Procedure.

- (d) A failure by the Authority's Representative to endorse and return such Submitted Item within the period specified in Clause 1(b) will be deemed to constitute an objection by the Authority's Representative to such Submitted Item. If the Parties fail to agree the form and content of such Submitted Item within 10 Business Days following the expiry of the period specified in Clause 1(b), the matter will be determined in accordance with the Dispute Resolution Procedure but PPP Co. may proceed at risk until such determination provided that it will be liable for any loss suffered by the Authority as a result.

## **2. FURTHER INFORMATION**

PPP Co. will 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. If PPP Co. does not submit any such information, data and documents, the Authority's Representative will be entitled to:

- (a) comment on the Submitted Item on the basis of the information, data and documents which have been provided; or
- (b) 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.

## **3. GROUNDS OF OBJECTION**

The expression "raise comments" in this paragraph will 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 Law or not be in accordance with any Necessary Consent, but otherwise may raise comments in relation to a Submitted Item only as follows:

- (a) in relation to any Submitted Item:
  - (i) PPP Co.'s ability to perform its obligations under this Project Agreement would (on the balance of probabilities) be adversely affected by the implementation of the Submitted Item; or
  - (ii) the implementation of the Submitted Item would (on the balance of probabilities) adversely affect any right of

the Authority under this Project Agreement or its ability to enforce any such right;

- (iii) the Authority's ability to perform its obligations under this Project Agreement would be adversely affected by the proposed course of action;
  - (iv) the Authority's ability to provide the [Educational] or [Clinical] Services or to carry out any of its statutory functions would (on the balance of probabilities) be adversely affected by the proposed course of action;
  - (v) 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 Project Agreement;
- (b) in relation to Reviewable Design Data, the Submitted Item is not in accordance with the D&C Requirements;
- (c) in relation to the submission of any revised Construction Programme on the ground that the revised Construction Programme:
- (i) would not (on the balance of probabilities) enable any part of the Works to be completed before the Target Commencement Date;
  - (ii) [would materially increase the cost or disruption to the Authority of any decanting from or within an Existing Project Facility];
  - (iii) [would materially increase the disruption to the provision of [Educational] [Clinical, etc] Services by the Authority]; or
  - (iv) would render the Authority or Independent Tester unable to carry out any part of the Final Commissioning Programme without material additional expense or disruption;
- (d) in relation to the submission of any Planned Maintenance Programme or any revision to any Planned Maintenance Programme on the grounds that:
- (i) 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 Authority [or a School] or [Hospital, etc] and such interference could be avoided or mitigated by PPP Co. rescheduling the programmed maintenance;

- (ii) the safety of [pupils] or [patients] or [staff] or [other users] of the Project Facility would (on the balance of probabilities) be adversely affected; or
  - (iii) the period for carrying out the programmed maintenance would (on the balance of probabilities) exceed the period reasonably required for the relevant works;
- (e) in relation to the submission of PPP Co.'s Proposals for the Handback Works, the Handback Programme and the Handback Amount, on the grounds that:
  - (i) in the case of the Handback Works, PPP Co.'s Proposals will not (on the balance of probabilities) ensure that the Handback Requirements are achieved by the Expiry Date;
  - (ii) in the case of the Handback Programme for the Works, performance of the Handback Works in accordance with the programme is not (on the balance of probabilities) capable of achieving satisfaction of the Handback Requirements by the Expiry Date; or
  - (iii) in the case of the Handback Amount, it does not represent the cost of carrying out the Handback Works in accordance with the Handback Programme and the provisions of Clause 40 (Handback).

#### 4. **EFFECT OF REVIEW**

- (a) 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 PPP Co.
- (b) In the case of any Submitted Item other than Reviewable Design Data, if the Authority's Representative returns the Submitted Item to PPP Co. endorsed "comments", PPP Co. will comply with such Submitted Item after amendment in accordance with the comments unless PPP Co. disputes that any such comment is on grounds permitted by this Project Agreement, in which case PPP Co. or the Authority's Representative may refer the matter for determination in accordance with Clause 44 (Dispute Resolution) [and PPP Co. will not act on the Submitted Item until such matter is so determined or otherwise agreed].
- (c) In the case of a Submitted Item comprising Reviewable Design Data, if the Authority's Representative returns the Submitted Item endorsed other than "no comment", PPP Co. will:

- (i) where the Authority's Representative has endorsed the Submitted Item "Proceed subject to amendment as noted", either proceed to construct or proceed to the next level of design of the part of the Works to which the Submitted Item relates but take into account any amendments required by the Authority's Representative in his comments;
- (ii) where the Authority's Representative has endorsed the Submitted Item "Subject to amendment as noted ", not act upon the Submitted Item, amend the Submitted Item in accordance with the Authority's Representative's comments and re-submit the same to the Authority's Representative;
- (iii) where the Authority's Representative has endorsed the Submitted Item "Rejected", PPP Co. must:
  - (A) re-submit that item to the Authority's Representative; and
  - (B) not proceed to the next level of design to which that item relates until such item of Reviewable Design Data has been approved by the Authority's Representative in accordance with this paragraph 4,

provided always that any such response will not otherwise relieve PPP Co. of its obligations under this Project Agreement nor is it an acknowledgement by the Authority that PPP Co. has complied with such obligations.

## 5. DOCUMENT MANAGEMENT

- (a) PPP Co. will issue [ ● ] 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.
- (b) PPP Co. will compile and maintain a register of the date or receipt and content of all Submitted Items that are returned or deemed to be returned by the Authority's Representative.

## 6. VARIATIONS

- (a) No approval or comment or any failure to give or make an approval or comment under this Schedule will constitute an Authority Change save to the extent provided in this Schedule.
- (b) If, having received comments from the Authority's Representative, PPP Co. considers that compliance with those

comments would amount to an Authority Change, PPP Co. will, 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 will be dealt with in accordance with Schedule 20 (Variations). Any failure by PPP Co. to notify the Authority that it considers compliance with any comments of the Authority's Representative would amount to an Authority Change will constitute an irrevocable acceptance by PPP Co. that any compliance with the Authority's comments will be without cost to the Authority and without any extension of time.

- (c) No alteration or modification to the design, quality and quantity of the Works arising from the development of detailed design or from the co-ordination of the design will be construed or regarded as an Authority Change.



**APPENDIX 1**  
**REVIEWABLE DESIGN DATA**

ITEM	REVIEWABLE DESIGN DATA	FORMAT OF DATA

## **SCHEDULE 6 – CERTIFICATES**

## **SCHEDULE 7 – TESTS ON COMPLETION**

**[VERY PROJECT SPECIFIC – BELOW ARE GENERIC TESTS THAT  
MIGHT BE REFERRED TO BUT THESE ARE UNLIKELY TO BE  
ENOUGH]**

The following testing, inspection verifications and commissioning activities:

### **Tests during Construction Period**

Evidence must be provided that during the construction period, tests have been carried out by D&C Co. on each of the following and that such tests have been passed:

1. Brickwork and Blockwork – Comprehensive strength tests on bricks, blocks and mortar. This test can be satisfied by suppliers certification.
2. Screeds – Before laying finishes on screeds, hardness and moisture content tests will be carried out. Screed supplier to provide adequate certification of compliance with specification.
3. Fire Protection – If spray applied system is used, thickness tests will be carried out as work proceeds.
4. Flat Roof Decking – Tests as appropriate with Certification.
5. Doors and Screens – Finish complies with specification. Any doors that do not have manufacturers test certificate will be fully tested for the use they are put to i.e. Fire rating, smoke testing.
6. Windows – Hose test to ensure compliance with manufacturers specification and installation. Also check quality of finish.
7. Metal Work – Where applied finish is used, quality to be checked and tested where appropriate.
8. Asphalt Flooring and Roofing – Samples of material to be tested for correct mix. Where non-slip surface is specified (either applied or textured) slip tests to be carried out and certified.
9. Underground Drainage – All underground drainage will be tested and logged before backfilling – Building Regulations Certificate of Compliance.
10. Concrete:
  - (a) Samples of concrete will be taken to confirm the strength of the concrete.
  - (b) Concrete will be obtained from a QSRMC approved supplier who will also carry out independent sampling and testing.

11. Fill Material
  - (a) Compaction tests will be carried out as appropriate.
  - (b) Samples of fill material to be taken at regular intervals and grading curves obtained to ensure compliance.
12. Steelwork – certificates will be provided for steel grade and sections. Applied protection will be tested to confirm compliance with the specification.
13. Building Tolerances – Will be tested appropriately in accordance with Good Industry Practice.
14. Reinforcement – certificates provided from an approved supplier to ensure compliance with the relevant British Standards or equivalent Irish Standards.
15. Precast Concrete and Stonework – Design certificates will be obtained from suppliers.
16. Applied finishes – Film thickness to be tested to certify compliance with specification and manufacturers

## **SCHEDULE 8 - SITE**

## SCHEDULE 9 – PROFESSIONAL TEAM

### PART 1 – MEMBERS OF PROFESSIONAL TEAM

DESIGN TEAM	NAME	ADDRESS	PHONE	FAX	CONTACT
Architect					
Acoustic Engineer					
Civil & Structural Engineer					
Mechanical & Electrical Engineer					
Project Supervisor (Design Stage)					
Quantity Surveyor					
Project Archaeologist					
Fire Consultant					
Audio / Visual					

**SCHEDULE 9 – PROFESSIONAL TEAM**

**PART 2 – PROFESSIONAL APPOINTMENTS**

## **SCHEDULE 9 – PROFESSIONAL TEAM**

### **PART 3 – PROFESSIONAL TEAM COLLATERAL WARRANTIES**

#### **D&C CO.**

[ ]

- Collateral Warranty between [ ] and Authority

#### **CONSULTANTS**

##### **Authority's Representative/Quantity Surveyor**

- Collateral Warranty between [ ] and Authority

##### **Architects**

- Collateral Warranty between [ ] and Authority

##### **Structural Engineers**

- Collateral Warranty between [ ] and Authority

##### **Mechanical and Electrical Engineers**

- Collateral Warranty between [ ] and Authority



**SCHEDULE 9 – PROFESSIONAL TEAM**

**PART 4 – D&C CO COLLATERAL WARRANTIES**

## **SCHEDULE 10 – O&M REQUIREMENTS**

## **SCHEDULE 11 – REQUIRED DOCUMENTS**

### **CONTENTS**

**[NOTE – THIS MUST BE CONSIDERED ON A PROJECT SPECIFIC BASIS]**

#### **Part 1**

Corporate Documentation

#### **Part 2**

Project Documents

#### **Part 3**

Funding Agreements

#### **Part 4**

Miscellaneous

The documents referred to in this Schedule 4 must be delivered in one of the following forms:

“O” Original document

“CC” Copy certified as being a true copy of the original document by the relevant Party’s solicitor

“AF” Agreed Form document

## **SCHEDULE 11 – REQUIRED DOCUMENTS**

### **PART 1 – CORPORATE DOCUMENTATION**

1. The Shareholders Agreements. (CC)
2. Equity subscription agreement and evidence that share subscriptions have been made by the Shareholders. (CC)
3. Certificate of Incorporation and Certificate(s) on Change of Name of PPP Co. and the Shareholders. (CC)
4. The Memorandum and Articles of Association of PPP Co. and the Shareholders. (CC)
5. Resolutions of the board of directors of PPP Co. and the Shareholders approving the transaction, inter alia, contemplated by this Project Agreement and authorising the execution of, inter alia, this Project Agreement and the other Project Documents to which each of them is a party. (CC)
6. Power of Attorney of PPP Co. and Shareholders appointing persons named therein as attorneys of PPP Co. and Shareholders. (CC)
7. Certificate of the secretary of PPP Co. and Shareholders setting out the names and specimen signatures of the person(s) authorised to execute the relevant Project Documents. (CC)
8. PPP Co.'s Tax Clearance Certificate. (CC)
9. [Others].

## **SCHEDULE 11 – REQUIRED DOCUMENTS**

### **PART 2 – PROJECT DOCUMENTS**

1. D&C Contract between PPP Co. and D&C Co. (CC)
2. O&M Contract between PPP Co. and O&M Co.. (CC)
3. Principal Sub-Contractor's Direct Agreements. (CC)
4. [Guarantees]. (CC)
5. PPP Co.'s Safety Statement (pursuant to Section 12 of the Safety, Health and Welfare at Work Act, 1989) and its proposed Safety Plan (as defined in the Safety Health and Welfare at Work (Construction) Regulations 1995). (CC)
6. Evidence of the insurances required in accordance with Clause 45 (Insurances) having been taken out by PPP Co. and that the policies comply with the requirements of this Project Agreement.
7. Two copies of the Base Case audited by [ ● ] and a computer disk copy. (CC)
8. Evidence that the Insurance Proceeds Account has been opened in the joint names of the Authority and PPP Co.
9. The insurance broker's letter of undertaking. (CC)
10. [Others].

## **SCHEDULE 11 – REQUIRED DOCUMENTS**

### **PART 3 – FUNDING AGREEMENTS**

1. Senior Loan Agreement. (CC)
2. Accounts Agreement between, inter alia, PPP Co. and [ ● ]. (CC)
3. Intercreditor Agreement between, inter alia, PPP Co., [ ● ] and [ ● ]. (CC)
4. Hedging Agreements. (CC)
5. Junior Debt documents. (CC)
6. Authority Funder Direct Agreement. (CC)
7. Principal Sub-Contractors' Funder Direct Agreements. (CC)
8. [Others].

## **SCHEDULE 11 – REQUIRED DOCUMENTS**

### **PART 4 – DOCUMENTS TO BE DELIVERED BY THE AUTHORITY TO PPP CO.**

1. Executed copy of the Project Agreement. (O)
2. Licence referred to in Clause 6.1 (Licence). (O)

## **SCHEDULE 12 - REPRESENTATIVES**

### **PART 1 – AUTHORITY’S REPRESENTATIVE DURING CONSTRUCTION PHASE (PRE-CERTIFICATION DATE)**

Name:

Telephone:

Fax:

Mobile:

E-mail:

### **Authority’s Representative during the Service Period (post Certification Date)**

Name:

Telephone:

Fax:

Mobile:

E-mail:



**SCHEDULE 12 - REPRESENTATIVES**

**PART 2 – CONTRACTOR’S REPRESENTATIVE DURING  
CONSTRUCTION PHASE**

Name:

Telephone:

Facsimile:

Mobile:

E-mail:

**PPP Co.’s Representative during Service Period**

Name:

Telephone:

Fax:

Mobile:

E-mail:

## **SCHEDULE 13 - EQUIPMENT**

### **PART 1 – AUTHORITY EQUIPMENT**

**SCHEDULE 13 – EQUIPMENT**

**PART 2 – PPP CO. EQUIPMENT**

**PART 2A – GENERAL PPP CO. EQUIPMENT**

## SCHEDULE 14 – REPORTS AND RECORDS

### PART 1 - REPORTS

#### 1. REPORTS DURING THE CONSTRUCTION PERIOD

- (a) From the Commencement Date until the issue of the Certificate of Commencement, PPP Co. will submit to the Authority's Representative within five (5) Business Days of the end of each calendar month that falls within such period, [ ● ] copies of the reports detailed in this Part 1.

A “**Monthly Design and Construction Report**” covering all relevant aspects of the Works, including without limitation:

- (i) a report on progress against Construction Programme;
- (ii) value of works done;
- (iii) any notable events;
- (iv) report on consultations with third parties;
- (v) all actual or potential departures from the requirements of this Project Agreement including the D&C Requirements and the Construction Programme;
- (vi) all grounds for a Dispute that have occurred or that may reasonably be foreseen as likely to occur, the status of the Dispute and the measures taken to resolve same;
- (vii) all breaches of this Project Agreement, including the occurrence of any matter set out in Clause 33.1 (PPP Co. Default);
- (viii) all non-conformities in respect of the Quality Plans which occurred during the month;
- (ix) all substantial disagreements between PPP Co. and third parties which are material to the Design or the Construction of the Works;
- (x) the proposed measures to be taken by PPP Co. to overcome such departure, breach, non-conformity or occurrence or to resolve such grounds for a disagreement; and
- (xi) the date on which PPP Co. expects the Works will be completed.

- (b) PPP Co. will submit to the Authority's Representative such other reports as may be reasonably required.

## 2. **REPORTS DURING SERVICE PERIOD**<sup>79</sup>

- (a) Within 5 Business Days after the end of each calendar month which falls within the period from Service Commencement Date to the Expiry Date or Termination Date, PPP Co. will provide to the Authority's Representative [ ● ] copies, save as expressly provided below, of a report, the **"Monthly Services Report"**.
- (b) Within [ ● ] Business Days after the end of each Contract Year, PPP Co. will provide to the Authority's Representative, [ ● ] copies, save as expressly provided below, of a report, the **"Annual Services Report"**.
- (c) Monthly and Annual Services Reports will contain information on all relevant aspects of the Services, including without limitation:
  - (i) a summary of [Service Failures];
  - (ii) operating expenditure and income;
  - (iii) maintenance activity;
  - (iv) maintenance costs;
  - (v) staff and industrial relations matters;
  - (vi) a summary of all Accident Reports submitted in the last month or year as appropriate;
  - (vii) all actual or potential departures from the provision of Schedule 10 (O&M Requirements);
  - (viii) all breaches of this Project Agreement, including the occurrence of any matter set out in Clause 33.1 (PPP Co. Default);
  - (ix) all non-conformities in respect of the Quality Plans which occurred during the month;
  - (x) all grounds for a Dispute that have occurred or that may reasonably be foreseen as likely to occur;

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<sup>79</sup> It is essential that the Authority adapts this to the Project in question. The TPA contains suggested contents of a Report but it depends entirely on the Service being provided.

- (xi) the proposed measures to be taken by PPP Co. to overcome such departure, breach, non-conformity or occurrence or to resolve such grounds for a Dispute;
- (xii) details of Defects identified at the Project Facility; and
- (xiii) an account of the number and type of complaints received from users of the Project Facility in respect of the Project Facility.

### 3. **ACCIDENT REPORTS**

At any time during the Term, within 24 hours of any accident (excluding minor injury), including any incident which involves a fatality, PPP Co. will submit to the Authority's Representative an Accident Report. PPP Co. will submit to the Authority's Representative any additional details of such accident or its causes which become known to it. These reports do not replace any statutory obligations. The Accident Report will contain:

- (a) time and date of the incident;
- (b) the location (marked on a scale plan, if possible);
- (c) brief description of circumstances, including photographs and any CCTV videotape recording of the area;
- (d) casualties involved; and
- (e) other relevant information, e.g. events being held at the time, weather.

### 4. **ACCOUNTS**

PPP Co. will provide to the Authority's Representative:

- (a) as soon as possible and in any event within [ ● ] days after the end of the first 6 months of each of its financial years, copies of the unaudited accounts of PPP Co. certified by the Secretary of PPP Co. as true copies thereof and, if appropriate, consolidated accounts of PPP Co. and its Subsidiaries and Holding Company as at the end of and for that 6 month period; and
- (b) as soon as the accounts of PPP Co. will have been finalised but no later than one hundred and twenty (120) Business Days after the end of each of its financial years a copy of the audited accounts of PPP Co. and, if appropriate, consolidated accounts of PPP Co. and its Subsidiaries and Holding Company and its subsidiaries in respect of that period together with copies of all relevant directors' and auditors' reports.

*[To be discussed]*

**5. AUDITOR'S REPORT**

If at any time after the provision to him/her of the documents referred to in Clause 4 (Accounts) above the Authority's Representative notifies PPP Co. of any matter which gives him concern and which arises in connection with anything in such documents, PPP Co. will instruct its auditors to prepare as soon as is reasonably practicable a report on that matter, giving such further information, amplification or explanation as is reasonable having regard to the contents of the Authority's notification; and PPP Co. will provide the Authority with a copy of that report within five (5) Business Days of PPP Co.'s receipt of it from its auditors.

## **SCHEDULE 14 – REPORTS AND RECORDS**

### **PART 2 - RECORDS<sup>80</sup>**

#### **1. General**

The records listed below will be supplied by PPP Co. and copies retained in a single location approved by the Authority's Representative for the periods indicated.

#### **2. Design**

- |     |  |  |
|-----|--|--|
| (a) | A Design manual containing all relevant Design standards, codes of practice, design loadings, design parameters and product data sheets for all components and parts.  | Until Termination or Expiry of this Project Agreement  |
| (b) | Full set of all relevant Design assumptions and final Design calculations for all parts of the Works including details of the influence on Design of actual construction methods, and any changes or any remedial works during construction. | Until Termination or Expiry of this Project Agreement. |
| (c) | Full set of drawings issued for Construction.  | Until the first anniversary of the Certification Date. |
| (d) | Full specification issued for Construction plus detailed records of any and all revisions made thereto.  | Until the first anniversary of the Certification Date. |
| (e) | Full set of all certificates issued relating to the Design of the Works.   | years from issue date of certificate.                  |
| (f) | All records of all Planning Applications, Planning Permissions (Approvals), Appeals, refusals, and other related documents and records.  | years from the Commencement Date.                      |

#### **3. Construction**

- |     |  |  |
|-----|--|--|
| (a) | Full set of progress photographs recording the construction of the Works including but not | Until the first anniversary of the Certification Date. |
|-----|--|--|

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<sup>80</sup> This must be adapted on a project specific basis.



- limited to aerial photographs  
and all other photographs  
recording important operations.
- (b) Full set of Construction site records relating to progress, testing of materials, monitoring of standards of workmanship, meteorological conditions, instructions issued and other correspondence. 12 years from the Certification Date.
  - (c) Full set of As-Built Records incorporating all changes to the Design and all remedial works during Construction, and all final As-Built details and dimensions of the Works. These records will include permanent modifications made to suit the construction method. Until Termination or Expiry of this Project Agreement.
  - (d) All correspondence relating to the Design. Until Termination or Expiry of this Project Agreement.
  - (e) Full set of records of major temporary works during construction. 12 years from the Certification Date.
  - (f) Full list of suppliers of plant and materials, detailing which of their products have been used and their location in the Works. Until Termination or Expiry of this Project Agreement.
  - (g) Full set of all Certificates relating to the construction of the Works issued in accordance with the Certification Procedure in Schedule 5 (Review Procedure) of this Project Agreement. Until Termination or Expiry of this Project Agreement.
  - (h) Full/set of survey reports, including ground, topographical, environmental, traffic and CCTV. Until Termination or Expiry of this Project Agreement.
  - (i) Geotechnical reports obtained by PPP Co. during the construction of the works. Until Termination or Expiry of this Project Agreement.

#### 4. **Operation and Maintenance**

- (a) Full records of all incidents and accidents that affect the Operation and/or maintenance of the Project. 12 years from the date of incident.
- (b) Full records of any audits, Until Termination or Expiry of

inspections and surveys and results of such audits, inspections and surveys, including photographs where applicable.	this Project Agreement.
(c) Details of all works of repair and/or replacement, including photographs, as-built drawings and other documentary records.	Until Termination or Expiry of this Project Agreement.
(d) Full set of Monthly Reports and Annual Reports.	12 years from date of issue of the Report.
(e) Adequate records of adverse meteorological conditions.	12 years from date of record.
(f) Monthly records of availability of the Project Facility.	Until Termination or Expiry of this Project Agreement.
(g) Records of all landscape planting and of management and maintenance of landscape areas.	Until Termination or Expiry of this Project Agreement.
(h) Records of all drainage systems.	Until Termination or Expiry of this Project Agreement.
(i) Schedule of all permanent project, wayfinding, statutory and traffic signs for the Project Facility.	Until Termination or Expiry of this Project Agreement.
(j) Maintenance manuals, structure registers and structure files for all special structures on the Project Facility.	Until Termination or Expiry of this Project Agreement.
(k) Such of the records referred to in Clauses 2 and 3 of this Part 2 as will be applicable to any maintenance works or other works in connection with the maintenance, repair or improvement of the Project.	For the periods specified in Clauses 2 and 3 of this Part 2 as applicable.
(l) Full set of all issued certificates relating to the operation and maintenance of the Project Facility.	12 years from the date of Certification.
(m) Records of third party claims.	12 years after settlement of the claim.
(n) Comprehensive database for the Planned Maintenance Programme.	Until Termination or Expiry of this Project Agreement.
(o) Records of Defects identified by Safety and Detailed inspection, safety patrols, or following other report and complaints with details of the action taken.	Until Termination or Expiry of this Project Agreement.
(p) Full set of maintenance assessment	Until Termination or Expiry of

survey records.	this Project Agreement.
(q) The monthly register relating to queries and complaints received concerning the Project Facility.	12 years after the date when the query / complaint is logged unless the query / complaint remains unresolved.
(r) All information relating to the Handback inter alia reports, and programmes as described in Clause 44 (Handback) of the Project Agreement.	Until issue of Handback Certificate.
(s) Full set of land ownership boundary plans.	Until Termination or Expiry of this Project Agreement.
(t) Records relating to the maintenance of electrical and electronic equipment as described in Schedule 10 (O&M Requirements) of the Project Agreement.	Until Termination or Expiry of this Project Agreement.
(u) General Correspondence Files.	12 years from date of receipt or production of correspondence.
(v) Safety Audits.	12 years from date of the safety audit.
(w) Health and Safety File.	Until Termination or Expiry of this Project Agreement.
(x) Noise assessments.	12 years after final noise assessment.
(y) Full set of survey reports including ground, topographical, environment, traffic and CCTV.	12 years from date of issue of the final report.
(z) Dilapidation surveys.	Until Termination or Expiry of this Project Agreement.

## 5. Other

(a) Any documents relating to the Project Facility held by the Authority up to 180 Days after the Commencement Date.	As directed by the Authority on delivery.
(b) The documents referred to in Clause 21.6 (Operating Accounts) of the Project Agreement.	12 years after Termination or Expiry of this Project Agreement.

## SCHEDULE 15 – PAYMENT MECHANISM

The Payment Mechanism must be developed on a project specific basis.<sup>81</sup>

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1. The TPA assumes a Unitary Charge payable by the Authority which depends on availability of the Service and performance of the available Service rather than on usage.
2. The payment mechanism is at the heart of the Project Agreement, as it puts into financial effect the allocation of risk and responsibility between the Authority and PPP Co. It determines the payments the Authority makes to PPP Co. and establishes the incentives for PPP Co. to deliver exactly the Service required in a manner that gives value for money.
3. The Unitary Charge may in some cases be determined by usage (or volume). Complete transfer of usage risk is only appropriate in cases in which PPP Co. can forecast or influence future usage. This may be the case where PPP Co. is satisfied with predictions of level of demand for the Service or there is significant third party revenue which PPP Co.'s performance can affect. In many projects, demand or scope for generating significant revenue is not possible to predict and so it is unlikely to offer value for money to transfer any volume risk. A part of usage risk can, however, be transferred, but only in some Project Agreements. Transfer of a degree of usage risk does, of course, bring advantages of simplicity as customers "vote with their feet" on the availability and quality of the Service. Of course, some projects cannot transfer any usage risk (even where catering facilities are being provided) and transferring usage risk in inappropriate cases is likely to result in poor value for money.
4.
  - (a) If PPP Co. fails to perform there can be both direct and indirect incentives to remedy the failure.
  - (b) The direct approach involves immediate deductions from the Unitary Charge and depends on availability of the Service. For example, if certain prison cells or classroom space do not meet the relevant availability definition, then a deduction is made from the Unitary Charge. The Project Agreement should contain sufficient incentives for PPP Co. to rectify the default itself. Unavailability for a prolonged period will trigger a termination event.
  - (c) The indirect approach depends on the level of performance of the available Service and involves substandard performance being addressed by the award of performance points which will vary according to the severity and regularity (if a ratchet mechanism is used) of the breach. When PPP Co. accumulates a certain level of performance points, the consequence is a deduction from the Unitary Charge. Once performance deteriorates below a certain level (whether for a single failure or for persistent failure under a ratchet mechanism), or a certain number of performance points are accumulated, then a range of other incentives can be imposed, from formal warnings to, in extreme cases, eventual termination for a breach of the Project Agreement.
  - (d) A combination of deductions for unavailability and under-performance may be used to address failure by the PPP Co. Care should be taken, however, to avoid unintended deductions of both types in respect of the same failure.

## **SCHEDULE 16 – FINANCIAL MODEL**

**SCHEDULE 17 – COMPENSATION ON TERMINATION**

**CONTENTS**

**PART 1.....206**  
TERMINATION FOR PPP CO. DEFAULT

**PART 2.....216**  
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## SCHEDULE 17

### COMPENSATION ON TERMINATION

#### PART 1

#### Termination for PPP Co. Default

#### 1. RETENDERING ELECTION<sup>82</sup>

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##### <sup>82</sup> Compensation on Termination for PPP Co. Default

The amount of compensation payable on PPP Co. Default termination is one of the key commercial issues for all parties concerned. The market value approach described below is the recommended approach for all accommodation projects.

The market value approach represents a balance between protecting the Authority's interest and not imposing unreasonable deductions on PPP Co. for its default. It also encourages the Senior Lenders to step-in and rescue the Project instead of simply relying on the termination payment to pay their outstanding debt.

The "no compensation" models have been driven by a proper concern that, on PPP Co. Default, Senior Lenders should be encouraged to step-in and work the Project out. However, they do expose the public sector to the charge that it is seeking a possible windfall gain in the event that termination occurs (e.g. if it takes over a valuable asset), although this may be refuted by the Authority agreeing to pay the market value for any assets to be transferred to it. They may also serve to increase the costs of projects to the public sector by forcing bidders to take a conservative approach to risk pricing, liquidated damages and the limits on liability they require from the sub-contractors.

On the other hand, calculations based on the NPV of future cashflows have proven to be extremely complex and difficult to negotiate. In practice, they are unlikely to take full account either of the performance history of the defaulting Project (and so expectation of future performance), the extra costs accruing to the Authority over the Term or of the risk transfer to PPP Co. (particularly in relation to whole life costing). Equally, if payments based on NPV calculations were sufficient to pay Senior Debt in full, the Senior Lenders would have less incentive to rescue the ailing Project. This might well result in terminations which would otherwise have been avoidable and would be to the detriment of Authorities and PPP Cos.

The Market Value approach facilitates the Senior Lenders right to step-in, manage and rescue or sell the Project if PPP Co. defaults, but, if they fail to do so, offers compensation on termination based on the market value of the unexpired Term.

The recommended approach:

- does not require the Senior Lenders to make attempts to take responsibility and seek to transfer the Project if there is no liquid market for similar PPP projects;
- does not penalise Senior Lenders for stepping in if, subsequently, they choose to step-out
- increases the incentives for Senior Lenders to work with the Authority and PPP Co. to achieve a long term solution rather than terminate a project that hits difficulties;
- ensures that the Authority is no worse off as a result of the termination where Senior Lenders elect not to step-in;
- does not give the Authority a windfall gain on termination; and
- does not discriminate against different classes of finance or against bidders who are prepared to finance the Project through their own balance sheets.

If the Authority issues a Termination Notice to PPP Co, the Senior Lenders will require an opportunity to put together a remedial plan and accordingly, the right to attempt to rectify breaches or transfer the Project Agreement. The Senior Lenders are given this opportunity under the terms of the Funder Direct Agreement. In such circumstances, the Senior Lenders are incentivised to take control of the Project because any failure to do so will lead to termination of the Project Agreement.

Senior Lenders accept that they should take the risk of PPP Co's performance and take responsibility for the Project if the Authority elects to terminate PPP Co for poor performance. The Senior Lenders will not, however, agree to any requirements to take reasonable steps to transfer the Project Agreement to a third party at the time of the issuance of the Termination Notice if there is no liquid market for similar types of projects. The recommended approach is therefore that if at the time the Authority issues the Termination Notice the Parties agree that there is no liquid market (or it is determined in accordance with the Dispute Resolution Procedure), the procedure set out below (No retendering Procedure) should be used to determine the compensation payable to the PPP Co.

- 1.1 Where a PPP Co. Default gives rise to termination the Authority will be entitled, subject to paragraph 1.2 below, either to:
- (a) retender the provision of the Services in accordance with Paragraph 2 below (Retendering Procedure); or
  - (b) require an expert determination in accordance with Paragraph 3 below (No Retendering Procedure);
- 1.2 The Authority will be entitled to retender the provision of the Services in accordance with Paragraph 2 below (Retendering Procedure) if:
- (a) the Authority notifies PPP Co. on or before the date falling 20 Business Days after the Termination Date; and
  - (b) there is a Liquid Market, and either:
    - (i) the Senior Lenders have not exercised their rights to step-in under Clause [ ● ] of the Funder Direct Agreement; or
    - (ii) PPP Co. or the Senior Lenders have not procured the transfer of PPP Co.'s rights and liabilities under this

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#### Retendering Election and Liquid Market

The Authority is given a choice in certain circumstances whether to retender the Project Agreement or not following termination. It would not be appropriate for the Authority to choose between these two methods of compensation if:

- there is no liquid market for similar PPP projects; or
- the Senior Lenders have stepped in and are using their reasonable efforts to find a buyer for the Project Agreement.

The Authority should, however, in other circumstances have the right to elect whether to require retendering of the unexpired term of the Project Agreement or to have the Project Agreement valued on the basis of there being no retendering.

If there is no liquid market for the Project Agreement or similar contracts, and the Project Agreement terminates then the procedure set out in Paragraph 3 (No Retendering Procedure) should be used.

There will be a liquid market for the Project Agreement if there are a sufficient number of contractors in the prevailing PPP market (or markets for similar contracts to PPP contracts) to ensure that the price that a contractor will offer for the Project Agreement is reasonably likely to represent a fair value.

The question is whether the market for contracts of this type in general is liquid (it is possible for there to be no bidders for a retendered Project Agreement and there still to be a liquid market). If the Authority only receives one compliant tender then the amount that the compliant tenderer bids for the new contract should not automatically be rejected as not representing the fair value of the new contract. The relevant test is not what happens at the end of the Retendering Procedure, but the state of the PPP market for similar contracts at the time the liquid market test is run. If there is a liquid market for PPP and the Authority elects to retender the Project Agreement, the market will determine the Fair Value of the Project Agreement (i.e. if there are no bidders for the Retendering of the Project Agreement, the market has, by definition, determined that the market value of the Project Agreement is less than or equal to zero). The Senior Lenders are therefore incentivised to exercise their rights under their Funder Direct Agreement with the Authority to ensure greater control by means of Retendering of the Project Agreement.

If the Project Agreement is transferred to a new contractor via the Retendering Procedure, the price for which the Project Agreement is to be sold will be determined through a competitive bidding process, controlled by the Authority. The Senior Lenders will generally prefer to control any transfer of the Project Agreement, and the price achieved for the transfer, themselves. This they are permitted to do by stepping in under the Funder Direct Agreement. Accordingly, the Senior Lenders are incentivised to exercise their rights of step-in and take control of the sale of the Project Agreement to a new contractor.

Any dispute as to the existence of a liquid market for the Project Agreement should be dealt with through the dispute resolution procedure.



Project Agreement to a Suitable Substitute Contractor (as defined in the Funder Direct Agreement) and have failed to use all reasonable efforts to do so.

but otherwise the Authority will not be entitled to retender the provision of the Services and Paragraph 3 below (No Retendering Procedure) will apply

## 2. RETENDERING PROCEDURE<sup>83</sup>

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### <sup>83</sup> Retendering Procedure

The Authority will in the circumstances referred to above (Retendering Election) be entitled to elect to sell (i.e. retender) the unexpired term of the Project Agreement on its original terms and pay the proceeds of the sale (net of the Authority's costs) to the former PPP Co.

Bidders would be invited to tender to the Authority for the provision of the Services set out in the Project Agreement at the same Unitary Charge as that set out in the Project Agreement. Since both the Services and price remain unchanged, the Authority will be no better and no worse off than it would have been had the Project Agreement not been terminated, save for the disruption caused. If the Authority wishes to retender the Project Agreement on the basis of different Services, then the Authority will need to agree with PPP Co. (and its lenders) any changes which would adversely affect PPP Co., or alternatively pay the Adjusted Estimated Fair Value of the Contract.

The Unitary Charge should be sufficient, in most circumstances, to represent a positive valuation from prospective bidders (and so generate a cash sum) since, particularly if termination takes place during the Service Period, bidders will not typically incur capital costs on the scale envisaged when the price was originally agreed. The private sector is, of course, familiar with the cash flow valuation techniques which would be used to assess the value of the Project Agreement. These involve their valuing a number of factors, including the revenue stream of the Project, the capital and service costs they expect to incur (taking into account the conditions of the Assets), the perceived risks associated with the Project, financing costs and market appetite.

One of the concerns that the outgoing PPP Co. will have is that, in the period between the Termination Date and the date of the New Contract, there will be no income, finance costs will increase, the condition of the Assets may deteriorate (thereby detrimentally affecting their value) and the Authority will potentially be obtaining some value even though there is no service (in that, even with the Authority itself performing the Service, a significant benefit exists). For that reason, the Authority should periodically pay a Post Termination Service Amount to the outgoing PPP Co which should approximate to the value received in this interim period. The recommended approach is to take the Unitary Charge that was paid at the Termination Date and deduct from that both the costs of alternative provision of the Service and any rectification costs (allowing the PPP Co. the benefit of any rectified availability as a result of rectification costs being incurred).

To the extent that the term of the New Contract is the same as the unexpired term for the terminated Project Agreement (i.e. the expiry date in the New Contract is later than that in the Project Agreement by the amount of time the Retendering Procedure has taken) then any Post Termination Service Amounts should be deducted from the ultimate payment made. That is, once the estimated value of the post termination period to the Authority has been accurately assessed, this deduction is appropriate.

It may be, however, for Service reasons that a service requirement can, in fact, only be delivered for a period that expires on the original Expiry Date. In such circumstances, it would not be possible for the term of the retendered contract to be for a period equal to the unexpired term of the Project Agreement. If it is not possible to relet for a period equal to the unexpired term (e.g. the Expiry Date of the original Project Agreement is the date on which the Service ceases to be required) then the Post Termination Service Amounts should not be deducted from the Market Value of the Contract.

As in the original procurement, the Authority will select the bid which represents best value (which should not simply be the lowest price). Given the need for the outgoing PPP Co. is the amount paid by the Authority to the outgoing PPP Co. in compensation, even if the Authority decides to contract with a separate compliant tenderer offering better value for money and which has agreed to pay a lower price. In such a situation the Authority will have to have satisfied itself as to the value for money benefits of choosing such a tenderer. All things being equal, and provided bidders are able to show that they are capable of meeting the service requirements, the best priced compliant bid should win. The bid price, net of the Authority's own costs of Retendering and any costs incurred in relation to running the Service prior to replacement of the PPP Co. (having taken into account non-payment of the Unitary Charge), will be paid to the former PPP Co. as compensation (this is defined as the Adjusted Highest Compliant Tender price in the drafting).

It is important that neither party is incentivised to delay the process by which market value is determined. These provisions help prevent such a delay occurring.

If the Authority elects to retender the Project Agreement, the Authority will be responsible for and will control the Retendering process. Consequently, if the Senior Lenders decide not to step in, or have subsequently stepped out they will cease to have any control over the transfer of the Project Agreement to the new contractor. However, the Senior Lenders will be concerned to ensure that the Authority correctly follows the Tender Process so as to help ensure that a fair market value for the Project Agreement is received. The Senior Lenders (through PPP Co.) should therefore have the right to appoint a third party (the "Tender Process Monitor") to monitor the retendering process and report on its progress to PPP Co. and Senior Lenders.

If the Authority elects to retender the provision of the Services, then the following provisions will apply:

- 2.1 The objective of the retendering procedure will be to establish and pay to PPP Co. the Highest Compliant Tender Price, as a result of the Tender Process.
- 2.2 The Authority will (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as practicable.
- 2.3 The Authority will notify PPP Co. of the qualification criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process but will act reasonably in setting such requirements and terms.
- 2.4 PPP Co. authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under Clause 52 (Confidentiality) that is reasonably required as part of the Tender Process.
- 2.5 PPP Co. may, at its own cost, appoint a person (the “**Tender Process Monitor**”) to monitor the Tender Process for the purpose of monitoring and reporting to PPP Co. and the Senior Lenders on the Authority’s compliance with the Tender Process and making representations to the Authority. The Tender Process Monitor will not disclose any confidential information to PPP Co. or any other person (and will provide an undertaking to the Authority to such effect as a condition of its appointment) but will be entitled to advise PPP Co. as to whether it considers that the Authority has acted in accordance with the Tender Process, and correctly determined the Adjusted Highest Compliant Tender Price.
- 2.6 The Tender Process Monitor will enter into a confidentially agreement with the Authority in a form acceptable to the Authority and will be entitled to attend all meetings relating to the Tender Process, inspect copies of the tender documentation and bids and will be required to make written representations to the Authority regarding compliance with the Tender Process. All representations will be made by the Tender Process Monitor in a timely manner as the Tender Process proceeds. The Authority will not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by the PPP Co. in the event that the PPP Co. refers a dispute relating to the Adjusted Highest Compliant Tender Price to Dispute Resolution in accordance with Clause 44 (Dispute Resolution).

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Although the Tender Process Monitor should have the right to attend meetings, review tender process documentation and bids, the Authority should not be required to have regard to any representations made by the Tender Process Monitor in respect of the Tender Process.

- 2.7 For all or any part of a month, falling within the period from the Termination Date to the Compensation Date, the Authority will pay to PPP Co.:
- (a) the Post Termination Service Amount for that month, on or before the date falling 10 (ten) Business Days after the end of that month; and
  - (b) the Post Termination Service Amount for the period ending on the Compensation Date, on or before the date falling [20 (twenty)] Business Days after the Compensation Date.
- 2.8 If any Post Termination Service Amount is less than zero then it will be carried forward and will be set off against any future positive Post Termination Service Amounts. If any such Post Termination Service Amount has not been set off on or before the Compensation Date then it will be taken into account in the calculation of the Adjusted Highest Compliant Tender Price.
- 2.9 The Authority will require bidders to bid on the basis that they will receive the benefit of any outstanding claims under material damage insurance policies and amounts (if any) standing to the credit of the Joint Insurance Account on the date that the New Contract is entered into.
- 2.10 As soon as practicable after tenders have been received, the Authority will (acting reasonably) determine the Compliant Tenders and will notify the PPP Co. of the Adjusted Highest Compliant Tender Price.
- 2.11 If PPP Co. refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 44 (Disputes Resolution Procedure), the Authority will be entitled to enter into a New Contract. The Authority will pay to PPP Co. the Adjusted Highest Compliant Tender Price on or before the date falling [20 (twenty)] Business Days after it has been determined in accordance with Clause 44 (Disputes Resolution) and the Authority will pay interest to PPP Co. at the Senior Debt Rate on any amount of Adjusted Highest Compliant Tender Price which had been withheld, from the date specified in paragraph 2.12 below until the date specified in this paragraph 2.11.
- 2.12 Subject to paragraphs 2.11 and 2.15, the Authority will pay to PPP Co. an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling [20 (twenty)] Business Days after the date of the New Contract.
- 2.13 The discharge by the Authority of its payment obligation in paragraph 2.11 and/or 2.12 above will be in full and final settlement of all PPP Co.'s claims and rights against the Authority for breaches and/or termination of this Project Agreement and the Project Documents whether under contract, tort, restitution or otherwise, save for any

liability of the Authority which arose prior to the Termination Date that has not already been taken into account in the Adjusted Highest Compliant Tender Price.

- 2.14 Subject to paragraphs 2.15 and 2.18 below, if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price to PPP Co. on or before the date falling two years after the Termination Date then the following provisions of this paragraph 2 of Part 1 of Schedule 17 will not apply to that termination and the provisions of paragraph 3 of Part 1 of this Schedule 17 (No Retendering Procedure) will apply instead.
- 2.15 If the Adjusted Highest Compliant Tender Price is zero or a negative number then the Authority will have no obligation to make any payment to PPP Co. and with effect from the time that the Authority gives notice of that event to PPP Co., the Authority will be released from all liability to PPP Co. for breaches and/or termination of this Project Agreement and any other Project Document whether under contract, tort, restitution or otherwise save for any antecedent liability of the Authority which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price.
- 2.16 If the Adjusted Highest Compliant Tender Price is less than zero then an amount equal to the Adjusted Highest Compliant Tender Price will be due and payable by PPP Co. to the Authority on the date of the New Contract.
- 2.17 The Authority may elect at any time prior to the receipt of a Compliant Tender to follow the Retendering Procedure under paragraph 3 of Part 1 of this Schedule 17 (No Retendering Procedure) by notifying PPP Co. that this election has been made.
- 2.18 If the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it will notify PPP Co. of this decision and pay to PPP Co. an amount equal to the Adjusted Highest Compliant Tender Price within [20 (twenty)] Business Days of such notification.

### 3. NO RETENDERING PROCEDURE<sup>84</sup>

If either the Authority is not entitled to retender the provision of the Services under paragraph 1 of Part 1 of this Schedule 17 (Retendering Election) or the Authority elects to require an expert determination in accordance with this paragraph 3 of Part 1 of Schedule 17 (No Retendering Procedure) then the following procedure will apply.

3.1 Subject to paragraph 3.2 below, PPP Co. will not be entitled to receive any Post Termination Service Amount.

3.2 If the Authority elects to require an expert determination in accordance with this paragraph 3 (No Retendering Procedure) after it has elected to follow the procedure under paragraph 2 above (Retendering Procedure), then the Authority will continue to pay to the PPP Co. each Post Termination Service Amount until the Compensation Date, in accordance with this paragraph 3 (No Retendering Procedure).

3.3 In agreeing or determining the Estimated Fair Value of the Contract the parties will be obliged to follow the principles set out below:

- (a) all forecast amounts should be calculated in nominal terms at current prices, recognising the adjustment for Indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in the Project Agreement;

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#### <sup>84</sup> No Retendering.

The Authority may elect not to retender the Project or it may be that there is no Liquid Market, in which case the Authority will instead pay to PPP Co an assessed value of the amount it would have received through an appropriate retender process (net of costs) that is, if a Liquid Market had existed (the “Estimated Fair Value of the Contract”).

Estimated Fair Value computations are conducted by forecasting the full unitary charge from the date of termination to the expiry of the Project Agreement (ignoring any deductions for performance or availability), from which the estimated costs of delivering the service to the required standard in the output specification (this includes the running costs, lifecycle costs and any rectification costs) are deducted to arrive at the estimated operating cash-flow stream which, had a liquid market existed and the project been re-tendered, a hypothetical bidder would have valued to determine the amount to bid for the project.

The first point to consider in making this computation is whether this computation should be conducted in nominal terms (i.e. using current prices) or in real terms (i.e. using constant prices). For contracts with 100% indexation to RPI, it should not normally matter since both methods would return the identical result. However, it is easier and safer to conduct the analysis in nominal terms because:

- (a) many elements of a project (including tax and cost of funds) are always quoted in nominal terms, and it is easy to make errors by ignoring this when conducting “real” computations, and
- (b) the majority of PPP contracts let in the PPP market are partially indexed. For such contracts, the “real” value of the Unitary Payment effectively declines with time. The effect of indexation must therefore be recognised by explicitly including the indexation effects and conducting the analysis in nominal terms.

The next question is whether the Estimated Fair Value analysis should be conducted in pre- or post-tax terms. It is considerably easier and more transparent to conduct the analysis in pre-tax terms because this avoids protracted scrutiny of the assumptions underlying the tax forecasts.

The forecast cash-flows should be discounted at a discount rate which reflects the risk of the underlying cash-flow. The most transparent measure of the risk of the cashflows is the real pre-tax project IRR reflected in the Base Case.

- (b) the total of all future payments of the full Unitary Charge (without deductions) forecast to be made will be calculated and discounted to the Termination Date at the Termination Date Discount Rate;
- (c) the total of all costs forecast to be incurred by the Authority as a result of termination will be calculated and discounted at the Termination Date Discount Rate and deducted from the payment calculated pursuant to sub-paragraph 3.3(b) above, such costs to include (without double counting):
  - (i) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;
  - (ii) the costs of the service forecast to be incurred by the Authority to the standard required; and
  - (iii) any rectification costs required to deliver the Services to the standard required (including any costs forecast to be incurred by the Authority to complete construction or development work and additional operating costs required to restore operating services standards),

in each case such costs to be forecast at a level that will deliver the full Unitary Charge referred to in sub-paragraph 3.3(b) above.

- 3.4 If the Parties cannot agree on the Adjusted Estimated Fair Value of the Contract on or before the date falling [30 (thirty)] days after the date on which the Authority elected to require an expert determination in accordance with this paragraph 3 (No Retendering Procedure), then the Estimated Fair Value of the Contract will be determined in accordance with Clause 44 (Disputes Resolution).
- 3.5 The Authority will pay to PPP Co. an amount equal to the Adjusted Estimated Fair Value of the Contract on the date falling 60 (sixty) days after the date on which the Adjusted Estimated Fair Value of the Contract has been agreed or determined in accordance with this paragraph 3 (No Retendering Procedure).
- 3.6 The discharge by the Authority of its obligation in paragraph 3.5 is in full and final settlement of all PPP Co.'s claims and rights against the Authority for breaches and/or termination of this Project Agreement or other Project Document whether in contract, tort, restitution or otherwise save for any liability that arose prior to the Termination Date (but not from the termination itself) that has been taken into account in determining the Adjusted Estimated Fair Value of the Contract.
- 3.7 To the extent that the Adjusted Estimated Fair Value of the Contract is less than zero, then an amount equal to the Adjusted Estimated Fair

Value of the Contract will be due and payable by PPP Co. to the Authority on the Compensation Date.

**4. LIMIT OF LIABILITY**

In the event the Adjusted Highest Compliant Tender Price or the Adjusted Estimated Fair Value of the Contract exceeds the Base Senior Debt Termination Amount, the Authority will only be obliged to pay to PPP Co. the [Revised Senior Debt Termination Amount] in full and final settlement of all PPP Co.'s claims and rights against the Authority for breaches and/or termination of this Project Agreement and the Project Documents whether under contract, tort, restitution or otherwise.

## SCHEDULE 17

### COMPENSATION ON TERMINATION

#### PART 2

#### **Termination for Authority Default and Voluntary Termination<sup>85</sup>**

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<sup>85</sup> The objective should be to ensure that PPP Co. and its financiers are fully compensated i.e. no worse off because of Authority Default or Voluntary Termination than if the Project Agreement had proceeded as expected.

PPP Co. should be required to specify its preferred method of calculation of equity return at the time of its bid. It should choose between the level set out in the original base case, the market value at the time of termination and the original base case return from the Termination Date.

In many PPP projects, equity is invested as a blend of share capital and junior debt. In calculating Authority Default compensation, many projects have distinguished between junior debt and equity. Typically, junior debt has been repaid in full (together with interest) while compensation for equity has been based either on its market value or on a base case return. Mezzanine debt has not been specifically identified. If the project concerned does have an element of mezzanine debt then the Authority will have to consider the extent to which, for the purposes of Authority Default or Voluntary Termination, it is more akin to Senior Debt or equity and decide upon an appropriate approach for termination compensation.

Since in many PPP projects, much of the "equity" is invested as junior debt, the approach taken in the early PFI projects in the UK was to give PPP Co. the opportunity of equity upside (through the market value compensation) but insulate it from downside (since junior debt is repaid in full). This is not appropriate. It is important that the same method of calculation (whether "market value" or "base case return") is used for both equity and junior debt.

For similar reasons, calculations based on the higher of base case return and market value" (giving PPP Co. all upside but no downside) or the lower of base case return and market value" (giving the PPP Co. all downside but no upside) are inappropriate.

Bidders should be invited to bid which of the following levels of equity/junior debt compensation they prefer:

- Compensation to reflect the base case IRR for equity and junior debt for the entire duration of the Project Agreement. The purpose is to provide equity investors with the returns they expected from the Project at the outset, regardless of actual project performance (whether better or worse than expected).

The compensation payment is the amount which, when taken together with all amounts already paid to equity (in dividends/redemption payments etc) and junior debt (in interest and principal repayments) taking account of the actual timing of all such payments, provides equity and junior debt with their base case project-life IRR as agreed on signature of the Project Agreement up to the Termination Date. Where equity or junior debt have already hit their project-life base case IRR, no payment should be made.

- Compensation to reflect the market value of both equity and junior debt for the entire duration of the Project Agreement. The purpose is to allow the equity investors to take the full benefit of good PPP Co. performance but bear the risks associated with poor performance.

The Authority pays an amount for both equity and junior debt based on their market value on a going concern basis immediately prior to the termination i.e. the amount for which the equity and junior debt could have been sold to a willing buyer at the relevant date (the calculation being based on the assumption that there had been no Authority Default and that both equity and junior debt were freely transferable).

The market valuation will reflect the value of anticipated future cashflows (both revenue and costs); risk allocation under the Project Agreement; and market appetite for contracts of a similar nature. It will also take into account the value of the Assets (including any cash balances) held by PPP Co. at the Termination Date.



## 1. COMPENSATION ON AUTHORITY DEFAULT

- 1.1 On termination of the Project Agreement under Clause 34 (Termination for Authority Default) or Clause 35 (Voluntary Termination by the Authority) the Authority will pay PPP Co. the “Authority Default Termination Sum” in accordance with Clause 39 (Compensation on Termination).
- 1.2 Subject to paragraphs 1.4 to 1.6 below the Authority Default Termination Sum will be an amount equal to the aggregate of:
  - (a) the Base Senior Debt Termination Amount;
  - (b) redundancy payments for employees of PPP Co. that have been or will be reasonably incurred by PPP Co. as a direct result of termination of this Project Agreement and any Sub-contractor Breakage Costs; and

EITHER

[(c) the aggregate amount for which the share capital of PPP Co. and the amounts outstanding under the Junior Debt Documents could have been sold on an open market basis based on the Relevant Assumptions.]

OR

[(c) an amount which when taken together with

- (i) dividends (or other distributions) paid by PPP Co. on its share capital on or before the Termination Date; and

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•Compensation to reflect the base case return for equity and junior debt for the remainder of the duration of the Project Agreement. This is an amalgamation of the first two approaches. The compensation payment is the amount of future return that the equity and junior debt providers originally provided for in the base case bid.

Care should be taken that if a refinancing has occurred (see Section 35 (Refinancing)) and the original equity and Junior debt reduced, there is no double counting.

PPP Co. is likely to incur redundancy costs as a result of the termination of the Project Agreement and, to the extent that these will occur, these should be included in the compensation payable by the Authority. Similarly, the Sub-Contractors may incur losses as a direct result of the early termination of the Project Agreement (e.g. in respect of cancellation of orders for materials and goods). The Project Agreement should specify those heads of loss which the Authority will pay to PPP Co., on account of the Sub-Contractors' losses. If the Authority proposes to offer compensation to cover the Sub-Contractors' future loss of profits, it should limit the period of time for which it will pay for such future loss (e.g. for a one year period from termination) and satisfy itself (through conducting due diligence over sub-contracts or otherwise) that the quantum of the loss of profit and other consequential losses and breakage costs are reasonable and appropriate.

The Authority should also decide what happens to the Assets following a compensation payment. As the Authority has fully compensated PPP Co., they should usually revert to the Authority. Where the assets may have a significant residual value and PPP Co. retains the assets then different considerations will apply.

- (ii) interest paid and principal repaid by PPP Co. under the Junior Debt Documents on or before the Termination Date,

taking account of the actual timing of all such payments, gives a real internal rate of return on the share capital subscribed and amounts advanced under the Junior Debt Documents equal to the Base Case Equity IRR;]

OR

[(c) all amounts shown in the Base Case as payable by PPP Co. from the Termination Date, either in dividends or other distributions on the share capital of PPP Co. or as payments of interest or repayments of principal made by PPP Co. under the Junior Debt Documents, each amount discounted back at the Base Case Equity IRR from the date on which it is shown to be payable in the Base Case to the Termination Date less any amount that has been realised in a Refinancing which has occurred prior to the Termination Date.]

- 1.3 On payment of the amount referred to in paragraph 1.1 above, the Authority will have the option to require the PPP Co. to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority and the terms of Clause 40 (Hand-back) will apply.
- 1.4 If the aggregate of the amounts referred to in paragraphs 1.2(a) and 1.2(c) is less than the Revised Senior Debt Termination Amount, then the Authority Default Termination Sum will be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.2(b) provided always that:
  - (a) the amount referred to in paragraph 1.2(b) will only be paid to the extent that PPP Co. has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and
  - (b) if at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs will be paid in respect of any Principal Sub-Contract in circumstances where there is an event of default under such Principal Sub-Contract which would entitle the PPP Co. to terminate such Principal Sub-Contract.
- 1.5 if a Distribution is made whilst any Additional Permitted Borrowing is outstanding and PPP Co. has wilfully, or through gross negligence, failed to comply with the obligations under Clause [ ● ] of the Funder Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority will be entitled to set off the value of that Distribution a second time against the Authority Default

Termination Sum, provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

- 1.6 If PPP Co. has wilfully or through gross negligence failed to comply with its obligations under Clause [ ● ] of the Funder Agreement and there has been an overstatement of the cash balances by PPP Co. as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this paragraph 1.6, then the Authority Default Termination Sum, will be reduced by the amount of such overstatement (to the extent that such overstatement is still applicable at the Termination Date), provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

## SCHEDULE 17

### COMPENSATION ON TERMINATION

#### PART 3

#### **Compensation On Termination For Force Majeure, Uninsurable Risk Or Change In Law**

- 1.1 On termination of the Project Agreement under Clause 36.1 (Force Majeure), Clause 36.2 Uninsurable Risk) or Clause 36.3 (Change in Law), the Authority will pay to PPP Co. the **“Force Majeure Termination Sum”**.

Subject to paragraphs 1.3 to 1.5 below the Force Majeure Termination Sum will be an amount equal to the aggregate of:

- (a) the Base Senior Debt Termination Amount;
- (b) Junior Debt less an amount equal to the aggregate of payments of interest and principal made by PPP Co. under the Junior Debt Documents;
- (c) all amounts paid to PPP Co. by way of subscription for shares in the capital of PPP Co. less dividends and other distributions paid to the shareholders of PPP Co. (save to the extent deducted under paragraph 1.1(b) above); and
- (d) redundancy payments for employees of PPP Co. that have been or will be reasonably incurred by PPP Co. as a direct result of termination of the Project Agreement and any Sub-contractor Breakage Costs.

- 1.2 If the amounts referred to in paragraphs 1.1(b) and/or 1.1(c) are less than zero, then, for the purposes of the calculation in paragraph 1.1 they will be deemed to be zero.

- 1.3 If the aggregate of the amounts referred to in paragraphs 1.1(a), 1.1(b) and 1.1(c) is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum will be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.1(d) provided always that:

- (a) the amount referred to in paragraph 1.1(d) will only be paid to the extent that PPP Co. has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution and
- (b) if at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs will be paid in respect of any Principal Sub-Contract in

circumstances where there is an event of default under such Principal Sub-Contract which would entitle PPP Co. to terminate such Principal Sub-Contract.

- (c) If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the PPP Co. has wilfully, or through gross negligence, failed to comply with the obligations under Clause [ ● ] of the Funder Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority will be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- (d) If PPP Co. has wilfully or through gross negligence failed to comply with its obligations under Clause [ ● ] of the Funder Direct Agreement and there has been an overstatement of the cash balances by PPP Co. as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Part 3 of Schedule 17 (Compensation on Termination), then the Force Majeure Termination Sum, will be reduced by the amount of such overstatement (to the extent that such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- (e) Such amount will be determined and paid in accordance with Clause 39 (Compensation on Termination).

## **SCHEDULE 17**

### **COMPENSATION ON TERMINATION**

#### **PART 4**

##### **Termination for Corrupt Gifts and Fraud and Breach of Refinancing Provisions**

On termination of the Project Agreement in accordance with Clause 37 (Termination for Breach of Refinancing Provisions or Clause 38 (Termination for Corrupt Gifts and Fraud) then the Authority will pay PPP Co. an amount equal to the Revised Senior Debt Termination Amount.

## **SCHEDULE 18 – FUNDER DIRECT AGREEMENT**

## **SCHEDULE 19 – PPP CO. AND ITS SHAREHOLDERS**

### **1. PPP CO.**

- Name:
- Registered number:
- Date of Incorporation:
- Place of Incorporation
- Former name (if any):
- Registered office:
- Business address:
- Accounting Reference Date:
- Auditors:
- Tax Residence:
- Directors:                      Name:                      Address:
- Secretary:                      Name:                      Address:
- Authorised share capital:                      Name and address of registered holder:                      Number and class held:                      Amount paid up:
- Issued share capital:                      Name and address of registered holder:                      Number and class held:                      Amount paid up:
- Members:                      Name and address of registered holder:                      Nominal value of loan stock:                      Amount paid up:

*Charges: [Include information in relation to date of charge, person in whose favour charge is created, property/assets over which charge is created, any satisfactions registered etc]*

### **2. SHAREHOLDER 1**

- Name:
- Registration number:
- Date of Incorporation:



- Place of Incorporation
- Former name (if any):
- Registered office:
- Business address:
- Accounting Reference Date:
- Auditors:
- Tax Residence:
- Directors:                      Name:                      Address:
- Secretary:                      Name:                      Address:
- Authorised share capital:                      Name and address of registered holder:                      Number and class                      Amount paid up: held:
- Issued share capital:                      Name and address of registered holder:                      Number and class                      Amount paid up: held:
- Members:                      Name and address of registered holder:                      Nominal value of loan stock:                      Amount paid up:

*Charges: [Include information in relation to date of charge, person in whose favour charge is created, property/assets over which charge is created, any satisfactions registered etc]*

### 3. **SHAREHOLDER 2**

- Name:
- Registration number:
- Date of Incorporation:
- Place of Incorporation
- Former name (if any):
- Registered office:
- Business address:
- Accounting Reference Date:
- Auditors:

- Tax Residence:
- Directors:                      Name:                      Address:
- Secretary:                      Name:                      Address:
- Authorised share capital:                      Name and address of registered holder:                      Number and class                      Amount paid up: held:
- Issued share capital:                      Name and address of registered holder:                      Number and class                      Amount paid up: held:
- Members:                      Name and address of registered holder:                      Nominal value of loan stock:                      Amount paid up:

*Charges: [Include information in relation to date of charge, person in whose favour charge is created, property/assets over which charge is created, any satisfactions registered etc]*

## SCHEDULE 20 – VARIATIONS

### 1. AUTHORITY CHANGES

- (a) The Authority has the right to require changes to the Works or Services (other than Small Works Changes in which case Clauses 29.3 and 29.4 (Small Works) will apply) in accordance with this Clause 1 of Schedule 20 (an “**Authority Change**”).
- (b) PPP Co. may refuse an Authority Change which:
  - (i) requires the Works or Services to be performed in a way that infringes any Law or is inconsistent with Good Industry Practice;
  - (ii) would cause any Necessary Consent to be revoked;
  - (iii) would, if implemented, result in a material and adverse change in the nature of the Project (including its risk profile);
  - (iv) would materially and adversely affect PPP Co.’s ability to deliver the Project;
  - (v) would materially and adversely affect the health and safety of any person;
  - (vi) would materially and adversely affect PPP Co.’s ability to meet any of its obligations under the Funding Agreements as at the Commencement Date or as otherwise approved by the Authority in a way not compensated for pursuant to this Schedule 20 (Variations);
  - (vii) would cause any of the Project Insurances to be invalid.
- (c) If the Authority requires an Authority Change, it must serve an Authority Notice of Change (“**Authority Notice of Change**”) on PPP Co. The Authority Notice of Change will:
  - (i) set out the change in the Works or Services required in sufficient detail to enable PPP Co. to calculate and provide the Estimated Change in Project Costs in accordance with Clause 1(d) below;
  - (ii) in the event that the Authority Change will require Capital Expenditure, state whether the Authority intends to pay to PPP Co. the costs involved in implementing the Authority Change or whether the Authority requires PPP Co. to use its reasonable efforts to obtain funding in accordance with Clause 1(j) below.
- (d) As soon as practicable and in any event within 15 (fifteen) Business Days after having received the Authority Notice of Change, PPP Co. will deliver to the Authority the Estimated Change in Project Costs which will include the opinion of PPP Co. on:

- (i) whether relief from compliance with Project Agreement obligations is required;
  - (ii) any impact on the provision of the Works or Services;
  - (iii) any amendment required to this Project Agreement and/or any Project Document as a result of the Authority Change;
  - (iv) any costs that result from the change in the Works or Services;
  - (v) any change of revenue that results from the change in Works or Services;
  - (vi) any Capital Expenditure that is required or no longer required as a result of the change in Works or Services;
  - (vii) any Necessary Consents which are required; and
  - (viii) the programme for implementing the Authority Charge.
- (e) As soon as practicable after the Authority receives the Estimated Change in Project Costs, the Parties will discuss and agree the issues set out therein, including:
- (i) providing evidence that PPP Co. has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige D&C Co. and / or O&M Co. and/or Sub-contractors to minimise any increase in costs and maximise any reduction in costs;
  - (ii) demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such Capital Expenditure is incurred, foreseeable Changes in Law at that time have been taken into account by PPP Co.; and
  - (iii) 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 Authority Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under paragraphs 1(d)(iv) and/or 1(d)(v) above.

In such discussions the Authority may modify the Authority Notice of Change and, if the estimated increase in Capital Expenditure in respect of the change in Works or Services is expected to exceed €[ ● ] (Indexed) the Authority may require PPP Co. to seek and evaluate competitive tenders. In each case PPP Co. will, as soon as practicable, and in any event not more than ten (10) Working Days after receipt of such modification, notify the Authority of any consequential changes to the Estimated Change in Project Costs.

- (f) If PPP Co. does not intend to use its own resources to implement any Authority Change it will comply with Good Industry Practice with the objective of ensuring that it obtains best value for money.
- (g) If the parties cannot agree on the contents of the Estimated Change in Project Costs then the dispute will be determined in accordance with Clause 44 (Dispute Resolution Procedure).
- (h) As soon as practicable after the contents of the Estimated Change in Project Costs have been agreed or otherwise determined pursuant to Clause 44 (Dispute Resolution Procedure), the Authority will:
  - (i) confirm in writing the Estimated Change in Project Costs (as modified); or
  - (ii) withdraw the Authority Notice of Change.
- (i) If the Authority does not confirm in writing the Estimated Change in Project Costs (as modified) within twenty (20) Business Days of the contents having been agreed in accordance with paragraph (e) above or determined pursuant to Clause 44 (Dispute Resolution Procedure), then the Authority Notice of Change will be deemed to have been withdrawn and the Authority will reimburse any and all reasonably incurred costs of PPP Co.
- (j) In the event that the Estimated Change in Project Costs (as modified) involves estimated Capital Expenditure then (unless the Authority has elected to fund such costs) PPP Co. will use its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, on terms reasonably satisfactory to the Authority and the Senior Lenders.
- (k) If PPP Co. has used its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, but has been unable to do so within 40 (forty) Business Days of the date that the Authority confirmed the Estimated Change in Project Costs, then PPP Co. will have no obligation to carry out the Authority Change, unless the Authority agrees within twenty (20) Business Days of the end of such period to pay the costs for which funding is not available.
- (l) The Authority may, at any time following the date on which the Estimated Change in Project Costs is confirmed, agree to meet all or, to the extent PPP Co. has obtained funding for part of the Capital Expenditure, the remaining part of the estimated Capital Expenditure.
- (m) In the event that the Estimated Change in Project Costs has been confirmed by the Authority, then the adjustment to the Unitary Charge will be made in accordance with Part [ ● ] of Schedule 15 (Payment Mechanism).
- (n) In the event that the Estimated Change in Project Costs has been confirmed by the Authority, the relevant Authority Change will be commenced by the PPP Co. within fifteen (15) Business Days of the Authority's confirmation and

implemented by PPP Co. in accordance with the programme for implementing the proposed change included in the Estimate. Within such period of fifteen (15) Business Days (or such longer period agreed by the Authority and the PPP Co. acting reasonably), the Parties will enter into any documents to amend this Project Agreement or any relevant Project Document which are necessary to give effect to such change.

## 2. **PPP Co. CHANGES**

- (a) If PPP Co. wishes to introduce a change in the Works or Services (other than minor changes that have no financial impact and do not adversely affect the delivery of Services, in which case Schedule 5 (Review Procedure) will apply and/or Small Works, in which case Clause 29.3 (Small Works) will apply) (a **“PPP Co. Change”**), it must serve a PPP Co. Notice of Change (the **“PPP Notice of Change”**) on the Authority.
- (b) The PPP Co. Notice of Change must:
  - (i) set out the proposed change to the Works or Services in sufficient detail to enable the Authority to evaluate it in full;
  - (ii) specify PPP Co.’s reasons for proposing the change in Works or Services;
  - (iii) request the Authority to consult with PPP Co. with a view to deciding whether to agree to the change in Works or Services and, if so, what consequential changes the Authority requires as a result;
  - (iv) indicate any implications of PPP Co. change in the Works or Services;
  - (v) indicate, in particular, whether a variation to the Unitary Charge is proposed (and, if so, give a detailed cost estimate of such proposed change);
  - (vi) indicate if there are any dates by which a decision by the Authority is critical; and
  - (vii) set out the programme for implementing the proposed change.
- (c) The Authority will evaluate PPP Co.’s proposed change to the Works or Services in good faith, taking into account all relevant issues, including whether:
  - (i) a change in the Unitary Charge will occur;
  - (ii) the PPP Co. Change affects the quality of the Works or Services or the likelihood of successful delivery of the Project;
  - (iii) the PPP Co. Change will adversely interfere with the relationship of the Authority with third parties;

- (iv) the financial strength of PPP Co. is sufficient to perform the changed Works or Services; or
  - (v) the PPP Co. Change materially affects the risks or costs to which the Authority is exposed.
- (d) As soon as practicable after receiving the PPP Co. Notice of Change, the Parties will meet and discuss the matter referred to in it. During their discussions the Authority may propose modifications or accept or reject the PPP Co. Notice of Change.
- (e) If the Authority accepts the PPP Co. Notice of Change (with or without modification), the relevant change in Works or Services will be implemented within five (5) Business Days of the Authority's acceptance and implemented by PPP Co. in accordance with the programme for implementing the proposed change included in the PPP Co. Notice of Change (as modified). Within this period, the Parties will consult and agree the remaining details as soon as practicable and will enter into any documents to amend this Project Agreement or any relevant Project Document which are necessary to give effect to the PPP Co. Change.
- (f) If the Authority rejects the PPP Co. Notice of Change, it will not be obliged to give its reasons for such a rejection. Subject to Clause 2(i) below, the Authority may reject any PPP Co. Notice of Change in its absolute discretion.
- (g) Unless the Authority's acceptance specifically agrees to an increase in the Unitary Charge, there will be no increase in the Unitary Charge as a result of a change in Works or Services proposed by PPP Co.
- (h) If the proposed PPP Co. Change causes or will cause PPP Co.'s costs or those of a Sub-contractor to decrease, there will be a decrease in the Unitary Charge such that the savings are shared between the Authority and PPP Co. PPP Co. and the Authority will agree how such savings are to be apportioned in relation to each PPP Co. Change but in any event the Authority's share of such savings will not be less than 50% of the total value of the savings.
- (i) The Authority cannot reject a PPP Co. Change, which is required in order to conform to a Change in Law. The costs of introducing a PPP Co. Change resulting from a Change in Law (including any resulting variation in the Unitary Charge) will be dealt with in accordance with Schedule 21 (Change in Law) and to the extent not dealt with will be borne by PPP Co.

## **SCHEDULE 21 – CHANGE IN LAW**

1. (a) The Authority will bear the risk of any Qualifying Change in Law subject to the provisions of this Schedule 21 (Change in Law).
- (b) PPP Co. will bear the risk of any General Change in Law subject to the provisions of this Schedule 21 (Change in Law).

### **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:

- (a) any necessary change to the Works or Services;
- (b) whether any changes are required to the terms of the Project Agreement to deal with the Qualifying Change in Law;
- (c) whether relief from compliance with obligations under the Project Agreement is required, including the obligation of the PPP Co. to achieve the Target Service Commencement Date and/or meet the Output Specification during the implementation of any Qualifying Change in Law;
- (d) any loss of revenue that will result from the Qualifying Change in Law;
- (e) any Estimated Change in Project Costs that directly result from the Qualifying Change in Law; and
- (f) any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect during the Service Period,

in each case giving in full detail the procedure for implementing the change in the Works and/or in the Services. Responsibility for the costs of implementation (and any resulting variation to the Unitary Charge) will be dealt with in accordance with Clause 3 (Parties to Discuss) to 6 (Unitary Charge Adjustment) below.

### **3. PARTIES TO DISCUSS**

As soon as practicable after receipt of any notice from either Party under Clause 2 (Qualifying Change in Law) above, the Parties will discuss and agree the issues referred to in Clause 2 (Qualifying Change in Law) above and any ways in which PPP Co. can mitigate the effect of the Qualifying Change in Law, including:

- (a) providing evidence that PPP Co. has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Sub-contractors to minimise any increase in costs and maximise any reduction in costs;



- (b) providing evidence that PPP Co. has used reasonable endeavours to minimise loss of revenue;
- (c) demonstrating how any Capital Expenditure 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 PPP Co;
- (d) 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 Associated Companies carry on business; and
- (e) 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 paragraph 2(e) and/or 2(f) above.

#### 4. **CHANGE AGREED**

- (a) If the Parties agree or it is determined under Clause 44 (Dispute Resolution) that PPP Co. is required to incur additional Capital Expenditure due to a Qualifying Change in Law, then PPP Co. will use its reasonable endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to the Authority and the Senior Lenders.
- (b) The Authority will be entitled to any savings in Capital Expenditure and/or operations costs which result directly from a Qualifying Change in Law and there will be a Unitary Charge adjustment to reflect such savings.

#### 5. **FINANCING**

- (a) Subject to paragraph 4(a) if PPP Co. has used reasonable endeavours to obtain funding for capital expenditure referred to in Clause 4 (Change Agreed), but has been unable to do so within [sixty (60)] days of the date that the agreement or determination in paragraph 4 (Change Agreed) occurred, then the Authority will pay to PPP Co. an amount equal to that Capital Expenditure on the basis provided in paragraph 5(b) below.
- (b) Where funding is not available in accordance with Clause 5(a):
  - (i) the Authority and PPP Co. will agree:
    - (A) a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by PPP Co. in implementing the Qualifying Change in Law to the extent borne by the Authority; and

- (B) where payment for part of the Qualifying Change in Law reflects the implementation of, or specific progress towards, an element within the Qualifying Change in Law, an objective means of providing evidence confirming that the part of the Qualifying Change in Law corresponding to each occasion when payment is due under the payment schedule appears to have been duly implemented,

(such payment schedule and evidence to be determined in accordance with Clause 44 (Dispute Resolution Procedure) in the event of the Authority and PPP Co. failing to agree as to its terms); and

- (ii) the Authority will make a payment to PPP Co. within fifteen (15) Business Days of receipt by the Authority of invoices presented to the Authority (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 Qualifying Change in Law has been implemented.

## **6. UNITARY CHARGE ADJUSTMENT**

Any compensation payable under this paragraph by means of an adjustment to or reduction in the Unitary Charge will be in accordance with Part [ ● ] of Schedule 15 (Payment Mechanism).

**SCHEDULE 22 – INDEPENDENT TESTER CONTRACT**

**DATED** \_\_\_\_\_

(1) [AUTHORITY]

(2) [PPP CO.]

(3) [INDEPENDENT TESTER]

(4) [FUNDER]

(5) [D&C CO.]

[(6) [O&M CO.]]

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**INDEPENDENT TESTER CONTRACT**

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**THIS AGREEMENT** is made [●]

**BETWEEN:**

- (1) [●] (the "**Authority**");
- (2) [●] ("**PPP Co.**") a company incorporated in Ireland ([Company Number]) whose registered office is at [●];
- (3) [**INDEPENDENT TESTER**] (the "**Independent Tester**");
- (4) [●](s) of [●] (the "**Funder**" being one of the Funders);
- (5) [●] of [●] (the "**D&C Co.**"); and
- [(6) [●] of [●] (the "**O&M Co.**"); ]

**WHEREAS:**

- (A) PPP Co. and the Authority have entered into an agreement for the design, build, finance, operation and maintenance of the Project Facility in accordance with the terms and conditions of the Project Agreement. Under the terms of the Project Agreement they have jointly agreed to appoint an independent tester.
- (B) PPP Co. has entered into the D&C Contract with the D&C Co. for the development of the Project Facility at the Site(s).
- (C) PPP Co. has entered into the Senior Funding Agreements with the Funders.
- (D) The Independent Tester is an independent adviser willing to provide services to PPP Co. and the Authority and for the benefit of the Funders.
- (E) PPP Co. and the Authority have jointly agreed to engage the Independent Tester to carry out the duties and obligations ascribed to the Independent Tester in the Project Agreement upon the terms of this Agreement.

**IT IS AGREED** as follows:

**1. Interpretation**

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

## 2. Appointment

2.1 PPP Co. and the Authority jointly appoint the Independent Tester to perform the obligations and tasks which are ascribed to the Independent Tester under the Project Agreement and which are set out in Appendix 1 upon the terms and conditions set out below. The D&C Co. and the O&M Co. are parties to this Agreement solely to make the commitments on their respective parts as expressly made in this Agreement and, for the avoidance of doubt, the Independent Tester will have no liability to the D&C Co. and the O&M Co..

### 2.2

- (a) The Independent Tester will provide the services under Clause 2.1 above (the “**Services**”) independently, fairly and impartially to and as between PPP Co. and the Authority in relation to the Project Agreement at such times and at such locations as the parties will agree from time to time.
- (b) The Independent Tester owes the Authority and the PPP Co. a duty of care in respect of its obligations under this Agreement.
- (c) In performing the Services, the Independent Tester will have regard to the interest of the Funders. Whilst the Independent Tester may take account of any representations made by PPP Co. and the Authority [and the D&C Co., O&M Co. and the Funder's Technical Adviser]<sup>86</sup> the Independent Tester will not be bound to comply with any representations made by any of them in connection with any matter on which the Independent Tester is required to exercise his professional judgement.

### 2.3 Additional Services

- (a) The Independent Tester will carry out and perform any additional and/or varied services required for the implementation of the Project reasonably required by the Authority and PPP Co. which are not included in, or which are omitted from, the Services (the “**Additional Services**”).
- (b) If the Independent Tester will at any time be required to perform Additional Services, it will give to the Authority and PPP Co. a written estimate of the cost thereof (taking into account any reduction in work or other expense which might also occur as a result of the circumstances giving rise to the Additional Services).
- (c) Where a change to the Project occurs pursuant to the terms of the Project Agreement (whether by virtue of a Delay Event, Variation, change to the Construction Programme or otherwise) which may materially impact on the Services or otherwise on the Independent

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<sup>86</sup> Delete as appropriate.

Tester, the Authority and PPP Co. will promptly notify the Independent Tester of such change. The Independent Tester will within [ ] Business Days of receiving such notification, notify the Authority and PPP Co. of the impact of such change, if any, on the Services, including whether such change gives rise to any Additional Services and the provisions of this Clause 2.3 will apply accordingly.

- (d) If the Independent Tester is required to perform Additional Services then, before commencing such Additional Services, and unless otherwise agreed with the Authority and PPP Co., the Authority and PPP Co. may direct that such Additional Services be performed:
  - (i) For the amount specified in the written estimate given under Clause 2.3(b);
  - (ii) Such other amount as is agreed among the Authority, PPP Co. and the Independent Tester; or
  - (iii) In accordance with the daily rates for personnel which are set out in Appendix 2 Part 2 hereto.
- (e) The Fee for the Additional Services will be paid by PPP Co. and the Authority on a [●] basis or as otherwise agreed, monthly in arrears.

2.4 The Independent Tester will promptly and efficiently provide the Services and the Additional Services:

- (a) with the reasonable care, skill and diligence to be expected of a properly qualified and competent professional adviser who has held itself out as competent and experienced in rendering such services for projects of a similar size, nature, scope and complexity to the Project; and
- (b) in accordance with all applicable Laws, Legal Requirements, Good Industry Practice and the Authority's Requirements.

2.5 All instructions to the Independent Tester must be given in writing, signed by both the Authority's Representative and the PPP Co.'s Representative or such other person appointed pursuant to Clause 23 of the Project Agreement (*Representatives*) and, for the avoidance of doubt, the Independent Tester will not act in accordance with any instructions given to him by either the Authority or PPP Co. (or any other person) not given in accordance with the provisions of this Clause 2.5.

2.6 The Authority, PPP Co., the O&M Co. and the D&C Co. agree to co-operate with and provide reasonable assistance to the Independent Tester to familiarise the Independent Tester with all necessary aspects of the Project to enable the Independent Tester to carry out its obligations under this Agreement.

- 2.7 The Independent Tester will be deemed to have full knowledge of the provisions of the Project Agreement, the D&C Contract, the O&M Contract and the Interface Agreement [(as defined in the Construction Contract)] such as relates to the Services and any Additional Services and will be deemed to be aware of, and to have taken full account of, all the undertakings and warranties, both expressed and implied, on the part of PPP Co. and the Authority which are set out in the Project Agreement provided always that true and accurate copies of the same have been delivered to the Independent Tester.
- 2.8 Subject to Clause 2.9, the Independent Tester will use the following partners, directors or employees: [*insert names of individuals*] in connection with the performance of the Services and any Additional Services and such persons' services will be available when necessary and for so long as may be necessary to ensure the proper performance by the Independent Tester of the Services and any Additional Services. Such persons will have full authority to act on behalf of the Independent Tester for all purposes in connection with the Services and any Additional Services.
- 2.9 The Independent Tester may by written notice to the Authority and PPP Co. replace the staff identified in Clause 2.8 taking into account the need for liaison, continuity, level of qualification and availability of personnel in respect of the Project. Such replacement will be subject to approval in writing by PPP Co. and the Authority (such approval not to be unreasonably withheld or delayed).

### 3. **Duration**

- 3.1 The Services will commence on the date of this Agreement<sup>87</sup>.
- 3.2 The Parties hereby agree that this Agreement governs all of the Services and any Additional Services provided by the Independent Tester in relation to the Project whether before or after the date hereof.

### 4. **Fee**

- 4.1 PPP Co. will pay to the Independent Tester a fee of [●] for the Services provided in relation to the Project Agreement. The fee is exclusive of VAT and inclusive of disbursements. The Independent Tester will issue an invoice to PPP Co. on a monthly basis in accordance with Appendix 2 Part 1. The date on which the invoice is received by PPP Co. will constitute the due date. The final date for payment by PPP Co. will be thirty (30) days after receipt of the Independent Tester's invoice.
- 4.2 Not later than [ ● ] Business Days after the due date ascertained in accordance with Clause 4.1, PPP Co. may give written notice to the Independent Tester

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<sup>87</sup> Authority to amend according to specific requirements.



stating the amount which PPP Co. proposes to pay and the basis on which the amount is calculated.

- 4.3 Where PPP Co. intends to withhold payment of any amount stated in the invoice, PPP Co. and the Authority will give written notice to the Independent Tester not later than [ ● ] Business Days before the final date for payment pursuant to Clause 4.1. The notice will state the amount to be withheld and the ground or grounds for withholding the payment and if there is more than one ground, the notice will identify the amount attributable to each ground.
- 4.4 If PPP Co. fails to pay the Independent Tester any sum payable under this Agreement by the final date for payment, PPP Co. will pay the Independent Tester simple interest on that sum from the final date for payment until the actual date of payment at the Default Interest Rate.
- 4.5 If PPP Co. fails to pay the amounts properly due pursuant to these provisions and no notice to withhold the payment has been given pursuant to Clause 4.3, the Independent Tester may suspend performance of any or all of the Services. This right is subject to the Independent Tester first giving PPP Co. and the Authority not less than [ ● ] Business Days' notice in writing of such intention stating the grounds for suspension. The right to suspend performance will cease when PPP Co. pays the amount properly due.
- 4.6 Without prejudice to Clause 2.5, neither the Authority nor PPP Co. will issue instructions or do anything which does or is reasonably likely materially to increase the fees payable to the Independent Tester without the prior approval of the other (such approval not to be unreasonably withheld or delayed).
- 4.7 As soon as the Independent Tester becomes aware of the same and before acting on the same the Independent Tester will inform the Authority and PPP Co. of any instructions given to him pursuant to Clause 2.5 which will or could reasonably be expected to increase the fees payable to the Independent Tester under the terms of this Agreement. The Independent Tester will, if requested by either PPP Co. or the Authority, provide both the Authority and PPP Co. with a detailed estimate of the increase in the fees payable to it if it carries out such instructions. The estimate of increased fees will be based upon the rates contained in Appendix 2, Part 2.
- 4.8 For the avoidance of doubt, neither the Authority nor the Funder will have any liability or responsibility to discharge in whole or in part, the Independent Tester's fee for the Services. The obligations of PPP Co. and the Authority to pay the Independent Tester for any Additional Services in accordance with Clause 2.3(e) will be several and not joint.

## **5. Limitations on Authority**

The Independent Tester will not:

- 5.1 make or purport to make any alteration or addition to or omission from the design of the Project Facility (including, without limitation, the setting of performance standards) or issue any instruction or direction to any contractor or professional consultant employed or engaged in connection with the Project; or
- 5.2 (unless both PPP Co. and the Authority consent in writing) consent or agree to any waiver or release of any obligation of PPP Co. or the Authority under the Project Agreement or of any contractor or professional consultant employed or engaged in connection with the Project.

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

## 6. Termination

- 6.1 PPP Co. and the Authority may by joint notice in writing (a “**Joint Notice**”) immediately terminate this Agreement if the Independent Tester:
  - (a) is in breach of any of the terms of this Agreement which, in the case of a breach capable of remedy, will not have been remedied by the Independent Tester within [●] days of receipt by the Independent Tester of a Joint Notice specifying the breach and requiring its remedy;
  - (b) is incompetent, guilty of gross misconduct and/or any material failure, negligence or delay in the provision of the Services and/or its other duties under this Agreement;
  - (c) fails or refuses after written warning to provide the Services or any Additional Services and/or its other duties under this Agreement reasonably and as properly required of him; or
  - (d) is subject to an event analogous to any of the events set out in Clause 33.1(b) or (c) (*PPP Co. Default*) of the Project Agreement.
- 6.2 If the Project Agreement is rescinded, terminated or repudiated for any reason and, notwithstanding that the validity of such rescission, termination or repudiation may be disputed, this Agreement may be terminated by Joint Notice and with immediate effect.
- 6.3 Following any termination of this Agreement, but subject to the right of PPP Co. and the Authority to any set-off, withholding or deductions which PPP Co. or the Authority may be entitled properly to make as a result of any breach of this Agreement by the Independent Tester, the Independent Tester will be entitled to be paid in full and final settlement of any valid claim which the Independent Tester may have in consequence thereof, any fees due under Clause 4 above in respect of the Services carried out in accordance with this Agreement prior to the date of termination. For the avoidance of doubt,

neither PPP Co. nor the Authority will be liable to the Independent Tester for any loss of profits or consequential losses as a result of the termination of this Agreement.

- 6.4 Termination of this Agreement will be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including the right of PPP Co. and the Authority to recover damages from the Independent Tester).
- 6.5 If this Agreement is terminated in accordance with Clause 6.1, PPP Co. and the Authority will use reasonable endeavours to engage an alternative independent tester within [ ● ] days, subject to applicable Law. If within such period PPP Co. and the Authority are unable to procure the appointment of an alternative independent tester on reasonable commercial terms, the Independent Tester will pay to PPP Co. and/or the Authority, as the case may be, any reasonable incremental loss, damage or extra costs suffered by each of them as a result thereof.
- 6.6 If PPP Co. fails to make a payment of any undisputed sum to the Independent Tester within [ ● ] Business Days of the expiry of any notice issued pursuant to Clause 4.5 in respect of such sum, the Independent Tester may issue a further written notice to the Authority and PPP Co. specifying that the payment remains outstanding (the "Second Notice") and if payment is not made within [ ● ] Business Days of receipt of the Second Notice the Independent Tester may issue a further written notice terminating this Agreement with immediate effect. Following such termination the Independent Tester will be entitled to be paid in accordance with Clause 6.3.
- 6.7 Termination of this Agreement will not affect the continuing rights and obligations of PPP Co., the Authority and the Independent Tester under Clauses 5 (*Limitations on Authority*), 7 (*Confidential Information and Copyright*), 8 (*Professional Indemnity Insurance*), 17 (*Dispute Resolution Procedure*) and this Clause or under any other Clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

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

- 7.1 The Independent Tester will treat as secret and confidential and will not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of or permit to be made use of any unpublished information relating to PPP Co.'s or the Authority's, the D&C Co.'s or the O&M Co.'s (if appropriate) technology or other know-how business plans or finances or any such information relating to a subsidiary, supplier, customer or client of PPP Co., the Authority, D&C Co. or the O&M Co. (if appropriate) where the information was received during the period of this Agreement except as may be reasonably necessary in the performance of the Services and any Additional Services. Upon termination of this Agreement for whatever reasons the Independent Tester will deliver up to PPP Co. and the Authority all working papers, computer disks and tapes and any other material and

copies provided to or prepared by him pursuant either to this Agreement or to any previous obligation owed to PPP Co. or the Authority.

- 7.2 The obligation to maintain confidentiality does not apply to any information or material to the extent that the Independent Tester is compelled to disclose any such information or material by law or any regulatory local or governmental authority.
- 7.3 The copyright in all reports, and other documents produced by the Independent Tester in connection with the Project will remain vested in the Independent Tester but the Independent Tester hereby grants to PPP Co. and Authority and their nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such reports, and other documents and to reproduce the information contained in them for any purpose related to the Project including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Project. Such licence will include a licence to grant sub-licences and to transfer the same to third parties.
- 7.4 The Independent Tester will not be liable for use by any person of the documents, (including reports, details, plans, specifications, schedules, computer programs, software, consents and any other papers, works, reports and inventions produced by the Independent Tester) for any purpose other than that for which the same were prepared by or on behalf of the Independent Tester.

## **8. Professional Indemnity Insurance**

- 8.1 Without prejudice to its obligations under this Agreement, or otherwise at law, the Independent Tester will maintain professional indemnity insurance with a limit of indemnity of not less than [ ● ]<sup>88</sup> for any one claim in respect of any neglect, error or omission on the Independent Tester's part in the performance of its obligations under this Agreement for the period commencing on the date of this Agreement and expiring 12 years after:
  - (a) the date of Certification of the Works; or
  - (b) the termination of this Agreement,whichever is the earlier, provided that such insurance is available in the market place at commercially reasonable rates.
- 8.2 The Independent Tenderer will provide on request, to both the Authority and PPP Co.:
  - (a) copies of its insurance policies; and

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<sup>88</sup> Authority to take advice from insurance advisers on appropriate level of PII cover from the Independent Tester for the Project.

- (b) evidence that the premiums payable thereunder have been paid.
- 8.3 The Independent Tester will maintain such insurance with reputable insurers carrying on business in Ireland or the United Kingdom.
- 8.4 Any increased or additional premium required by insurers by reason of the Independent Tester's own claims record or other acts, omissions, matters or things particular to the Independent Tester will be deemed to be within commercially reasonable rates.
- 8.5 The Independent Tester will as soon as reasonably practicable inform PPP Co. and the Authority if such insurance ceases to be available at commercially reasonable rates in order that the Independent Tester and PPP Co. and the Authority can discuss means of best protecting the respective positions of PPP Co. and the Authority and the Independent Tester in respect of the Project in the absence of such insurance.
- 8.6 The Independent Tester will fully co-operate with any measures reasonably required by PPP Co. and the Authority including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if PPP Co. and the Authority undertake in writing to reimburse the Independent Tester in respect of the net cost of such insurance to the Independent Tester above commercially reasonable rates.
- 8.7 The Independent Tester hereby indemnifies, represents and warrants that all insurances policies required in order to carry out the Services and any Additional Services in respect of the Project are in full force and effect.
- 8.8 The Independent Tester will, prior to commencing the provision of the Services and as soon as reasonably practicable following renewal dates, produce for inspection by PPP Co. and the Authority documentary evidence that such insurance is being properly maintained.
- 8.9 The above obligations in respect of professional indemnity insurance will continue notwithstanding termination of this Agreement for any reason whatsoever, including (without limitation) breach by PPP Co. and the Authority.

## **9. Limitation of liability**

- 9.1 With the exception of liability for death, personal injury and/or any other liability that cannot lawfully be excluded or limited, the Independent Tester's maximum [aggregate] liability to all parties, under or in connection with this Agreement, whether in contract or in tort, or for breach of statutory duty is limited to €[●] million.
- 9.2 No action or proceedings under or in connection with this Agreement will be commenced against the Independent Tester after the expiry of twelve years from the completion of the Services.

## 10. Notices

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

## 11. Assignment

- 11.1 The Independent Tester will not assign or transfer any of its rights or obligations under this Agreement or sub-contract the whole or any part of the Services or any Additional Services.<sup>89</sup>
- 11.2 Neither PPP Co. nor the Authority will be entitled to assign or transfer any of their respective rights or obligations under this Agreement save that the parties hereby consent to any such assignment or transfer which is contemporaneous to the assignment or transfer of the Project Agreement and is made to the same assignee or transferee. In the event that the Project Agreement is novated to a third party, the term "Project Agreement" will include any replacement contract arising from such novation.
- 11.3 The Independent Tester will not be entitled to contend that any person to whom this Agreement is assigned in accordance with Clause 11.2 is precluded from recovering under this Agreement any loss incurred by such assignee resulting from any breach of this Agreement (whenever happening) by reason that such person is an assignee and not a named promisee under this Agreement.

## 12. Cumulative Rights and Enforcement

- 12.1 Any rights and remedies provided for in this Agreement whether in favour of PPP Co. or the Authority or the Independent Tester are cumulative and in addition to any further rights or remedies which may otherwise be available to the parties.
- 12.2 The duties and obligations of the Independent Tester arising under or in connection with this Agreement are owed to PPP Co. and the Authority both jointly and severally and PPP Co. and the Authority may accordingly enforce the provisions hereof and pursue their respective rights hereunder in their own name, whether separately or with each other.

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<sup>89</sup> Where the Independent Tester intends to sub-contract any part of the Services, this should be stated in the bid submitted to the Authority and additional drafting should be included to identify any such sub-contractors and to ensure that the Independent Tester remains liable for the relevant part of the Services. The Authority should consider whether it is appropriate to obtain a warranty from such sub-contractors.

12.3 PPP Co. and the Authority covenant with each other that they will not waive any rights, remedies or entitlements or take any other action under this Agreement which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the other without the other's prior written consent, such consent not to be unreasonably withheld or delayed.

**13. Waiver**

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

**14. Severability**

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

**15. Counterparts**

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

**16. Variation**

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

**17. Dispute Resolution Procedure**

17.1 All disputes will be resolved in accordance with terms equivalent (mutatis mutandis) to the Dispute Resolution Procedure as set out in the Project Agreement.

17.2 PPP Co., the Authority and the Independent Tester will co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Agreement.

**18. Governing Law and Jurisdiction**

18.1 This Agreement will be governed by and construed in accordance with the laws of Ireland and the parties hereby submit to the exclusive jurisdiction of the courts of Ireland.

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

**IN WITNESS WHEREOF** the Parties have executed and delivered this Agreement on the date first written above.



## SCHEDULE 22

### Appendix 1

#### Scope of Services - Independent Tester Contract<sup>90</sup>

The Independent Tester will perform the role of Independent Tester as referred to in [Clauses 11 (*Independent Tester*) and 12 (*Commissioning and Completion*) of the Project Agreement and Schedules and Schedules 3 (*D&C Requirements*), 4 (*Construction Programme*), 5 (*Review Procedure*), 6 (*Certificates*) and 7 (*Tests on Completion*) of the Project Agreement], by providing the following scope of Services:

#### 1. MONTHLY REPORT AND COMPLETION CERTIFICATION

The Independent Tester will:

- 1.1 During the Works, provide the Authority and PPP Co. with a monthly report on the activities carried out by the Independent Tester.
- 1.2 Undertake regular inspections during the Works, as necessary, in accordance with the [periods set out in the Construction Programme and Final Commissioning Programme]. Report on the completion status of the Project, identifying any work that is not compliant with the Authority's D&C Requirements, the Approved Reviewable Design Data (Approved RDD) and/or the Final Commissioning Programme.
- 1.3 [Determine whether any relevant phase is finished or complete in accordance with the Final Commissioning Programme and advise PPP Co. and the Authority of the need for any re-testing which may be necessary to demonstrate whether a relevant phase of the Project is finished or complete.]
- 1.4 Certify the Practical Completion Date and issue a Certificate of Practical Completion in accordance with the Project Agreement.
- 1.5 Within [ ● ] Business Days of issue of the Certificate of Practical Completion, issue a Snagging Notice specifying any Snagging Matters. Monitor and review rectification of such Snagging Matters in accordance with the Project Agreement.
- 1.6 Review the programme for the rectification of all Snagging Matters to be carried out and advise PPP Co. and the Authority as appropriate.

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

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<sup>90</sup> To be amended according to the relevant Project.

## **2. General**

The Independent Tester will:

- 2.1 Familiarise itself with the Project Agreement (including the Design Data, all drawings relating to the Works and any Variations issued from time to time and any other relevant documentation or information referred to in the Project Agreement, relevant Output Specifications, the D&C Contract and the O&M Contract to the extent necessary to be in a position to carry out the Services in accordance with the terms of the Project Agreement and this Agreement.
- 2.2 Following notification by PPP Co., pursuant to Clause 12.3 (Commissioning Procedure) of the Project Agreement, inspect and comment as required on the Works [each relevant phase] as required by the Final Commissioning Programme.

## **3. Design Review**

- 3.1 For the avoidance of doubt, nothing in this paragraph 3 or elsewhere in this Agreement will impose any design liability on the Independent Tester, and any design liability will remain with the parties responsible for such design under the Project Agreement. The Services required under this paragraph 3 will be supervisory in nature and will not require the Independent Tester to approve (or otherwise) the suitability of the design under the Project Agreement.
- 3.2 The Independent Tester will:
  - (a) Monitor and report upon the implementation of the D&C Requirements for the construction, structural and engineering services design for the Project.
  - (b) Monitor the detailed working drawings and specifications for a sample number and type of rooms which in his professional judgment is appropriate to be selected by the Independent Tester to verify that they comply with the Approved RDD as described in the Project Agreement. The Independent Tester has indicated that in normal circumstances [● percent (●%)] of rooms should be sampled. If in the professional judgment of the Independent Tester, because of the results of its sample or other circumstances a different sampling percentage is appropriate, he will provide a detailed report in respect of that and, if so agreed (or determined as between PPP Co. and the Authority by the Dispute Resolution Procedure) any change in the percentage sampling resulting in a change in fees will be borne by PPP Co. and the Authority as they will agree or as determined by the Dispute Resolution Procedure.

## **4. Procedure Review**

The Independent Tester will:

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

## 5. CONSTRUCTION REVIEW

The Independent Tester will:

- 5.1 Visit the Site(s) and monitor the Works for their compliance with the D&C Requirements and the Approved RDD. The frequency and timing of the Independent Tester's visits are dependent on the progress of Construction on Site(s). The D&C Co. will agree a programme with the Independent Tester for the inspection of key construction processes and the completed [phases of the] Works and will give the Independent Tester advance notice of these Works being carried out on Site. The Independent Tester will identify any aspect of the Works which needs to be inspected before being covered over by subsequent activity so that he may satisfy himself that these have been constructed in accordance with the Construction Programme and the D&C Requirements without the need for opening up.
- 5.2 Randomly check that the Works are being undertaken in accordance with the D&C Requirements that has been agreed by the Authority and PPP Co..
- 5.3 Review the written mechanical and electrical engineering services testing and Commissioning Procedure. Undertake selective witnessing of the mechanical and electrical services testing and commissioning. The Independent Tester has indicated that these sampling proportions should amount to approximately [ ● ] percent [( ● %)]. The Independent Tester will review [ ● ] percent [( ● %)] of all test results. If in the professional judgment of the Independent Tester, because of the results of witnessing (or because of other circumstances) a different sampling percentage is appropriate he will provide a detailed report in respect of that and any change in the percentage sampling resulting in a change of fees will be borne by PPP Co., the Authority or the D&C Co. as they will agree, failing such agreement, as determined by the Dispute Resolution Procedure.
- 5.4 Inspect rectification works which have previously prevented the Independent Tester from certifying the Project as complete. Concurrent with the issue of the Certificate of Practical Completion, agree a list of Snagging Matters with

PPP Co. together with its programme for implementation and issue a Snagging Notice in accordance with Clause 12.5 (*Snagging Matters*).

- 5.5 Check the production of the relevant operating manuals, relevant approvals, test results, inspection records and as built drawings and monitor the timely handover of this documentation.

## 6. **Participation in Dispute Resolution**

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

## **SCHEDULE 22**

### **Appendix 2**

#### **Part 1**

#### **Schedule of Drawdown of Fees**

## **SCHEDULE 22**

### **Appendix 2**

#### **Part 2**

#### **Schedule of Daily Rates**

*[individual rates can be inserted here]*

## **SCHEDULE 22**

### **Appendix 3**

**Tests on Completion to be witnessed by the Independent Tester**

## **SCHEDULE 23 –REQUIRED INSURANCE**

This Schedule 23 comprises four Parts-<sup>91</sup>

**PART 1:** Policies to be taken out by the PPP Co. and maintained during the Construction Period.

**PART 2:** Policies to be taken out by PPP Co. and maintained during the Service Period

**PART 3:** Endorsements

**PART 4:** Broker's Letter of Undertaking

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<sup>91</sup> Schedule 23 will require to be drafted on a project by project basis. Account will need to be taken of issues such as pre-existing structures, transition phases, or project specific requirements. Levels of maximum deductibles, extent and period of cover and limits of indemnity for example, will require to be considered based on each project's requirements.



## **Part 1**

Policies to be taken out by PPP Co. and maintained during the design and construction phase.

Common to each policy in Part 1 (unless stated otherwise):

### **Insureds:-**

1. Authority.
2. PPP Co.
3. D&C Co.
4. O&M Co.
5. Sub-contractors to Insureds 2, 3 and 4 of any tier.
6. Senior Lenders.
7. Junior Lenders.
8. Consultants - for their site activities only?

each for their respective rights and interests in the Project.

### **1. Contractors' 'All Risks' Insurance (CAR)**

#### **1.1 Insured Property**

The permanent and temporary works, materials, goods, plant and equipment for incorporation in the Works (other than constructional plant, tools, accommodation and equipment belonging to or the responsibility of D & C Co. or his Sub-contractors) and all other property used or for use in connection with the Works associated with the Project;

#### **1.2 Coverage**

“All risks” of physical loss or damage to the Insured Property unless otherwise excluded.

#### **1.3 Sum Insured**

At all times an amount not less than the full reinstatement or replacement value of the Insured Property but not less than the value specified in the D & C Contract plus provision to include extensions as appropriate.

#### 1.4 **Maximum Deductible**

[€ [ ● ] each and every loss in respect of [DE5], € [ ● ] each and every other loss.]

#### 1.5 **Territorial Limits**

Republic of Ireland including offsite storage and during inland transit.

#### 1.6 **Period of Insurance**

In respect of Insured Property from the Commencement Date until the Service Commencement Date and thereafter in respect of defects liability until expiry of the [ ● months]<sup>92</sup> defects liability period.

#### 1.7 **Cover Features & Extensions**

1.7.1. [Terrorism.]<sup>93</sup>

1.7.2. Munitions of war clause.

1.7.3. Additional costs of completion clause.

1.7.4. Professional fees clause.

1.7.5. Debris removal clause.

1.7.6. 72 hour clause.

1.7.7. European Union local authorities' clause.

1.7.8. Free issue materials clause.

1.7.9. [15%] escalation clause.

1.7.10. Automatic reinstatement of sum insured clause.

1.7.11. Loss minimisation.

1.7.12. Plans and documents.

1.7.13. Expediting expenses.

1.7.14. [Fire Prevention Joint Code of Compliance],

1.7.15. Temporary repairs.

1.7.16. Advance payment.

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<sup>92</sup> This should reflect the Defects Liability Period in the D&C Contract.

<sup>93</sup> Terrorism cover to be considered on a project by project basis.

1.7.17. Full guarantee maintenance.

1.7.18. Testing and commissioning.

1.7.19. Computer data reinstatement.

1.7.20. [Replacement/ reinstatement basis of claims settlement with cash option for non reinstatement alternative]

## **1.8 Principal Exclusions**

1.8.1. War and related perils.

1.8.2. Nuclear/radioactive risks.

1.8.3. Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds.

1.8.4. Wear, tear and gradual deterioration.

1.8.5. Consequential financial losses.

1.8.6. Cyber risks.

1.8.7. Inventory losses, fraud and employee dishonesty.

1.8.8. Faulty design, workmanship, materials – DE5.

## **2. Delay in Start Up Insurance (DSU)**

### **2.1 Insureds**

2.1.1. PPP Co.

2.1.2. Senior Lenders.

2.1.3. Junior Lenders.

2.1.4. Authority in respect of additional cost of working only.

each for their respective rights and interests in the Project.

### **2.2 Indemnity**

In respect of:

- (a) loss of anticipated Revenue during at least the Minimum Indemnity Period (referred to in paragraph 2.5 below) arising from a delay in completion of the Project as a result of loss or damage covered under the Contractors' All Risks' Insurance effected in accordance with Item 1 of Part 1 of this Schedule, including physical loss or damage which would be indemnifiable but for the application of any deductible;

- (b) the economic additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of anticipated Revenue of PPP Co., which without such expenditure would have taken place, during the Minimum Indemnity Period.

## **2.3 Sum Insured**

2.3.1. An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.

2.3.2. € [ ● ] in respect of Authority additional cost of working.

## **2.4 Maximum Excess**

[ ● ]

## **2.5 Minimum Indemnity Period**

[ ● ]

## **2.6 Period of Insurance**

As per the Contractors' "All Risks" Insurance, excluding the defects liability period.

## **2.7 Cover Features & Extensions**

2.7.1. Denial of access.

2.7.2. Utilities.

2.7.3. Terrorism.

2.7.4. Automatic reinstatement of sum insured.

2.7.5. Professional fees.

2.7.6. [Suppliers' extension.]

## **2.8 Principal Exclusions**

2.8.1. The exclusions under the Contractors' 'All Risks' Insurance, other than for consequential financial losses.

2.8.2. Delayed response by a public body or state authority.

### 3. **Construction Third Party Liability Insurance**

#### 3.1 **Interest**

To indemnify the Insured in respect of all sums that they may become legally liable to pay (including claimant's costs and expenses) as damages in respect of accidental:

- (a) death, or bodily injury, illness, death, disease contracted by any person;
- (b) loss or damage to property;
- (c) interference to property or any easement right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, nuisance, loss of amenities, or any like cause,

happening during the Period of Insurance and arising out of or in connection with the Works.

#### 3.2 **Limit of Indemnity**

Not less than € [ ● ] in respect of any one occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution liability.

#### 3.3 **Maximum Deductible**

€ [ ● ] for each and every occurrence of property damage. (personal injury claims will be paid in full).

#### 3.4 **Territorial Limits**

[Worldwide excluding USA, Canada and Australia]<sup>94</sup>

#### 3.5 **Jurisdiction**

Republic of Ireland

#### 3.6 **Period of Insurance**

As per the Contractors' "All Risks" Insurance, including the defects liability period.

#### 3.7 **Cover Features & Extensions**

3.7.1. Munitions of war.

3.7.2. Cross liabilities.

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<sup>94</sup> Alternative may be Republic of Ireland and elsewhere in the world in respect of non-manual visits.

- 3.7.3. Contingent motor.
- 3.7.4. Legal defence costs.
- 3.7.5. Infringement of Privacy and Wrongful Arrest.
- 3.7.6. Contractual liability assumed under the Project Agreement.

### **3.8 Principal Exclusions**

- 3.8.1. Liability for death, illness, disease or bodily injury sustained by employees of the insured.
- 3.8.2. Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles.
- 3.8.3. Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the Insured.
- 3.8.4. Liability in respect of loss or damage to property in the care, custody and control of the insured but this exclusion is not to apply to all property belonging to the Authority which is in the care, custody and control of another Insured.
- 3.8.5. Events more properly covered under a professional indemnity policy.
- 3.8.6. Liability arising from the ownership, possession or use of any aircraft or marine vessel.
- 3.8.7. Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.
- 3.8.8. Losses indemnified under the CAR policy or DSU policy.
- 3.8.9. Liability arising from war and related perils.
- 3.8.10. Liability arising from nuclear/radioactive risks.
- 3.8.11. Liability arising from cyber risks.
- 3.8.12. [Liability arising from or out of asbestos.]
- 3.8.13. [Liability arising from or out of toxic mould.]

## **4. Employers' Liability Insurance**

- 4.1 All parties and legal entities subject to the Project Agreement are required to effect and maintain adequate Employers' Liability Insurance.

- 4.2 The limit of indemnity for the Employers' Liability Insurance will not be less than [€13,000,000] any one occurrence inclusive of costs, the number of occurrences being unlimited during the period of insurance. This limit will be for any one occurrence, the number of occurrences being unlimited during the period of insurance or such greater amount as is required by the applicable law for the duration of the Project Agreement or such greater period as is required by law.
- 4.3 Employers Liability Insurance will contain an Indemnity to Principals Clause in respect of claims made against the Authority arising out of the performance of the party of his duties under this Project Agreement.

## **Part 2**

Policies to be taken out by the PPP Co. and maintained during the Service Period.

Common to all policies in Part 2 (unless stated otherwise):

### **Insureds:-**

1. Authority.
2. PPP Co.
3. O&M Co
4. Sub-contractor to Insureds 2 and 3 of any tier.
5. Senior Lenders.
6. Junior Lenders.

each for their respective rights and interests in the Project.

### **1. Property Damage Insurance**

#### **1.1 Insured Property**

The Project assets which are the property of PPP Co. or for which PPP Co. is responsible under the terms of this Project Agreement including but not limited to the new facilities.

#### **1.2 Coverage**

“All risks” of physical loss or damage to the Insured Property from any cause not excluded [including machinery breakdown and computer breakdown in respect of appropriate equipment].

#### **1.3 Sum Insured**

At all times an amount not less than the total reinstatement or replacement value of the Insured Property plus provision to include other Cover Features Extensions as appropriate. (escalated periodically as appropriate).

#### **1.4 Maximum Deductible**

€ [ ● ] each and every claim.

#### **1.5 Territorial Limits**

Anywhere at the facilities and temporary removals elsewhere in the [Republic of Ireland].



## **1.6 Period of Insurance**

From the Service Commencement Date or as otherwise specified in the Project Agreement for the duration of the Project Agreement and renewable on an annual basis unless agreed otherwise by the Authority [and the Senior Lenders].

## **1.7 Cover Features & Extensions**

- 1.7.1. [Terrorism.]
- 1.7.2. Automatic reinstatement of sum insured.
- 1.7.3. Capital additions clause.
- 1.7.4. 72 hour clause.
- 1.7.5. European Union local authorities' clause.
- 1.7.6. Professional fees.
- 1.7.7. Debris removal.
- 1.7.8. Pollution and contamination to the Insured Property arising from an event which itself is not otherwise excluded.
- 1.7.9. [Repair / reinstatement basis of claims settlement with cash option for non-reinstatement.]
- 1.7.10. Temporary repairs.
- 1.7.11. Payment on account.
- 1.7.12. Minimisation of loss.
- 1.7.13. Expediting expenses.

## **1.8 Principal Exclusions**

- 1.8.1. War and related perils.
- 1.8.2. Nuclear/radioactive risks.
- 1.8.3. Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds.
- 1.8.4. Wear, tear and gradual deterioration.
- 1.8.5. Consequential financial losses.
- 1.8.6. Cyber risks.

1.8.7. Losses recovered under the CAR policy.

1.8.9. Inventory losses or other unexplained losses or shortages.

## **2. Business Interruption Insurance**

### **2.1 Insureds**

2.1.1. PPP Co.

2.1.2. Senior Lenders.

2.1.3. [Junior Lenders.]

2.1.4. Authority in respect of Additional Cost of Working only,  
each for their respective rights and interests in the Project.

### **2.2 Indemnity**

In respect of:

- (a) loss of Revenue during at least the Minimum Indemnity Period arising from an interruption or interference in the operation of the Project as a result of loss or damage covered under Property Damage Insurance effected in accordance with paragraph 1 of Part 2 of this Schedule including physical loss or damage which would be indemnifiable but for the application of any deductible;
- (b) the economic additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of Revenue (as defined in Part 5 of this Schedule) of PPP Co. which without such expenditure would have taken place, during the Indemnity Period.

### **2.3 Sum Insured**

2.3.1. An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.

2.3.2. € [ ● ] in respect of Authority additional cost of working.

### **2.4 Maximum Excess**

€ [ ● ] each and every loss (escalated periodically as appropriate).

### **2.5 Minimum Indemnity Period**

[ ● ] months

## **2.6 Period of Insurance**

From the Service Commencement Date for the duration of this Project Agreement and renewable on an annual basis unless agreed otherwise between the Parties.

## **2.7 Cover Features & Extensions**

2.7.1. Denial of access.

2.7.2. Terrorism.

2.7.3. Utilities.

2.7.4. Accountants clause.

2.7.5. Automatic reinstatement of sum insured.

2.7.6. [Suppliers' extension.]

## **2.8 Principal Exclusions**

2.8.1. Exclusions under the Property Damage Insurance, other than for consequential financial losses.

2.8.2. Delayed response by a public body or state authority.

# **3. Third Party Public and Products Liability Insurance**

## **3.1 Interest**

To indemnify the Insured in respect of all sums that they may become legally liable to pay (including claimant's costs and expenses) as damages in respect of accidental:

- (a) death, or bodily injury, illness, death, disease contracted by any person;
- (b) loss or damage to property;
- (c) interference to property or any easement right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, nuisance, loss of amenities, or any like cause,

happening during the period of insurance and arising out of or in connection with the Project and the provision of the Services.

## **3.2 Limit of Indemnity**

Not less than € [ ● ] (escalated periodically as appropriate), in respect of any one occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution and products liability.

### 3.3 **Maximum Deductible**

€ [ ● ] for each and every occurrence of property damage (escalated periodically as appropriate) (personal injury claims to be paid in full).

### 3.4 **Territorial Limits**

[Worldwide excluding USA, Canada and Australia.]<sup>95</sup>

### 3.5 **Jurisdiction**

Republic of Ireland

### 3.6 **Period of Insurance**

From Service Commencement Date or as otherwise specified in this Project Agreement for the duration of the Project Agreement and renewable on an annual basis unless agreed otherwise by the Authority [and the Senior Lenders].

### 3.7 **Cover Features & Extensions**

3.7.1. Munitions of war.

3.7.2. Cross liability clause.

3.7.3. Contingent motor.

3.7.4. Legal defence costs.

3.7.5. Infringement of privacy and wrongful arrest.

3.7.6. Contractual liability assumed under the Project Agreement.

### 3.8 **Principal Exclusions**

3.8.1. Liability for death, illness, disease or bodily injury sustained by employees of the insured.

3.8.2. Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles.

3.8.3. Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the insured.

3.8.4. Liability in respect of loss or damage to property in the care, custody and control of the insured but this exclusion is not to apply to all

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<sup>95</sup> Alternative may be Republic of Ireland and elsewhere in the world in respect of non-manual visits

property belonging to the Authority which is in the care, custody and control of another Insured Party.

- 3.8.5. Liability arising out of technical or professional advice (given for a fee) other than in respect of death or bodily injury to persons or damage to third party property.
- 3.8.6. Liability arising from the ownership, possession or use of any aircraft or marine vessel.
- 3.8.7. Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.
- 3.8.8. Losses under the property damage policy or business interruption policy.
- 3.8.9. Liability arising from any failure to educate or other Authority liabilities not arising in connection with the provision of services under the Project Agreement.
- 3.8.10. Liability arising from war and related perils.
- 3.8.11. Liability arising from nuclear/radioactive risks.
- 3.8.12. Liability arising from cyber risks.
- 3.8.13. [Liability arising from asbestos.]
- 3.8.14. [Liability arising from toxic mould.]

#### **4. Employers Liability Insurance**

- 4.1 All parties and legal entities subject to the Project Agreement are required to effect and maintain adequate Employers' Liability Insurance
- 4.2 The limit of indemnity for the Employers' Liability Insurance will not be less than [€13,000,000] any one occurrence inclusive of costs, the number of occurrences being unlimited during the period of insurance. This limit will be for any one occurrence, the number of occurrences being unlimited during the period of insurance or such greater amount as is required by the applicable law for the duration of the Contract or such greater period as is required by law.
- 4.3 Employers Liability Insurance will contain an Indemnity to Principals Clause in respect of claims made against the Authority arising out of the performance of the party of his duties under this Project Agreement.

## **Part 3**

### **Endorsements**

#### **Endorsements**

Unless the context otherwise requires defined terms set out in the following endorsements will have the meaning set out in the Project Agreement.

#### **Endorsement 1**

##### **Cancellation**

This policy will not be cancelled or terminated before the original expiry date is to take effect except in respect of non-payment of premium.

The insurer will by written notice advise the Authority:

- (a) at least 30 days before any such cancellation or termination is to take effect;
- (b) at least 30 days before any reduction in limits or coverage or any increase in deductibles is to take effect; and
- (c) of any act or omission or any event of which the insurer has knowledge and which might invalidate or render unenforceable in whole or in part this policy.

#### **Endorsement 2**

##### **Multiple Insured/Non-Vitiation Clause**

Each of the parties comprising the Insured will for the purposes of this policy be considered a separate co-insured entity, insured on a composite basis, with the words “the insured” applying to each as if they were separately and individually insured provided that the total liability of the insurers under each section of this policy to the insured collectively will not (unless the policy specifically permits otherwise) exceed the limit of indemnity or amount stated to be insured under that section or policy. Accordingly, the liability of the insurers under this policy to any one insured will not be conditional upon the due observance and fulfilment by any other insured party of the terms and conditions of this policy or of any duties imposed upon that insured party relating thereto, and will not be affected by any failure in such observance of fulfilment of any such other insured party.

It is understood and agreed that any payment or payments by insurers to any one or more of the Insured will reduce, to the extent of that payment, insurers’ liability to all such parties arising from any one event giving rise to a claim under this policy and (if applicable) in the aggregate.

Insurers will be entitled to avoid liability to or (as may be appropriate) claim damages from any insured party in circumstances of fraud, misrepresentation, non-disclosure or material breach of warranty or condition of this policy (each referred to in this clause as a “**Vitiating Act**”) committed by that insured party save where such misrepresentation, non-disclosure or breach of warranty or condition was committed innocently and in good faith.

For the avoidance of doubt it is however agreed that a Vitiating Act committed by one insured party will not prejudice the right to indemnity of any other insured who has an insurable interest and who has not committed the Vitiating Act.

Insurers hereby agree to waive all rights of subrogation and/or recourse which they may have or acquire against any insured party (together with their employees and agents) except where the rights of subrogation or recourse are acquired in consequence of a Vitiating Act in which circumstances insurers may enforce such rights against the insured responsible for the Vitiating Act notwithstanding the continuing or former status of the vitiating party as an insured.

Notwithstanding any other provision of this policy or any other document or any act and/or omission by any insured party insurers agree that:

1. no party other than the Authority has any authority to make any warranty, disclosure or representation in connection with this policy on behalf of the Authority;
2. where any warranty, disclosure or representation is required from the Authority in connection with this policy insurers will contact the Authority in writing (in accordance with Endorsement 3 to the Project Agreement) and set out expressly the warranty, disclosure and/or representation required within a reasonable period of time from the Authority (regarding itself); and
3. save as set out in a request from insurers to the Authority in accordance with (2) above, the Authority will have no duty to disclose any fact or matter to insurers in connection with this policy save to the extent that for the Authority not to disclose a fact or matter would constitute fraudulent misrepresentation and/or fraudulent non-disclosure.

### **Endorsement 3**

#### **Communications**

All notices or other communications under or in connection with this policy will be given to each insured (and the Authority) in writing or by facsimile. Any such notice will be deemed to be given as follows:

- (a) if in writing, when delivered;
- (b) if by facsimile, when transmitted but only if, immediately after transmission, the sender's facsimile machine records a successful transmission has occurred.

The address and facsimile number of the Authority for all notices under or in connection with this policy are those notified from time to time by the Authority for this purpose to PPP Co. at the relevant time. The initial address and facsimile number of the Authority are as follows:

1. The Authority:

Address:

Facsimile No: [ ● ]

Attention: The Chief Executive from time to time of  
the Authority

It is further agreed that a notice of claim given by the Authority or any other insured will in the absence of any manifest error be accepted by the insurer as a valid notification of a claim on behalf of all Insureds.

## Endorsement 4

### Loss Payee (applicable only to the Physical Damage Policies)

Subject to the provision of Clause 45.2 all proceeds of this policy will be payable without deduction or set-off to the Joint Insurance Account.

## Endorsement 5

## Primary Insurance

It is expressly understood and agreed that this policy provides primary cover for the insured parties and that in the event of loss destruction damage or liability covered by this policy which is covered either in whole or in part under any other policy or policies of insurance effected by or on behalf of any of the insured parties the insurers will indemnify the insured parties as if such other policy or policies of insurance were not in force and the insurers waive their rights of recourse if any against the insurers of such other policy or policies of insurance.

## Endorsement 6

## Ringfencing

The level of any indemnity available to an insured party under this policy in relation to any claim(s) concerning the Project will not be affected and/or reduced by any claim(s) unrelated to the Project.



## Part 4

### Broker's Letter of Undertaking

To: The Authority

Dear Sirs

Agreement dated[ ] entered into between [ ] Limited (the “**PPP Co.**”) and [ ] (the “**Authority**”) (the “Project Agreement”)

1. We refer to the Project Agreement. Unless the context otherwise requires, terms defined in the Project Agreement will have the same meaning in this letter.
2. We act as insurance broker to PPP Co. in respect of the Required Insurance and in that capacity we confirm that the Required Insurance which are required to be procured pursuant to Clause 45 (Insurance) and Schedule 23 of the Project Agreement;
  - 2.1 where appropriate name you and such other persons as are required to be named pursuant to the Project Agreement for their respective interests;
  - 2.2 are, in our reasonable opinion as insurance brokers, as at today's date, in full force and effect in respect of all the matters specified in the Project Agreement;
  - 2.3 all premiums due to date in respect of the Required Insurance are paid and the Required Insurance are, to the best of our knowledge and belief, placed with insurers which, as at the time of placement, are reputable and financially sound. We do not, however, make any representations regarding such insurers' current or future solvency or ability to pay claims; and
  - 2.4 the endorsements set out in Part 3 of Schedule 23 of the Project Agreement are as at today's date in full force and effect in respect of the Required Insurance.
3. We further confirm that the attached cover notes confirm this position.
4. Pursuant to instructions received from PPP Co. and in consideration of your approving our appointment [or continuing appointment] as brokers in connection with the Required Insurance, we hereby undertake in respect of the interests of the Authority in relation to the Required Insurance:
  - 4.1 **Notification Obligations**
    - (a) to notify you at least 30 (thirty) days prior to the expiry of any of the Required Insurance if we have not received instructions from PPP Co. to negotiate renewal and in the event of our receiving instructions to renew, to advise you promptly of the details thereof;

- (b) to notify you at least 30 (thirty) days prior to ceasing to act as brokers to PPP Co. unless, due to circumstances beyond our control, we are unable to do so in which case we will notify you as soon as practicable; and
- (c) to pay into the Joint Insurance Account without set off or deduction of any kind of reason all payments in respect of claims received by us from insurers in relation to the Required Insurance specified in Clause 45.2 (Reinstatement) of the Project Agreement.

#### **4.2 Advisory Obligations**

- (a) to notify you promptly of any default in the payment of any premium for any of the Required Insurance;
- (b) to notify you if any insurer cancels or gives notification of cancellation of any of the Required Insurance, at least 30 (thirty) days before such cancellation is to take effect or as soon as reasonably practicable in the event that notification of cancellation takes place less than 30 (thirty) days before it is to take effect;
- (c) to notify you of any act or omission, breach or default of which we have knowledge which in our reasonable opinion may either invalidate or render unenforceable in whole or in part any of the Required Insurance or which may otherwise materially impact on the extent of cover provided under the Required Insurance; and
- (d) to advise PPP Co. of its duties of disclosure to insurers and to specifically advise upon:
  - (i) the facts, circumstances and beliefs that should generally be disclosed to insurers; and
  - (ii) the obligation not to misrepresent any facts, matters or beliefs to insurers.

#### **4.3 Disclosure Obligations**

- (a) to disclose to insurers any information made available to us from any source and any fact, change of circumstances or occurrence made known to us from any source which in our reasonable opinion is material to the Risks insured against under the Required Insurance and which properly should be disclosed to insurers as soon as practicable after we become aware of such information, fact, change of circumstance or occurrence whether prior to inception or renewal or otherwise; and
- (b) to treat as confidential all information so marked or otherwise stated to be confidential and supplied to us by or on behalf of PPP Co. or the Authority and not to disclose such information, without the prior

written consent of the supplier, to any third party other than those persons who, in our reasonable opinion have a need to have access to such from time to time, and for the purpose of disclosure to the insurers or their agents in respect of the Required Insurance in discharge of our obligation set out at Clause 4.3(a) of this letter. Our obligations of confidentiality will not conflict with our duties owed to PPP Co. and will not apply to disclosure required by an order of a court of competent jurisdiction, or pursuant to any applicable law, governmental or regulatory authority having the force of law or to information which is in the public domain.

#### 4.4 **Administrative Obligations**

- (a) to hold copies of all documents relating to or evidencing the Required Insurance, including but without prejudice to the generality of the foregoing, insurance slips, contracts, policies, endorsements and copies of all documents evidencing renewal of the Required Insurance, payment of premiums and presentation and receipt of claims;
- (b) to supply to the Authority and/or its insurance advisers (or the Authority's or its insurance authorised representatives) promptly on written request copies of the documents set out in Clause 4.4(a) of this letter, and to the extent available, to make available to such persons promptly upon the Authority's request the originals of such documents;
- (c) to administer the payment of premiums due pursuant to the Required Insurance such that, in so far as we hold appropriate funds, all such premiums will be paid to insurers in accordance with the terms of the Required Insurance;
- (d) to administer the payment of claims from insurers in respect of the Insurances (the "**Insurance Claims**") including;
  - (i) negotiating settlement of Insurance Claims presented in respect of the Required Insurance;
  - (ii) collating and presenting all information required by insurers in relation to Insurance Claims presented in respect of the required Insurance, and
  - (iii) insofar as it is relevant and practicable, liaising with and reporting to each Authority throughout the settlement, payment and administration of such Insurance Claims.
- (e) to advise the Authority promptly upon receipt of notice of any material changes which are instructed to make in the terms of the Required Insurance and which, if effected, in our opinion as Insurance Brokers would result in any material reduction in limits or coverage or in any increase in deductibles, exclusions or exceptions;

- (f) to advise the Authority in advance of any change of the terms of, or any lapse, non-renewal and/or cancellation of any policy maintained in respect of the Required Insurance; and
- (g) to use our reasonable endeavours to have endorsed on each and every policy evidencing the Required Insurance (when the same is issued) endorsements substantially in the form set out in Part 3 to Schedule 23 of the Project Agreement.

#### **4.5 Insurance Cost Reporting Procedures**

- (a) to prepare following request, at the expense of PPP Co., a Joint Insurance Cost Report on behalf of both PPP Co. and the Authority in accordance with the Insurance Review Procedure as set forth in Clause 45.7 of the Project Agreement (Insurance Premium Risk Sharing. We will ensure that the information in the Joint Insurance Cost Report is fairly represented, based on the information available to us.

#### **5. Notification Details**

- 5.1 Our obligations at Clause 4 of this letter to notify or inform you will be discharged by providing the requisite information in hard copy to:

[ ] Authority

- 6. We will supply further letters substantially in this form on renewal of each of the Required Insurance and will supply copies of such letters to those parties identified to us by the Authority for such purposes.

Yours faithfully

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For and on behalf of PPP Co.'s Insurance Broker

## **SCHEDULE 24 – EMPLOYEE TRANSFER AGREEMENT**

## **SCHEDULE 25 – DISCLOSURE LETTER**