

DATED [ ]

**[PROJECT NAME]  
PROJECT AGREEMENT**

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**[PROJECT NAME]  
PROJECT AGREEMENT  
for the design, construction, financing, and maintenance  
of [ X ] at [Location]<sup>1</sup>**

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<sup>1</sup> Note generally that the financial amounts, percentages and formulae used in this Project Agreement template and the Schedules including the figures set out under Clause 26 (Market Testing and Benchmarking), Parts 12 (Termination), Part 15 (Insurance, Indemnities and Refinancing) and Clause 57.5 (Financial Adjustments) will need to be reviewed on a project-specific basis.

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**PROJECT AGREEMENT** dated

**BETWEEN:**

1. [●] of [●]<sup>2</sup> acting by its agent, **the NATIONAL TREASURY MANAGEMENT AGENCY** (describing itself as the **NATIONAL DEVELOPMENT FINANCE AGENCY**) of Treasury Dock, North Wall Quay, Dublin 1, D01 A9T8 (**the Authority**”); and
2. [PPP Co.] a company registered in Ireland with number [●] whose registered office is at [●] (“**PPP Co.**”).

**BACKGROUND:**

- (A) The Authority requires the provision of a [●] at[●]: [**‘the Project Facilities’**]<sup>3</sup>;
- (B) By a notice published in the Official Journal of the European Union on [●] the Authority invited expressions of interest from appropriately qualified parties for the design, construction, financing and maintenance [**AMEND AS APPROPRIATE**] of the Project Facilities.
- (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 and maintain the Project Facilities in accordance with the terms of this Project Agreement; and
  - (ii) the Authority will [grant][procure the grant of] a licence to PPP Co. in respect of each of the Sites for the sole purpose of enabling PPP Co. to fully comply with its obligations under this Project Agreement.

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<sup>2</sup> Identity of the contracting authority to be discussed and reviewed (including vires) on a project-specific basis.

<sup>3</sup> This Project Agreement assumes multiple Project Facilities, however some projects might cover only a single Project Facility. To be reviewed on a project-specific basis.

**THIS AGREEMENT 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 “writing” shall include writing by electronic means;
- (i) references to a “signature” (or to “sign” or “signed”) shall include signature by electronic means;
- (j) 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;
- (k) any phrase introduced by the terms “including”, “include”, “in particular” or other similar expression will be construed without limitation as illustrative only and as such will not limit the sense or meaning of the words either preceding or succeeding those terms;
- (l) references to the singular include the plural and vice versa; and

(m) 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:

- (a) this Project Agreement (including for this purpose Schedule 1 (Definitions) but excluding all other Schedules) and the Schedules (other than Schedule 1 (Definitions)), Appendices or documentation referred to in this Project Agreement (excluding for this purpose all Schedules other than Schedule 1 (Definitions)), then the provisions of the Clauses of this Project Agreement will prevail except in the case of the Funder Direct Agreement, in which case the Funder Direct Agreement will prevail; and
- (b) the provisions of Schedule 28 (PPP Co. Proposals) and the other provisions of this Project Agreement, the other provisions of this Project Agreement will prevail save to the extent that the application of the provisions of Schedule 28 (PPP Co. Proposals) will, in the opinion of the Authority's Representative (acting reasonably), give rise to a higher standard of work or service than that contemplated by this Project Agreement, in which case the provisions of Schedule 28 (PPP Co. Proposals) will apply.

#### 1.5 **[Role of the Authority]<sup>4</sup>**

From the Commencement Date until the Service Commencement Date the role of the Authority will be undertaken by the National Development Finance Agency as agent for and on behalf of [●]. With effect from the Service Commencement Date and for the remainder of the Term, the role of the Authority will be undertaken by [●].

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<sup>4</sup> To be reviewed on a project specific basis.

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

### **2. APPOINTMENT**

- 2.1 The Authority hereby appoints PPP Co. to design, construct, finance and maintain the Project Facilities 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**

- 3.1 This Project Agreement and the rights and obligations of the Parties will take effect on the Commencement Date.<sup>5</sup>
- 3.2 The Term of this Project Agreement will commence on the Commencement Date and will terminate in respect of each of the Project Facilities on the earlier of the Expiry Date or the Termination Date.

### **4. DELIVERY OF REQUIRED DOCUMENTS<sup>6</sup>**

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

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<sup>5</sup> To be reviewed on a project-specific basis.

<sup>6</sup> To be reviewed on a project -specific basis.



## **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 Commencement Date:

- (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 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, subject to Clause 5.2(j) below, any necessary third party consents, approvals and authorisations have been obtained and are valid and subsisting to authorise the execution, delivery and performance of the Project Agreement and the Project Documents (to which PPP Co. is a party) by PPP Co., and the Project Agreement and the Project Documents (to which PPP Co. is a party) when executed will constitute valid and legally binding agreements of 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 which would affect the interpretation or application of the Project Agreement, the Project Documents or 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. are 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. (save where the contrary is expressly permitted in or contemplated by the Project Agreement, any of the Project Documents or any of the Funding Agreements); or

- (v) result in the creation (other than in favour of the Funders), 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) it 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 of the Project Agreement, Project Documents or the Funding Agreements;
- (g) there is no outstanding judgment, 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 PPP Co. Necessary Consents, which are necessary in connection with:
  - (i) 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.,

to the extent that they are required at the Commencement Date 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 memorandum and 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 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) the legal and beneficial ownership of the Shareholders 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 Authority and PPP Co. is not in default in any 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, Works Co., and Services Co. are members for the year ended [20XX] have been prepared on a proper and consistent basis and in accordance with the Companies Acts and accounting principles, practices and standards which are generally accepted in Ireland or equivalent accounting principles, practices and standards applicable in the country that the relevant member is based, or have been prepared in accordance with International Financial Reporting Standards (IFRS) 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 its 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. to the Authority 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) it 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. 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 Sites and the Off-Site Areas 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 such Ground Conditions;<sup>7</sup> and
- (y) it has inspected, reviewed and satisfied itself in relation to the Planning Permissions which have been obtained prior to the Commencement Date to the extent that the Planning Permissions are necessary for the performance of its obligations under this Project Agreement and it accepts entire responsibility (including any financial or other consequences) for the design of the Works pursuant to the Works Requirements (including responsibility of ensuring that the Works comply with the Planning Permission).<sup>8</sup>

### 5.3 PPP Co. Undertakings

PPP Co. undertakes with the Authority as follows:

- (a) PPP Co. will in accordance with this Project Agreement:
  - (i) design, construct, complete and commission the Works;

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<sup>7</sup> The Project Agreement is drafted with this assumption i.e. that the site is provided by the public sector with outline planning permission and 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) is transferred to PPP Co. To be reviewed on a project-specific basis.

<sup>8</sup> This assumes that the Authority has secured Planning Permissions in respect of the Project Facilities which may not be the case. To be reviewed on a project specific basis.

(ii) maintain the Project Facilities and provide the Services; 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, administrative, 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 within 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 for Tax purposes nor shall it become liable to tax outside Ireland; and it will not transfer in whole or in part its undertaking, business or trade outside Ireland or to a person that is not resident in Ireland for Tax purposes or to a person that is liable to Tax 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 Works or Services;
- (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 obtained before the Commencement Date, it will obtain all PPP Co. 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 in a timely manner and, to the extent that it is within the control of PPP Co., it will ensure that all Necessary Consents remain in full force and effect and it will comply and will ensure compliance with the terms and requirements of each of such Necessary Consents and will exercise all reasonable skill, care and diligence to ensure that no act or omission of PPP Co. or any of its Sub-Contractors will cause the Authority to be in breach of any Necessary Consent; and

- (i) PPP Co. will, and will use all reasonable endeavours to ensure 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 ensure 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 51 (Sub-Contracting) provided that in the event of the occurrence of an event of default by a Principal Sub-Contractor under its Principal Sub-Contract, the Authority shall not object to PPP Co. terminating such Principal Sub-Contract in accordance with its terms (but without prejudice to the Authority's right to approve the replacement Principal Sub-Contractors in accordance with Clause 51.1(c) (Principal Sub-Contractors);

- (ii) make or agree to any amendment to, or variation of, any Project Document (including the form of any Project Document in the Agreed Form) other than in accordance with the Review Procedure or Schedule 20 (Variations), or to reflect a Compensation Event or a Qualifying Change in Law 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) without prejudice to Clause 48 (Refinancing) 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);

- (B) relating to the rescheduling of its indebtedness for the Project or the re-financing of the Project; or

- (C) for the amendment to, or variation of, any Funding Agreements;

other than with the prior written consent of the Authority or in accordance with the express provisions of this Project Agreement, provided that PPP Co. shall promptly notify the Authority of such agreements or amendments and, if applicable, shall deliver to the Authority a certified, confirmed copy of each such amendment or agreement within ten (10) Business Days of its execution or creation.

#### 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 (Disclosure Letter). Without prejudice to the preceding sentence of this Clause 5.4

(Disclosure by PPP Co.), 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 PPP Co. Warranty untrue, inaccurate, incomplete or misleading as a defence to a claim for breach of a PPP Co. Warranty.

#### **5.5 Disclosed Data and Disclaimer**

- (a) The Authority has made available to PPP Co. certain materials, documents and data related to the Project and other matters which are or may be relevant to the Project and the obligations undertaken by PPP Co. under this Project Agreement (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 5.5 (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 Commencement Date.

#### **5.6 Acknowledgement by PPP Co.**

- (a) PPP Co. acknowledges and confirms that:
  - (i) 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 5.5(c) (Disclosed Data and Disclaimer), 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 (excluding title to the Sites and the Licensed Off-Site Areas) 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 Conditions of the Sites; and
    - (B) information relating to areas of archaeological, scientific or natural interest, local conditions and facilities and the quality of existing structures;
    - (C) the location of Utilities and the extent and nature of the Works necessary to ensure that the Project Facilities will be fully serviced by Utilities on the Service Commencement Date;

- (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, local employment agreements, 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 in accordance with this Agreement; 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 5.5(c) (Disclosed Data and Disclaimer) 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.
- (d) The provisions of this Clause 5.6 (Acknowledgement by PPP Co.) are without prejudice to PPP Co.'s rights and remedies pursuant to Clause 6 (Land Issues and the Sites).



## PART 4 - LAND ISSUES AND THE SITES

### 6. LAND ISSUES AND THE SITES

#### 6.1 Licences

- (a) Subject to Clause 6.1(b) and Clause 6.1(d), the Authority hereby grants or agrees to procure the grant to PPP Co. and any PPP Co. Related Party of a non-exclusive licence to occupy each Site and each [Licensed Off-Site Area (excluding, for the avoidance of doubt, any Public Off-Site Areas)] for the sole purpose of allowing PPP Co. to perform its obligations under this Project Agreement (the “**Licences**”) subject to any right of access of the Authority or any other person under this Project Agreement or Law.<sup>9</sup> A breach by the Authority of its obligations or confirmations under this Clause 6 (Land Issues and the Sites) shall be treated as a Compensation Event for the purposes of this Project Agreement.
- (b) The Authority confirms that:
  - (i) save as disclosed in Schedule 8 (Sites) and/or Schedule 26 (Off-Site Works), the Sites and the Licensed Off-Site Areas are not subject to any Adverse Rights;
  - (ii) there are no disputes, claims, actions, demands or complaints in respect of the Sites or the Licensed Off-Site Areas that are outstanding and that would prevent or disrupt the carrying out of the Works and/or the provision of the Services; and
  - (iii) subject to Schedule 26 (Off Site Works), the Licences will allow PPP Co. to perform its obligations under this Project Agreement in order to carry out the Works and/or provide the Services without disruption or delay.
- (c) The Licences 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 any of the Sites or the Licensed Off-Site Areas or any part of them nor will PPP Co. (or any PPP Co. Related Party) have or be entitled to any estate, right, title or interest in them and PPP Co. and those authorised by it will enter the Sites and the Licensed Off-Site Areas only as licensee of the Authority or the relevant licensor.
- (d) The Licences in respect of the Sites will commence on the Commencement Date and will each immediately terminate in respect of each Project Facilities upon the earlier of the Expiry Date or Termination of this Project Agreement. The Licences in respect of the Licensed Off-Site Areas will each commence on the date that access is required by PPP Co. (or any PPP Co. Related Party) to carry out the relevant part of the Off-Site Works and will each immediately terminate when the relevant part of the Off-Site Works has been, to include the remedying of any Defects in the Off-Site Works, completed in accordance with this Project Agreement.

#### 6.2 Site Risk

- (a) The Authority will ensure that at the time of granting the Licences, PPP Co. and any PPP Co. Related Party will, subject to the access rights of the Users, have unimpeded access to the Sites and the Licensed Off-Site Areas for the purposes of PPP Co.

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<sup>9</sup> Amend as appropriate to refer to third party access.

carrying out its obligations under this Project Agreement (subject, in respect of each of the Licensed Off-Site Areas, to PPP Co. providing the Authority with one (1) month's prior written notice of the date that PPP Co. requires access to the relevant Licensed Off-Site Area).

- (b) Following grant of the Licences, the condition of the Sites (and, in relation to the Off-Site Areas at any time when access thereto is required by PPP Co. to carry out the Off-Site Works, the condition of the Off-Site Areas) will be the sole risk and responsibility of PPP Co. Accordingly (and without prejudice to Clause 5.6 (Acknowledgement by PPP Co.) or any other obligation of PPP Co. under this Project Agreement but subject to Clause 6.1(b) (Licences) above), PPP Co. will (save in relation to title to the Sites and the Licensed Off-Site Areas) be deemed to have satisfied itself and will assume all risk (including costs arising from and any other financial consequence arising) in relation to:
  - (i) the means of access to and through each of the Sites (and, where necessary for carrying out the Off-Site Works, the Off-Site Areas), the boundaries of the Sites (and, where necessary for carrying out the Off-Site Works, the Off-Site Areas) and the possibility of interference by persons of any description whatsoever (including protestors and trespassers) with access to or use of or rights in respect of the Sites (and, where necessary for carrying out the Off-Site Works, the Off-Site Areas), with particular regard to the owners of any land adjacent to each of the Sites (and, where necessary for carrying out the Off-Site Works, the Off-Site Areas);
  - (ii) the precautions and the times and methods of working at the Sites (and, where necessary for carrying out the Off-Site Works, the Off-Site Areas) necessary to prevent any nuisance, whether public or private, to any third parties;
  - (iii) the Ground Conditions of the Sites (and, where necessary for carrying out the Off-Site Works, the Off-Site Areas) ;
  - (iv) the collection and analysis of all data it requires in relation to the Sites (and, where necessary for carrying out the Off-Site Works, the Off-Site Areas), 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:
    - (A) responsibility for determining the location and adequacy of Utilities at the Sites (and, where necessary for carrying out the Off-Site Works, the Off-Site Areas) and for the connection of the Project Facilities to all necessary Utilities so as to comply with Schedule 3 (Works Requirements) and Schedule 10 (Services Requirements);
    - (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 comply with PPP Co.'s obligations pursuant to Schedule 3 (Works Requirements) and Schedule 26 (Off-Site Works) (including paying to the Utilities Provider all costs and expenses incurred in respect thereof [other than Capital Contributions which are the responsibility of the Authority to discharge in accordance with section [●] of Schedule 3 (Works Requirements) which shall be

discharged by the Authority directly to the Utilities Provider]<sup>10</sup>) and to perform the Services to comply with Schedule 10 (Services Requirements).<sup>11</sup>

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

### 6.3 Archaeology

#### (a) Archaeological Requirements

Subject to any health and safety requirements imposed by Law, PPP Co. will not restrict the access of any Relevant Authority to any Site or Off-Site Areas at all reasonable times to carry out any archaeological surveys, inspections or excavations of the relevant Site (and, where necessary for carrying out the Off-Site Works, the Off-Site Areas) and will comply with any instructions of such Relevant Authorities.

#### (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 Authority and all Relevant Authorities of the discovery of any Archaeological Objects and await and carry out the instructions from the Relevant Authority or the Authority regarding their examination and treatment in accordance with the Archaeological Requirements.

#### (d) Archaeological Event

- (i) PPP Co. will make all reasonable efforts to mitigate any delays and/or increased costs caused by the discovery and/or removal or excavation of any Archaeological Objects including rearranging and re-programming construction activities.
- (ii) Subject to the foregoing, if discovery and/or removal or excavation of any Archaeological Objects may result in a delay in excess of [two (2) weeks] which delay has resulted or is likely to result in PPP Co. being unable to achieve Certification of the Works on or before the Planned Service Commencement Date for a Project Facility or, following the Planned Service Commencement Date, on or before the Longstop Date for that Project Facility, PPP Co. will notify the Authority of the delay or potential 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

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<sup>10</sup> To be reviewed on a project-specific basis.

<sup>11</sup> Payment of utility use during the term to be considered on a project specific basis.

PPP Co. shall be responsible for dealing with any Archaeological Objects (whether by preservation in situ or removal) in accordance with this Clause 6.3 (Archaeology). Where PPP Co. incurs costs due to the discovery and/or removal of Archaeological Objects in excess of [€100,000] (in the aggregate) per Site (which for the purposes of this Clause 6.3(e) (Cost-Sharing) shall include any related Off-Site Areas), then any such reasonably incurred and accurately verified costs in excess of this amount will be treated as an Authority Change in accordance with Schedule 20 (Variations).

#### 6.4 Migrating Contamination

The Authority shall, but only to the extent that PPP Co. is able to demonstrate to the Authority that the Authority (or, if not the Authority, the current legal owner of the relevant Site from whom the Authority has procured a licence to occupy in favour of PPP Co. under Clause 6.1 (Licences) (herein referred to as the “**Site Owner**”)) has materially better rights than PPP Co. to take action against third parties to recover the losses suffered or incurred by PPP Co. in cleaning up or otherwise dealing with contamination at the relevant Site, at the Authority’s option:

- (a) take (or use reasonable endeavours to procure that the Site Owner takes) such action against third parties in its own name as PPP Co. may (acting reasonably) direct; or
- (b) permit PPP Co. (or use reasonable endeavours to procure that the Site Owner permits PPP Co.) to take such action in the name of the Authority (or the Site Owner) at PPP Co.’s expense,

subject to PPP Co. indemnifying the Authority (or the Site Owner) in respect of all costs properly and reasonably incurred by the Authority (or the Site Owner) in respect of such action. Where the Authority (or Site Owner) takes action under Clause 6.4(a) or 6.4(b), the Authority shall pay to PPP Co. the amount recovered by or in the name of the Authority (or the Site Owner) from the relevant third party in respect of the losses referred to in this Clause 6.4 (Migrating Contamination).

## PART 5 – DESIGN AND CONSTRUCTION

### 7. NECESSARY CONSENTS

- 7.1 PPP Co. will be responsible for obtaining (at its own cost) all PPP Co. Necessary Consents which may be required for the performance by it of the Project and for implementing (at its own cost) each Necessary Consent within the period of its validity in accordance with its terms.<sup>12</sup>
- 7.2 Without prejudice to the generality of Clause 7.1 above, PPP Co. will apply for, or otherwise seek and will obtain (to the extent not already obtained), all Necessary Consents 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. The Authority will provide all reasonable assistance required by PPP Co. in implementing the terms of any conditions or requirements of a Necessary Consent (including in respect of any conditions associated with a Planning Permission) provided that the Authority will not be required to incur any expense in so doing.
- 7.3 PPP Co. will provide the Authority with a copy of any application for any PPP Co. Necessary Consents and other relevant documents relating to them. PPP Co. will notify the Authority of any decision by any Relevant Authority on an application for any PPP Co. Necessary Consent 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 PPP Co. Necessary Consent as the Authority may reasonably require.
- 7.4 **Planning Permission**
- (a) Without prejudice to PPP Co.'s obligations to obtain the PPP Co. Necessary Consents, PPP Co. acknowledges that, as at the Commencement Date, the Authority has obtained the Planning Permissions for each of the Project Facilities. PPP Co. further acknowledges that as and from the Commencement Date it shall be responsible for obtaining any amendments to any existing Planning Permissions or any additional Planning Permission which is necessary to allow it to perform all obligations under this Project Agreement.
- (b) Any application made by PPP Co. to a Relevant Planning Authority for Planning Permission shall be subject to the prior Approval of the Authority. PPP Co. shall notify the Authority of any meetings scheduled with any Relevant Planning Authority in respect of any Planning Permission applications and the Authority shall be entitled to attend such meetings with PPP Co. and the Relevant Planning Authority.

### 7.5 Project Facility Contribution Conditions and Off-Site Works Planning Conditions

Where an amendment to a Planning Permission and/or an additional Planning Permission is necessary to allow PPP Co. to perform its obligations under this Project Agreement and the amendment and/or additional Planning Permission granted by the Relevant Planning Authority in respect of a Project Facility contains conditions which require financial contributions, conditions, commitments or expenditure on surrounding infrastructure not within the relevant Site itself PPP Co. shall discharge any additional financial contributions, conditions, commitments or expenditure (as described in this Clause) required by the relevant Planning Permission (“**PPP Co. Development Contribution Condition(s)**”).

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<sup>12</sup> The Authority may secure some or all Necessary Consents in advance of calling for Tenders.

Where an amendment to a Planning Permission and/or an additional Planning Permission is necessary to allow PPP Co. to perform its obligations under this Project Agreement and the amendment and/or additional Planning Permission granted by the Relevant Planning Authority in respect of a Project Facility requires the development of surrounding infrastructure (not within the relevant Site itself) and such development is not the subject of a PPP Co. Development Contribution Condition, (a “**PPP Co. Off-Site Works Planning Condition**”), PPP Co. shall discharge the PPP Co. Off-Site Works Planning Condition at its own expense and there shall be no adjustment to the Unitary Charge.

## 8. THE WORKS<sup>13</sup>

### 8.1 Carrying out the Works

PPP Co. will carry out the design, construction, completion, commissioning and testing of the Works so that the Works required in respect of each Project Facility will be completed by the Planned Service Commencement Date for that Project Facility in accordance with:

- (a) the terms of this Project Agreement;
- (b) Schedule 3 (Works Requirements);
- (c) Schedule 6 (Certification Procedure);
- (d) Schedule 10 (Services Requirements);
- (e) Law and any Necessary Consents;
- (f) Schedule 26 (Off-Site Works);
- (g) Schedule 27 (Quality Assurance); and
- (h) Schedule 28 (PPP Co. Proposals),

so that the Services can be provided from the Service Commencement Date for each Project Facility, provided that a failure to complete the Works for a Project Facility by the Planned Service Commencement Date for that Project Facility will not, of itself, be capable of giving rise to a PPP Co. Default under Clause 34.1(a) or Clause 34.1(o) (Termination for PPP Co. Default) of this Project Agreement.

If PPP Co. finds any ambiguity, inconsistency or discrepancy between any of the items listed (b) to (h) above, PPP Co. shall notify the Authority’s Representative as soon as is reasonably possible. The Authority’s Representative will, subject to Clause 1.4 (Precedence of Documents), decide on the course of action to be followed and will, where necessary, advise on the appropriate order of precedence.

### 8.2 Independent Obligations

- (a) The obligations in Clause 8.1 (Carrying out the Works) are independent obligations. In particular compliance with the PPP Co. Proposals, Works Requirements or Services Requirements is not a defence to a breach of this Project Agreement.
- (b) If it is discovered that the PPP Co. Proposals do not fulfil the requirements of Schedule 3 (Works Requirements) and Schedule 10 (Services Requirements), PPP

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<sup>13</sup> Obligations on the parties in relation to any existing structures to be reviewed on a project-specific basis.

Co. will, at its own expense, amend the PPP Co. Proposals and rectify the Works or any part of the Project Facility(s) affected. Such amendments and rectification will have the effect that the PPP Co. Proposals will satisfy the requirements of Schedule 3 (Works Requirements) and Schedule 10 (Services Requirements).

### 8.3 Standard of Design and Workmanship

In carrying out the Works, PPP Co. will:

- (a) use the degree of skill, care and diligence in the design and construction of the Project Facilities that would reasonably be expected of a competent professional designer and contractor experienced in carrying out design and construction 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 Facilities; and
- (d) not specify or use in the Works (or in connection with any future maintenance of the Project Facilities) 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 Facilities;
  - (iv) a potential hazard to health or safety;
  - (v) capable of posing a threat to the stability, integrity or performance of the Works or the Project Facilities or any part of the Works or the Project Facilities; and/or
  - (vi) capable of reducing the normal life expectancy of the Works or the Project Facilities or any part of the Works or the Project Facilities.

### 8.4 Asbestos Liability

PPP Co. accepts entire responsibility (including any financial and other consequences which result whether directly or indirectly) for any asbestos in relation to any of the Sites.

### 8.5 Signs

Other than as required under this Project Agreement, PPP Co. will not permit any Site to be used for the display of advertisements or other boards, notices or signs except such signs relating to and indicating the nature of the Works and the identity of PPP Co., Works Co. and the Professional Team provided that such usual developers' and contractors' signs and other 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).

### 8.6 Authority Access

Subject to

- i. any health and safety requirements imposed by Law and to any health and safety procedures implemented by PPP Co. in accordance with its obligations under Clauses 14.1 and 14.4 (Health and Safety); and
- ii. without prejudice to Clause 6 (Land Issues and the Sites), PPP Co. will ensure that:
  - (a) the Authority and any persons nominated by it will have unrestricted access to the Sites:
    - (i) in the case of an Emergency at all times during the Term without the need to give notice; and
    - (ii) at all reasonable times during the Term without the need to give notice;
  - (b) the Authority will be entitled at all reasonable times to enter upon any property used by PPP Co. to perform the Works or Services, to inspect the construction and maintenance of the Project Facilities and to monitor compliance by PPP Co. with its obligations; and
  - (c) the Authority will be entitled at all reasonable 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 including for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works.
  - (d) PPP Co. shall procure that satisfactory facilities are made available to the Authority and any Authority Representative or Authority Related Party and that reasonable assistance is given for the purposes of Clauses 8.6(a), 8.6(b), and 8.6(c) (Authority Access) subject to the Works not being adversely affected and to the Authority reimbursing PPP Co. for any reasonable costs or expenses incurred as a result of the action taken by the Authority under Clauses 8.6(a), 8.6(b) and 8.6(c) (Authority Access) .

#### **8.7 Utilities during Construction<sup>14</sup>**

- (a) In the event that any Utility on any Site or serving any of the Sites is damaged by PPP Co. or its Sub-Contractor in carrying out the Works PPP Co. shall, subject and without prejudice to the provisions of Schedule 15 (Payment Mechanism), take immediate steps to make the Utility safe and shall use its best endeavours to remedy the damage within twenty-four (24) hours of its occurrence. PPP Co. will provide temporary alternative utility supplies to the relevant Project Facilities as are necessary to enable such Project Facilities to become Available.
- (b) Failure by PPP Co. to comply with Clause 8.7(a) above will entitle the Authority to step-in to take action pursuant to Clause 19 (Authority Step-In).
- (c) [Other than Capital Contributions which are the responsibility of the Authority to discharge in accordance with [section [x] of Schedule 3 (Works Requirements)] which shall be discharged by the Authority directly to the Utilities Provider] PPP Co. will be responsible for all costs associated with alterations to or additional provision of any Utilities made necessary as a result of the Works or Services and

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<sup>14</sup> Provisions relating to Utilities to be tailored, where necessary, on a project by project basis.



will assume all risk (including costs and any other financial consequence whether incurred by PPP Co., the Authority or Users) in relation to any interruption in, failure of supply to or availability of Utilities to the Project Facility arising as a result of any act or omission of PPP Co. or its Sub-Contractor in carrying out the Works or Services, including in relation to complying with its obligations pursuant to Clause 8.7(a) above.

- (d) PPP Co. will be responsible for the provision of any necessary temporary cross-over points in respect of Utilities during the Construction Period in accordance with Good Industry Practice and Law and will remove such points immediately when they are no longer required.

## **8.8 Building Control**

- (a) The Parties agree that PPP Co. is the “building owner” in respect of each Site for the purposes of the Building Regulations and will be responsible for ensuring the Works are carried out in accordance with the requirements of the Building Regulations. For the avoidance of doubt nothing in this Clause 8.8 (Building Control) will operate or be deemed to operate as a demise of any of the Sites, the Project Facility or any part of them nor will PPP Co. (or any PPP Co. Related Party) have or be entitled to any estate, right, title or interest in them.
- (b) PPP Co. shall engage the Independent Tester to carry out the role of Assigned Certifier for the purposes of the Building Regulations and any costs associated with such engagement as Assigned Certifier shall be borne by PPP Co.
- (c) PPP Co. and the Assigned Certifier shall engage and liaise with the relevant building control authority as appropriate from the commencement of the Works to ensure the relevant requirements of the Building Regulations are satisfied to facilitate the entry by the relevant building control authority of the particulars of the Certificate of Compliance on Completion on the register maintained under Part IV of the Building Regulations to permit the opening, occupation and use of each Project Facility by its Planned Service Commencement Date.
- (d) PPP Co. acknowledges that the Independent Tester shall not issue the Certificate of Service Availability for any Project Facility where the corresponding Certificate of Compliance on Completion under the Building Regulations has not been entered on the register maintained under Part IV of the Building Regulations by the relevant building control authority.

## **9. DESIGN REVIEW PROCEDURE**

### **9.1 Obligation to Finalise Design**

Without prejudice to Clause 8 (The Works), PPP Co. will develop and finalise the design and specification of the Works and carry out the Works in accordance with the finalised design and specification. 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 9 (Design Review Procedure).

### **9.2 Submission of Reviewable Design Data**

PPP Co. will submit the Reviewable Design Data to the Authority’s Representative for review under the Review Procedure at such time or times indicated in the Construction Programme (which programme shall allow reasonable and sufficient time for the Authority to review the Reviewable Design Data submitted, having regard to the time set out in the

Construction Programme for commencement of the part or parts of the Works to which the Reviewable Design Data submitted relates).

### 9.3 No Construction prior to Review

- (a) Subject to Clause 9.3(b) below, PPP Co. will not commence or permit the commencement of the construction of the part or parts of the Works to which any Reviewable Design Data relates until it has submitted the relevant Reviewable Design Data for review and either it is confirmed by the Authority's Representative that PPP Co. is entitled to proceed with construction in accordance with the Review Procedure or PPP Co. is disputing the status of such Reviewable Design Data pursuant to paragraph 1(c) (Review Procedure) and/or paragraph 4(c) (Effect of Review) of Schedule 5 (Review Procedure).
- (b) If PPP Co. commences or permits the commencement of construction:
  - (i) before the Authority's Representative provides such Approval; or
  - (ii) during such a dispute,

and it is subsequently determined that PPP Co. was not entitled to proceed with construction in accordance with paragraph 4 (Effect of Review) of Schedule 5 (Review Procedure), then PPP Co. shall forthwith (if so directed by the Authority acting in its absolute discretion) undo, remove from the Site(s) (and, in relation to the Off-Site Works, the Off-Site Area) and replace (in a manner complying with this Project Agreement) any parts of the Works which it has been determined PPP Co. was not entitled to construct.

### 9.4 REVIEWED RDD

- (a) With effect from the date on which any item of Reviewable Design Data is or becomes a Reviewed RDD Item in accordance with the Review Procedure, such Reviewed RDD Item is deemed to become a part of the Works and 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 Reviewed RDD Item. Notwithstanding the foregoing, any item of Reviewable Design Data becoming a Reviewed RDD Item shall not in any way relieve PPP Co. of its obligations to comply with the terms of the Project Agreement.
- (b) If it is subsequently determined that PPP Co. has proceeded in a manner that is not in accordance with the Reviewed RDD Item and the construction of the part or parts of the Works to which the Reviewed RDD Item relates has been commenced or completed, then PPP Co. shall forthwith make good and, if necessary, undo, remove from the Site(s) (and, in relation to the Off-Site Works, the Off-Site Area) and replace (in a manner complying with the Project Agreement) any parts of the Works which it has been determined were not constructed in accordance with the Reviewed RDD Item.
- (c) In accordance with Part 3 (PPP Co.'s Certification Procedure) of Schedule 6 (Certification Procedure), the Relevant Designer and the Design Checker shall certify to the Authority that the relevant part or parts of Works have been constructed in accordance with the Reviewed RDD Item and the finalised design and specification.

## 9.5 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.

## 9.6 Design Database

- (a) PPP Co. will establish and maintain a computerised design database and database register in accordance with paragraph 5 (Document Management) of Schedule 5 (Review Procedure) which the PPP Co.'s Representative, the Independent Tester and the Authority's Representative can 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.

## 9.7 Certification Procedure

Save in respect of any obligations of the Authority and the Authority's Representative, PPP Co. shall procure that the procedures referred to in Schedule 6 (Certification Procedure) are complied with provided that PPP Co. will always be responsible for coordinating the Certification Procedure.

# 10. QUALITY ASSURANCE

## 10.1 Quality Management Systems

PPP Co. will ensure that all aspects of the Works (including but not limited to the preparation of all Design Data and all certificates required pursuant to Schedule 6 (Certification Procedure) and other ancillary activities including Tests on Completion, and completion of Snagging Items), the management and provision of the Services and the performance of all other obligations of the PPP Co. under the Project Agreement are the subject of quality management systems which comply with the provisions of this Clause 10 (Quality Assurance) and Schedule 27 (Quality Assurance).

## 10.2 Quality Plans

PPP Co.'s quality management systems will be reflected in appropriate quality plans for the Construction Period and Service Period respectively, the standard of which will be consistent with ISO 9001:2008 or any equivalent standard which is generally recognised as having replaced it ("**Quality Plans**").

## 10.3 Review of Quality Plans

PPP Co. will carry out the Works (including but not limited to ancillary activities including Tests on Completion and completion of Snagging Items), the management and provision of the Services and the performance of all other obligations of the PPP Co. under the Project Agreement in compliance with the Quality Plans. PPP Co. will submit all Quality Plans or any material changes to such Quality Plans to the Authority's Representative in accordance with Schedule 5 (Review Procedure). Neither PPP Co. nor any other party will be entitled to implement any Quality Plan (or any material change thereto) that has not been Approved in accordance with Schedule 5 (Review Procedure).

#### **10.4 Compliance by Sub-Contractors**

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

#### **10.5 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).

#### **10.6 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 of any Key Sub-Contractor. PPP Co. will co-operate and will procure that any Key Sub-Contractor co-operates with the Authority's Representative in connection with his rights under this Clause 10.6 (Right of Audit).

### **11. CONSTRUCTION PROGRAMME<sup>15</sup>**

#### **11.1 Planned Service Commencement Date**

PPP Co. will carry out and complete the Works in accordance with the Construction Programme and all other provisions of this Project Agreement on or before the Planned Service Commencement Date for the relevant Project Facility. 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 where PPP Co. fails to achieve Certification by the relevant Planned Service Commencement Date.

#### **11.2 The Construction Programme**

Any Construction Programme submitted in accordance with Clause 11.3 (Changes to the Construction Programme) 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. Without prejudice to the generality of the foregoing, the Construction Programme shall include:

- (a) the current critical path, critical resources, floats and other flexibility;
- (b) details of any changes made to programme logic and durations;
- (c) details of actual progress and of the progress projected by PPP Co.; and
- (d) details of any Submitted Item and Reviewable Design Data.

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<sup>15</sup> To be reviewed on a project-by-project basis.

### 11.3 Changes to the Construction Programme

- (a) 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 11.3 (Changes to the Construction Programme), Clause 11.4 (PPP Co. Falling Behind Construction Programme), Clause 30 (Variation Procedure), Clause 31 (Change in Law), Clause 42 (Compensation Events), Clause 43 (Relief Events), Clause 44 (Force Majeure) and Schedule 5 (Review Procedure).
- (b) PPP Co. will submit to the Authority's Representative, within five (5) Business Days of any request, a copy of any version of the Construction Programme varied in accordance with this Clause 11.3 (Changes to the Construction Programme) and Schedule 5 (Review Procedure).

### 11.4 PPP Co. Falling Behind Construction Programme

- (a) If it appears to the Authority's Representative at any time that the progress of the Works has significantly fallen behind the Construction Programme and/or the Final Commissioning Programme, then the Authority's Representative will be entitled to require PPP Co. to submit to the Authority's Representative a report identifying (i) the reasons for the delay and (ii) PPP Co.'s proposed corrective action measures and require PPP Co. to produce and submit to the Authority's Representative in accordance with Schedule 5 (Review Procedure) a revised Construction Programme and/or Final Commissioning Programme showing the timetable and the manner in which the Works will be carried out to ensure Certification of a [Project Facility][Phase] by the Planned Service Commencement Date for that [Project Facility][Phase] or the earliest possible date acceptable to the Authority after the Planned Service Commencement Date for that Project Facility but not later than the Longstop Date.

If PPP Co. demonstrates to the satisfaction of the Authority's Representative (acting reasonably) that it is not possible to achieve Certification of a [Project Facility][Phase] by the Planned Service Commencement Date for that [Project Facility][Phase], then the revised Construction Programme shall show a Planned Service Commencement Date for that [Project Facility][Phase] at the earliest possible date after the Planned Service Commencement Date for that [Project Facility][Phase] but not later than the Longstop Date.

## 12. INDEPENDENT TESTER

### 12.1 Appointment

The Authority has on or prior to the Commencement Date approved a suitably qualified and experienced professional person or entity to act as the Independent Tester under this Project Agreement upon the terms of the independent tester contract (the "**Independent Tester Contract**") set out at Schedule 22 (Independent Tester Contract).

### 12.2 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.

### **12.3 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.

### **12.4 Co-Operation**

- (a) 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 issued to the Independent Tester must be given in writing and signed by both the Authority's Representative and PPP Co.'s Representative and all representations issued or made by either Party to the Independent Tester must be given in writing and simultaneously copied to the other Party. Both the Authority's Representative and PPP Co.'s Representative will be entitled to attend all inspections undertaken by or meetings involving the Independent Tester.
- (b) In the event of a dispute over any instruction given or proposed to be given to the Independent Tester by either Party the matter will be referred to the Liaison Procedure with a view to agreeing the instruction to be given.
- (c) In the event that agreement is not reached within thirty (30) Business Days of its referral to the Liaison Procedure then the matter will be referred for resolution in accordance with Clause 45.8 (Fast Track Procedure).

### **12.5 Replacement**

- (a) In the event of the Independent Tester's appointment being terminated in accordance with Clause 6.1 or Clause 6.2 of the Independent Tester Contract, as soon as reasonably practicable the Parties will liaise and co-operate with each other in order to appoint, in accordance with this Clause 12 (Independent Tester), a suitably qualified and independent consultant or entity 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, in writing by the Parties, 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 12.5(a) above, within ten (10) Business Days of the original Independent Tester's appointment being terminated (or such other period as is mutually agreed), then such Dispute will be referred for resolution in accordance with Clause 45.8 (Fast Track Procedure).

## **13. COMMISSIONING AND COMPLETION**

### **13.1 Agreeing Final Commissioning Programme**

Not less than nine (9) months before the Planned Service Commencement Date for each [Project Facility], PPP Co. will provide the Authority's Representative and the Independent Tester with a draft of the Final Commissioning Programme in respect of that

[Project Facility] as developed by PPP Co. in accordance with the provisions of Clause 13.2 (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 one (1) month after its receipt. The Parties and the Independent Tester will, within twenty (20) 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 for the relevant [Project Facility]. If the Parties are unable to agree a 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 one (1) month period, the draft Final Commissioning Programme will be deemed to be accepted by the relevant Party.

### 13.2 Standard of Final Commissioning Programme

The Final Commissioning Programme will be of a standard consistent with Good Industry Practice and must facilitate the Tests on Completion and appropriate training for any persons nominated by the Authority. The Final Commissioning Programme will be in sufficient detail so as to enable the Authority's Representative to monitor the progress of the commissioning activities and likely future progress of the Tests on Completion. Without prejudice to the generality of the foregoing, the Final Commissioning Programme shall include:

- (a) the critical path, critical resources (including those to be provided by Sub-Contractors and Relevant Designers), floats and other flexibility; and
- (b) details of the programme logic and durations.<sup>16</sup>

### 13.3 Commissioning Procedure

- (a) PPP Co. will give to the Authority's Representative and the Independent Tester twenty (20) Business Days' notice in writing of the date when it will be ready to commence activities under the Final Commissioning Programme in respect of each [Project Facility]. Such activities will only be considered to be ready to commence when the Relevant Designer and the Design Checker (where relevant) have confirmed to PPP Co., in accordance with Part 3 (PPP Co.'s Certification Procedure) of Schedule 6 (Certification Procedure), that the relevant part or parts of the Works are ready for the Tests on Completion to be performed. 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 and the Independent Tester of the time and place for the carrying out of such activities. On successful completion of the activities described in the Final Commissioning Programme in respect of each [Project Facility], PPP Co. shall supply the results of all of the relevant tests, commissioning and inspections to the Authority's Representative in accordance with the Review Procedure, and to the Independent Tester, within five (5) Business Days of completion of the relevant tests, commissioning and inspections.
- (b) The Independent Tester will, within ten (10) Business Days of the later of:
  - (i) any inspection made pursuant to this Clause 13.3 (Commissioning Procedure); or

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<sup>16</sup> Contents of the Final Commissioning Programme to be reviewed on a project-specific basis.

- (ii) receipt by the Authority's Representative and the Independent Tester of the results of all of the relevant tests, commissioning and inspections carried out under the Final Commissioning Programme,

notify PPP Co. and the Authority's Representative of any outstanding matters (including the repetition of any activities which are required to be carried out and passed in accordance with the Final Commissioning Programme) which in the reasonable opinion of the Independent Tester are required to be attended to before the Works (including, where relevant, the Off-Site Works) in respect of each [Project Facility] can be considered to be complete in accordance with this Project Agreement such that the Services may commence at that [Project Facility]. PPP Co. will attend to such matters promptly and will, if necessary, give the Authority's Representative and Independent Tester further notices in accordance with this Clause 13.3 (Commissioning Procedure) but dealing only with matters raised in the notification under this Clause 13.3(b) so that the procedures in this Clause 13.3 (Commissioning Procedure) are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Works (including, where relevant, the Off-Site Works) are attended to and the Tests on Completion have been satisfied. 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.

#### 13.4 Independent Tester's Certificates

Pursuant to the Independent Tester Contract, the Parties will procure that the Independent Tester will when he is satisfied:

- (a) subject to Clause 13.5 (Snagging Items), that all Works have been completed and the Tests on Completion have been satisfied in respect of each [Project Facility] in accordance with this Project Agreement;
- (b) the particulars of the Certificate of Compliance on Completion (referred to in Part IIIC of the Building Control Regulations) in respect of each [Project Facility] have been entered by in the register of the Relevant Authority maintained under Part IV of the Building Regulations,

issue a Certificate of Service Availability in accordance with Part 4 (Independent Tester's Certification Procedure) of Schedule 6 (Certification Procedure) for that [Project Facility] stating the Certification Date.

#### 13.5 Snagging Items

The Independent Tester may issue a Certificate of Service Availability for a [Project Facility] subject to Snagging Items in accordance with the following provisions:

- (a) The Independent Tester will on the same day as the date of issue of a relevant Certificate of Service Availability issue to PPP Co. and the Authority a list of the relevant Snagging Items for that [Project Facility] (the "**Snagging List**"). Within five (5) Business Days after the date of receipt from the Independent Tester of the Snagging List, PPP Co. will provide to the Authority and the Independent Tester a reasonable programme (the "**Snagging Programme**") for making good each Snagging Item set out in the Snagging List. The Snagging Programme will require that each Snagging Item will be made good within twenty (20) Business Days after the date of provision of the Snagging Programme or within such time as is reasonably practicable. The Parties will seek to agree the Snagging Programme or



in default of agreement will refer the matter for determination under Clause 45 (Dispute Resolution Procedure). Pending any such referral or the outcome of any referral, PPP Co. shall be required to proceed with the making good of Snagging Items in accordance with the Snagging Programme.

- (b) PPP Co. will make good each Snagging Item in accordance with the Snagging Programme to the satisfaction of the Independent Tester. Upon satisfactory completion of the Snagging List the Independent Tester will issue the Snagging Items Completion Certificate for the relevant Project Facility in accordance with the Independent Tester Contract and Schedule 6 (Certification Procedure). If any Snagging Item has not been rectified by the date set out in the Snagging Programme then the Authority will be entitled either:
  - (i) to effect such repairs as may be necessary and recover the costs of effecting such repairs from PPP Co. as a debt; or
  - (ii) to report the Snagging Item to the helpdesk to be managed in accordance with the relevant helpdesk provisions set out in Schedule 10 (Services Requirements).
- (c) PPP Co. shall agree a programme with the Authority for making good Snagging Items, having regard to the reasonable use of the [Project Facilities] and in order to minimise disruption to Users and the Parties shall take into account any such period of use in agreeing and implementing the Snagging Programme.

### **13.6 Off-Site Works Completion Certificate**

- (a) Pursuant to the Independent Tester Contract, the Parties will procure that the Independent Tester will when he is satisfied, subject to Clause 13.6(b) below, that all Off-Site Works have been completed in respect of a Project Facility in accordance with this Project Agreement, issue an Off-Site Works Completion Certificate in accordance with Part 4 (Independent Tester's Certification Procedure) of Schedule 6 (Certification Procedure) for the relevant Project Facility.
- (b) The Independent Tester may issue an Off-Site Works Completion Certificate for a Project Facility subject to an agreed list of known outstanding works required to be completed by PPP Co.. The agreed list of known outstanding works will be attached to the Off-Site Works Completion Certificate. PPP Co. will proceed expeditiously with the carrying out and completion of such outstanding works.
- (c) Upon the issue of an Off-Site Works Completion Certificate in respect of any part of the Off-Site Works;
  - (i) the Authority will (subject to Clause 13.6(c)(ii) to Clause 13.6(c)(v) below) assume responsibility for the maintenance of such part of the Off-Site Works unless and until a Relevant Authority assumes responsibility for the maintenance of such part of the Off-Site Works;
  - (ii) PPP Co. will proceed with any outstanding works (appended as a list to the Off-Site Works Completion Certificate) required to be carried out in respect of such part of the Off-Site Works expeditiously;
  - (iii) PPP Co. will liaise with the Relevant Authority and will use all reasonable endeavours during the period commencing on the date of issue of the Off-Site Works Completion Certificate and expiring twelve (12) months following that date, or twelve (12) months following the Service Commencement Date

of the Project Facility to which the Off-Site Works Completion Certificate relates, whichever is the later, to procure that the Relevant Authority takes responsibility for the maintenance of such part of the Off-Site Works in accordance with the requirements of applicable Law;

- (iv) should the Authority's Representative believe (acting reasonably) that PPP Co. is failing to carry out the agreed list of outstanding works expeditiously, the Authority's Representative may instruct PPP Co. to execute the work within such reasonable period as the Authority's Representative may prescribe, failing which the Authority will be entitled to effect such repairs as may be necessary and recover the costs of effecting such repairs from PPP Co. as a debt; and
- (v) PPP Co. will execute such work of amendment, reconstruction and remedying of Defects as the Authority's Representative may reasonably instruct PPP Co. to execute in order to bring or return (fair wear and tear and damage caused by third parties excepted) the relevant part of the Off-Site Works to the standard required by this Project Agreement, such instruction to be issued during the period commencing on the date of issue of the Off-Site Works Completion Certificate and expiring twelve (12) months following that date, or twelve (12) months following the Service Commencement Date of the Project Facility to which the Off-Site Works Completion Certificate relates, whichever is the later, provided that the Defects for the purposes of this Clause 13.6(c)(v), will not include defects or damage which have arisen other than due to a failure of PPP Co. to comply with the terms of this Project Agreement.

#### 13.7 [Authority Fit-Out Works

- (a) Not less than three (3) months prior to the date on which the Authority proposes to commence the Authority Fit-Out Works in respect of a Project Facility (the "**Fit-Out Works Commencement Date**"), which date shall be no more than eight (8) weeks prior to the relevant Target Service Commencement Date for the Project Facility (or such longer period as the Parties may agree), PPP Co. shall submit to the Authority's Representative a programme detailing the proposed timing of the Fit-Out Works in relation to the Project Facility (the "**Fit-Out Programme**"). This Fit-Out Programme will include a detailed room and building services readiness matrix (the "**Room and Building Services Readiness Matrix**") detailing all items to be in place in accordance with Schedule 3 (Works Requirements), Schedule 7 (Tests on Completion) and the Reviewed RDD Item prior to the Fit-Out Works Commencement Date.
- (b) If PPP Co and the Authority agree on the Fit-Out Programme, the Authority shall proceed to carry out the Authority Fit-Out Works in accordance with such Fit-Out Programme. PPP Co will procure that all Fit-Out Areas affected by or necessary to facilitate the Authority Fit-Out Works will have received the Certificate of Readiness for Authority Fit-Out Works prior to the Fit-Out Works Commencement Date.
- (c) The Fit-Out Programme will not relieve PPP Co. of its obligations to carry out the Works in accordance with the Construction Programme. PPP Co. shall liaise with the Authority to coordinate the Fit-Out Programme with the Construction Programme so that if required, they may be carried out simultaneously.

- (d) If PPP Co. and the Authority do not agree on the Fit-Out Programme within twenty (20) Business Days of submission thereof, either Party may refer the matter to the Fast Track Procedure for determination.
- (e) The Authority will use reasonable endeavours to procure that any nominee, contractor or consultant of the Authority that enters a Project Facility for the purposes of carrying out the Authority Fit-Out Works comply with all relevant Law (in particular in relation to health and safety) and the reasonable requirements of the Project Supervisor Construction Stage and the PPP Co.'s Representative in relation thereto.
- (f) In the event that, as a direct result of the actions or omissions of the Authority or any nominee, contractor or consultant of the Authority (as agreed by the Parties or agreed in accordance with the Dispute Resolution Procedure) in respect of the Authority Fit-Out Works PPP Co. is materially and adversely impeded in complying with any of its obligations under this Project Agreement (the "**Affected Obligations**"), then PPP Co. shall be entitled to claim an extension of time and/or relief from performance of the Affected Obligations in accordance with Clause 42 (Relief Events) of this Project Agreement until the circumstances giving rise to such delay or impediment have been resolved or determined.
- (g) Upon the discovery of any damage caused by the Authority Fit-Out Works, PPP Co. will:
  - (i) record any relevant details of the damage (including photographs if necessary);
  - (ii) as soon as practicable notify the Authority's Representative and PPP Co. and the Authority's Representative will agree, pursuant to Clause 13.7(h), whether or not the damage constitutes Authority Damage; and
  - (iii) if so required by the Authority, as soon as is practicable, reinstate, replace or make good the damage returning the damaged item to its original standard (or equivalent) in accordance with the relevant provisions of this Project Agreement.
- (h) Without prejudice to the obligations of PPP Co. in respect of completion of the Works, as between the Authority and PPP Co., the Authority will have responsibility for the cost of damage caused by Authority Fit-Out Works to a Site or any Project Facility (or the contents of any Project Facility that is the responsibility of PPP Co. to provide or maintain under this Project Agreement) if PPP Co. is able to prove to the Authority's satisfaction (acting reasonably):
  - (i) the extent to which such damage was not caused or contributed to by any act or negligence of PPP Co. or a PPP Co. Related Party; or
  - (ii) the extent to which such damage was not caused or contributed to by a breach by PPP Co. or a PPP Co. Related Party of this Project Agreement (including any failure to monitor or perform the Works);
  - (iii) that the cost of such damage is either;
    - (A) of a value below the level of the deductible of the Required Insurances (up to the maximum deductible specified in the Required Insurances); or

- (B) is not covered by the insurances taken out, or which should have been taken out by PPP Co. in accordance with this Project Agreement,

provided that the Authority will be liable for any excess or deductible (up to the amount of any maximum deductible specified in the Required Insurances) which is payable as a result of any Authority Damage which has resulted in a Repair Cost being incurred where such Repair Cost has been funded under any Required Insurance; and

- (i) PPP Co. will be responsible for the cost of all damage on or to any of the Sites or Project Facilities (or the contents of any Project Facility that it is the responsibility of PPP Co. to provide or maintain under this Project Agreement) that is not the responsibility of the Authority pursuant to Clause 13.7(h) or Clause 17.4 (Accidental Damage and Vandalism).
- (j) Nothing in this Clause 13.7 will limit the Authority's rights or remedies under Clause 47.1 (PPP Co. Indemnity) of this Project Agreement.
- (k) Where PPP Co. and the Authority's Representative:
  - (i) agree that the relevant damage constitutes Authority Damage, PPP Co. will be entitled to issue an invoice in respect of its reasonable and demonstrable costs incurred in reinstating the damage, but only in respect of those costs that are the responsibility of the Authority under Clause 13.7(h); or
  - (ii) do not agree that the relevant damage constitutes Authority Damage, the matter will be referred to the Fast Track Procedure for resolution and if the Dispute is resolved in PPP Co.'s favour, PPP Co. will be permitted to submit an invoice in respect of its reasonable and demonstrable costs incurred in reinstating the damage, but only in respect of those costs that are the responsibility of the Authority under Clause 13.7(h);
- (l) Any invoice submitted to the Authority pursuant to Clause 13.7(k) will be supported by any relevant information reasonably required by the Authority to evidence PPP Co.'s costs incurred. The Authority will pay any such invoice within twenty (20) Business Days of receipt by the Authority of the invoice and supporting information.
- (m) PPP Co shall facilitate the Authority, its nominees, contractor and/or consultants in exercising their rights pursuant to this Clause 13.7 (Authority Fit-Out Works).
- (n) For the avoidance doubt, Certification of any Project Facility is independent of the Fit-Out Programme for the Authority Fit-Out Works and completion of the Authority Fit-Out Works.]<sup>17</sup>

### 13.8 Defects

The issue of any Certificate of Service Availability and/or Off-Site Works Completion Certificate will in no way affect the obligations of PPP Co. under this Project Agreement in respect of any Defects.

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<sup>17</sup> To be reviewed on a project specific basis.

### 13.9 Early Certification

- (a) Subject always to the Authority's discretion, the Certificate of Service Availability for any Project Facility may be issued before the Planned Service Commencement Date for that Project Facility (such earlier date for the purposes of this Clause 13.9 (Early Certification) being the "**Early Certificate of Service Availability Date**").
- (b) Where the Certificate of Service Availability for a Project Facility is issued on the Early Certificate of Service Availability Date, the Expiry Date for that Project Facility will be the [●] anniversary of the Early Certificate of Service Availability Date for that Project Facility.

### 13.10 As-built Specification

PPP Co. will comply with the requirements of Part 3 (As-Built Records) of Schedule 14 (Reports and Records).

### 13.11 Service Commencement Dates

For the avoidance of doubt, without prejudice to Clause 25 (Payment), payment of the Unitary Charge each Project Facility will be paid as and from the relevant Service Commencement Date in accordance with Part II (The Unitary Charge) of Schedule 15 (Payment Mechanism).

### 13.12 Disputes

Any Dispute regarding the Certificate of Service Availability, a Snagging Items Completion Certificate, [the Fit-Out Works]<sup>18</sup> or an Off-Site Works Completion Certificate will be referred to the Fast Track Procedure.

### 13.13 Liability of Authority

Any approval, agreement, opinion expressed by the Authority or the Independent Tester, or any 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

### 13.14 Induction

- (a) PPP Co. will provide an induction to each Project Facility for [persons / groups of persons as proposed / nominated by Authority] at the dates and times identified in the Construction Programme (which shall include at least two (2) alternative sessions for each Project Facility) and in any event no later than twenty (20) Business Days after the Service Commencement Date for that Project Facility. Provided PPP Co. provides reasonable notice of such alternative sessions for each Project Facility, PPP Co. will have no responsibility to repeat such induction to those [persons / groups of persons as proposed / nominated by Authority] who do not attend the planned induction for the Project Facility in question.

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<sup>18</sup> To be removed if not relevant.

- (b) A written copy of the induction information will be made available by PPP Co. to the Authority's Representative for dissemination to all [persons / groups of persons as proposed / nominated by Authority]. PPP Co. will be responsible for maintaining the accuracy of the information contained in the induction information.

#### 14. HEALTH AND SAFETY

- 14.1 PPP Co. will be responsible for the security, stability and safety of its operations on the Sites (and during the carrying out of the Off-Site Works, the Off-Site Areas) and at the Project Facilities 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.
- 14.2 PPP Co. represents, warrants and undertakes that it and its Sub-Contractors have the competence to comply with the provisions of this Clause 14 (Health and Safety) and will allocate adequate resources to facilitate such compliance.
- 14.3 Unless otherwise agreed, PPP Co. will, in respect of each [Project Facility] from the Commencement Date until the relevant Certification Date for that [Project Facility]:
  - (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;
  - (c) take all reasonable steps to protect the environment on and off the Sites (and, during the carrying out of the Off-Site Works, the Off-Site Areas) and to avoid damage and nuisance to persons or to property resulting from pollution including noise, dust or other causes arising as a consequence of the execution of the Works;
  - (d) provide that the surroundings and the perimeter of the Sites (and, during the carrying out of the Off-Site Works, the Off-Site Areas) are signposted and laid out so as to be clearly visible and identifiable;
  - (e) ensure that safe means of access to and egress from the Sites (and, during the carrying out of the Off-Site Works, the Off-Site Areas) are provided and they are maintained and indicated where appropriate; and
  - (f) ensure appropriate precautions are taken to protect persons present, at or in the vicinity of each of the Sites (and, during the carrying out of the Off-Site Works, the Off-Site Areas) from risks which may arise from such Site (or Off-Site Area), including the provision of appropriate controlled barriers, where necessary, to prevent unauthorised entry.
- 14.4 Without prejudice to the generality of Clause 14.1 above, PPP Co. will comply with all safety Law including the Safety, Health & Welfare at Work Act, 2005 and any subordinate legislation made thereunder (including the Safety, Health & Welfare at Work (Construction) Regulations, 2013 (the "**Construction Regulations**"), the Safety, Health & Welfare at Work (General Application) Regulations 2007-2012) and all safety Law relevant to the design, construction and operation of the Project Facilities.
- 14.5 The Authority and PPP Co. agree that PPP Co. will be the 'client' for the purpose of the Construction Regulations. No person or company may be appointed by PPP Co. to the

roles of Project Supervisor for the Design Process or Project Supervisor for the Construction Stage without the prior written consent of the Authority, such consent not to be unreasonably withheld or delayed.

14.6 PPP Co. warrants, represents and undertakes to the Authority that:

- (a) its nominees are competent to perform the functions and obligations of the Project Supervisor for both the Design Process and the Construction Stage pursuant to the Construction Regulations;
- (b) its nominees will each allocate adequate resources to enable each to discharge its duties under the Construction Regulations;
- (c) the appointments under this Clause 14.6 will be Required Documents for the purposes of the Project; and
- (d) in the performance of the obligations under the Construction Regulations, the nominee(s) will exercise all the reasonable skill and care to be expected of a properly qualified and competent person or company experienced in carrying out the functions of a Project Supervisor for the Design Process and/or the Construction Stage on projects of a similar size, scope, complexity and purpose to the Project.

14.7 PPP Co. is required to provide before the Commencement Date to the Authority as Required Documents two (2) hard copies and one (1) electronic copy of:

- (a) Safety Statement (as defined in and pursuant to Section 20 of the Safety, Health & Welfare at Work Act, 2005); and
- (b) developed Safety and Health Plan (as defined in the Construction Regulations).

**14.8 Hazardous Substances/Equipment**

- (a) All goods, equipment, consumables and materials which are to be used in the provision of the Works and Services shall be of satisfactory quality and consistent with all relevant Law, Guidance and Good Industry Practice.
- (b) PPP Co. shall ensure that the goods, equipment, consumables and materials used by it or any Sub-Contractor (of any tier) in connection with the provision of any of the Works and the Services (each as a distinct and separate obligation) are maintained in a safe, serviceable and clean condition in accordance with all relevant Law, Guidance and Good Industry Practice, and shall, as soon as practicable after receiving a request from the Authority's Representative, supply to the Authority's Representative evidence to demonstrate its compliance with this Clause 14.8 (Hazardous Substances/ Equipment).
- (c) Without prejudice to the generality of its obligations, PPP Co. shall ensure that all potentially hazardous material and equipment used or stored at the Project Facilities during the Construction Period and the Service Period shall be properly labelled and kept secure in accordance with all appropriate supervision, protection and safety notices and used only by appropriately trained and competent Staff.
- (d) PPP. Co. shall use all practicable and reasonable means to:
  - (i) prevent or counteract unauthorised, accidental or unsupervised interaction with any hazardous substances/equipment;
  - (ii) prevent or counteract the unlawful emission of any hazardous substance;

- (iii) prevent the unlawful or dangerous generation, accumulation or migration of any hazardous substance at or from the Project Facilities;
- (iv) insofar as such hazardous substance/equipment is, or should be, under the control of the PPP Co. pursuant to this Project Agreement.

## 15. PROFESSIONAL TEAM

- 15.1 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). On or before the Commencement Date PPP Co. will procure and deliver the Professional Team Collateral Warranties to the Authority in the Agreed Form.
- 15.2 PPP Co. shall procure that 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) and Part 1 (Members of Professional Team) will be amended accordingly.
- 15.3 Upon the appointment of any replacement member or additional members to the Professional Team, PPP Co. will procure and will deliver the Professional Team Collateral Warranties from such new members.
- 15.4 PPP Co. will not, or will procure that Works 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 member of the Professional Team to regard as terminated its Professional Appointment.
- 15.5 Without prejudice to Clause 15.2, PPP Co. will not, or will procure that Works Co will not, without the prior written Approval of the Authority's Representative (such Approval not to be unreasonably withheld or delayed) terminate any of the Professional Appointments.

## 16. EQUIPMENT<sup>19</sup>

### 16.1 PPP Co. Equipment

PPP Co. will procure, deliver to and where necessary construct, install, commission and (subject to Clause 16.1(g) below) maintain at the Project Facilities, the PPP Co. Equipment.

- (a) PPP Co. represents, warrants and undertakes to the Authority that in so procuring, delivering, constructing, installing, commissioning and (subject to Clause 16.1(g) below) maintaining the PPP Co. Equipment it will:
  - (i) comply with Good Industry Practice, Schedule 3 (Works Requirements), Schedule 10 (Services Requirements), Schedule 13 (Equipment), Schedule 27 (Quality Assurance), Law and all Necessary Consents;

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<sup>19</sup> To be reviewed on a project-specific basis. In appropriate circumstances, decanting and relocation of Authority Equipment may be required.



- (ii) comply with its obligations under Clause 18 (Maintenance of the Project Facilities); and
  - (iii) without limiting its other obligations under this Project Agreement, replace any item of PPP Co. Equipment and make it available for use 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 Facilities during the Term, (except for such temporary removal as may be required for replacement, 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 are assignable in favour of the Authority.
- (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 its rights under this Project Agreement.
- (e) The PPP Co. Equipment will remain in the ownership of PPP Co. until the end of the Term.
- (f) PPP Co. will ensure that any Leased Equipment will be leased on terms which allow Clause 41 (Handback) to have effect at no cost to the Authority in excess of any included in respect thereof in the Base Case.
- (g) PPP Co. will not be responsible for the maintenance or replacement of Supply Only Equipment (as defined in Schedule 13 (Equipment)), 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<sup>20</sup>

#### 17.1 Provision of the Services

From the relevant Service Commencement Date for each [Project Facility][Phase][Building][Open Space], PPP Co. will provide the Services to the Authority at each Project Facility in accordance with:

- (a) Schedule 2 (Handback Requirements);
- (b) Schedule 3 (Works Requirements);
- (c) Schedule 10 (Services Requirements);
- (d) Schedule 27 (Quality Assurance);
- (e) Schedule 28 (PPP Co. Proposals);
- (f) Good Industry Practice;
- (g) all Necessary Consents;
- (h) Law; and
- (i) the provisions of this Project Agreement.

#### 17.2 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.

#### 17.3 Compliance with Guidance and Authority's Policies

Subject to Schedule 20 (Variations) and Schedule 21 (Change in Law), PPP Co. will comply with all Guidance which is in the public domain at the date of this Project Agreement and the Authority's Policies.

PPP Co. will comply with all future Guidance and any change in the Authority's Policies of which it is informed by way of the Liaison Procedure and which is consistent with Schedule 10 (Services Requirements), Good Industry Practice and PPP Co.'s obligations under this Project Agreement. Where any such future Guidance and/or change in the Authority's Policies is inconsistent with Schedule 10 (Services Requirements), 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.

#### 17.4 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

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<sup>20</sup> Usage of Project Facilities and income sharing arrangements to be discussed on a project-specific basis.

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.

### 17.5 Operating Manual

- (a) Without prejudice to Clause 20 (Reports) or Clause 21 (Records), PPP Co. will, three (3) months before the Planned Service Commencement Date for each Project Facility, provide to the Authority hard copy and electronic versions of a draft operating and maintenance manual setting out the procedures for providing the Services. PPP Co. will provide to the Authority a final operating and maintenance manual (the “**Operating Manual**”) no later than the Service Commencement Date for each Project Facility. PPP Co. will update the Operating Manual within twenty (20) Business Days of the relevant Service Commencement Date and maintain and update the Operating Manual throughout the Service Period. Two copies of the updated electronic versions of the Operating Manual are to be maintained on the EDMS throughout the Service Period.
- (b) PPP Co. will, at the request of the Authority, provide the Authority with access to the Operating Manual in order to demonstrate that PPP Co. has complied with its obligations to maintain and update the Operating Manual under Clause 17.5(a) above.
- (c) On termination of this Project Agreement, howsoever arising, PPP Co. will within ten (10) Business Days thereof provide the Authority with a copy of the Operating Manual in respect of each Project Facility.

### 17.6 Utilities Services<sup>21</sup>

#### (a) Supply of Utilities

The [Authority] will enter into all contracts for the provision of Utilities Services to the Project Facilities, with the exception of Utilities Services used by the PPP Co. in connection with the carrying out and completion of the Works. PPP Co. shall ensure that the conducting media (including connections) and containers for the supply of Utilities Services comply with applicable Laws and Good Industry Practice and are maintained, repaired and replaced in accordance with Schedule 3 (Works Requirements) and Schedule 10 (Services Requirements) throughout the Term of this Project Agreement.

#### (b) Liability for Cost of Utilities Consumed at the Project Facilities

- (i) PPP Co. shall be responsible for all costs in relation to consumption and use by PPP Co. of Utilities Services in connection with the carrying out and completion of the Works up to (but not including) the Service Commencement Date for each [Project Facility][Building].
- (ii) Subject to this Clause 17.6 (Utilities Services), with effect from the Service Commencement Date for each [Project Facility][Building] and for the remainder of the Term, PPP Co. will incur no liability for the costs of the provision of Utilities Services to the [Project Facilities][Building], other than costs arising as a result of:

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<sup>21</sup> Provisions relating to Utilities to be tailored, where necessary, on a project by project basis.

- (A) any breach by PPP Co. of any of its obligations under this Project Agreement; or
  - (B) any use of Utilities or Utilities Services by PPP Co. both in the performance of its obligations and which is not in accordance with Good Industry Practice.
- (iii) PPP Co.'s obligations in respect of [Utilities Services] management are set out in Part VIII (Utilities Management) of Schedule 15 (Payment Mechanism).
- (c) **Damage to Utilities**
- (i) In the event that any [Utility]<sup>22</sup> on any Site or serving any of the Sites is damaged by PPP Co. or its Sub-Contractor during the Services Period and such damage causes a Project Facility to become Unavailable, PPP Co. shall, subject and without prejudice to the provisions of Schedule 15 (Payment Mechanism) take immediate steps to make the Utility safe and shall use its best endeavours to remedy the damage within twenty-four (24) hours of its occurrence. PPP Co. will provide temporary alternative utility supplies to the relevant Project Facilities as are necessary to enable such Project Facilities to become Available.
  - (ii) Failure by PPP Co. to comply with Clause 17.6(c)(i) above will entitle the Authority to step-in to take action pursuant to Clause 19 (Authority Step-In).

## 18. MAINTENANCE OF THE PROJECT FACILITIES

### 18.1 General Maintenance Obligation

- (a) PPP Co. will, at all times during the Term, at its own expense, maintain, repair, refurbish and renew the Project Facility to ensure that:
  - (i) the Services are continuously available in accordance with the terms of Schedule 3 (Works Requirements) and Schedule 10 (Services Requirements), PPP Co. Proposals and the terms of this Project Agreement;
  - (ii) it can maintain the design life<sup>23</sup> of the Buildings and Assets to achieve the required life expectancy as set out in Schedule 2 (Handback Requirements);
  - (iii) the Buildings are kept in good structural and decorative order (subject to fair wear and tear) in accordance with this Project Agreement;
  - (iv) the Open Spaces are maintained in good order in accordance with this Project Agreement; and
  - (v) the [Project Facility][Buildings][Open Spaces] are handed back to the Authority on the Expiry Date in a condition complying with the applicable requirements of Clause 41 (Handback) and Schedule 2 (Handback Requirements).

### 18.2 Planned Maintenance Programme

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<sup>22</sup> Definition to be reviewed on a project-specific basis.

<sup>23</sup> Term to be considered on a project-specific basis.

- (a) Not later than three (3) months before the Planned Service Commencement Date for each [Project Facility][Phase][Building][Open Space] and not later than two (2) months before the commencement of each subsequent Contract Year, PPP Co. will submit to the Authority's Representative a draft Planned Maintenance Programme in respect of such Project Facility for the next Contract Year for agreement in accordance with the 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 Services] and to the Users of the [Project Facility].

### 18.3 Maintenance Surveys

- (a) The Authority may at its own cost conduct surveys of the Project Facilities so as to determine the state of maintenance of the Project Facilities, at such intervals as the Authority will reasonably determine ("**Maintenance Surveys**"). The Authority will give PPP Co. at least fifteen (15) Business Days prior notice of such a Maintenance Survey. When carrying out a Maintenance Survey the Authority will use reasonable endeavours to minimise any disruption caused to the provision of the Services by PPP Co.
- (b) If, following a Maintenance Survey of the Project Facilities in accordance with Clause 18.3(a) the condition of any of the Project Facilities 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 relevant Project Facility(s) 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).

### 18.4 Accidental Damage and Vandalism

Without prejudice to the obligations of PPP Co. in respect of the maintenance, repair, refurbishment and renewal of the Project Facilities and subject to Clause 18.8 (Minor Authority Damage), as between the Authority and PPP Co.:

- (a) the Authority will only have any responsibility for the cost of damage to a Site or any Project Facility (or the contents of any Project Facility that is the responsibility of PPP Co. to provide or maintain under this Project Agreement) if PPP Co. is able to prove to the Authority's satisfaction (acting reasonably) that the damage:
  - (i) was not caused or contributed to by any act or negligence of PPP Co. or a PPP Co. Related Party; or
  - (ii) was not caused or contributed to by a breach by PPP Co. or a PPP Co. Related Party of this Project Agreement (including any failure to monitor or provide the Services); or
  - (iii) was Authority Damage or Third Party Damage;
  - (iv) does not constitute fair wear and tear; and
  - (v) does not arise as a result of the damaged item being used for its reasonable and proper purpose or an Area being used for its reasonable and proper purpose; and
  - (vi) that the cost of such damage is either:
    - (A) of a value below the level of the deductible of the Required Insurances (up to the maximum deductible specified in the Required Insurances); or
    - (B) is not covered by the insurances taken out, or which should have been taken out by PPP Co. in accordance with this Project Agreement, provided that the Authority will be liable for any excess or deductible (up to the amount of any maximum deductible specified in the Required Insurances) which is payable as a result of any Authority Damage which has resulted in a Repair Cost being incurred where such Repair Cost has been funded under any Required Insurance; and
- (b) PPP Co. will be responsible for the cost of all damage on or to any of the Sites or Project Facilities (or the contents of any Project Facility that is the responsibility of PPP Co. to provide or maintain under this Project Agreement) that is not the responsibility of the Authority pursuant to Clause 18.4(a).
- (c) Nothing in this Clause 18.4 (Accidental Damage and Vandalism) will limit the Authority's rights or remedies under Clause 47.1 (PPP Co. Indemnity) of this Project Agreement.

#### 18.5 Discovery of Damage

Upon the discovery of any damage PPP Co. will:

- (a) record any relevant details of the damage (including photographs if necessary);
- (b) as soon as is practicable, reinstate, replace or make good the damage returning the damaged item to its original standard (or equivalent) in accordance with the relevant

provisions of this Project Agreement including, where relevant, in accordance with Clause 46.2 (Reinstatement); and

- (c) as soon as practicable notify the relevant Project Facility Representative, and PPP Co. and the Project Facility Representative will form an initial view to inform the decision to be made between PPP Co. and the Authority's Representative pursuant to Clause 18.6 (Determination Following Discovery of Damage) as to whether or not the damage constitutes Authority Damage. If, despite using reasonable efforts to discuss the damage with the Project Facility Representative, PPP Co. has been unable to do so within forty-five (45) minutes of discovering the relevant damage, PPP Co. will record the details of the damage as required by Clause 18.5(a) above and assess (acting reasonably) whether and why the damage constitutes Authority Damage and will notify the Authority of its assessment.

#### **18.6 Determination Following Discovery of Damage**

Where PPP Co. and the Authority's Representative:

- (a) agree that the relevant damage constitutes Authority Damage, PPP Co. will be entitled to issue an invoice in respect of its reasonable and demonstrable costs incurred in reinstating the damage, but only in respect of those costs that are the responsibility of the Authority under Clause 18.4(a) (Accidental Damage and Vandalism);
- (b) do not agree that the relevant damage constitutes Authority Damage, the matter will be referred to the Dispute Resolution Procedure for resolution and if the dispute is resolved in PPP Co.'s favour, PPP Co. will be permitted to submit an invoice in respect of its reasonable and demonstrable costs incurred in reinstating the damage, but only in respect of those costs that are the responsibility of the Authority under Clause 18.4(a) (Accidental Damage and Vandalism);
- (c) agree an extension to the applicable Rectification Period in accordance with Part XII (Rectification Periods for Unavailability) of Schedule 15 (Payment Mechanism), such Rectification Period will apply in respect of the relevant damage for the purposes of Schedule 15 (Payment Mechanism) of this Project Agreement;
- (d) do not agree either that there should be an extension to the relevant Rectification Period or what the extension should be, the matter will be referred to the Dispute Resolution Procedure.

#### **18.7 PPP Co. Invoice for Authority Damage**

Any invoice submitted to the Authority pursuant to Clause 18.6 (Determination Following Discovery of Damage) will be supported by any relevant information recorded pursuant to Clause 18.5(a) (Discovery of Damage), and may be in respect of multiple incidents of damage. The Authority will pay any such invoice within twenty (20) Business Days of receipt by the Authority of the invoice and supporting information.

#### **18.8 Minor Authority Damage**

If any Authority Damage is of such a minor nature (when considered item by item and in aggregate) that it can be remedied by PPP Co. without incurring any additional costs through the use of its Site-based resources during their normal working hours and without

adversely affecting the ability of PPP Co. to perform the Services, then the cost of rectifying such damage will be for the account of PPP Co.

#### 18.9 **Dispute Regarding Damage**

Any disputes between the Parties arising from this Clause 18 (Maintenance of the Project Facilities) will be referred to the Dispute Resolution Procedure.

#### 18.10 **Repair Cost**

In relation to any Repair Cost which has been funded or partly funded by the Authority or under any Required Insurances (“**Damage Funding**”), PPP Co. will take such funding and the timing of such repair or replacement into account in preparing and agreeing with the Authority the Planned Maintenance Programme and any savings will be offset against any future adjustments to the Unitary Charge pursuant to Clause 57 (Financial Adjustments) otherwise, the savings will be shared equally between PPP Co. and the Authority.

#### 18.11 **Annual Account of Damage**

At the end of each Contract Year and for each Project Facility, PPP Co. will supply to the Authority an account of any damage and associated Repair Costs and Damage Funding, as well as money spent or saved or to be spent or saved in accordance with the Planned Maintenance Programme.

#### 18.12 **Consolidated Accounts of Damage**

On every fifth (5<sup>th</sup>) anniversary of the Service Commencement Date for each Project Facility, PPP Co. will provide a consolidated and reconciled account of the accounts referred to in Clause 18.11 (Annual Account of Damage). If such account shows that in respect of the preceding five (5) year period there was or in respect of the next five (5) year period there is likely to be a saving in the money needed to be spent by PPP Co. in complying with its obligations under this Project Agreement because of the Damage Funding, then, PPP Co. will within thirty (30) days after submission of the account pay to the Authority half of such saving to the extent that such saving has not previously been (i) offset against any future adjustments to the Unitary Charge or (ii) shared with the Authority pursuant to Clause 18.10 (Repair Cost).

### 19. **AUTHORITY STEP-IN**

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

Without prejudice to the Authority’s rights otherwise set out in this Project Agreement, 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; or
- (b) to discharge a statutory duty; or
- (c) because in the reasonable opinion of the Authority’s Representative the circumstances constitute an Emergency; or



- (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 carry out the [●]<sup>24</sup> at the Project Facilities]

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 it reasonably believes is necessary (together, the “**Required Action**”) and PPP Co. will give all reasonable assistance to the Authority while it is taking the Required Action. The Authority will use reasonable endeavours to provide reasonable advance notice of the date on which it anticipates completing the Required Action and will provide PPP Co. with notice of its actual completion.

### 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 which is 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:

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<sup>24</sup> Reference to appropriate scope of services to be included.

- (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 which is 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 pursuant to Clause 19.1 (Reasons for Step-In), 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 (Reports) of Schedule 14 (Reports and Records), in such numbers and at such times as provided therein (the "**Required Reports**"). The Required Reports will, at the Authority's Representative's request, be accompanied by a copy of such report or any part of it in electronic format and published by PPP Co.'s Representative using the EDMS.

#### 20.2 Form of Reports

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

#### 20.3 Further Information

- a) 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.
- b) The Authority's Representative may at any reasonable time during normal working hours carry out audits or spot checks of PPP Co.'s records in order to validate any information included in the Required Reports.

#### 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 Required Report objecting to such Required Report.
- (b) If any such objection has not been resolved by agreement between the Authority's Representative and PPP Co. within ten (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 45 (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 (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) (the "**Required Records**").

## 21.2 Audit

The Required Records will be kept in good order and in such form (including by electronic means) as to be capable of audit 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 (acting reasonably) will be entitled to take copies of all such Required 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 (Records) 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 Required Records (as set out against the relevant class of records in Part 2 (Records) 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. will, at its own cost, 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 the original of those Required Records are required by Law to remain with PPP Co., then 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 five years following the Expiry Date or Termination of this Project Agreement all such Required 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 Required 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 those referred to in Clause 21.4(d)(i) and 21.4(d)(ii) above by PPP Co. and the Authority equally.

## 21.5 Computer Records

To the extent that the Required Records 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 Required 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 (Records) of Schedule 14 (Reports and Records), PPP Co. will (save where otherwise provided pursuant to Clause 20 (Reports) or this Clause 21 (Records) at all times:
  - (i) maintain a full set of records detailing the costs of performing the Services including those relating to the design, construction, operation, maintenance and finance until the Termination Date or Expiry Date 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) above, 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 this Clause 21.6 (Operating Accounts) 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 and original invoices (if applicable) evidencing the items listed in Clauses 21.6(b)(i) - (iv) above available for inspection by the Authority (or its nominee) 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 45 (Dispute Resolution Procedure) will apply.

## 22.2 Liaison Committee

- (a) Within three (3) months of the Commencement Date a liaison committee, (“**Liaison Committee**”), will be established and will consist of the following persons:
  - (i) [the Authority’s Representative;
  - (ii) one (1) Project Facility Representative;
  - (iii) one (1) person nominated by the Authority; and
  - (iv) 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 the other Party 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) below 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 provided prior notice to 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) Authority 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

(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. twenty-four (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 previously 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.

### 23.3 Project Facility Representative<sup>25</sup>

(a) The Authority may notify in writing in advance to PPP Co. from time to time the member of staff who will undertake the role of the Project Facility Representative for each [Project Facility], which Project Facility Representative will provide a day to day contact with PPP Co. for the routine operation of this Project Agreement.

(b) Unless pursuant to a specific delegation under Clause 23.3(c) or otherwise specifically provided for in terms of this Project Agreement, the Project Facility Representative will have no power or authority to bind the Authority or vary the terms of this Project Agreement in any way and PPP Co. acknowledges that it will not act on the instructions of, or as a consequence of, or otherwise rely upon any act or omission of the Project Facility Representative for the purposes of this Project Agreement unless

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<sup>25</sup> To be reviewed on a project-specific basis.

under a specific delegation issued pursuant to Clause 23.3(c) or otherwise specifically provided for in this Project Agreement.

- (c) The Authority's Representative may from time to time by notice to PPP Co. delegate any of its powers, duties or responsibilities under this Project Agreement to the Project Facility Representative subject to such terms and conditions, and for such duration as may be specified by the Authority's Representative.

#### 23.4 PPP Co. Key Works Personnel

PPP Co.'s Key Works Personnel are identified in Part 3 of Schedule 12 (Representatives) and PPP Co. shall insofar as it is within PPP Co.'s control ensure that such persons maintain their involvement in the Works and in particular PPP Co. will not for the duration of the Works remove any PPP Co. Key Works Personnel from the Project without the prior written approval of the Authority and without implementing a satisfactory procedure for handover of duties. PPP Co. shall ensure that all PPP Co. Key Works Personnel shall be available at all necessary times in order to ensure the delivery of the Works in accordance with the provisions of this Project Agreement.

### 24. PERFORMANCE MONITORING

#### 24.1 PPP Co. Monitoring

PPP Co. will monitor its performance in the delivery of the Services in accordance with the procedure set out in paragraph 2.5 of Part II (The Unitary Charge and Fixed Lump Sum) of Schedule 15 (Payment Mechanism).

#### 24.2 Authority Monitoring

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

#### 24.3 Project Agreement Performance and Efficiency Reviews

- (a) PPP Co. shall adopt a continuous improvement approach to the provision of all Services, and shall work proactively with the Authority to identify and implement opportunities and related initiatives for improving the performance, efficiency and effectiveness (including in particular improved energy efficiency, sustainability and climate impact reduction) of the Project Facilities and the Services, taking into account Good Industry Practice and Irish government policy.
- (b) Every two (2) years during the Term following the Certification Date for the [last] Project Facility to achieve Certification (each a "**Project Agreement Review Date**") the Authority and PPP Co. shall meet to review PPP Co.'s performance of this Project Agreement and shall conduct a Project Agreement efficiency review in order to ensure that the Services and the Project Facilities are providing a suitable and cost effective solution for the Authority (the "**Project Agreement Review**"). Each Project Agreement Review shall be carried out during the first 3 (three) months of the calendar year in which the relevant Project Agreement Review Date falls due (or such other time as the Authority may direct in writing). All net savings arising



from any Project Agreement Review shall be shared between the Authority and PPP Co. with 75% going to the Authority and 25% going to PPP Co.

- (c) PPP Co. shall produce a Project Agreement improvement report (each a “**Project Agreement Improvement Report**”) and submit this for review by the Authority no less than twenty (20) Business Days prior to the relevant Project Agreement Review Date.
- (d) The Project Agreement Improvement Report shall identify any activities undertaken by PPP Co. to improve the effectiveness of the Services, and any further opportunities for improvement of the Project Agreement through prospective changes in the Services and/or behaviour or usage changes by either Party and shall include as a minimum:
  - (i) a trend analysis of performance against performance and availability standards over the Term to date to identify areas of performance that can be improved, and steps taken by PPP Co. to address performance issues. Where the performance trend analysis identifies a deteriorating trend in performance, repeat failures, or significant failures that impact on the Authority, PPP Co. shall produce an action plan to identify how these failures are to be improved;
  - (ii) a summary of energy consumption over the period since the last Project Agreement Efficiency Review identifying the effectiveness of energy consumption reduction initiatives previously undertaken and identifying areas where energy consumption or carbon emissions can be further reduced;
  - (iii) a summary of sustainability and climate impact reduction initiatives undertaken over the period since the last Project Agreement Efficiency Review identifying their effectiveness together with details of further opportunities identified for improvement.
- (e) No less than twenty (20) Business Days prior to the relevant Project Agreement Review Date PPP Co. shall also submit to the Authority a financial summary identifying the cost impact of all the efficiency improvement opportunities identified separated into:
  - (i) cost savings that can be achieved without instigating a Variation under this Project Agreement including changes made by the Authority.
  - (ii) ‘gain-share’ and ‘spend to save’ opportunities where the Authority can benefit from savings generated through investment or changes in the Services.
  - (iii) other Variations to the Services or the Project Facilities that can improve efficiency and effectiveness including energy efficiency, sustainability or reduce climate impact.
- (f) At each Project Agreement Review the Parties shall review:
  - (i) the Project Agreement Improvement Report;
  - (ii) the Required Reports referred to in Clause 20.1 (Required Reports) for the past two (2) years; together with
  - (iii) such other reports as described in Clause 20 (Reports) for the past two (2) years as the Authority may request (together the “**Project Agreement Review Reports**”).

- (g) At the Project Agreement Review both parties shall present their overview of the effectiveness of the Project Agreement and the Parties shall conduct a discussion concerning the improvements to be made and a record shall be made of the decisions taken.
- (h) PPP Co. shall report on any aspects of this Project Agreement and/or PPP Co.'s performance which the Authority wishes to discuss with PPP Co., and the Authority and PPP Co. shall consider what efficiencies and improvements can be implemented.
- (i) PPP Co. shall submit its proposals for dealing with any unremedied performance or other issues identified in the Project Agreement Review Reports or as identified by the Authority pursuant to Clause 24(h) above.
- (j) The Authority may provide a report on the Authority's current and future requirements in relation to the Project Facilities and what impact these requirements will have on the Services or the Project Facilities.
- (k) For the avoidance of doubt the requirements of this Clause 24 (Performance Monitoring) shall in no way limit or relieve PPP Co. from any of its obligations under this Project Agreement.

#### **24.4 Independent Review of Project Agreement Efficiency**

- (a) The Authority may, in its discretion, appoint independent technical advisors to carry out an independent review and produce in part or in whole an independent Project Agreement Improvement Report including without limitation where PPP Co. fails to provide the Project Agreement Improvement Report, or fails to provide it to a standard acceptable to the Authority, or the Authority has reasonable grounds for questioning the accuracy of the analysis undertaken by PPP Co..
- (b) PPP Co. shall cooperate fully with the independent technical advisor and provide access to systems, copies or report and any relevant data to enable the independent technical advisor to complete its report.
- (c) The costs of the independent technical advisor shall be borne by PPP Co..

## [PART 8 – PAYMENT]

### 25. PAYMENT

#### 25.1 Calculation of Unitary Charge<sup>26</sup>

- (a) Payment of the Unitary Charge will be calculated and made in accordance with the provisions of Schedule 15 (Payment Mechanism) and this Clause 25 (Payment).

#### 25.2 Payment Commencement Date

- (a) The Unitary Charge will be paid from the Service Commencement Date for each Project Facility in accordance with Part II (The Unitary Charge) of Schedule 15 (Payment Mechanism).
- (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 in accordance with Part II (The Unitary Charge) of Schedule 15 (Payment Mechanism).
- (c) The Parties agree to comply with their respective obligations under the European Communities (Late Payment in Commercial Transactions) Regulations 2012.

#### 25.3 Payable in Arrears

- (a) The Unitary Charge will be claimed in accordance with Part II (The Unitary Charge) of Schedule 15 (Payment Mechanism), by means of a valid invoice, in the form of the pro-forma set out in Appendix I of Schedule 15 (Payment Mechanism) (which shall include the Payment Mechanism Report) together with such other documentation as the Authority may reasonably require to enable them to verify the amounts claimed.
- (b) The invoices submitted by PPP Co. in accordance with Clause 25.3(a) shall comply with and be issued in accordance with Clause 28.2 (Issue of Invoices) and shall constitute a valid VAT Invoice in respect of each Taxable Supply.

#### 25.4 Payment following Invoice

Payment will be due in accordance with Part II (The Unitary Charge) of Schedule 15 (Payment Mechanism), following the presentation by PPP Co. of each valid and accurate monthly invoice in accordance with Clause 25.3 (Payable in Arrears).

#### 25.5 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 unpaid 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 unpaid sum as is determined to be the proper sum due and payable:

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<sup>26</sup> Any payments for Off-Site Works are to be dealt with on a project-specific basis.

- (i) 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
- (ii) 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.

## 25.6 Payment Currency

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

## 25.7 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 25.3 (Payable in Arrears) ("**Disputed Amount**"), within ten (10) 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 25.7(b) below 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 of the relevant invoice, 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 25.3 (Payable in Arrears).
- (b) If the Authority's Representative disputes the amount specified in any invoice in accordance with Clause 25.7(a) above the Authority will pay the undisputed part of the invoice in accordance with Clause 25.4 (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 25.7(a) (Disputed Invoices) either Party 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 VAT Invoice in respect of that amount.

## 25.8 Indexation

On each Indexation Review Date, the Unitary Charge will be adjusted for the year commencing on that date in accordance with paragraph 2.4 (Indexation) of Part II (The Unitary Charge) of Schedule 15 (Payment Mechanism).

## 25.9 Set-Off

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

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

### (b) Authority Set-Off

Subject to Clause 25.9(d) (Set-Off on Termination) below, 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 25.9(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 45 (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.

## 25.10 Incomplete Months

- (a) Calculation of any Unitary Charge payable where Services commence or expire or terminate (as appropriate) during a Month (for example where the Service Commencement Date for a Project Facility is not the first day of a Month, or where the Termination Date or Expiry Date for any Project Facility does not occur on the final day of any Month) will be effected in accordance with paragraph 2.3 (Calculation of the Monthly Unitary Charge) of Part II (The Unitary Charge) of Schedule 15 (Payment Mechanism).

## 26. MARKET TESTING AND BENCHMARKING<sup>27</sup>

### 26.1 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 not more than six (6) months before any Market Testing

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<sup>27</sup> To be reviewed on a project-specific basis including the nature of services to be covered and the frequency of the market-testing and/or benchmarking.

Review Date. If the Authority 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 Services Co.
- (c) With a view to agreeing with the Authority the appropriate adjustments to the Unitary Charge on the basis set out in Clause 26.5 (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 cost of the relevant Testable Services as identified in the Financial Model as the costs of providing the Testable Services in question (as such element may have been indexed or changes as a result of previous adjustments to this Clause 26 (Market Testing and Bench Marking) (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 the date falling 2 (two) months and ten (10) Business Days before 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 the Market Testing Procedure.

## 26.2 Market Testing Review Dates

Subject to Clause 26.1 (Benchmarking), the Testable Services will be subject to market testing by PPP Co. on Market Testing Review Dates.

## 26.3 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 26.1 (Benchmarking) indicates that there is a cost difference between the Latest Service Element and Market Costs as defined in Clause 26.1 (Benchmarking) of more than five per cent and the Parties cannot agree an adjustment to the Unitary Charge following a Benchmarking Exercise;
- (b) the Parties agree or it is determined through the Dispute Resolution Procedure that a Benchmarking Exercise cannot be carried out due to the absence of suitable Benchmarking Data; or
- (c) PPP Co. fails to carry out a Benchmarking Exercise.

## 26.4 Market Testing Procedure

If this Project Agreement requires market testing, PPP Co. and the Authority will agree and select an independent third party (the “**Market Tester**”) to carry out the market testing

process on behalf of PPP Co. and (subject to Clause 26.7 (Costs)) at PPP Co.'s cost and the following procedure will apply:

- (a) At least two (2) months and ten (10) Business Days before each Market Testing Review Date the Parties and the Market Tester will meet together as often as may be necessary to agree:
  - (i) the number and identity of prospective tenderers that will be invited to prepare and submit tenders for the relevant Testable Services provided that any prospective tenderer will possess an appropriate degree of skill, resources, reputation and financial standing relative to the provision of the relevant Testable Services (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 the Authority representatives on the evaluation panel (who may comprise up to fifty per cent (50%) of all members on the evaluation panel);
  - (iv) any changes to the relevant Testable Services; 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 which will be incorporated into an agreed document(the “**Market Testing Procedure**”).
- (b) If the Parties and the Market Tester 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) The Market Tester 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 and the Market Tester fail 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 appoint all tenderers selected in accordance with the Market Testing Procedure as its sub-contractors, or procure the appointment of all such tenderers as sub-contractors of Services Co. 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.

## 26.5 Adjustments to Unitary Charge

- (a) Where the tender price of a sub-contractor appointed by PPP Co. or Services Co. as the case may be pursuant to Clause 26.4 (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 in accordance with Clause 56 (Financial Adjustments).
- (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 in accordance with Clause 56 (Financial Adjustments).

## 26.6 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 Services Co. co-operates with the Authority and provides such documents and other requisite information as the Authority deems necessary for the purposes of any Benchmarking Exercise and any Market Testing Procedure.

## 26.7 Costs

The costs of the Market Tester incurred by PPP Co. in performing its obligations under this Clause 26 (Market Testing and Benchmarking) will be payable as follows:

- (a) by 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; and
- (c) by both parties equally where the Successful Tenderers’ price is equal to the Latest Service Element.

For the purpose of this Clause 26.7 (Costs), differences of less than 1% (one per cent) will be disregarded.

## 26.8 Indemnity

Without prejudice to Clauses 26.5 (Adjustments to Unitary Charge) and 26.7 (Costs), PPP Co. will indemnify the Authority from and against all and any Claim and/or Losses which may arise out of any failure by PPP Co. (or Services Co. on its behalf) to act in good faith, or any negligence or misconduct of PPP Co. (or Services Co. on its behalf), in the course of carrying out the Benchmarking Exercise and/or Market Testing Procedure or any breach



of PPP Co. of its obligations under this Clause 26 (Market Testing and Benchmarking), except where such Claim and/or Losses are solely and directly caused by an act or omission of the Authority and/or the Authority's Representative.

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## **PART 9 – TAXES<sup>28</sup>**

### **27. TAXES**

#### **27.1 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 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 relevant Taxation Authority 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 relevant Taxation Authority 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.
- (b) Without limitation of or prejudice to the generality of Clause 27.1(a) (Deductions and Withholdings from Payments), the Authority shall be entitled to 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) and any regulations thereunder. For the avoidance of doubt, the Parties do not intend such deductions and withholdings referred to in this Clause 27.1(b) to be an exhaustive list of all circumstances in which a deduction or withholding may arise, but this Clause 27.1(b) will be governed by Chapter 2 of Part 18 of the Taxes Act (Payments to sub-contractors in certain industries).

#### **27.2 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 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. In the event of any of the foregoing obligations not being complied with or actions not being undertaken or in the event of non-continuation of compliance by PPP Co., the Authority may suspend or refuse to make payments under this Project Agreement until such date as PPP Co. demonstrates to the Authority's satisfaction that PPP Co. is fully in compliance with Section 1095 of the Taxes Act.

#### **27.3 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.

#### **27.4 Tax Equalisation of Compensation Payments**

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<sup>28</sup> To be reviewed on a project specific basis.

- (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 the Compensation Payment 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 Tax in respect of the receipt arise in relation to the same payment, full account shall be taken of any credit relief or repayment in respect of such withholding tax) in the calculation of the increase in any Compensation Payment. It shall also be assumed that PPP Co. would have been liable to Tax on receipts from the Project (as trading income) such that the amount of such Tax on trading income forgone shall reduce the amount of the Relevant Tax Liability.
- (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 or but for any voluntary act or transaction of PPP Co.) 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 relevant Taxation Authority 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 27.4(a) above to reflect such outcome.
- (d) Any increase in the amount of a Compensation Payment which is payable under Clause 27.4(a) above will be paid on the later of five (5) Business Days after a demand thereof (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 relevant Taxation Authority 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 relevant Taxation Authority 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 27.4(a) above in respect of an Actual Liability only direct to the relevant Taxation Authority in satisfaction of the Actual Liability Tax due by PPP Co. and if the Authority does so, it will notify PPP Co. forthwith.

## **28. VALUE ADDED TAX**

### **28.1 Application of VAT**

All amounts stated to be payable by either Party under this Project Agreement shall be exclusive of any amounts in respect of VAT properly chargeable thereon.

### **28.2 Issue of Invoices**

- (a) PPP Co. shall issue a valid VAT Invoice within the time limit set out by Law.
- (b) In each valid VAT Invoice issued by PPP Co., details of the components of the consideration and/or Unitary Charge in respect of the separate elements being supplied by PPP Co. will be separately identified in accordance with Appendix I (Pro Forma Invoice) of Schedule 15 (Payment Mechanism) and in the case of each component, the valid VAT Invoice issued must indicate:
  - (i) the consideration and/or monthly amount of the Unitary Charge previously invoiced;
  - (ii) the consideration and/or monthly amount of the Unitary Charge which is exempt from VAT;
  - (iii) the consideration and/or monthly amount of the Unitary Charge which is liable to VAT arising from such valid VAT Invoice and upon which the Authority is liable to account for VAT, together with an indication of the amount of VAT arising thereon; and
  - (iv) the consideration and/or monthly amount of the Unitary Charge, which is liable to VAT arising from such valid VAT Invoice and upon which PPP Co. is liable to account for VAT, together with the amount of VAT arising thereon.
- (c) 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.

### **28.3 Payment of VAT**

- (a) Subject to Clause 28.3(b) below, each Party shall pay to the other Party any amount in respect of VAT properly chargeable in respect of any supply made to it under this Project Agreement provided that it shall first have received from the other Party a valid VAT Invoice in respect of that supply.
- (b) In relation to any supplies where consequent on Section 16(3) of the VAT Act or otherwise the Authority is liable to account to the relevant Taxation Authority for the VAT arising on the supply, PPP Co. shall not charge any amount in respect of VAT to the Authority and any invoice raised by PPP Co. charging an amount in respect of VAT on such supply is not a valid VAT Invoice.
- (c) Where Clause 28.3(b) above applies, PPP Co. will issue to the Authority all invoices or documents required under Law and agree to provide the Authority with all

necessary information and assistance to enable the Authority to comply with the applicable Law, including pursuant to the VAT Act and to account for the correct amount of VAT.

- (d) Any overpayment by the Authority of any amount in respect of VAT to PPP Co. will be a sum of money recoverable for the purposes of Clause 25 (Payment).

#### 28.4 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 supplies made pursuant to the Project Agreement, then the provisions of Schedule 21 (Change in Law) will apply as if the irrecoverable input VAT arose as a result of a Qualifying Change in Law.<sup>29</sup>

#### 28.5 Determination of VAT Status

- (a) Not less than eighty (80) Business Days before the anticipated date for payment of VAT referred to in Clause 28.3 (Payment of VAT), PPP Co. will, if requested by the Authority, consult with the relevant Taxation Authority to agree the approach to be taken by the relevant Taxation Authority for the purposes of calculation of VAT. PPP Co. will consult with the Authority in advance of such consultation with the relevant Taxation Authority and will immediately after such consultation advise the Authority of the outcome of such consultation.
- (b) To the extent that the Authority disagrees or otherwise objects to the approach, or decision of the relevant Taxation Authority, 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 relevant Taxation Authority with a view to amending such decision/approach to the satisfaction of the Authority.

#### 28.6 Ruling from the Relevant Taxation Authority

If either Party (the “**First Party**”) shall consider that:

- (a) any amount in respect of VAT which the other Party (the “**Second Party**”) claims to be properly chargeable by the Second Party to the First Party in connection with this Project Agreement; or
- (b) any VAT which the Second Party claims to be properly accountable by the First Party in accordance with Section 16.3 of the VAT Act or otherwise

is not in fact properly so chargeable or accountable as the case may be, the First Party shall be entitled to require the Second Party to obtain a ruling (the “**Ruling**”) from the relevant Taxation Authority as to the amount in respect of VAT (if any) properly so chargeable by the Second Party or the VAT (if any) to be accounted for by the First Party as the case may be. The Second Party shall forthwith request the relevant Taxation Authority to issue the Ruling. In the event that the relevant Taxation Authority issues a Ruling that the relevant amount in respect of VAT is chargeable by the Second Party or the relevant VAT is accountable by the First Party as the case may be, the First Party shall bear the costs

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<sup>29</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.

incurred by both parties in connection with the Ruling on the matter, provided however, in the event of the relevant Taxation Authority confirming that the relevant amount in respect of VAT is not chargeable by the Second Party or the relevant VAT is not accountable by the First Party as the case may be, or in the event of the supply being exempt from VAT, the Second Party shall bear the costs incurred by both parties in connection with the relevant Taxation Authority's ruling on the matter.

#### **28.7 Procedures for Obtaining a Ruling from the Relevant Taxation Authority**

The following further provisions shall apply in respect of the application for a Ruling in accordance with Clause 28.6 (Ruling from the Relevant Taxation Authority):

- (a) prior to submitting its request for the Ruling and any further communication to the relevant Taxation Authority in connection with the Ruling, the Second Party shall 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 or delayed);
- (b) the Second Party shall provide to the First Party copies of all communications received from the relevant Taxation Authority in connection with the application for the Ruling as soon as practicable after receipt; and
- (c) the Second Party shall use all reasonable efforts (including without limitation the provision of such additional information as the relevant Taxation Authority may require) to obtain the Ruling as soon as reasonably practicable following the initial request.

#### **28.8 Obligation to Pay on Receipt of Ruling**

If a Ruling is required by the First Party under Clause 28.6 (Ruling from the Relevant Taxation Authority), the First Party shall not be obliged to pay the amount in respect of VAT so charged by the Second Party unless and until the Ruling is received from the relevant Taxation Authority which states that an amount in respect of VAT is properly so chargeable. In the event of the receipt of a Ruling which states that an amount in respect of VAT (the “**VAT Sum**”) is properly so chargeable, then subject to Clause 28.9 (Disagreement) and Clause 28.10 (Further Provisions) and provided that the First Party shall first have received a valid VAT Invoice which states the VAT Sum to be the amount in respect of VAT chargeable to the First Party, the First Party shall pay the VAT Sum to the Second Party together with any interest arising from date of receipt of the valid VAT Invoice to date of payment of the VAT Sum by the First Party.

#### **28.9 Disagreement**

In the event that the First Party disagrees with any Ruling obtained pursuant to Clause 28.6 (Ruling from the Relevant Taxation Authority) by the Second Party from the relevant Taxation Authority, then the Second Party (provided that it is indemnified by the First Party to its reasonable satisfaction against all costs, penalties, surcharges, interest and expenses which it may incur in relation thereto) shall 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.

#### **28.10 Further Provisions**

The following further provisions shall apply in the event that the First Party shall exercise its rights under Clause 28.9 (Disagreement):

- (a) the action which the First Party shall be entitled to require the Second Party to take shall include contesting any assessment for VAT or other relevant determination of the relevant Taxation Authority before the Appeal Commissioners or court of competent jurisdiction and appealing any judgment or decision of the Appeal Commissioners or such court;
- (b) in the event that the Second Party shall be required to pay to or deposit with the relevant Taxation Authority any sum in order to be able to pursue any appeal, the First Party shall, at its election, either pay such sum to the relevant Taxation Authority 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 relevant Taxation Authority the First Party shall pay such sum to the Second Party;
- (c) save as specifically provided in Clause 28.10(b) above, the First Party shall 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
- (d) the Second Party shall account to the First Party for any amounts awarded to the Second Party on any appeal (to the extent that such amounts have been discharged by the First Party), shall account for any sum paid to or deposited with the relevant Taxation Authority in accordance with Clause 28.10(b) above which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

29. **RATES<sup>30</sup>**

- 29.1 Any rates arising or payable in connection with the use of any property under this Project Agreement or in connection with compliance with any obligations under this Project Agreement shall be discharged by [●]<sup>31</sup> for and on behalf of the Authority.

**PART 10 – CHANGE**

30. **VARIATION PROCEDURE**

30.1 **Authority Changes**

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

30.2 **PPP Co. Changes**

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

30.3 **[●] Funded Variations**

<sup>30</sup> To be reviewed on a project-specific basis.

<sup>31</sup> To be determined by the Authority.

Paragraph 3 ([●] Funded Variations) of Schedule 20 (Variations) will have effect in respect of changes proposed by a [●].<sup>32</sup>

#### 30.4 Small Works

- (a) PPP Co. will carry out Small Works at the request of the Authority.
- (b) Thirty (30) days before the Planned Service Commencement Date for each Project Facility 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**”). PPP Co. shall ensure that such proposed Small Works Rates shall provide value for money to the Authority with reference to those rates prevailing for comparable works and services in the Irish market, and in any event, any percentage increase in the proposed Small Works Rates shall not exceed the construction price index published by the Society of Chartered Surveyors Ireland, applicable at the date of the proposed Small Works Rates are submitted to the Authority for its approval.
- (c) The Small Works Rates agreed pursuant to Clause 30.3(b) shall 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 consist of materials and labour (including plant) only and shall be calculated on the basis that:
  - (i) the labour element (including plant) 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 five per cent (5%).
- (d) 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.
- (e) Subject to Clause 25.7 (Disputed Invoices), the Authority will pay PPP Co. for any Small Works carried out pursuant to this Clause 30.3 (Small Works) within twenty (20) Business Days of receipt of a valid invoice and such other documentation as the Authority may reasonably require to enable it to verify the amounts claimed.

30.5 Without prejudice to Clause 30.4(e) above, any dispute between the parties relating to the Small Works will be determined in accordance with Clause 45 (Dispute Resolution Procedure).

#### 31. CHANGE IN LAW

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

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<sup>32</sup> To be reviewed on a project-specific basis.



## PART 11 – EMPLOYMENT ISSUES

### 32. TRANSFERRING EMPLOYEES

#### 32.1 No Transferring Employees

- (a) The Parties agree that there are no persons presently employed by the Authority [or] or any third party contractor to the Authority [or] who on or after the Services Commencement Date will be entitled to transfer employment to PPP Co. or Services Co. by virtue of the application of the Transfer Regulations to the provision of any of the Services. If it is subsequently agreed or determined that there are any such persons entitled to transfer to PPP Co. or Services Co. pursuant to the Transfer Regulations and:
  - (i) They do so transfer, the transfer of employee(s) will be effected in accordance with the provisions of Clauses 32.1(b) to 32.1(k); or
  - (ii) They do not so transfer, PPP Co. shall not be liable for any Losses arising in respect of any Claim made by any such persons.
- (b) In the event of a Relevant Transfer which is not foreseen by the Parties as at the date of this Agreement, PPP Co. will employ those of the Employees who have not resigned and/or formally objected to the transfer of their employment (the **“Transferring Employees”**) (and procure the employment of the Transferring Employees by the relevant Sub-Contractors) on and after the Transfer Date and the terms and conditions of the Transferring Employees shall include all such employment related benefits as those in force immediately before the transfer of their employment by virtue of the Transfer Regulations.
- (c) The Authority shall, to the extent that it is entitled to do so by Law and upon request of PPP Co., supply to PPP Co. any information in relation to the terms and conditions of employment of the Transferring Employees to the extent that the Authority has or has received such information from any employer of a Transferring Employee other than the Authority. The Authority does not give and will not give any warranty as to the accuracy or completeness of any such information.
- (d) 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 the Transferring 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 Transferring Employees in respect of or in connection with the period up to the Re-Transfer Date including, without limitation in respect of:
  - (i) any claim (statutory, contractual or otherwise) made by or on behalf of any Transferring Employee which relates to his employment or the termination of employment by PPP Co. or any of its Sub-Contractors on or after the Transfer Date;
  - (ii) any detrimental change in the working conditions or remuneration of any Transferring Employee on or after the Transfer Date;
  - (iii) PPP Co. or any of its Sub-Contractors becoming employer of the Transferring Employees pursuant to the Transfer Regulations;

- (iv) the failure of PPP Co. or any of its Sub-Contractors to comply with its obligations under this Clause 32 in relation to Transferring Employees;
  - (v) any claim, order or award made by any tribunal or court, relating to an allegation or determination that Transferring Employees are employees of the Authority;
  - (vi) the failure of PPP Co. or any of its Sub-Contractors to comply with its obligations under the Transfer Regulations in relation to Transferring Employees; or
  - (vii) any claims of whatsoever nature by any third party against the Authority in respect of this Project Agreement for which the Authority is liable by virtue of the Transfer Regulations.
- (e) 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 being or 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, in respect of or in connection with the period up to the Re-Transfer Date, including:
- (i) any claim (statutory, contractual or otherwise) made by or on behalf of any such member of Staff or third party which relates to his employment by PPP Co. or any of its Sub-Contractors on or after the Transfer Date;
  - (ii) any claim in relation to the employment or termination of employment of any such member of Staff or third party on or after the Transfer Date;
  - (iii) any substantial and detrimental change in the working conditions or remuneration of any such member of Staff or third party on or after the Transfer Date;
  - (iv) PPP Co. or any of its Sub-Contractors succeeding the Authority as employer of such member of Staff or third party pursuant to the Transfer Regulations;
  - (v) the failure of PPP Co. or any of its Sub-Contractors to comply with its obligations under this Clause 33.1(d); or
  - (vi) any claim of whatsoever nature by any third party against the Authority in respect of this Project Agreement for which the Authority is liable by virtue of the Transfer Regulations and/or any judicial decision interpreting the same.
- (f) If there is a Relevant Transfer not foreseen by the Parties as at the date of this Project Agreement, there shall be a corresponding adjustment to the Unitary Charge in respect of any such Relevant Transfer so as to place PPP Co. in no better and no worse position in accordance with Clause 57 (Financial Adjustments).
- (g) In calculating any adjustment to the Unitary Charge pursuant to Clause 32.1(f):
- (i) to avoid doubt, any changes in costs which fall to be dealt with under Clause 32.1(f) and which arise from a Change in Law will be dealt with in accordance with the provisions of Clause 31 (Change in Law); and

- (ii) in order to prevent duplication, no adjustment will be made under this Clause 32.1(g) if any indemnity given by the Authority under any provision of this Project Agreement would apply.

(h) **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 Transferring Employees will be borne by the Authority up to the relevant Transfer Date and by PPP Co. on and thereafter up to, but not including, the Re-Transfer Date and all necessary apportionments will be made.

(i) **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.

(j) **Details of New Employees**

The Authority will promptly notify PPP Co. in writing of any appointment made in accordance with Clause 32.1(i) (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.

The Authority, PPP Co. and any Sub-Contractor undertake to take all reasonable steps to mitigate any costs and expenses arising under this Clause 32.1 (No Transferring Employees).

**32.2 Re-Transfer**

(a) **PPP Co. Indemnity**

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 being or 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, in respect of or in connection with the period up to the Re-Transfer Date, including:

- (i) any claim (statutory, contractual or otherwise) by or on behalf of any such member of Staff or third party which relates to his employment by PPP Co. or any of its Sub-Contractors;
- (ii) any claim in relation to the employment or termination of employment of any such member of Staff or third party and which arises out of an act or

omission of PPP Co. or of any of its Sub-Contractors, which act or omission occurs on or after the Transfer Date;

- (iii) any substantial and detrimental change in the working conditions or remuneration of any such member of Staff or third party on or after the Transfer Date;
  - (iv) the failure of PPP Co. or any of its Sub-Contractors to comply with its obligations under this Clause 32 (Employment Issues);
  - (v) any claim of whatsoever nature by any third party against the Authority for which the Authority is or may be liable by virtue of the application of the Transfer Regulations (and/or any judicial decision interpreting the same) in respect of this Project Agreement; or
  - (vi) any demands by any Staff of PPP Co. and/or a Sub-Contractor for any breach of employment law or for such taxes and payments, and penalties and interests, and against its costs in dealing with such demands.
- (b) 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.”**).
  - (c) The Authority for the purposes of this Clause 32 (Employment Issues) will include any sub-contractors appointed by the Authority and each Replacement PPP Co.
  - (d) 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.
  - (e) 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 five (5) 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.
  - (f) If the contract of employment of any individual in connection with the Project will have effect as if originally made between the individual concerned and PPP Co. (or the relevant Sub-Contractor) as a result of the provision of the Transfer Regulations and/or any judicial decision interpreting the same, then such persons will for the purposes of the indemnities at Clause 32.1 above be deemed to be a member of Staff.
  - (g) **Application of Transfer Regulations upon Expiry or Termination**

The Parties acknowledge that by virtue of the cessation or partial cessation of the provisions of the Services by PPP Co. (or the relevant Sub-Contractor) (whether or not on the Expiry Date or earlier termination of this Project Agreement) the contract of employment of each member of Staff will have the effect after such cessation as if originally entered into between a Replacement PPP Co. and the individual concerned pursuant to the Transfer Regulations but the Parties agree that Clause 32.2(h) (PPP Co Indemnity Upon Expiry or Termination) will apply irrespective of whether or not the Transfer Regulations are applied.

(h) **PPP Co Indemnity Upon Expiry or Termination**

PPP Co. will indemnify and will keep indemnified on demand the Authority and/or any Replacement PPP Co. from and against any Claims and/or Losses which relate to or arise out of the following:

- (i) any claim (statutory, contractual or otherwise) made by or on behalf of any member of Staff which relates to his employment by PPP Co. or any of its Sub-Contractors;
- (ii) the employment or termination of employment of any member of Staff by PPP Co. or any of its Sub-Contractors;
- (iii) any detrimental change in the working conditions or remuneration of any member of Staff by PPP Co. or any of its Sub-Contractors;
- (iv) the failure of PPP Co. or any of its Sub-Contractors to comply with its obligations under the Transfer Regulations; or
- (v) the failure of PPP Co. or any of its Sub-Contractors to comply with its obligations under this Clause 32.2(h) (PPP Co. Indemnity Upon Expiry or Termination),

after the Transfer Date and up to and including the Re-Transfer Date for which the Authority and/or any Replacement PPP Co. is or becomes liable for any reason by virtue of the operation of the Transfer Regulations and/or any judicial decision interpreting the same or otherwise.

**33. STAFF**

**33.1 Sufficient trained and competent Staff**

PPP Co. will

- (a) 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; and
- (b) ensure that Staff (including any replacement/new members of Staff) are made sufficiently aware of the obligations of PPP Co. under this Project Agreement to the extent required for the fulfilment of their role in the delivery of the Works or Services and, in particular, informed of the measures PPP Co. takes to ensure its compliance with Clause 57 (Data Protection).

**33.2 Employment Conditions**

- (a) PPP Co. will comply, and will ensure that each of its Sub-Contractors and Staff will comply with all Law 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 as may be required by Law. Furthermore, insofar as permissible under Law, PPP Co. will apply to its Staff, and will procure that each of its Sub-Contractors will apply to each of their Staff, increases in wages in accordance with national wage agreements negotiated between the Social Partners (if applicable to the Staff) from time to time

unless such increases have otherwise been applied by PPP Co. or its Sub-Contractors whether pursuant to joint industrial councils or otherwise provided that nothing in this Clause 33.2(b) shall prevent PPP Co. or its Sub-Contractors from applying decreases in wages which have been incorporated in national wage agreements negotiated between the Social Partners (if applicable to the Staff), unless such decreases have otherwise been applied by PPP Co. or its Sub-Contractors whether pursuant to **joint industrial** councils or otherwise. The expression “**joint industrial council**” will have the meaning set out in the Industrial Relations Acts 1946 to 2015.

- (c) PPP Co. will be the supplier of services under this Project Agreement and, unless otherwise agreed in writing, no relationship of employer and employee shall be created by this Project Agreement or otherwise between PPP Co. and the Authority and Staff and the Authority. PPP Co. shall at all times be directly accountable to the Revenue Commissioners for any income tax, PRSI, VAT, Corporation Tax or any other government impost payable in respect of its Staff.

### 33.3 Ongoing Training

PPP Co. will provide 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. If requested by the Authority, PPP Co. will provide evidence to confirm that it has complied with this Clause 33.3.

### 33.4 Training of Authority Staff

Without prejudice to Clause 13.13 (Induction), PPP Co. will, at its own cost, provide training for key nominated employees of the Authority in the use of the Project Facilities when reasonably requested by the Authority.

### 33.5 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 and the Project Facilities which are disclosed to PPP Co. including health and safety, fire safety policies and data protection 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.

### 33.6 Supervision

- (a) PPP Co. will ensure that while at a Site, a Project Facilities or an existing Project Facilities
  - (i) the Staff will be appropriately managed and supervised at all times in connection with the carrying out of the Project;
  - (ii) the Staff will carry out their duties in an orderly manner;
  - (iii) appropriate work wear will be provided at PPP Co.'s expense and used when required (including personnel protective equipment at all times when on site during the Construction Period);
  - (iv) appropriate safety gear and equipment will be provided at PPP Co.'s expense and used when required;

- (v) during the Service Period, the Staff will wear identity badges (with photograph, name of PPP Co. and name of member of Staff displayed) and will wear uniforms as required by the Authority which will be provided at PPP Co.'s expense; and
- (vi) appropriate occupational health facilities will be provided at PPP Co.'s expense; and
- (b) without prejudice to the requirements of Clause 33 (Staff), PPP Co. will ensure that any Staff attending any Site for the purpose of performing Unprogrammed Maintenance Work or in an Emergency, who have not been checked and vetted in accordance with Clause 33.13 (Employee Checks) shall at all times be accompanied by a member of Staff who has been checked and vetted in accordance with Clause 33.13 (Employee Checks).

### **33.7 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 no cost to the Authority) to deal with it but PPP Co. will continue to comply with its obligations under this Project Agreement.

### **33.8 Disciplinary Action**

- (a) The Authority's Representative may (acting reasonably) instruct PPP Co. to take appropriate disciplinary action against any employee of PPP Co. or to ensure that any of its Sub-Contractors takes appropriate action against their employees (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 Sites, the Off-Site Areas or Project Facility is otherwise considered by the Authority's Representative (acting reasonably) to be undesirable. The Authority's Representative will co-operate with and will use reasonable endeavours to ensure that the Project Facility co-operates with any such disciplinary proceedings and will be advised in writing by PPP Co. of the outcome.
- (b) PPP Co. will set up and maintain and procure that all Sub-Contractors set up and maintain personnel policies and procedures governing all relevant matters (including discipline, grievances, equality and health and safety). The terms and the implementation of such policies and procedures shall comply with Law and Good Industry Practice.

### **33.9 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 43 (Relief Events) will apply.

### 33.10 Employee Information and Changes to the Workforce

- (a) The Authority's Representative may carry out audits of PPP Co.'s Employee Information at approximate intervals of three (3) months and may carry out other reasonably periodic monitoring spot checks and auditing of PPP Co.'s Employee Information, to the extent permitted by Law. The Authority shall notify PPP Co. of its intention to audit or spot check the Employee Information. 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, to the extent permitted by Law.
- (b) PPP Co. will ensure that before such disclosure it has complied, and has procured compliance by any Staff, with the Data Protection Acts 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 an appropriate confidentiality undertaking from any such party to whom it discloses Employee Information.
- (e) For the purposes of this Clause 33 (Staff), "Employee Information" means in relation to employees, direct subcontractors and agents of each PPP Co. and the Principal Sub-Contractors and below these tiers relating to employees of those sub-contractors engaged in the Project who have more than ten (10) employees written details of:
  - (i) the total number of employees employed by PPP Co. or any of its contractors or 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 34.10(e)(i):
    - (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) 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; and

- (iii) any relevant information relating to or connected with the employment of employees falling within the scope of Clause 34.10(e)(i):
  - (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
  - (E) 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).

### 33.11 Changes to the Workforce

During the six (6) months preceding the Expiry Date or where a Termination Notice has been served during the Service Period, PPP Co. will not, without the prior written agreement of the Authority's Representative, such agreement not to be unreasonably withheld or delayed:

- (i) materially amend or offer, promise or agree to amend the terms and conditions of employment of any employee falling within the scope of Clause 33.10 (Employee Information and Changes to the Workforce) including, the rates of remuneration or hours to be worked by any Staff, including holidays; or
- (ii) 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, or
- (iii) materially increase or decrease the number of employees whose work (or any part of it) is work undertaken for the purposes of this Project Agreement, or make offers of employment that would have the effect of increasing the number of such employees or give notice of termination of employment that would have the effect of decreasing the number of such employees,

unless required by Law.

For the purposes of this Clause 33.11, what is material for the purposes of the phrase “materially amend” will be determined by considering the individual contract of employment as a whole.

### 33.12 Conduct of Staff

PPP Co. will and will procure that all persons engaged for the provision of the Works or Services will, whilst within any Site, any Off-Site Area, and/or any Project Facility:

- (a) comply with Guidance relating to the conduct of Staff and security arrangements;
- (b) keep confidential all documentation and Confidential Information to which that person may have access or have obtained during the course of his/her employment;
- (c) not consume or have in their possession any alcohol or illegal substances; and
- (d) not be under the influence of alcohol or any illegal substances.

### 33.13 Employee Checks

#### (a) Identity Checks

Prior to the Service Commencement Date for each relevant Project Facility, PPP Co. will be responsible for carrying out the following procedures to provide the Authority with confirmation as to the identity and background of Staff (present and future) (the “**Basic Checks**”).

#### (i) Documents To Be Checked

Before recruitment, PPP Co. must seek from prospective members of Staff original documents to establish their identity. Duplicates and photocopies may not under any circumstances be accepted. The documents necessary to establish identity will vary according to the nationality of the individual concerned:

#### (A) Irish Nationals

- (a) Either a full (i.e. 10 year) Irish passport or at least one of the following:
  - (i) Irish driving licence;
  - (ii) P.45;
  - (iii) a birth certificate which bears an issue date within a few weeks of birth. The short version of a birth certificate (an "abbreviated certificate") is not acceptable; and/or
  - (iv) proof of residence at a given address, such as a bill from one of the public utilities (e.g. water, electricity, gas or telephone).
- (b) In the event that none of the above are available (for example where prospective Staff members are of a young age), PPP Co. may request the prospective Staff member to provide a passport-sized photograph of him/herself endorsed on the back with the signature of a person of some standing in the community (e.g.

Garda, lawyer, teacher, bank manager or civil servant) and accompanied by a signed statement, completed by the same person, stating the period of time that the subject has been known to them (minimum one year). PPP Co. must ensure that the signature matches that on the back of the photograph and that it contains a legible name, address and telephone number. In all cases of doubt, and for a random sample of the others, PPP Co. is required to contact signatories, preferably by telephone, to check that he/she did complete the statement and has known the subject for a minimum of one year.

(B) Other EU Nationals

Either a full EU passport or an identity card issued by an EU Member State.

(C) Other Nationalities

Either (i) a full passport issued by the country concerned or a national identity card or (ii) a document/letter issued by the Department of Justice/Department of Business, Enterprise and Innovation establishing the individual's immigration status in Ireland.

(ii) PPP Co. acknowledges that the following must not be accepted as proof of identity from any prospective member of Staff:

(A) an international driving licence; or

(B) copy birth certificate.

(iii) **Checking Documents**

PPP Co. must take the following steps to verify the documents produced:

(A) insist that original documents are produced and not transcripts or photocopies; and

(B) examine the documents to make sure that they are originals and true and correct.

(iv) **Checks On Integrity**

PPP Co. acknowledges that it is of fundamental importance to the Authority that prospective Staff members meet suitable standards of integrity and suitability before being allowed to work at the [Project Facility] If PPP Co.'s recruiting officer has any doubts about the acceptability of evidence of integrity, he must consult the Authority's Representative prior to instructing such Staff to access any of the [Project Facilities]

(v) **Records**

(A) PPP Co. must keep and maintain full records of all identity and integrity checks carried out which must detail the name of the person making the check and the date when the check was made and must produce such records as and when requested by the Authority.

- (B) The Authority reserves the right to arrange for such enquiries to be made as it considers necessary about any member of Staff supplied by PPP Co.

(b) **Vetting Checks<sup>33</sup>**

When employing any person who will be performing any of the Works or Services, PPP Co. shall and shall procure that any Sub-Contractor of any tier shall, act with the diligence and care expected of a prudent employer to:

- (i) obtain, where reasonably practicable, satisfactory references in respect of any such person (written references must be followed up directly with the referee concerned);
  - (ii) to the extent permitted by Law, procure the carrying out of a security vetting check (of the most extensive kind available) by An Garda Síochána (or in respect of Staff from other countries by the relevant authority responsible for the carrying out of security vetting checks in the relevant jurisdiction) and to the extent permitted by Law provide a copy of the results of the vetting check to the Authority; and
  - (iii) inform each applicant for such employment that all Convictions and cautions must be declared and obtain such a declaration in writing from each applicant for such employment.
- (c) PPP Co. shall procure that no person who discloses any Convictions or caution, or who is found to have any Convictions following the results of a security vetting check, is employed or engaged without the Authority's prior written consent.
  - (d) PPP Co. shall procure that the Authority is kept advised at all times of any member of Staff who, subsequent to his/her commencement of employment as a member of Staff, receives a Conviction or caution or cautions or whose previous Convictions or caution or cautions become known to PPP Co. (or any employee of a Sub-Contractor involved in the provision of the Works or Services). PPP Co. will advise the Authority of all appropriate steps it is taking in respect of any member of Staff following any Convictions or cautions becoming known as referred to in this Clause 33.13(d).

(e) **Temporary Access**

- (i) Without prejudice to PPP Co.'s obligations pursuant to Clause 33.13(b), 33.13(c), 33.13(d) or to the provisions of Clause 33.13(e)(ii) and Clause 33.13(e)(iii), if:

- (A) following a request from PPP Co., the Project Facility or the existing Project Facility is unable to procure the carrying out of a security vetting check in accordance with Clause 33.13(b), 33.3(c), 33.13(d); or

- (B) the result of a security vetting check is not available,

prior to the date when the relevant person requires access to the Project Facility and/or the existing Project Facility, the Parties will agree such arrangements to facilitate temporary access to the Project Facility and/or existing Project Facility for such person provided always that no such person

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<sup>33</sup> Extent of vetting checks to be reviewed on a project-specific basis.

shall be given access to the Project Facility or the existing Project Facility unless such person is, accompanied at all times or supervised, by one of the following:

- (A) another member of PPP Co.'s Staff who has been subject to a security vetting check in accordance with Clause 33.13(b), 33.13(c) and 33.13(d) and in respect of whom no Convictions or cautions have been disclosed; or
- (B) a Transferring Employee,

and such arrangements have been agreed in advance (and in any event prior to any such access being given) with the Authority.

- (ii) In the event that a relevant person, who has not been subject to a security vetting check, requires access to an existing Project Facility or a Project Facility in the case of an Emergency only, the Authority may facilitate access to the Project Facility or existing Project Facility, in its absolute discretion, subject to any arrangements that may be required by the Authority.

- (iii) In the event that a relevant person, who has not been subject to a security vetting check, requires access to a Project Facility for the purpose of carrying out snagging works in accordance with the Snagging Programme pursuant to Clause 13.5 (Snagging Items), the Authority will facilitate access to the Project Facility for such person, provided always, that no such person shall be given access to the Project Facility unless such person is accompanied at all times or supervised, by one of the following (at the Authority's election):

- (A) another member of Staff who has been subject to a security vetting check in accordance with Clause 33.13(b), 33.13(c) and 33.13(d) and in respect of whom no Convictions or cautions have been disclosed; or
- (B) the Authority's Representative; or
- (C) the Project Facility Representative.

- (f) For the avoidance of doubt, no person will be permitted to be employed in providing the Works or Services who is a sex offender within the meaning of the Sex Offenders Act, 2001.

#### **33.14 Refusal of Admission**

The Authority reserves the right (acting on its own behalf or on behalf of the relevant Authority) to refuse to admit to the Sites or the Project Facility any person, employed or engaged by PPP Co. or a Sub-Contractor, whose admission would, in the reasonable opinion of the Authority (acting on its own behalf or on behalf of the relevant Authority), present a risk to themselves, an Authority Related Party, Users or property.

#### **33.15 Decision to Refuse Admission**

The decision of the Authority (acting in its absolute discretion) as to whether any person is to be refused admission to the Sites or the Project Facilities pursuant to Clause 33.14 (Refusal of Admission) or is removed pursuant to Clause 33.16 (Removal from Sites/Project Facilities) will be final and conclusive. The Authority shall communicate to PP Co. its decision for such refusal.

### **33.16 Removal from Sites/Project Facilities**

PPP Co. will comply with any notice issued by the Authority from time to time requiring the removal from any of the Sites or Project Facility any person employed thereon who in the opinion of the Authority, such person:

- (a) commits an act of gross misconduct (whether in the course of his duties or not); and
- (b) is not acceptable or is undesirable on the grounds of security or other grounds as the Authority (acting reasonably) will determine,

such person may not be employed again upon the Project without the written consent of the Authority.

### **33.17 Relief from Deductions**

Where the Authority exercises its rights under this Clause 33 (Staff) and it can be shown that:

- (a) PPP Co. or any Sub-Contractor has acted in accordance with the relevant provisions of this Clause 33 (Staff); or
- (b) the Authority did not act reasonably in instructing PPP Co. not to employ and/or in requesting any removal and/or in refusing admission,

then the Authority will give PPP Co. such relief from Deductions for a reasonable period to allow PPP Co. or any Sub-Contractor to make alternative arrangements to replace the person whose employment has been refused or whose removal has been requested. For the avoidance of doubt, any relief from Deductions given under this Clause 33.17 (Relief from Deductions) will only be in respect of those Services in which such person is or would have been engaged.

### **33.18 Social Inclusion during the Works (PPP Co.'s Personnel Recruitment Requirements)**

- (a) Subject to Clause 33.18(h), during the period commencing on the Commencement Date up to the Certification Date for the last Project Facility to achieve Certification PPP Co. shall ensure that no less than:
  - (i) five per cent (5%) of the aggregate number of Person Weeks (being a whole number, rounded down) represent work carried out at the Sites and the Off-Site Areas by Relevant Workers. For the purposes of this Clause 33.18(a) any person whose employment commenced prior to the date of the formal notification by the Authority of the award of this Project Agreement to PPP Co. shall not be considered to be a Relevant Worker; and
  - (ii) two and a half per cent (2.5%) of the aggregate number of Person Weeks (being a whole number, rounded down) represent work carried out at the Sites and the Off-Site Areas by Relevant Trainees.
- (b) PPP Co. shall use reasonable endeavours to ensure that the employment of Relevant Workers and Relevant Trainees in connection with the Works is spread evenly

across the period running from the Commencement Date up to the Certification Date for the last Project Facility to achieve Certification.

- (c) PPP Co. shall provide accurate documentary evidence to the Authority on a monthly basis and upon the Authority's request at any other time to demonstrate that the provisions of Clause 33.18(a) have been and continue to be complied with.
- (d) The documentary evidence required under Clause 33.18(c) shall include but shall not be limited to:
  - (i) self-declaration in the form in Schedule 14 (Reports and Records), or, if there is none, a form approved by the Authority, from a director of the PPP Co. that each Relevant Worker and each Relevant Trainee satisfies the requirements of either Clause 33.18(a)(i) or Clause 33.18(a)(ii), as applicable;
  - (ii) self-declarations in the form in Schedule 14 (Reports and Records), or, if there is none, a form approved by the Authority, from a director of the employer of each Relevant Worker and each Relevant Trainee that he or she satisfies the requirements of either Clause 33.18(a)(i) or Clause 33.18(a)(ii), as applicable;
  - (iii) timesheets indicating when and where each Relevant Worker or Relevant Trainee (as the case may be) has been deployed in the carrying out of the Works and the total hours worked by each Relevant Worker or Relevant Trainee (as the case may be) in the carrying out of the Works; and
  - (iv) the key performance indicator reporting requirements in the form in Schedule 14 (Reports and Records) in respect of those persons employed under Clause 33.18(a).
- (e) Upon the Certification Date for the last Project Facility to achieve Certification PPP Co. shall provide the Authority with PPP Co.'s employer PAYE/PRSI Number (in its capacity as employer of the Relevant Worker or Relevant Trainee, as applicable), the PAYE/PRSI Numbers of any other employers employing Relevant Workers or Relevant Trainees, a full and final written report on how it has discharged its obligations under Clause 33.18(a) together with accurate supporting documentary evidence including but not limited to those items specified in Clause 33.18(d) in respect of the period from the Commencement Date up to the Certification Date for the last Project Facility to achieve Certification. PPP Co. acknowledges that the Authority may share any of the information provided under this Clause 33.18(e) with other State agencies for any purpose whatsoever in connection with this Project Agreement.
- (f) The Authority shall be entitled to request any other documentary evidence as it may reasonably require at any time in respect of both the monthly reports required under Clause 33.18(c) and final report required under Clause 33.18(e).
- (g) [If the PPP Co. has failed to comply with the provisions of Clause 33.18(a) the Authority shall be entitled to deduct from the relevant instalment of the Unitary Charge upon completion of the Works a sum calculated on the basis of [forty five euro (€45) per week] for each Person Week by which the PPP Co. falls short of the

aggregate of the minimum requirements set out in Clauses 33.18(a)(i) and 33.18(a)(ii).]<sup>34</sup>

- (h) Where PPP Co. can demonstrate to the Authority's satisfaction that there is a particular skill-set shortage amongst Relevant Workers and/or Relevant Trainees then its obligations pursuant to Clause 33.18(a) shall be satisfied by PPP Co. having used all reasonable endeavours to fulfil its obligation.

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<sup>34</sup> To be reviewed on a project specific basis.



## PART 12 – TERMINATION

### 34. TERMINATION FOR PPP CO. DEFAULT<sup>35</sup>

#### 34.1 Termination for 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 in respect of PPP Co. where “Insolvency Event” means the occurrence of any of the following:
  - (i) the inability of PPP Co. or Hold Co. to pay its debts as they fall due within the meaning of Sections 569 and 570 of the Companies Acts or the admission by PPP Co. or Hold Co. of its inability to pay its debts as they fall due;
  - (ii) the presentation of a petition (that is not dismissed or withdrawn within fifteen (15) Business Days of the presentation thereof) or the granting of an order by a court for the winding up or examinership of PPP Co. or Hold Co. or the passing of a resolution for the voluntary winding-up of PPP Co. or Hold 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 Hold Co. or the presentation of a petition (that is not dismissed or withdrawn within fifteen (15) Business Days of the presentation thereof) 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;
  - (iv) the convening of a meeting of creditors of PPP Co. or Hold Co. for the purposes of Section 587 of the Companies Act or the sanction or approval of any composition in respect of the satisfaction of the debts of PPP Co. or Hold 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; or
  - (v) a request by the directors of PPP Co. or Hold Co. for the appointment of a liquidator, trustee in bankruptcy, judicial custodian, compulsory manager, receiver, 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 jurisdiction applicable to PPP Co. or Hold Co. other than Ireland;
- (d) a breach of Clauses 15.2 or 15.3 (Professional Team) or Clauses 51.1(c) or 51.2(b) (Sub-Contracting);
- (e) a breach by PPP Co. of its obligations under Clause 49 (Assignment);

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<sup>35</sup> To be reviewed on a project-specific basis.

- (f) Abandonment or repudiation by PPP Co. of the whole of the Project Agreement or the Project or a material obligation on the part of PPP Co. under this Project Agreement or the Project;
- (g) failure to achieve the Service Commencement Date for any Project Facility by the Longstop Date;
- (h) in any consecutive four (4) month period the Unavailability Deductions amount to in Contract Years one (1) to twenty five (25) of the Service Period twenty five per cent (25%) or more of the aggregate of the Monthly Unitary Charge for that period;
- (i) in each and every month in any consecutive six (6) month period, the Service Performance Deductions amount to twenty per cent. (20%) or more of the Monthly Unitary Charge. Prior to the Final Services Commencement Date, the Monthly Unitary Charge shall, for the purposes of this sub-clause, be calculated as if the Project has achieved Final Services Commencement Date.<sup>36</sup>
- (j) in any consecutive three (3) month period any Project Facility has been Unavailable for twenty (20) or more days;
- (k) subject to Clause 46.3 (Terms and Conditions that become Unavailable) and Clause 46.4 (Risks that become Uninsurable) a breach by PPP Co. of its obligation to take out and maintain the Required Insurances;
- (l) a breach by PPP Co. of its obligations under Clause 50 (Change in Ownership);
- (m) a material breach by PPP Co. of Clause 40.3 (Changes to Funding Agreements);
- (n) a failure by PPP Co. to reinstate the Project Facilities or any material part thereof in accordance with Clause 46.2 (Reinstatement);
- (o) following the Service Commencement Date for a Project Facility 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 [●]<sup>37</sup> at that Project Facility; or
- (p) a breach by PPP Co. of its obligations under Clause 33.13 (Employee Checks).

#### 34.2 Persistent Breach<sup>38</sup>

- (a) If a particular breach (other than a breach for which Unavailability Deductions or Service Performance Deductions could have been made) of this Project Agreement has in respect of any Project Facility continued for more than fourteen (14) days or occurred more than three (3) times within any six (6) month period, then the Authority may serve a notice, (a “**Warning Notice**”), on PPP Co.:
  - (i) specifying that it is a formal Warning Notice;

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<sup>36</sup> This assumes a multi-site PPP.

<sup>37</sup> Reference to appropriate scope of services to be included.

<sup>38</sup> To be reviewed on a project-specific basis.

- (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 beyond thirty (30) days after the date of service of the Warning Notice or recurred in three (3) or more months within the six (6) month period 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 six (6) month period before the date of service of the Final Warning Notice; and
  - (iii) stating that if such breach continues or recurs for more than fourteen (14) days or recurs in three (3) or more months within the six (6) month period after the date of service of the Final Warning Notice, this 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 twelve (12) months has elapsed since the date of service of the previous Warning Notice.

#### 34.3 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.

#### 34.4 Rectification<sup>39</sup>

- (a) If a PPP Co. Default falling within Clauses 34.1(d), 34.1(e), 34.1(f), 34.1(k), 34.1(l), 34.1(m), 34.1(n), 34.1(o) or 34.1(p) (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 forty (40) Business 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 twenty (20) Business Days of receipt of the Rectification Notice or rectifies the PPP Co. Default within forty (40) Business Days of receipt of the Rectification Notice or the provisions of the Funder Direct Agreement apply to prevent Termination. The Rectification Programme put forward by PPP Co. may

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<sup>39</sup> To be reviewed on a project-specific basis.

propose the rectification of the PPP Co. Default in whole or in part by means of financial compensation to be paid by PPP Co. to the Authority.

- (c) If PPP Co. either rectifies the PPP Co. Default within forty (40) Business 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.
- (d) If PPP Co. fails to rectify the PPP Co. Default within forty (40) Business Days or in accordance with the Rectification Programme, the Authority may give a Termination Notice stating that, on the date falling five (5) Business Days after the date of receipt of such notice, this Project Agreement will, subject to the terms of the Funder Direct Agreement, terminate.
- (e) If a PPP Co. Default falling within Clauses 34.1(a), 34.1(b), 34.1(c), 34.1(g), 34.1(h), 34.1(i) or 34.1(j) (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; and
  - (ii) that the Project Agreement will terminate on the day falling forty (40) Business Days after the date on which PPP Co. receives the Termination Notice unless the provisions of the Funder Direct Agreement apply to prevent Termination.
- (f) In the event of Termination for PPP Co. Default:
  - (i) the provisions of Clause 40 (Compensation on Termination) and Part 1 (Termination for PPP Co. Default, Corrupt Gifts and Fraud and Breach of the Refinancing Provisions) of Schedule 17 (Compensation on Termination) will apply; and
  - (ii) PPP Co. will comply with Clauses 41.8(b) and 41.8(c) (Handback).

### 35. **TERMINATION FOR AUTHORITY DEFAULT<sup>40</sup>**

35.1 “**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. or Hold 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 one (1) month’s Unitary Charge 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 (2) (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

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<sup>40</sup> To be reviewed on a project-specific basis.

obligations under this Project Agreement for a continuous period of two (2) months;  
or

- (d) a breach by the Authority of Clause 49 (Assignment).

35.2

- (a) If an Authority Default has occurred and PPP Co. wishes to terminate the Project Agreement, it must serve a Termination Notice on the Authority within thirty (30) Business 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 thirty (30) Business Days after the date the Authority receives the Termination Notice, unless the Authority rectifies the Authority Default within twenty-five (25) Business Days of receipt of the Termination Notice.

35.3 In the event of Termination for Authority Default:

- (a) the provisions of Clause 40 (Compensation on Termination) and Part 2 (Termination for Authority Default and Voluntary Termination) of Schedule 17 (Compensation on Termination) will apply; and
- (b) PPP Co. will comply with Clauses 41.8(b) and 41.8(c) (Handback).

**36. VOLUNTARY TERMINATION BY THE AUTHORITY**

36.1 The Authority may terminate the Project Agreement at any time on or before the Expiry Date by complying with its obligations under Clauses 36.2, 36.3 and 36.4 below.

36.2 If the Authority wishes to terminate the Project Agreement under this Clause 36 (Voluntary Termination by the Authority), it must give a Termination Notice to PPP Co. stating:

- (a) that the Authority is Terminating the Project Agreement under this Clause 36 (Voluntary Termination by Authority); and
- (b) that the Project Agreement will terminate on the date specified in the notice, which must be a minimum of thirty (30) Business Days after the date of receipt of the Termination Notice.

36.3 The Project Agreement will terminate on the date specified in the Termination Notice referred to in Clause 36.2 above.

36.4 In the event of Voluntary Termination by the Authority:

- (a) the provisions of Clause 40 (Compensation on Termination) and Part 2 (Termination for Authority Default and Voluntary Termination) of Schedule 17 (Compensation on Termination) will apply; and
- (b) PPP Co. will comply with Clauses 41.8(b) and 41.8(c) (Handback).

**37. TERMINATION FOR FORCE MAJEURE, RISKS UNINSURABLE, CHANGE IN LAW AND SUBSTANTIAL MODIFICATION, MANDATORY EXCLUSION OR SERIOUS INFRINGEMENT**

**37.1 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 the Affected Party is prevented from carrying out obligations by that Force Majeure Event. The Authority will not be entitled to terminate this Project Agreement for a PPP Co. Default if such PPP Co. Default arises from a Force Majeure Event (but without prejudice to Clauses 37.1(e) and 37.1(f) below).
- (b) Nothing in Clause 37.1(a) above will affect any entitlement of the Authority to make Service Performance Deductions or Unavailability Deductions in the period during which the Force Majeure Event is subsisting. However, such Service Performance Deductions and Unavailability Deductions will not be aggregated for the purposes of the termination triggers in Clause 34.1(h) and 34.1(i) (as appropriate) (PPP Co. Default), nor will Unavailability during the subsistence of a Force Majeure Event be aggregated for the purposes of Clause 34.1(j) (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 under this Project Agreement for a period of more than one hundred and eighty (180) days, then, subject to Clause 37.1(f) 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 37.1(e) above or Clause 37.1(g) below:
  - (i) the provisions of Clause 40 (Compensation on Termination) and Part 3 (Termination for Force Majeure, Risks Uninsurable and Change in Law) of Schedule 17 (Compensation on Termination) will apply; and
  - (ii) PPP Co. will comply with Clauses 41.8(b) and 41.8(c) (Handback).
- (g) If PPP Co. gives notice to the Authority under Clause 37.1(e) 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 37.1(e) above as if the Services were 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.

### **37.2 Termination for Risks Uninsurable**

- (a) In the event that a Risk becomes Uninsurable, the Authority may terminate this Project Agreement and the provisions of Clause 46.4(c) will apply.
- (b) In the event of Termination pursuant to Clause 37.2(a) above:
- (i) the provisions of Clause 40 (Compensation on Termination) and Part 3 (Termination for Force Majeure, Risks Uninsurable and Change in Law) of Schedule 17 (Compensation on Termination) will apply; and
  - (ii) PPP Co. will comply with Clauses 41.8(b) and 41.8(c) (Handback).

### **37.3 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 other period as the Parties agree, 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 37.3(a) above:
- (i) the provisions of Clause 40 (Compensation on Termination) and Part 3 (Termination for Force Majeure, Risks Uninsurable and Change in Law) of Schedule 17 (Compensation on Termination) will apply; and
  - (ii) PPP Co. will comply with Clauses 41.8(b) and 41.8(c) (Handback).

### **37.4 Termination for Substantial Modification, Mandatory Exclusion or Serious Infringement**

- (a) Notwithstanding the provisions of Clause 37.4(b) below and without prejudice to any other termination rights of the Authority under Part 13 of this Project

Agreement, the Authority may terminate this Project Agreement by issuing a Termination Notice on PPP Co. in the event that the Authority considers that any of the following circumstance have arisen:

- (i) where there is a Substantial Modification;
- (ii) where any of the circumstances detailed in the Mandatory Exclusions apply to PPP Co. at the time of the award of this Project Agreement; or
- (iii) where there is a Serious Infringement,

and this Project Agreement shall terminate on the date specified in the Termination Notice.

- (b) PPP Co. shall notify the Authority in writing within ten (10) Business Days of becoming aware of any circumstances listed in Clauses 37.4(a)(i) to 37.4(a)(iii) above applying.
- (c) In the event of Termination pursuant to Clause 37.4(a)(i) or (iii) above:
  - (i) the provisions of Clause 40 (Compensation on Termination) and Part 2 (Termination for Authority Default, Voluntary Termination and Termination for Substantial Modification or Serious Infringement) of Schedule 17 (Compensation on Termination) shall apply; and
  - (ii) PPP Co. will comply with Clause 41.8(b) and 41.8(c) (Handback).
- (d) In the event of Termination pursuant to Clause 37.4(a)(ii) above:
  - (i) the provisions of Clause 40 (Compensation on Termination) and Part 1 (Termination for PPP Co. Default, Corrupt Gifts and Fraud and Breach of the Refinancing Provisions and Mandatory Exclusion) of Schedule 17 (Compensation on Termination) shall apply; and
  - (ii) PPP Co. will comply with Clause 41.8(b) and 41.8(c) (Handback).

### **38. TERMINATION FOR BREACH OF THE REFINANCING PROVISIONS**

38.1 If PPP Co. wilfully breaches Clause 48 (Refinancing) then the Authority may terminate the Project Agreement at any time on or before the Expiry Date by complying with its obligations under Clauses 38.2 to 38.4 below.

38.2 If the Authority wishes to terminate the Project Agreement under this Clause 38 (Termination for Breach of the Refinancing Provisions), it must serve a Termination Notice on PPP Co. stating:

- (a) that the Authority is terminating the Project Agreement under this Clause 38 (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.

38.3 In the event of Termination in accordance with this Clause 38 (Termination for Breach of Refinancing Provisions):



- (a) the provisions of Clause 40 (Compensation on Termination) and Part 1 (Termination for PPP Co. Default, Corrupt Gifts and Fraud and Breach of the Refinancing Provisions) of Schedule 17 (Compensation on Termination) will apply; and
  - (b) PPP Co. will comply with Clauses 41.8(b) and 41.8(c) (Handback).
- 38.4 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 38.2(b) (Termination for Breach of the Refinancing Provisions) above.

**39. TERMINATION FOR CORRUPT GIFTS AND FRAUD<sup>41</sup>**

- 39.1 PPP Co. warrants that in entering the Project Agreement it has not committed any Prohibited Act.
- 39.2 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 39.2(a) to (f) (Termination for Corrupt Gifts and Fraud) below.
- (a) 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.
  - (b) 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 ten (10) 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 Services by another person.
  - (c) 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 Services by another person.
  - (d) 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 Services by another person.
  - (e) If the Prohibited Act is committed by any other person not specified in Clause 39.2(a) to 39.2(d) 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

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<sup>41</sup> To be reviewed on a project-specific basis.

employed by PPP Co. or the Sub-Contractors) and (if necessary) procures the performance of such part of the Works and/or the Services by another person.

- (f) Any Termination Notice under this Clause 39 (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 39 (Termination for Corrupt Gifts and Fraud).

39.3 In the event of Termination in accordance with the provisions of this Clause 39 (Termination for Corrupt Gifts and Fraud):

- (a) the provisions of Clause 40 (Compensation on Termination) and Part 1 (Termination for PPP Co. Default, Corrupt Gifts and Fraud and Breach of the Refinancing Provisions) of Schedule 17 (Compensation on Termination) will apply; and
- (b) PPP Co. will comply with Clauses 41.8(b) and 41.8(c) (Handback).

#### 40. **COMPENSATION ON TERMINATION**

##### 40.1 **Termination Payments**

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

##### 40.2 **Sole Entitlement to Compensation**

- (a) Subject to Clause 40.2(b) below and Clause 67 (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.
- (b) Any and all sums irrevocably paid by the Authority to PPP Co. pursuant to Schedule 17 (Compensation on Termination) shall be in full and final settlement of each Party's rights and claims against the other for breaches and/or termination of this Project Agreement or any Project Document whether arising at law, under contract, tort, restitution or otherwise, but subject only to:
  - (i) any antecedent liability of PPP Co. to the Authority which the Authority has been unable to set off pursuant to Clause 25.9(d) (Set-Off on Termination);
  - (ii) any antecedent liability of either Party to the other that arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining or agreeing the Adjusted Estimated Fair Value of the Contract, the Adjusted Highest Compliant Tender Price, or the Termination Payment as the case may be; and
  - (iii) any liabilities arising in respect of any breach by either Party of their obligations under Clause 45.7 (Continuing Obligations) which arises or continues after the Termination Date to the extent not taken into account in

the calculation of any Termination Payment or other payment of compensation on termination pursuant to this Project Agreement.

#### 40.3 Changes to Funding Agreements

- (a) Save in respect of:
  - (i) a Refinancing (in respect of which, the provisions of Clause 48 (Refinancing) will apply);
  - (ii) an Additional Permitted Borrowing;
  - (iii) an advance to PPP Co under the Senior Funding Agreements on or after the date on which such advance is scheduled to be made under the Senior Funding Agreements (as entered into at the Commencement Date prior to any subsequent amendment); and/or
  - (iv) interest and other amounts properly accrued or payable under the terms of the Senior Funding Agreements (as entered into at the Commencement Date prior to any subsequent amendment),

if entering into, amending or varying any Funding Agreement or a waiver or exercise of a right thereunder,

- (A) will have the effect of increasing the Authority's liabilities on early termination of the Project Agreement; and/or
- (B) may reasonably be expected to have a material adverse effect on the ability of PPP Co to perform its obligations under the Project Documents or this Project Agreement,

PPP Co. will obtain the prior Approval of the Authority in accordance with the Review Procedure.

- (b) Where a breach of this Clause 40.3 (Changes to Funding Agreements) arises directly as a result of an administrative or clerical error by PPP Co., which error is rectified within three (3) Business Days from the date of occurrence of such error, such breach shall not be considered a PPP Co. Default for the purposes of Clause 34.1(m) (PPP Co. Default). PPP Co. will notify the Authority of the occurrence of the administrative/clerical error as soon as is reasonably practicable.

#### 40.4 Method of Payment

- (a) The Authority will pay PPP Co. the Termination Sum, together with interest on any Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount element of the Termination Sum at the Senior Debt Rate, on or before the date falling sixty (60) days after the Notice Date unless it elects to pay in accordance with Clause 40.4 (b) below. Where this Project Agreement is terminated pursuant to Clause 35 (Termination for Authority Default), the Authority will pay to PPP Co. the Authority Default Termination Sum on or before the date falling thirty (30) days after the Termination Date.

- (b) The Authority may, other than on Authority Default, 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:
  - (i) in instalments as follows;
    - (A) in respect of that element of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) representing the Outstanding Principal (where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) is greater than or equal to the Outstanding Principal) on the dates (the “**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 (disregarding any changes to such amounts or dates that have not been approved by the Authority other than changes giving rise to an Additional Permitted Borrowing) had the Termination Date not occurred and the sum remaining after deducting the Outstanding Principal from the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) shall be paid in equal instalments on the Instalment Dates; or
    - (B) where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) is less than the Outstanding Principal, on the Instalment Dates pro rata to the amounts that PPP Co. would have been required to pay as principal to the Senior Lenders under the terms of the Senior Funding Agreements (disregarding any changes to such amounts or dates that have not been approved by the Authority other than changes giving rise to an Additional Permitted Borrowing) had the Termination Date not occurred; or
    - (C) as the Parties may otherwise 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 Clause 40.4(b) above, it may (on twenty-eight (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 together with any interest accrued pursuant to Clause 40.4 (c) in full on any Instalment Date.
  - (e) If the Authority:
    - (i) fails to make a payment to PPP Co. in accordance with Clause 40.4 (a) and/or Clause 40.4 (b) above; or
    - (ii) breaches Clause 49 (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 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 by the Senior Lenders' Agent of the Termination Sum 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).

#### 40.5 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.

#### 40.6 Dispute

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

### 41. HANDBACK

#### 41.1 Handback Requirements<sup>42</sup>

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

- (a) consistent with compliance by PPP Co. with the terms of this Project Agreement; and
- (b) consistent with the Project Facilities and all Assets that comprise the Project Facilities having been designed, constructed and operated in accordance with the applicable design life requirements set out in Schedule 2 (Handback Requirements (the "**Handback Requirements**")).

#### 41.2 First Handback Inspection

- (a) Not less than eighteen (18) months nor more than twenty (20) months before the Expiry Date, PPP Co. and the Authority's Representative will conduct a joint inspection of each of the Project Facilities (the "**First Handback Inspection**"). PPP Co. will bear its own costs associated with the First Handback Inspection and the Second Handback Inspection.
- (b) If the Authority requires inspections of the Project Facilities to be carried out in addition to the First Handback Inspection and the Second Handback Inspection, the cost shall be borne by:

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<sup>42</sup> Treatment of assets on expiry of service period and calculation of residual value to be reviewed on a project-specific basis.

- (i) PPP Co. where the results of such additional inspection(s) demonstrate that further Handback Works are required; and
- (ii) the Authority where the results of such additional inspection(s) demonstrate that no additional Handback Works are required.

#### 41.3 Handback Works, Programme and Amount

Within thirty (30) Business Days after the completion of the First Handback Inspection, if it is found that any element of any of the Project Facilities 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):

(a) **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(s) in order to ensure that they will, on the Expiry Date, satisfy the Handback Requirements;

(b) **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

(c) **Handback Amount**

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

41.4 The Authority's Representative may, within thirty (30) Business Days after receipt of the details set out in Clause 41.3 (Handback Works, Programme and Amount) from PPP Co., raise comments in accordance with paragraph 3 (Grounds of Objection) of Schedule 5 (Review Procedure) on PPP Co.'s proposals and estimate referred to in Clause 41.3 (Handback Works, Programme and Amount) above.

#### 41.5

- (a) On agreement, or determination in accordance with Clause 45 (Dispute Resolution Procedure), of the Handback Works, the Handback Programme and/or the Handback Amount, PPP Co. will carry out the Handback Works in accordance with the Handback Programme.
- (b) Within thirty (30) Business Days of the agreement (or determination in accordance with Clause 45 (Dispute Resolution Procedure)) envisaged in this Clause 41.5, PPP Co. will provide (at no additional cost to the Authority) an on-demand 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 Ireland or 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.

#### 41.6

- (a) Not later than sixty (60) Business Days before the Expiry Date, PPP Co. and the Authority's Representative will conduct a joint inspection of the Project Facilities. Such inspection will confirm whether or not the condition of the Project Facilities is in accordance with Clause 41.1(a) above (the "**Second Handback Inspection**").
- (b) On or within twenty (20) 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, 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; or
  - (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 41.6(b)(ii) above will set out each respect in which the Handback Works have not been completed or the Project Facilities do not comply with the Handback Requirements and will state the Authority's Representative's estimate of the cost of procuring that the Project Facilities comply in all respects with the Handback Requirements.
- (d) PPP Co. may, within ten (10) Business Days after receipt of the notice given in accordance with Clause 41.6(b)(ii) above 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 41.6(d) (Handback Requirements) within ten (10) 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 45 (Dispute Resolution Procedure) as to:
  - (i) whether the Project Facilities comply in all respects with the Handback Requirements; and
  - (ii) the estimated cost of procuring that the Project Facilities comply in all respects with the Handback Requirements.

41.7 If it is agreed or determined in accordance with Clause 45 (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 ten (10) 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, after taking account of any amount due to the Authority under this Clause 41.7, return any credit balance on the Retention Fund Account or the Handback Bond to PPP Co.

41.8

- (a) On or before a date falling six (6) 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) In the event of the early Termination of this Project Agreement following the service of a Termination Notice:
  - (i) without prejudice to the Authority's rights pursuant to Clause 19 (Authority Step-in), PPP Co. shall, before vacating each Site (and during the carrying out of the Off-Site Works, the Off-Site Areas) and Project Facility and in any event within forty eight (48) hours prior to the Termination Date and in accordance with Good Industry Practice, make safe and secure each Site (and during the carrying out of the Off-Site Works, the Off-Site Areas), each Project Facility, Assets and any machinery and equipment owned by PPP Co. or any PPP Co. Related Party which has been left on each Site (and during the carrying out of the Off-Site Works, the Off-Site Areas) or at each Project Facilities; and
  - (ii) the Authority shall have the option to require PPP Co. to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority at no cost to the Authority.
- (c) If the Authority wishes PPP Co. to transfer all of its rights, title and interest in and to the Assets to the Authority:
  - (i) PPP Co. will vest in the Authority (or in such third party as the Authority may nominate) the legal and beneficial ownership in all PPP Co. Equipment (but excluding any Leased Equipment);
  - (ii) PPP Co. will 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 of the Services;
  - (iii) PPP Co. will not remove and will ensure that no Sub-Contractor removes any PPP Co. Equipment or other items referred to in this Clause 41.8 (Handback Requirements) before the expiry of the period for serving a Termination Notice (where applicable) or a notice pursuant to Clause 41.8(a) above or following the service of either such notice. Upon either such notice being served, PPP Co. will use its best endeavours to procure that the benefit of all material documentation, including 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) PPP Co. will transfer or assign any assets or rights which are to transfer or be assigned under this Clause 41.8 (Handback Requirements) free from all



charges, mortgages, pledges, liens, Encumbrances or other securities in favour of third parties;

- (v) if the Authority does not serve a Termination Notice or a notice under Clause 41.8(a) above, 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; and
  - (vi) in relation to any Leased Equipment the Authority will have the right following service of a Termination Notice or notice under Clause 41.8(a) above 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) Business Days following termination of this Project Agreement.
- (d)
- (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 41.8(c) above) 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 Facilities.
- (e) PPP Co. will bear its own costs incurred under all parts of this Clause 41 (Handback) including, all fees, costs or other expenses payable so as to enable PPP Co. to perform its obligations under this Clause 41 (Handback).

## **PART 13<sup>43</sup> – COMPENSATION EVENTS, RELIEF EVENTS AND FORCE MAJEURE**

### **42. COMPENSATION EVENTS**

42.1 If as a direct result of the occurrence of a Compensation Event PPP Co.:

- (a) is unable to achieve Certification of the Works for any Project Facility on or before the Planned Service Commencement Date for that Project Facility or (following the relevant Planned Service Commencement Date but before the Longstop Date) on or before the Longstop Date; and/or
- (b) is unable to comply with its obligations under this Project Agreement; and/or
- (c) believes that it should be compensated for any Estimated Change in Project Costs,

then PPP Co. is entitled to apply for:

- (i) an extension to the Planned Service Commencement Date for that Project Facility, and/or (following the relevant Planned Service Commencement Date) to the Longstop Date; and/or
- (ii) relief from its obligations; and/or
- (iii) compensation under this Project Agreement.

42.2 If PPP Co. intends to claim relief or compensation or an extension of time under Clause 42.1 above, it must:

- (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 Estimated Change in Project Costs, give to the Authority a notice of its claim for:
  - (i) an extension to the Planned Service Commencement Date for the relevant Project Facility or (following the relevant Planned Service Commencement Date) to the Longstop Date; and/or
  - (ii) relief from its obligations; and/or
  - (iii) 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 42.2(a) above, give full details of the Compensation Event and the extension of time and/or relief from its obligations and/or any Estimated Change in Project Costs claimed and demonstrate to the reasonable satisfaction of the Authority that:
  - (i) the Compensation Event was the direct cause of the Estimated Change in Project Costs and/or any delay in the progress of the Works and/or breach of PPP Co.'s obligations under this Project Agreement; and

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<sup>43</sup> Supervening events to be reviewed on a project-specific basis.

- (ii) the Estimated Change in 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.
  - (c) Following service of a notice by PPP Co. pursuant to Clause 42.2(a) PPP Co. shall promptly supply to the Authority any further information relating to the Compensation Event which:
    - (i) is received by PPP Co.; or
    - (ii) is reasonably requested by the Authority.
- 42.3 Subject to PPP Co. giving the notice in accordance with Clause 42.2(a), demonstrating the matters set out in Clause 42.2(b), providing any further information that may have been reasonably requested by the Authority pursuant to Clause 42.2(c)(ii) and to such matters being agreed or otherwise being determined by the Dispute Resolution Procedure then:
- (a) in the case of a delay, the relevant Planned Service Commencement Date or, following the relevant Planned Service Commencement Date, the Longstop Date for the relevant Project Facility, will be extended by such time as will be reasonable in respect of such a Compensation Event, taking into account the likely effect of the 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 34 (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 Change in 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.
- 42.4 In the event that the notice is received after the date in Clause 42.2(a) above or the information is provided after the date in Clause 42.2(b) above 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.
- 42.5 If the Parties cannot agree the Estimated Change in Project Costs, an appropriate extension to the Planned Service Commencement Date for the relevant Project Facility and/or the Longstop Date and/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 45 (Dispute Resolution Procedure).
- 42.6 [When assessing the effect of any Compensation Event pursuant to Clause 42.3 above, the Authority will take account of any delay to the issuing of the Certificate of Service Availability for a Project Facility that may arise as a result of the operation of Clause 13.8 (Early Certification).]

#### 43. RELIEF EVENTS

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

- (a) PPP Co. is unable to achieve Certification of the Works for any Project Facility on or before the Planned Service Commencement Date for that Project Facility or (following the relevant Planned Service Commencement Date but before the Longstop Date) on or before the Longstop Date; and/or
  - (b) PPP Co. is unable to comply with its obligations under this Project Agreement,
- then PPP Co. is entitled to apply for:
- (i) an extension to the Planned Service Commencement Date for that Project Facility and/or (following the relevant Planned Service Commencement Date) to the Longstop Date; and/or
  - (ii) (subject to Clause 43.4 (Relief Events)) relief from its obligations under this Project Agreement.

43.2 If PPP Co. intends to claim relief under Clause 43.1 (Relief Events), 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 to the Planned Service Commencement Date for the relevant Project Facility or (following the relevant Planned Service Commencement Date) to the Longstop 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 43.2(a) 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:
  - (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) for a Project Facility the Relief Event directly caused the delay in achieving Certification before the Planned Service Commencement Date for that Project Facility or (following the relevant Planned Service Commencement Date) before the Longstop Date and/or the breach by PPP Co. of its obligations under this Project Agreement;
  - (iii) 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 without it incurring material expenditure; and
  - (iv) PPP Co. is using all reasonable endeavours to perform its obligations under this Project Agreement.
- (c) Following service of a notice by PPP Co. pursuant to Clause 43.2(a) PPP Co. shall promptly supply to the Authority any further information relating to the Relief Event which
  - (i) is received by PPP Co.; or
  - (ii) is reasonably requested by the Authority.

- 43.3 Subject to PPP Co. giving the notice in accordance with Clause 43.2(a), demonstrating the matters set out in Clause 43.2(b) and providing any further information that may have been reasonably requested by the Authority pursuant to Clause 43.2(c)(ii) above then:
- (a) (if relevant) the Planned Service Commencement Date for the relevant Project Facility or (following the Planned Service Commencement Date) the Longstop Date will be extended by such time as will be reasonable for such a Relief Event, taking into account the likely effect of the delay;
  - (b) the Authority will not be entitled to exercise its rights to terminate this Project Agreement under Clause 34 (Termination for PPP Co. Default); and/or
  - (c) subject to Clause 43.4 (Relief Events), below PPP Co. will have such relief from its obligations under this Project Agreement as is reasonable for such a Relief Event.
- 43.4 Nothing in Clause 43.3 (Relief Events) above will affect any entitlement of the Authority to make Deductions provided that Deductions that arise due to Relief Events will not be aggregated for the purposes of calculating the termination triggers in Clause 34.1(h) and/or 34.1(i) (PPP Co. Default) nor will Unavailability during the subsistence of a Relief Event be aggregated for the purposes of Clause 34.1(j).
- 43.5 In the event that the notice or information required under Clauses 43.2(a) above and 43.2(b) above respectively is provided after the date referred to in such Clauses 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.
- 43.6 PPP Co. shall notify the Authority if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.
- 43.7 If the Parties cannot agree the period of time by which the Planned Service Commencement Date for the relevant Project Facility or the Longstop 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 45 (Dispute Resolution Procedure).
- 43.8 When assessing the effect of any Relief Event pursuant to Clause 43.3 above, the Authority will take account of any delay to the issuing of the Certificate of Service Availability for a Project Facility that may arise as a result of the operation of Clause 13.9 (Early Certification).
44. **FORCE MAJEURE**
- The provisions of Clause 37 (Termination for Force Majeure, Risks Uninsurable and Change in Law) will apply on the occurrence of a Force Majeure Event.

## PART 14 – DISPUTE RESOLUTION

### 45. DISPUTE RESOLUTION PROCEDURE

#### 45.1 Addressing Disputes Arising

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 45 (Dispute Resolution Procedure).

#### 45.2 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 fifteen (15) Business Days of either Party notifying such a Dispute to the other.
- (b) If any Dispute is resolved by the Representatives pursuant to Clause 45.2(a) above 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) Without prejudice to Clause 45.2(a) above, but subject always to Clause 45.3 (Mediation), either Party at any time may refer the Dispute to an adjudicator (the “**Adjudicator**”) appointed in accordance with Clause 45.4 (Adjudication), (the “**Adjudication Referral**”). The referral will be in the form of a notice (a “**Notice of Referral**”). The Notice of Referral will record all matters in issue and the material factual details of the Dispute and shall nominate one of the Construction Expert, the Service Expert, the Financial Expert or the Legal Expert, as appropriate, to adjudicate the Adjudication Referral.

#### 45.3 Mediation

- (a) If the Parties have been unable to resolve any Dispute within the period of fifteen (15) Business Days of either Party’s notification of the Dispute as set out at Clause 45.2(a) above they shall refer the Dispute to mediation within five (5) Business Days of the expiry of the previous deadline. Any mediation shall be completed within thirty (30) Business Days of such referral and any agreement arising therefrom shall be recorded in writing and signed by the Parties and shall be binding and final to the extent set out in such agreement unless otherwise agreed.
- (b) Save where Clause 45.8 (Fast Track Procedure) applies, mediation shall be a precondition to the commencement of adjudication or court proceedings.

#### 45.4 Adjudication

- (a) As soon as reasonably practicable following the issue of a Notice of Referral and before the dates referred to in Clause 45.4(a)(i) to 45.4(a)(iv) below, 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 not less than sixty (60) days before the Planned Service Commencement Date for the first Project Facility it is anticipated will achieve Certification, in accordance with the Construction Programme;
- (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:
  - (A) the Parties will fail to appoint any expert to the Adjudication Panel on or before the relevant dates referred to in this Clause 45.4(a) or;
  - (B) the Parties fail to agree a replacement expert within 20 Business Days in accordance with Clause 43.4(d),

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 45.4 (Adjudication) will be secured in writing;
- (c) 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 or his appointment, PPP Co. and the Authority will jointly appoint a replacement expert to the Adjudication Panel as soon as practicable; and
- (d) If the Authority and PPP Co. are unable to agree on the identity of any replacement expert to be appointed to the Adjudication Panel then the provisions in Clause 43.4(a)(v)(B) shall apply. If the Authority and PPP Co. are unable to agree 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 within twenty (20) Business Days of a written request by either Party.
- (e) 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.

- (f) 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.
- (g) 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.
- (h) 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.
- (i) 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 Sites, the Off-Site Areas, or the Project Facilities. 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.
- (j) 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.
- (k) 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.

#### 45.5 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 Works Co. arising under the Works Contract or otherwise affects the relationship or rights of PPP Co. and/or Works Co. under the Works Contract, ("**Works Contract Dispute**"); and/or



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

then PPP Co. may include as part of its submissions made to the Adjudicator pursuant to the Adjudication Referral, submissions made by Works Co. or Services Co., as appropriate.

- (b) Any submissions made pursuant to Clause 45.5(a) above 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 Works Co. or Services 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) As between the Authority and PPP Co. it is agreed that the Authority will have no liability to either Works Co. or Services 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 either Works Co. or Services Co. in participating in the resolution of any Dispute under this Project Agreement.
- (e) PPP Co. will not allow any Works Co. or Services 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 Works Contract Dispute or the Services Contract Dispute as the case may be; and
  - (ii) the evidence able to be presented by Works Co. or Services 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 Works Co. or Services 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 45.5 (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 Works Co. or Services Co., (as appropriate), to advise in connection with the Dispute.

#### 45.6 Final Resolution

- (a) Unless the Parties have agreed that the Adjudicator’s decision will be final, or where the Adjudicator does not provide his written decision to the Parties within the time specified in Clause 45.4(f) (Adjudication) either Party may refer the Dispute to arbitration in accordance with Clause 45.6(d) below.

- (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 45.6(d) below the Adjudicator's decision will be final and binding on both Parties.
- (c) If a Dispute is referred to arbitration under Clause 45.6(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 determine as the arbitrator thinks fit.
- (d) At any time, within twenty (20) Business Days after both Parties have received the decision of the Adjudicator together with his reasons pursuant to Clause 45.4(f) (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 45.6(d) above will be deemed to be a submission to arbitration in accordance with the Arbitration Act 2010. The award of the arbitrator will be final and binding on the Parties save as set out in the Arbitration Act 2010 or as otherwise permitted by Law, and will be the sole and exclusive remedy between the Parties regarding any claims, counterclaims, issues, or accountings presented to the arbitrator. Unless otherwise agreed by the Parties, the place of arbitration shall be Dublin, Ireland.
- (f) The Parties agree that one or more independent experts may be appointed by the arbitrator if required to assist him in relation to one or more specific issues to be determined.
- (g) Judgement upon any award may be entered in any court having jurisdiction. The arbitrator's costs and the Parties' costs will be borne as the arbitrator will specify or, in default, the arbitrator's 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.
- (h) 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.
- (i) 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, 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. The Parties agree that the Arbitrator's powers in relation to any related disputes will include consolidating proceedings and/or holding concurrent hearings.

#### **45.7 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.

#### **45.8 Fast Track Procedure**

- (a) If the Fast Track Procedure applies:
  - (i) Clauses 45.2 (Resolution through Liaison) and 45.3 (Mediation) will not apply;
  - (ii) either Party may immediately refer the matter to an Adjudicator by issuing a Notice of Referral as set out in Clause 45.2 (Resolution through Liaison); and
  - (iii) the Dispute will be dealt with pursuant to Clause 45.4 (Adjudication) except that references to twenty (20) Business Days will be replaced by ten (10) Business Days.
- (b) The Fast Track Procedure will apply to any Dispute arising under the following provisions/schedules of this Project Agreement:
  - (i) Clause 9 (Design Review Procedure);
  - (ii) Clause 12.4(c) (Co-Operation);
  - (iii) Clause 12.5 (Replacement);
  - (iv) Clause 13.1 (Agreeing Final Commissioning Programme);
  - (v) Clause 13.11 (Disputes);
  - (vi) Clause 18.2 (Planned Maintenance Programme);
  - (vii) Clause 18.4 (Accidental Damage and Vandalism)
  - (viii) Clause 25.7 (Disputed Invoices);
  - (ix) Clause 41 (Handback);
  - (x) Clause 48 (Refinancing);
  - (xi) Clause 51 (Sub-Contracting);
  - (xii) Schedule 15 (Payment Mechanism); and
  - (xiii) any other provision which expressly provides for the Fast Track Procedure to apply or where either Party requests that the Fast Track Procedure should be used and the other Party consents, such consent not to be unreasonably withheld or delayed.

## PART 15 – INSURANCE, INDEMNITIES AND REFINANCING

### 46. INSURANCE<sup>44</sup>

#### 46.1 [Insurance - General]

- (a) PPP Co. will on the Commencement Date, and prior to the carrying out of any demolition or building work, take out and maintain or procure the maintenance of the insurances described in Part 1 (Policies to be taken out by PPP Co. and maintained during the Construction Period) of Schedule 23 (Required Insurances) and any other insurances as may be required by Law. All such insurances must be effective in each case not later than the date on which the relevant Risk commences.
- (b) PPP Co. will, prior to the Service Commencement Date of the first Project Facility to achieve Certification and during the Service Period, take out and maintain or procure the maintenance of the insurances described in Part 2 (Policies to be taken out by PPP Co. and maintained during the Service Period) of Schedule 23 (Required Insurances) and any other insurances as may be required by Law. All such insurances must be effective in each case not later than the date on which the relevant Risk commences.
- (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 its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co-insured or additional insured person.
- (d) With the exception of any insurances required by Law and Employers Liability Insurance the Required Insurances will:
  - (i) subject to Clause 46.1(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 (Endorsements) of Schedule 23 (Required Insurances);
  - (iii) contain a clause waiving the insurers' subrogation rights against the Authority, its employees and agents in accordance with Endorsement 2 in Part 3 (Endorsements) of Schedule 23 (Required Insurances);
  - (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 (Endorsements) of Schedule 23 (Required Insurances) 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 46.2 (Reinstatement).
- (e) Wherever possible and where stipulated in Schedule 23 (Required Insurances), the Required Insurances will name the Authority as a co-insured for its separate interest.

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<sup>44</sup> To be reviewed on a project specific basis.

- (f) PPP Co. will provide to the Authority:
  - (i) copies on request of all insurance policies referred to in Clauses 46.1(a) or 46.1(b) above (together with any other information reasonably requested by the Authority relating to such insurance policies) and the Authority will be entitled to inspect them during ordinary business hours; and
  - (ii) evidence that the premiums payable under all insurance policies referred to in Clauses 46.1(a) and 46.1(b) above have been paid and the policies are in full force and effect in accordance with the requirement of this Clause 46 (Insurance) and Schedule 23 (Required Insurances).
- (g) Evidence of renewal of policies referred to in Clauses 46.1(a) and 46.1(b) above 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 Clauses 46.1(a) or 46.1(b) above, the Authority may pay any premiums required to keep such Required Insurance in force or itself procure such Required Insurance and may in either case recover any premiums and other reasonable costs from PPP Co. on written demand.
- (i) PPP Co. will give the Authority notification within thirty (30) days after any claim in excess of €75,000 is made on any of the insurance policies referred to in this Clause 46 (Insurance) accompanied by full details of the incident giving rise to the claim.
- (j) The Required Insurances will be effected with insurers which have been approved in advance by the Authority, such approval not to be unreasonably withheld or delayed.
- (k) The insurance premiums and the payment of deductibles in respect of the Required Insurances will be the responsibility of PPP Co., subject to Part 5 (Insurance Premium Risk Sharing Schedule) of Schedule 23 (Required Insurances) or as otherwise expressly set out in this Project Agreement.

#### 46.2 Reinstatement

- (a) All insurance proceeds received under any of the Physical Damage Policies will be applied to repair, reinstate and replace each part or parts of the assets in respect of which the proceeds were received.
- (b) All insurance proceeds paid under any of the Physical Damage Policies in respect of a single event (or a series of related events) in an amount in excess of €250,000 (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 of the Physical Damage Policies in respect of a single event (or a series of related events) (the (“**Relevant Incident**”)) in an amount in excess of €250,000 (Indexed):
  - (i) PPP Co. will deliver as soon as practicable and in any event within twenty eight (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 Clause 46.2(d) below. The Reinstatement Plan will set out:

- (A) if not Works Co., the identity of the person proposed to effect the Reinstatement Works, which will be subject to the prior written approval of the Authority (such consent not to be unreasonably withheld or delayed); 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 withheld or delayed;
- (ii) provided that the Authority Approves the Reinstatement Plan in accordance with the Review Procedure (whereby it is satisfied that the Reinstatement Plan will enable PPP Co. to comply with Clause 46.2(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 (such approval not to be unreasonably withheld or delayed) to effect the Reinstatement Works with the person identified in the approved Reinstatement Plan;
  - (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 Clause 46.2(c)(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 46.2 (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 Clause 46.2(c)(ii)(B) above, 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 Clause 46.2(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 Clause 46.2(c)(ii)(C) above, in respect of the Relevant Incident, together with any interest accrued; and

- (G) subject to the provisions of Clause 47 (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 Works Requirements so that on completion of the work, the provisions of the Project Agreement are complied with.

#### 46.3 Terms and Conditions that become Unavailable

- (a) If, upon the renewal of any Required Insurances which 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, then Clause 46.3(b) below shall apply.
- (b) If it is agreed or determined that Clause 46.3(a) above applies, then the Authority will waive PPP Co.'s obligations in Clause 46.1 (Insurance – General) and/or Schedule 23 (Required Insurances) in respect of that particular Insurance Term and PPP Co. will not be considered to be 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 46.3(a) above continue to apply to such Insurance Term.
- (c) 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 Part 5 (Insurance Premium Risk-Sharing Schedule of Schedule 23 (Required Insurances).
- (d) PPP Co. will notify the Authority as soon as reasonably practicable and in any event within five (5) days of becoming aware that Clause 46.3(a)(i) and/or Clause 46.3(a)(ii) above 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.

- (e) In the event that Clause 46.3(a)(i) and/or Clause 46.3(a)(ii) above 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 46.3(a)(i) and/or Clause 46.3(a)(ii) above remain applicable to the Insurance Term. As soon as PPP Co. is aware that Clause 46.3(a)(i) and/or Clause 46.3(a)(ii) above 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 inceptioned as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Project Agreement.

#### 46.4 Risks that become Uninsurable

- (a) Nothing in this Clause 46.4 (Risks that become Uninsurable) 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 any act or omission of PPP Co. or any Sub-Contractor.
- (b) If a Risk usually covered by construction all risks insurance, delay in start-up insurance (but excluding loss of profits), construction third party liability insurance, property damage insurance, business interruption insurance (but excluding loss of profits), third party public and products liability insurance, employers liability insurance or statutory insurances in each case required under this Project Agreement becomes Uninsurable then:
  - (i) PPP Co. will notify the Authority on becoming aware of such Uninsurability within five (5) Business Days of becoming aware of same, and 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 45 (Dispute Resolution Procedure) that the Risk is Uninsurable and that:
    - (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 to that operated by PPP Co. would in similar circumstances (in the absence of the type of relief envisaged by this Clause 46.4 (Risks that become Uninsurable)) 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 which becomes Uninsurable 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 or shared (including considering the issue of self-insurance by either Party).
- (c) If the requirements of Clause 46.4(b) above are satisfied, but the Parties cannot agree as to how to manage or share 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 (Termination for Force Majeure, Risks Uninsurable and Change in Law) of Schedule 17 (Compensation on Termination) and the Project Agreement will terminate, or elect to allow the Project Agreement to continue and Clause 46.4 (c)(ii) (Risks that become Uninsurable) 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 46.4(c)(i) above), delay in start up and business interruption insurance (but not loss of profits), employers liability insurance or statutory insurances, 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 Part 3 (Termination for Force Majeure, Risks Uninsurable and Change in Law) of Schedule 17 (Compensation on Termination) 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.
- (d) Where pursuant to Clause 46.4(c)(i) and/or Clause 46.4(c)(ii) above 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.
- (e) Where pursuant to Clauses 46.4(c)(i) and/or Clause 46.4(c)(ii) above 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.
- (f) If, pursuant to Clause 46.4(c)(ii) above 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 (Termination for Force Majeure, Risks Uninsurable and Change in Law) of Schedule 17 (Compensation on Termination) (the "**Relevant Payment**"), PPP Co. will have the option (exercisable in writing within twenty (20) Business Days of the date of such election by the Authority (the "**Option Period**") to pay to the Authority on or before the end of the Option Period, an amount equal to the insurance proceeds that would have been payable had the relevant Risk not become 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.

- (g) In respect of any period between the Authority receiving notification in accordance with Clause 46.4(b)(i) above that a third party liability risk has become Uninsurable and the Authority notification to PPP Co. in accordance with Clause 46.4(c)(i) above in respect of such Risk, then provided it is ultimately agreed or determined that the requirements of Clause 46.4(b)(i) above are satisfied in respect of the Uninsurable third party liability Risk and subject to Clause 46.4(e) above, Clause 46.4(b)(ii) above 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
- (h) Clause 46.4(f) above 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 46.4(b)(ii) above 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.

#### 46.5 Compliance

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 through compliance with any indemnity provisions contained in this Project Agreement.

#### 46.6 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 (Broker's Letter of Undertaking) of Schedule 23 (Required Insurances), 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.

#### 46.7 Professional Indemnity Insurance

Except for Clause 46.1 (Insurance – General) the previous provisions of this Clause 46 (Insurance) will not apply to professional indemnity insurance (“**PI Insurance**”) and, in respect of PI Insurance, PPP Co. undertakes (and agrees to procure that Works Co. and members of the Professional Team undertake) from the Commencement Date to:

- (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 Service Commencement Date (such evidence to include details of the cover) including confirmation of territorial limits and indemnity limit (which shall be a minimum limit of cover of six million, five hundred thousand euro (€6,500,000) for each and every 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 ten million euro (€10,000,000) each and every occurrence or series of occurrences arising out of each and every event and in the aggregate in respect of Works 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 event of which it becomes aware, or of which it could reasonably be expected to become aware, which may vitiate the PI Insurance; and
  - (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 46 (Insurance); and
- (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.

46.8 The obligation to provide the insurances set out in Clause 46.7(a) is subject to such insurance being generally available in the European insurance market to contractors and that the premium payable for such insurance is not at such a level that this risk is not generally being insured against in the European insurance market. The payment of any increased or additional premiums required by insurers by reason of the claims record of the Works Co. or the Professional Team member or other acts, omissions, matters, or things peculiar to the Works Co. or the Professional Team member will be deemed to fall to the Works Co. or the Professional Team member.

46.9 PPP Co. will immediately inform the Authority in writing if such insurance ceases to be available pursuant to the provisions of Clause 46.7 (Professional Indemnity Insurance) in order that PPP Co. and the Authority can discuss the means of best protecting the respective positions and interests of the Authority and PPP Co. in respect of the Works in the absence of such insurance.

#### **46.10 Acts of Terrorism**

- (a) Subject to Clauses 46.10(c) and 46.10(d) below, the Authority will be liable for and will indemnify and keep PPP Co. indemnified against any and all Losses incurred by PPP Co. in respect of physical damage to the Project caused by any Act of Terrorism within the State, provided that this indemnity will not apply:

- (i) where such Act of Terrorism is covered by insurances taken out by PPP Co. in respect of the Project; or
  - (ii) during the Construction Period in respect of the first 45 days of delay or interruption and the first €100,000 (one hundred thousand euro) of reinstatement costs which arise as a result of each Act of Terrorism for the same cause; or
  - (iii) during the Service Period in respect of the first €100,000 (one hundred thousand euro) of Losses incurred as a result of each Act of Terrorism for the same cause.
- (b) All proceeds of any claim made by PPP Co. under this Clause 46.10 (Acts of Terrorism) will be applied to repair, reinstate and replace each part or parts of the Project Facilities in respect of which the proceeds were received.
- (c) Following any Act of Terrorism and where PPP Co. makes a claim under this Clause 46.10 (Acts of Terrorism):
- (i) PPP Co. will deliver as soon as practicable and in any event within twenty eight (28) days after the making of the claim, a Reinstatement Plan for the carrying out of the Reinstatement Works to repair, reinstate or replace the assets which are the subject of the relevant claim or claims. The Reinstatement Plan will set out:
    - (A) if not Works Co., the identity of the person proposed to effect the Reinstatement Works, which will be subject to the prior written approval of the Authority (such consent not to be unreasonably withheld or delayed);
    - (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 withheld or delayed;
    - (C) how PPP Co. will ensure that the Reinstatement Works will be carried out in accordance with the Works Requirements so that on completion of the Reinstatement Works, the provisions of the Project Agreement are complied with; and
    - (D) an estimate of the costs and expenses to be incurred in performing the Reinstatement Works, which costs and expenses will be subject to the prior written approval of the Authority, which approval will not be unreasonably withheld or delayed;
  - (ii) provided that the Authority Approves the Reinstatement Plan in accordance with the Review Procedure:
    - (A) the Reinstatement Plan will be adopted;
    - (B) PPP Co. will enter into contractual arrangements approved by the Authority (such approval not to be unreasonably withheld or delayed) to effect the Reinstatement Works with the person identified in the approved Reinstatement Plan;

- (C) the Authority agrees and undertakes that, subject to compliance by PPP Co. with its obligations under this Clause 46.10 (Acts of Terrorism), and provided that PPP Co. procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 46.10(c)(ii)(B) above, it will not exercise any right which it might otherwise have to terminate this Project Agreement by virtue of the Act of Terrorism;
  - (D) the Authority undertakes to use reasonable endeavours to assist PPP Co. in carrying out the Reinstatement Plan;
  - (E) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority, PPP Co. will be entitled to issue an invoice in respect of its reasonable and demonstrable costs and expenses incurred in undertaking the Reinstatement Works for which the Authority is responsible in accordance with Clause 46.10(a) above and provided that the Authority shall not be liable for any costs or expenses which have not been agreed, in accordance with Clause 46.10(c)(i)(D) above; and
  - (F) any invoice submitted to the Authority pursuant to Clause 46.10(c)(ii)(E) will be supported by any relevant information. The Authority will pay any such invoice within twenty (20) Business Days of receipt by the Authority of the invoice and the required supporting information.
- (d)
- (i) In respect of Acts of Terrorism which constitute a Force Majeure Event, the provisions of Clause 37.1 (Force Majeure) shall apply.
  - (ii) Where Clause 37.1 (Force Majeure) applies to the Act of Terrorism and the Parties agree, pursuant to Clause 37.1(d) (Force Majeure), to reinstate the Project, PPP Co. may make a claim against the Authority pursuant to this Clause 46.10 (Acts of Terrorism) for the Act of Terrorism which constitutes such Force Majeure Event, whereupon the proceeds of such claim shall be applied in accordance with Clause 46.10(b) above.
  - (iii) Where the Parties do not agree terms pursuant to Clause 37.1(d) (Force Majeure), PPP Co. shall not be entitled to make a claim pursuant to this Clause 46 (Insurance), but rather the provisions of Clause 37.1(e) to 37.1(i) (Force Majeure) shall apply.
- (e) This Clause 46.10 (Acts of Terrorism) is without prejudice to the Authority's rights to terminate this Project Agreement pursuant to Clause 36 (Voluntary Termination by the Authority).]

## 47. INDEMNITIES

### 47.1 PPP Co. Indemnity

- (a) PPP Co. will, subject to Clause 47.2 (Exclusions from PPP Co. Indemnity), be responsible for, and will release and indemnify the Authority or any Authority Related Party on demand from and against, all liability for Losses arising from:
  - (i) death or personal injury;

- (ii) loss of or damage to property including property belonging to the Authority or for which the Authority is responsible “**Authority Property**” but excluding:
  - (A) the land, buildings, plant, equipment and other assets which are the responsibility of PPP Co. to provide under this Project Agreement and which form part of the Project Facilities; and
  - (B) Authority Equipment (save to the extent that the loss or damage to such equipment is caused or contributed to by any negligence of PPP Co. or a PPP Co. Related Party or a breach by PPP Co. or a PPP Co. Related Party of this Project Agreement); and
- (iii) third party actions, claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis) other than any which are the subject of the indemnity in Clause 47.1(b) below,

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 Sites or at the Project Facilities of PPP Co. or any PPP Co. Related Party.

- (b) To the extent that there are no other remedies available to the Authority under this Project Agreement, PPP Co. will, subject to Clause 47.2 (Exclusions from PPP Co. Indemnity), be responsible for, and shall release and indemnify the Authority, [its employees, agents and contractors] on demand from and against all liability for Losses and Indirect Losses arising from third party actions, claims and demands brought against the Authority or an Authority Related Party for breach of statutory duty which may arise out of or in consequence of a breach by PPP Co. of its obligations under this Project Agreement.

#### 47.2 Exclusions from PPP Co. Indemnity

PPP Co. will not be responsible or be obliged to indemnify the Authority or any Authority Related Party:

- (a) for any of the matters referred to in Clauses 47.1(a) or 47.1(b) (PPP Co. Indemnity) above which arises as a direct result of PPP Co. acting on the instruction of the Authority;
- (b) for any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Authority or any Authority Related Party or by the breach by the Authority of its obligations under this Project Agreement; or
- (c) to the extent that any cost and expense related to any injury, loss or damage is the responsibility of the Authority pursuant to [Clause 13.7 (Authority Fit-Out Works)] or Clause 18.4 (Accidental Damage and Vandalism).

#### 47.3 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.

#### 47.4 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 47.4 (Conduct of Claims subject to PPP Co.'s Indemnities) on the giving of a notice pursuant to Clause 47.4(a) above, 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 47.4(b) above:
  - (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 47.4(b) above 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 €10,000 Indexed.
- (d) Subject to complying with the provisions of the relevant Required Insurances, 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 Clause 47.1 (PPP Co. Indemnity)) if:
  - (i) within twenty (20) Business Days of the issue date of the notice from the Authority under Clause 47.4(a) above 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 47.4(c) above.
- (e) Subject to complying with the provisions of the relevant Required Insurances, 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 47.4(b) above 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 47.4(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.

#### 47.5 Mitigation

Without prejudice to Clause 47.4 (Conduct of Claims Subject to PPP Co.'s Indemnities), to the extent within the Authority's direct control and provided not contrary to public policy, the Authority will take reasonable steps to mitigate those Losses (and, in respect of Clause 47.1(b) only, Indirect Losses) suffered or incurred by the Authority that are the subject of any Claim under Clause 47 (Indemnities).

#### 47.6 Conduct of Claims Subject to Authority's Indemnities

- (a) If PPP Co. receives any notice, demand, letter or other document concerning any Claim from which it appears that PPP Co. is or may become entitled to indemnification under this Project Agreement, PPP Co. will give notice in writing to the Authority as soon as reasonably practicable.
- (b) Subject to the rights of the insurers under the Required Insurances, the Authority may, at its own expense, and with the assistance and co-operation of PPP Co., conduct the Claim including its settlement and PPP Co. shall not, unless the Authority has failed to resolve the Claim within a reasonable period, take any action to settle, defend or pay the Claim.
- (c) PPP Co. shall at all times take all reasonable steps to minimise and mitigate any losses suffered or incurred by PPP Co. that are the subject of any Claim under any Authority indemnity in its favour under this Project Agreement.

### 48. REFINANCING

- 48.1 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.
- 48.2 The Authority will be entitled to receive a thirty three per cent (33%) share of any Refinancing Gain arising from a Qualifying Refinancing.
- 48.3 The Authority will not withhold or delay its consent to a Qualifying Refinancing to obtain a greater than thirty three per cent (33%) share of the Refinancing Gain arising from a Qualifying Refinancing in relation to Senior Funding Agreements and/or a thirty three per cent (33%) share of any Refinancing Gain arising from a Qualifying Refinancing in relation to Junior Debt Documents.
- 48.4 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).
- 48.5 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;
  - (c) a combination of any of the above; or
  - (d) such other form as may be agreed between the Parties.



- 48.6 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 48.5 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 45 (Dispute Resolution).
- 48.7 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 twenty (20) Business Days of any Qualifying Refinancing.
- 48.8
- (a) No Refinancing in relation to Junior Debt Documents that would, but for this Clause 48.8, be an Exempt Refinancing pursuant to limb (f) of the definition of Exempt Refinancing may occur during the Lock-In Period without the prior written consent of the Authority (a "**Lock-In Period Junior Debt Refinancing**").
  - (b) Where a Lock-In Period Junior Debt Refinancing is permitted by the Authority during the Lock-In Period (including a Lock-In Period Junior Debt Refinancing that is proposed prior to the expiry of the Lock-In Period but completed or effected after the Lock-In Period), the Authority's consent will be subject to the Authority receiving a thirty three per cent (33%) share of any Refinancing Gain arising from such Lock-In Period Junior Debt Refinancing. PPP Co. will promptly provide the Authority with full details of any proposed Lock-In Period Junior Debt 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.

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

### **49. ASSIGNMENT**

- 49.1 Subject to Clause 49.2 (Assignment) no Party may assign, novate, or otherwise transfer any benefits and/or burdens of this Project Agreement or create or allow to subsist any Encumbrance, trust or interest in the Project Agreement without the prior consent in writing of the other Party, provided that such consent will not be required:
- (i) where any assignment or creation or allowance to subsist of any Encumbrance, trust or interest is by way of security to the Funders pursuant to and in accordance with the Funding Agreements; or
  - (ii) where there is the novation of this Project Agreement in accordance with the provisions of the Funder Direct Agreement.
- 49.2 The Authority may transfer the benefit and burden of this Project Agreement to any Minister of the State or to any public authority which has the equivalent legal capacity and credit status (either alone or with evidenced government financial support) to enable it to enter into and meet the obligations under this Project Agreement as they fall due.
- 49.3 To the extent that the transferee under Clause 49.2 (Assignment) is not a Minister of the State, the Authority will provide details of the proposed transferee together with supporting information reasonably required by PPP Co in relation to its equivalent 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 49.2 (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.
- 49.4 If PPP Co assigns or transfers any of its rights or obligations under this Project Agreement, the Authority will not be obliged to make any additional payments under the Project Agreement to the extent that such additional payments would not have been required to be made had no assignment occurred.

### **50. CHANGE IN OWNERSHIP**

#### **50.1 PPP Co. Warranty**

PPP Co. represents and warrants to the Authority that the legal and beneficial ownership of PPP Co. and the Shareholders as at the Commencement Date is as set out in Schedule 19 (PPP Co. and its Shareholders) and that no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in PPP Co. or its Shareholders.

#### **50.2 Lock-in Period**

No Change in Ownership or Restricted Share Transfer may occur during the Lock-in Period without the prior written consent of the Authority.

#### **50.3 Change in Ownership**

- (a) Prior written consent of the Authority is not required for any Change in Ownership after the Lock-in Period unless it is a Restricted Share Transfer in which case PPP Co. shall obtain the prior written consent of the Authority.

- (b) PPP Co. shall inform the Authority of any Change in Ownership within ten (10) Business Days of such change.

#### 50.4 Actions Disregarded

For the purpose of this Clause 50 (Change in Ownership), the following will be disregarded:

- (a) any change in beneficial or legal ownership of any shares that are listed on an internationally recognised stock exchange;
- (b) any transfer of shares or of any interest in shares by a person to its Associated Company;
- (c) the grant or enforcement of security in favour of the Senior Lenders over or in relation to any of the shares or of any interest in the shares of PPP Co. provided that any document conferring security over any shares has been approved by the Authority (such approval not to be unreasonably withheld or delayed); 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.

50.5 For the purposes of a Change in Ownership under this Clause 50 (Change in Ownership), 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.

### 51. SUB-CONTRACTING

#### 51.1 Principal Sub-Contractors

- (a) The Authority hereby consents to PPP Co. sub-contracting to the Principal Sub-Contractors on the terms of the Principal Sub-Contracts.
- (b) PPP Co. will procure that the respective Principal Sub-Contractors enter into the Works Direct Agreement and the Services Direct Agreement with the Authority in the relevant form set out in Schedule 9 (Professional Team), 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.
- (c) Subject to Clause 26.4 (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 the Works or Services 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 can only be withheld on grounds that the Authority's Representative reasonably believes that:
  - (i) the appointment of the proposed substitute Principal Sub-Contractor will breach or is likely to bring about a breach of any Law; and/or

- (ii) 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
- (iii) the proposed substitute Principal Sub-Contractor does not have the technical ability and competence necessary to perform the relevant obligations under this Project Agreement; and/or
- (iv) the appointment would be regarded by a Relevant Authority or by the public at large as detrimental to Users of the Project Facility

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 and the terms of engagement of any proposed substitute Principal Sub-Contractor shall be subject to prior written consent of the Authority (such consent not to be unreasonably withheld or delayed).

- (d) 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.
- (e) All Principal Sub-Contracts to which the Authority gives its consent pursuant to Clause 51.1(c) above 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.
- (f) 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.
- (g) 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 Works Direct Agreement or the Services 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 Works Direct Agreement or the Services Direct Agreement) obligations which are more onerous than those imposed on PPP Co.
- (h) Without prejudice to the Authority's termination rights in respect hereof pursuant to Clause 34 (Termination for PPP Co. Default), PPP Co. will fully indemnify the Authority against all Losses arising as a result of any failure by PPP Co. to comply with Clause 51.1(g) above, 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.
- (i) 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 either Principal Sub-Contractor or any member of the Professional Team to regard as terminated any of the Principal Sub-Contracts or Relevant Professional Appointment (as the case may be).

- (j) Without prejudice to Clause 51.1(c) above, PPP Co. will not without the prior written Approval of the Authority's Representative (such Approval not to be unreasonably withheld or delayed) terminate any of the Principal Sub-Contractors nor appoint another Principal Sub-Contractor in addition to or in substitution for either of the Principal Sub-Contractors. The Authority will not withhold or delay such consent on grounds other than the technical ability competence or financial strength of the proposed Principal Sub-Contractor.

## 51.2 Sub-Contractors

- (a) 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).
- (b) 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 Variation).
- (c) 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.
- (d) On or before the Commencement Date, or in respect of those Sub-Contractors who have not been appointed at the Commencement Date, within ten (10) Business Days of having been appointed, PPP Co. will procure and will deliver warranties (in the form attached in Part 5 (Form of Collateral Warranty for Sub-Contractors) of Schedule 9 (Professional Team)) in favour of the Authority in respect of performance from all Key Sub-Contractors.

## 51.3 Defaulting Sub-Contractor

The rights set out in Clause 51.3(a) below may be exercised on no more than two (2) occasions during the Term and the rights set out in Clause 51.3(c) below may be exercised no more than once during the Term.

- (a) On the substitution or replacement of the defaulting Services Co. or a defaulting sub-contractor to the Services Co. PPP Co. may elect that, for the purposes of Clause 34 (Termination for PPP Co. Default) only:
  - (i) any accrued Unavailability Deductions and Unavailability; and/or
  - (ii) any accrued Service Performance Deductions; and/or
  - (iii) any Warning Notices or Final Warning Notices in respect of Clause 34.2 (Persistent Breach)

in each case relating to the relevant Services in respect of which Services Co. or any sub-contractor to Services Co. is being replaced shall be cancelled. PPP Co. will notify the Authority on or before the appointment of any such substitute or

replacement Services Co. or sub-contractor to Services Co. whether it elects for this Clause 51.3(a) to apply on that occasion.

- (b) Where an election is made pursuant to Clause 51.3(a) above on the substitution or replacement of the defaulting Services Co. or a defaulting sub-contractor to Services Co. then, for the purposes of Clause 34 (Termination for PPP Co. Default) only:
  - (i) no Unavailability Deductions or Unavailability shall accrue for the purposes of Clause **Error! Reference source not found.** and Clause 34.1(j) (PPP Co. Default);
  - (ii) no Services Performance Deductions shall accrue for the purposes of Clause 34.1(i) (Termination for PPP Co. Default); and
  - (iii) no Warning Notices or Final Warning Notices in respect of Clause 34.2 (Persistent Breach) shall accrue for the purposes of Clause 34.1(a) (PPP Co. Default),

in respect of a Service during a period of two (2) months from the date on which that Service is first provided by the replacement or substitute Services Co. or sub-contractor to Services Co. as the case may be. Deductions shall still be made from the Monthly Unitary Charge during that period but, whereas at the date of replacement pursuant to Clause 51.3(a) above, the Ratchet is being applied pursuant to Part V (Other Deductions) of Schedule 15 (Payment Mechanism) the Ratchet shall be reset with effect from the date of such replacement.

- (c) On the substitution or replacement of the defaulting Works Co. or a defaulting sub-contractor to Works Co. PPP Co. may elect that, for the purposes of Clause 34 (Termination for PPP Co. Default) only, any Warning Notices or Final Warning Notices in respect of Clause 34.2 (Persistent Breach) (in each case relating to the relevant Works in respect of which Works Co. or any sub-contractor to Works Co. is being replaced) shall be cancelled. PPP Co. will notify the Authority on or before the appointment of any such substitute or replacement Works Co. or sub-contractor to Works Co. whether it elects for this Clause 51.3(c) to apply on that occasion.
- (d) Where an election is made pursuant to Clause 51.3(c) above on the substitution or replacement of the defaulting Works Co. or a defaulting sub-contractor to Works Co. then for the purposes of Clause 34 (Termination for PPP Co. Default) only, no Warning Notices or Final Warning Notices in respect of Clause 34.2 (Persistent Breach) shall accrue for the purposes of Clause 34.1(a) in respect of the Works during a period of two (2) months from the date on which such works are first provided by the replacement or substitute Works Co. or sub-contractor to Works Co. as the case may be.

#### 51.4 Sub-Contractor Losses

Where:

- (a) a Sub-Contractor is entitled to claim any compensation and/or relief from PPP Co. under the Sub-Contracts; and
- (b) PPP Co. subsequently makes a claim against the Authority under this Project Agreement in relation to such compensation and/or relief

the Authority shall not be entitled to defend PPP Co.'s claim on the ground that PPP Co. is only required to pay compensation or grant relief to the Sub-Contractor under the Sub-

Contracts if and to the extent that such compensation and/or relief is recoverable by PPP Co. from the Authority.

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## PART 17 – MISCELLANEOUS

### 52. CONFIDENTIALITY

#### 52.1 Confidential Information

- (a) The parties agree that the provisions of this Project Agreement and each Project Document shall, subject to Clause 52.1(b) below, not be treated as Confidential Information and may be disclosed without restriction and PPP Co. acknowledges that the Authority intends to publish, subject to Clause 52.1(b) below, the Project Agreement and some of the Project Documents on a website.
- (b) Clause 52.1(a) above shall not apply to provisions of this Project Agreement or a Project Document designated as Commercially Sensitive Information and listed in Schedule 30 (Commercially Sensitive Information) to this Project Agreement which shall, subject to Clause 52.2, be kept confidential.
- (c) The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this Project Agreement and Project Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

This Clause 52.1 (Confidential Information) will not apply in the circumstances described in Clause 52.2 (Disclosure of Information).

#### 52.2 Disclosure of Information

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 45 (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;
- (f) if, and to the extent, the information has come into the public domain through no fault of that Party;
- (g) in respect of 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; or
- (h) in respect of any registration or recording of any Necessary Consents and property registration; or



- (i) without prejudice to the generality of Clause 52.2(a), if required to do so to ensure compliance with the Freedom of Information Acts and/or the Environmental Information Regulations provided that to do so would not permit disclosure of Confidential Information otherwise prohibited by Clause 52.1(c) where that information is exempt from disclosure under the Freedom of Information Acts or the Environmental Information Regulations as the case may be.

### **52.3 Obligations on Recipients of Confidential Information**

Where disclosure is permitted under Clause 52.2 (Disclosure of Information), 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 save in respect of information disclosed pursuant to Clauses 52.2(a) and 52.2(b) above.

### **52.4 Restrictions**

The restrictions contained in this Clause 52 (Confidentiality) will continue to apply for a period of five (5) years after the termination of the Project Agreement.

### **52.5 Return of Confidential Information**

At the end of the Term (or Termination of this Project Agreement, whichever is the earlier) each Party will return to the other such confidential information within its possession or control as may belong to the other Party, save that this Clause 52.5 (Return of Confidential Information) will not apply, in the case of the Authority, to confidential information belonging to PPP Co. necessary for the design, construction of the Works or provision of the Services, which confidential information may be so used or applied by the Authority in relation to the design, construction of the Works or provision of the Services.

### **52.6 Freedom of Information**

- (a) PPP Co. acknowledges that the Authority is subject to the requirements of the Freedom of Information Acts and the Environmental Information Regulations and shall facilitate the Authority's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in paragraphs (b) to (g) (inclusive) below.
- (b) Where the Authority receives a Request for Information in relation to Information that PPP Co. is holding on its behalf and which the Authority does not hold itself the Authority shall refer to PPP Co. such Request for Information that it receives as soon as practicable and in any event within five (5) Business Days of receiving a Request for Information and PPP Co. shall:
  - (i) provide the Authority with a copy of all such Information in the form that the Authority requires as soon as practicable and in any event within ten (10) Business Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and
  - (ii) provide all necessary assistance as reasonably requested by the Authority in connection with any such Information, to enable the Authority to respond to a Request for Information within the time for compliance set out in the Freedom of Information Acts or the Environmental Information Regulations as the case may be.
- (c) Following notification under Clause 52.6(b) and up until such time as PPP Co. has provided the Authority with all the Information specified in Clause 52.6(b)(i) PPP

Co. may make representations to the Authority as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Authority shall be responsible for determining at its absolute discretion:-

- (i) whether Information is exempt from disclosure under the Freedom of Information Acts and the Environmental Information Regulations; and
  - (ii) whether Information is to be disclosed in response to a Request for Information, and
  - (iii) in no event shall PPP Co. respond directly, or allow its Sub-Contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Authority.
- (d) PPP Co. shall ensure that all Information held on behalf of the Authority is retained for disclosure for at least such period (from the date it is acquired) as may be required by applicable Law or such longer period as the Authority may specify in writing from time to time having regard to the Authority's interpretation of its obligations under applicable Law and shall permit the Authority to inspect such Information as requested from time to time.
- (e) PPP Co. shall transfer to the Authority any Request for Information received by PPP Co. as soon as practicable and in any event within two (2) Business Days of receiving it.
- (f) PPP Co. acknowledges that any lists provided by it listing or outlining Confidential Information, are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of the Freedom of Information Acts and the Environmental Information Regulations.
- (g) In the event of a request from the Authority pursuant to Clause 52.6(b) above, PPP Co. shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of PPP Co.'s estimated costs of complying with the request to the extent these would be recoverable if incurred by the Authority under the Freedom of Information Acts and/or the Environmental Information Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in the Freedom of Information Acts or the Environmental Information Regulations (the "Appropriate Limit") the Authority shall inform PPP Co. in writing whether or not it still requires PPP Co. to comply with the request and where it does require PPP Co. to comply with the request the then (10) Business Days period for compliance shall be extended by such number of additional days for compliance as the Authority is entitled to under the Freedom of Information Acts or the Environmental Information Regulations. In such case, the Authority shall notify PPP Co. of such additional days as soon as practicable after becoming aware of them and shall reimburse PPP Co. for such costs as PPP Co. incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own Freedom of Information Acts or Environmental Information Regulations policy from time to time.
- (h) PPP Co. acknowledges that notwithstanding the provisions of Clause 52 (Confidentiality) the Authority may be obliged under the Freedom of Information Acts or the Environmental Information Regulations to disclose Information concerning PPP Co. or the Project:-

- (i) in certain circumstances without consulting with PPP Co.; or
  - (ii) following consultation with PPP Co. and having taken its views into account,
- provided always that where Clause 52.6(h)(i) above applies the Authority shall, draw this to the attention of PPP Co. prior to any disclosure.

### **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 Funders (acting reasonably) indicates is confidential or Commercially Sensitive Information) as it 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 has given its prior written approval.

### **54. NO AGENCY**

- 54.1 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 its Sub-Contractors' employees.

### **55. NOTICES**

- 55.1 Subject to Clause 55.2 below, any notice or other communication under this Project Agreement will only be effective if it is in writing and issued and received in accordance with the terms of this Project Agreement.
- 55.2 Communication by electronic mail will not be effective under this Project Agreement unless confirmed within twenty four (24) hours by the receiving Party. Communication by the EDMS will not be effective under this Project Agreement unless it complies with the Electronic Communications Protocol.
- 55.3 Each notice given or made by PPP Co. to the Authority must be unconditional and signed by the 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 (2) clear Business Days after the date of posting;
  - (c) if sent by facsimile, when transmitted;
  - (d) if sent by email, at the time of confirmation of receipt by the addressee; or

- (e) if sent using the EDMS, at the time of confirmation of upload as recorded by the EDMS.

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; and
- (b) Termination Notice.

## 56. FINANCIAL ADJUSTMENTS

### 56.1 Updating the Base Case

Whenever a Relevant Event occurs, the financial consequence will (save where otherwise provided in this Project Agreement or where the Parties mutually agree otherwise) be determined in accordance with this Clause 56 (Financial Adjustments). Where for the purposes of this Clause 56 (Financial Adjustments) the Base Case is to be adjusted by reference to a Relevant Event, this must be carried out by PPP Co., in consultation with the Authority, to reflect the cumulative impact of any prior Relevant Event on the version of the Base Case applicable immediately prior to the relevant adjustment and to reflect the impact of the Relevant Event in respect of which such adjustment is being undertaken. In calculating the Estimated Change in Project Costs and in assessing other adjustments to be made to the Base Case arising from a Relevant Event, PPP Co. will be entitled to take into account, inter alia:

- (a) any Change in Costs and Change in Revenue;
- (b) reasonable economic assumptions prevailing at the time; and
- (c) changes in the prospective technical performance of the Project arising as a result of the Relevant Event,

provided that the Authority will not be required (and PPP Co. will not be entitled) to take into account the financial impact up to the date of the Relevant Event of those risks which PPP Co. bears under the terms of this Project Agreement, including (to the extent so borne by PPP Co. under this Project Agreement) changes in Taxation, HICP and the impact of Deductions.

### 56.2 Application to the Base Case

Where, pursuant to this Project Agreement, either Party is entitled to payment of any sum the assessment of which properly requires reference to the Base Case (with the exception of payment of the Authority's share of the Refinancing Gain to which Clause 48

(Refinancing) will apply), the adjustment to the Unitary Charge due will be that required to ensure that, by reference to the Base Case adjusted under this Clause 56 (Financial Adjustments), PPP Co. is left in a no better and no worse position than under the version of the Base Case applicable immediately prior to the relevant adjustment, and will be ascertained by determining the adjustment to the Unitary Charge required to maintain the financial position of PPP Co. with that in which it would have been under the version of the Base Case applicable immediately prior to the relevant adjustment.

### 56.3 No Better and no Worse

- (a) Any reference in this Project Agreement to “no better and no worse” or to leaving PPP Co. in a “no better and no worse position” will be construed by reference to PPP Co.’s:
  - (i) rights, duties and liabilities under or arising pursuant to performance of this Project Agreement, the Funding Agreements, the Works Contract and the Services Contract; and
  - (ii) ability to perform its obligations and exercise its rights under this Project Agreement, the Funding Agreements, the Works Contract and the Services Contract,

so as to ensure that:

- (A) PPP Co. is left in a position which is no better and no worse in relation to the key ratios (to include loan life cover and debt service cover ratios) and the Nominal Base Case Equity IRR by reference to the version of the Base Case applicable immediately prior to the Relevant Event than had the Relevant Event not occurred; and
- (B) the ability of PPP Co. to comply with this Project Agreement is not adversely affected or improved as a consequence of the Relevant Event.

### 56.4 Replacement of Base Case

Any Base Case produced following adjustments in accordance with this Clause 56 (Financial Adjustments) will, when it is approved by the Authority (such approval not to be unreasonably withheld), become the Base Case for the purposes of this Project Agreement until its further amendment in accordance with this Project Agreement.

### 56.5 Amendments to Logic and/or Formulae

- (a) Where it is necessary to amend the logic or formulae incorporated in the Base Case to permit adjustments to be made, this will be done to the extent necessary and in accordance with generally accepted accounting principles.
- (b) Where any amendment is made to the logic or formulae incorporated in the Base Case, the Base Case, will first be run as at the date immediately prior to amendment to ensure that the key ratios (to include loan life cover and debt service ratios) from the Base Case are maintained at no lower or no higher levels than the key ratios (to include loan life cover and debt service ratios) immediately post the amendment, and the difference in the Real Base Case Project IRR after and immediately prior to amendment does not differ by more than five (5) basis points (being zero point zero five percent (0.05%) as shown in the resulting figure).

## 56.6 Copies of the Revised Base Case

Following any change to the Base Case under the provisions of this Clause 56 (Financial Adjustments), PPP Co. will promptly deliver a copy of the revised Base Case to the Authority in the same form as is established at the date of this Project Agreement or in such other form as may be agreed.

## 57. DATA PROTECTION

57.1 Any capitalised terms used in this Clause or related defined terms that are not defined in this Project Agreement will have the meaning given to them in the Data Protection Legislation.

57.2 Each party shall comply with the requirements applicable to it under Data Protection Legislation and the data protection principles specified in Data Protection Legislation that are applicable to it in connection with the Works and Services or the obligations of each Party under this Project Agreement.

57.3 The PPP Co. acknowledges and agrees that it will receive and Process certain Personal Data relating to the Data Categories in order and for as long as is necessary to provide the Works and Services and to perform its obligations under this Project Agreement.

57.4 The PPP Co. acknowledges and agrees that it will:

- (a) ensure that its internal operating systems only permit properly authorised Staff to access Personal Data;
- (b) provide appropriate training to its Staff with respect to:
  - (i) the correct handling of Personal Data so as to minimise the risk of security breaches; and
  - (ii) the requirements of the applicable Data Protection Legislation.
- (c) only Process Personal Data in accordance with the Authority's written instructions including with regard to transfers of Personal Data to a third country or an international organisation (which may be specific instructions or instructions of a general nature as set out in this Project Agreement or as otherwise notified by the Authority from time to time) unless required to Process Personal Data other than as instructed by the Authority, in order to comply with European Union or Member State law, in which case PPP Co. shall inform the Authority in accordance with Clause 55.9, except where prohibited by such law from doing so and shall in any event, cease the Processing pending receipt of further instructions from the Authority in relation to the Processing;
- (d) only use, reproduce or otherwise Process any Personal Data collected in connection with this Project Agreement to the extent necessary;
- (e) not modify, amend or alter the contents of the Personal Data, except as directed by the Authority;

- (f) not, without the Authority's written approval, Process any Personal Data on any PPP Co. Systems on which data (including any Personal Data) is Processed for any person outside of the Authority; and
- (g) implement and maintain a system for logging and identifying all PPP Co. Staff accessing any Personal Data through the PPP Co. Systems and if requested by the Authority, the PPP Co. shall provide to the Authority a copy of the access log.

57.5 The PPP Co. shall implement appropriate technical and organisational measures (in particular those required under the GDPR) to assure a level of security appropriate to the risk to the security of Personal Data, in particular, from accidental or unlawful destruction, loss, alteration, unauthorised, disclosure of or access to Personal Data in accordance with the PPP Co.'s obligations under Data Protection Legislation (the "**Security Measures**"). The Security Measures may include as appropriate:

- (a) the pseudonymisation and encryption of Personal Data;
- (b) the ability to ensure the ongoing confidentiality, integrity and availability of the Personal Data and resilience of PPP Co. Systems used for such Processing;
- (c) the ability to restore the availability and access to the Personal Data, in a timely manner but no later than 24 hours, in the event of a physical or technical security incident involving the Personal Data; and
- (d) a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the Processing.

57.6 The Authority may notify the PPP Co. immediately in the event that it does not consider that the Security Measures ensure an appropriate level of security for Personal Data and the Authority shall notify the PPP Co. of any additional or amended security controls or measures which the Authority considers in its reasonable opinion is necessary to ensure compliance with Data Protection Legislation. The PPP Co. agrees to implement such additional security controls or measures as are necessary to ensure compliance with the Security Measures.

57.7 The PPP Co. agrees and warrants that the Security Measures are appropriate to protect Personal Data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of Personal Data over a network, and against all other unlawful forms of Processing, and that these measures ensure a level of security appropriate to the risks presented by the Processing and the nature of the Personal Data to be protected having regard to the state of the art and the cost of their implementation.

57.8 Without limiting the PPP Co.'s other obligations under Clauses 57.9, 57.10, 57.11, 57.12 and 58.13, the PPP Co.:

- (a) may disclose Personal Data to its Staff but only those who:
  - (i) need to know for the purpose of this Project Agreement (and only to that extent);

- (ii) have been trained in accordance with Clause 57.4(b);
    - (iii) are subject to a binding contract to keep the Personal Data confidential (or are under an appropriate statutory obligation of confidentiality), and
  - (b) may only disclose Personal Data to any other person with the prior written consent of the Authority and, where the Authority provides its consent, only where the person is subject to a binding commitment to keep the Personal Data confidential (or is under an appropriate statutory obligation of confidentiality).
- 57.9 If the PPP Co or PPP Co. Staff are required by Law and/or an order of any court or competent jurisdiction or any regulatory, judicial or governmental body to disclose the Personal Data, the PPP Co. shall, except where prohibited by Law, first:
- (a) give the Authority notice of the details of the proposed disclosure;
  - (b) give the Authority a reasonable opportunity to take any steps it considers necessary to protect the confidentiality of the Personal Data including but not limited to seeking such judicial redress as the Authority may see fit in the circumstances;
  - (c) give any assistance reasonably required by the Authority to protect the confidentiality of the Personal Data; and
  - (d) inform the proposed recipient that the information is confidential Personal Data.
- 57.10 Without limiting the PPP Co.'s other obligations under this Project Agreement, the PPP Co. shall not engage any third party processors to Process Personal Data without the prior written consent of the Authority. If the PPP Co. engages any third party to Process any Personal Data, the PPP Co. shall impose on such third party, by means of a written contract, the same data protection obligations as set out in this Project Agreement.
- 57.11 PPP Co. shall inform the Authority of any intended changes concerning the addition or replacement of the any third party processors and shall not make any such changes without the prior written consent of the Authority.
- 57.12 PPP Co. shall remain liable to the Authority for Processing by permitted third parties as if the Processing was being conducted by the PPP Co..
- 57.13 The PPP Co. acknowledges and agrees that the PPP Co. or PPP Co. Staff may not transfer Personal Data to any Third Country except to the extent that the transfer is expressly approved by the Authority in writing.

## Assistance

- 57.14 Each Party shall co-operate with the other party to the extent necessary to enable that party to comply with any requests of the Data Protection Commissioner or other competent supervisory authority in respect of the Personal Data.



57.15 The PPP Co. shall:

- (a) make available to the Authority all information necessary to demonstrate compliance with the obligations set out in Article 28 of the GDPR and allow for and contribute to audits, including inspections, conducted by the Authority or another auditor mandated by the Authority;
- (b) immediately inform the Authority if, in its opinion, an instruction given or request made pursuant to Clause 57.15(a) infringes Data Protection Legislation;
- (c) taking into account the nature of the Processing, provide such assistance including by using appropriate technical and organisational measures as the Authority may require for the fulfilment of the Authority's obligation to respond to requests for exercising the Data Subject's rights laid down in Chapter III of the GDPR;
- (d) provide such reasonable co-operation and assistance as the Authority may require to enable the Authority to comply with its obligations and in particular those obligations under Articles 32-36 of the GDPR including without limitation to notify the Authority without undue delay and in any event within twenty four (24) hours following the PPP Co. becoming aware of a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, Personal Data ("**Personal Data Breach**"). The PPP Co. shall without undue delay notify the Authority of any Personal Data Breach affecting the Authority;
- (e) immediately notify the Authority of any monitoring activities and measures undertaken by the Data Protection Commission;
- (f) assist the Authority regarding the Authority's obligations to provide information about the collection, processing or usage of Personal Data to a Data Subject;
- (g) deal promptly and properly with all inquiries from the Authority relating to its Processing of the Personal Data;
- (h) if PPP Co. receives any request by any person to access or correct Personal Data, notify the Authority and provide the Authority with the full details of that request within two (2) Business Days; and
- (i) ensure that the Personal Data is not in any way used, manipulated, distributed, copied or processed for any other purpose than for the fulfilment of the contractual obligations as explicitly agreed upon and arising from this Project Agreement.

## Audit

57.16 PPP Co. shall permit the Authority or its representatives to access all relevant systems (including the PPP Co. Systems), Staff, records and information of the PPP Co. during normal working hours for the purpose of inspecting, testing and auditing the technical and organisational data security measures operated by the PPP Co. and for the purpose of confirming the PPP Co.'s compliance with its obligations under this Project Agreement and with Data Protection Legislation. The PPP Co. shall promptly implement any requirement made by the Authority to improve the technical and organisation measures.

## Information Obligations

57.17 If PPP Co. cannot comply or foresees that it cannot comply with its obligations as set out in this Project Agreement, for whatever reasons, it agrees to promptly inform the Authority of its inability to comply, in which case the Authority is entitled to suspend the transfer of Personal Data.

57.18 PPP Co. will promptly notify the Authority about:

- (a) any legally binding request for disclosure of the Personal Data by a law enforcement authority unless otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation;
- (b) any accidental, unauthorised access, or other event that constitutes a Personal Data Breach; and
- (c) any request received directly from the Data Subjects without responding to that request, unless it has been otherwise authorised to do so.

## **Indemnity**

57.1 PPP co. will indemnify and keep indemnified the Authority against all Losses incurred by it in respect of any breach of this Clause 57 (Data Protection) by PPP Co. and/or any act or omission of any Sub-Contractor.

## **58. SOLE REMEDIES**

### **58.1 PPP Co.'s Sole Remedy**

- (a) PPP Co.'s sole remedy (whether under contract, at common law or equity) for termination of this Project Agreement will be as set out in Clause 40.2 (Sole Entitlement to Compensation).
- (b) PPP Co.'s sole remedy (whether under contract, at common law or equity) for breach of this Project Agreement arising prior to the Termination Date (but not from the termination itself) shall be the express right or remedy in respect of such breach stated in this Project Agreement.

### **58.2 Authority's Sole Remedy**

Subject to any express right of the Authority under this Project Agreement, 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).

### **58.3 No Double Recovery**

Notwithstanding any other provisions of this Project Agreement, neither Party shall be entitled to recover compensation or make a claim or allowance under this Project Agreement in respect of any loss that it, or its Funder, has incurred to the extent that it has already been compensated in respect of that loss pursuant to this Project Agreement or otherwise.

## **59. WAIVER**

59.1 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.

59.2 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.

## 60. SEVERABILITY

60.1 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.

## 61. ENTIRE AGREEMENT

61.1 For the purposes of this Clause 61 (Entire Agreement), “**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.

61.2 This Project Agreement, and the agreements or documents between PPP Co. and the Authority referred to herein, constitute the whole and only agreement between the Parties relating to the Project.

61.3 Except to the extent repeated in and incorporated into this Project Agreement, the agreements referred to in Clause 61.2 above supersede and extinguish any Pre-contractual Statement.

61.4 Each Party acknowledges that in entering into the agreements referred to in Clause 61.2 above it is not relying upon any Pre-contractual Statement which is not incorporated into those Agreements.

61.5 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 the agreements referred to in Clause 61.2 above.

## 62. VARIATION

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

## 63. LANGUAGE

63.1 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.

63.2 The receiving Party will be entitled to assume the accuracy of and rely upon any English translation of any document provided pursuant to Clause 63.1(b) above.

64. **COUNTERPARTS**

64.1 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.

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

65. **GOVERNING LAW**

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

66. **JURISDICTION**

66.1 Subject to Clause 45 (Dispute Resolution Procedure) 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.

66.2 Subject to Clause 45 (Dispute Resolution Procedure) each of the Parties to this Project Agreement irrevocably waives any objection to Proceedings in the courts referred to in Clause 66.1 above on the grounds of venue or on the grounds of forum non-conveniens.

67. **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.

68. **WAIVER OF IMMUNITY**

68.1 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 appears on page 1 above.

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

**SIGNED AND DELIVERED** for  
and on behalf of and as the deed of  
[insert PPP Co.] by its lawfully  
appointed attorney(s) in the presence  
of:

Signature of witness:

Name:

Address:

Occupation:

***NDFA signing as Agent of [●]***

The Seal of the NATIONAL  
TREASURY MANAGEMENT  
AGENCY (describing itself as the  
National Development Finance  
Agency), as agent for and on behalf  
of [●] was affixed in the  
presence of:

\_\_\_\_\_  
**Director**

\_\_\_\_\_  
**Director**

and authenticated by the signature of:

Signature of witness:

Name:

Address:

Occupation:

## 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 Planned Service Commencement Date for a Project Facility;

**“Act of Terrorism”** means an act or series of acts, including the use of force or violence, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s), committed for political, religious or ideological purposes (including the intention to influence any government and/or to put the public in fear for such purposes) but excluding:

- (a) acts of nuclear detonation, nuclear reaction, nuclear radiation or radioactive contamination;
- (b) war, invasion or warlike operations (whether war be declared or not), hostile acts of sovereign or local government entities, civil war, rebellion, revolution, insurrection, martial law, usurpation of power, or civil commotion assuming the proportions of or amounting to an uprising;
- (c) confiscation, nationalisation, requisition, detention, embargo, quarantine, or any result of any order of public or government authority;
- (d) acts resulting in:
  - (i) the seepage and/or discharge of pollutants or contaminants;
  - (ii) chemical or biological emission, release, discharge, dispersal or escape or chemical or biological exposure of any kind;
  - (iii) asbestos emission, release, discharge, dispersal or escape or asbestos exposure of any kind;
- (e) measures taken to prevent suppress or control actual or potential terrorism;
- (f) a hoax or threat; and
- (g) a mysterious disappearance or unexplained loss;

**“Actual Liability”** means the total liability of PPP Co. to pay Tax levied by the relevant Taxation Authority as a consequence of or in respect of a Compensation Payment but excluding any interest, surcharge, penalty or fine in connection therewith;

**“Additional Permitted Borrowing”** means on any date, the amount equal to any amount of principal outstanding under the Senior Funding Agreements (as amended from time to time, whether with or without Authority approval) 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 10.3 of the Funder Direct Agreement as it applies to such Additional Permitted Borrowing; and
- (c) provided further that any such excess amount of principal which is: (i) invested as part of any Qualifying Variation; (ii) outstanding from time to time as a

result of any drawing under the Senior Funding Agreements as entered into at the date of this Project Agreement, disregarding any subsequent amendment (including any such excess amount of principal which is outstanding from time to time under any Committed Standby Facility); or (iii) outstanding from time to time as a result of any amendment to the Senior Funding Agreements in respect of which the Authority has agreed that its liabilities on a termination may be increased pursuant to Clause 40.3(a), (Changes to Funding Agreements) (including any such excess principal which is outstanding from time to time as a result of any amendments to any Committed Standby Facility in respect of which the Authority has agreed that its liabilities on termination may be increased pursuant to Clause 40.3 (Changes to Funding Agreements),

shall not be counted as Additional Permitted Borrowing;

**“Additional Permitted Borrowing Limit”** means an amount equal to:

- (d) ten per cent (10%) of the Original Senior Debt for any Additional Permitted Borrowing subsisting in the period from the Commencement Date to the date on which the amount outstanding under the Senior Funding Agreements is reduced to fifty per cent (50%) or less of the Original Senior Debt; and thereafter;
- (e) the higher of:
  - (i) five per cent (5%) of 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);<sup>45</sup>

**“Adjudication Panel”** has the meaning given to it in Clause 45.4(a) (Adjudication);

**“Adjudication Referral”** has the meaning given to it in Clause 45.2(c) (Resolution through Liaison);

**“Adjudicator”** has the meaning given to it in Clause 45.2(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:

- (f) where relevant, any Post Termination Service Amounts paid to PPP Co. (if a positive number);
- (g) the Tender Costs; and
- (h) amounts that the Authority is entitled to set off or deduct under Clause 25.9 (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; and
- (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

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<sup>45</sup> To be reviewed on a project-specific basis.

(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 of the Contract; and
- (B) 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 25.9 (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 highest priced Compliant Tender is received;
- (ii) any insurance proceeds and other amounts owing to PPP Co., to the extent not included in (i); and
- (iii) the Post Termination Service Amounts (if a negative number),

to the extent that:

- (A) (i) and (ii) and (iii) have not been directly taken into account in the Compliant Tender; and
- (B) the Authority has received such amounts in accordance with the Project Agreement;

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

- (d) 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;
- (e) 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 Ireland, or if unavailable in Ireland the United Kingdom,) the terms and conditions of collateral warranties and direct agreements with banks and/or awarding authorities entered into in relation to PPP projects by or on behalf of government of Ireland (or if unavailable) under the UK Government’s Private Finance Initiative;
- (f) the age, nature and condition of the facilities in which the Comparable Services are provided;



- (g) the geographical location where the Comparable Services are being performed relative to the Services;
- (h) the quality standards to which the Comparable Services are delivered;
- (i) the reasonable and proper adjustment to the number of Sub-Contractors employed in providing the Services at the time of the Benchmarking Exercise; and
- (j) any other differences in the Comparable Services when compared with the Testable Services and which would be material to the price charged or the service outputs delivered in respect of the Comparable Services;

**“Adverse Rights”** means any interests, rights, covenants, restrictions, stipulations, easements, or any other rights or interests in, over or under the Sites and the Licensed Off-Site Areas (or any of them) which if exercised would prevent, disrupt or delay the performance of PPP Co.’s obligations under this Project Agreement to carry out the Works and/or provide the Services;

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

**“Affected Obligations”** has the meaning given to it in Clause 13.7(f) (Fit-Out Works);]

**“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 Project Agreement Review”** has the meaning given to it in Clause 24.3 (Annual Project Agreement Reviews);

**“Annual Review Reports”** has the meaning given to it in Clause 24.3 (Annual Project Agreement Reviews);

**“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;

**“Appeal Commissioners”** means the appeal commissioners appointed by the Minister for Finance under section 850 of the Taxes Consolidation Act, 1997;

**“Approval”** means any agreement, consent, permission, expression of satisfaction or other approval to be given by the Authority’s Representative and/or the Authority under this Project Agreement and the term **“Approved”** will be interpreted accordingly;

**“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 Event);

**“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 Sites;

**“Archaeological Requirements”** means such requirements or instructions of the Relevant Authorities as required by Clause 6.3 (Archaeology);

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

**“Area”** has the meaning given to it in Part I (Definitions) 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 Facilities in accordance with this Project Agreement, including any land or buildings including any licence in respect thereof, roads and pathways, fixtures, fittings, equipment (including PPP Co. 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;

**“Assigned Certifier”** has the meaning given to it in Clause 8.8(b) (Building Control);

**“Associated Company”**<sup>46</sup> means:

- (k) 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;
- (l) in the case of PPP Co. will include each of the Shareholders, Works Co., Services Co. and any company which is a Subsidiary, a Holding Company or a Subsidiary of a Holding Company of a Shareholder, Works Co. or Services Co.;
- (m) a partnership or other entity of which any Shareholder or a company which is a Subsidiary, Holding Company, or a Subsidiary of a Holding Company of a Shareholder is either the general partner, trustee or the principal manager (either directly or indirectly);
- (n) any nominee or trustee of any entity falling within sub-paragraph (c) of this definition acting in such capacity (whether on a change of nominee or trustee or otherwise); and
- (o) any partnership, unit trust, open ended investment scheme or other investment fund in which any Subsidiary, Holding Company or Subsidiary of a Holding Company of a Shareholder is either a limited partner, member or investor;

**“Authority Change”** has the meaning given to it in paragraph 1(a) (Authority Changes) of Schedule 20 (Variations);

**“Authority Damage”** means any damage to any Site or Project Facilities, the cost of which is the responsibility of the Authority pursuant to [Clause 13.7 (Authority Fit-Out Works)] or Clause 18.4 (Accidental Damage and Vandalism);

**“Authority Default”** means one of the events set out in Clause 35.1 (Termination for Authority Default);

**“Authority Default Termination Sum”** means the amount payable in accordance with Clause 35.3 (Termination for Authority Default);

**“Authority Equipment”** means the equipment set out in Part 2 (Authority Equipment) of Schedule 13 (Equipment);

[**“Authority Fit Out Works”** means the [●];<sup>47</sup>]

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

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<sup>46</sup> Under review.

<sup>47</sup> To be reviewed on a project specific basis and if relevant, description of Authority Fit-Out Works to be included.

**“Authority’s Policies”** means the policies of the Authority referred to in Schedule [●] (Authority’s Policies);

**“Authority Related Party”** means an officer, agent, contractor, employee or sub-contractor (of any tier) of the Authority acting in the course of his office or employment or appointment (as appropriate) but excluding in each case PPP Co. and any PPP Co. Related Parties;

**“Authority’s Representative”** means such person as may be appointed by the Authority for the time being in accordance with the provisions of Clause 23 (Representatives);

**“Available”** has the meaning given to it in Part I (Definitions) of Schedule 15 (Payment Mechanism), and **“Unavailable”**, **“Availability”** and **“Unavailability”** will be construed accordingly;

**“Availability Certification Requirements”** has the meaning given to it in paragraph [●] of Schedule 10 (Services Requirements);

**“BAFO”** means best and final offer;

**“Base Case”** means the “base case” for the purposes of the Financial Model at the Commencement Date as the same may be amended from time to time in accordance with Clause 56 (Financial Adjustments);

**“Base Senior Debt Termination Amount”** means, subject to Clause 40.3 (Changes to Funding Agreements):

- (p) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from PPP Co., to the Senior Lenders in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing); and
- (q) 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 in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing) or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Project Agreement, 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 Base Senior Debt Termination Amount or the amounts below):

- (i) all credit balances on any bank accounts or any investment accounts (but excluding the Joint Insurance Account and the Distributions 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 in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing) or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Project Agreement; and

- (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;

**“Basic Checks”** means the identity and background checks outlined in Clause 33.13 (Employee Checks);

**“Benchmarking Data”** means the data required for the purposes of carrying out a Benchmarking Exercise;

**“Benchmarking Exercise”** means the exercise undertaken by PPP Co. pursuant to Clause 26.1 (Benchmarking) in relation to the Testable Services;

**“BIM”** means a three dimensional Building Information Model developed to a level of detail required for a Level 2 (7D for facilities management) in accordance with AEC (UK) Building Information Model Protocol.

**“[Building]”** means each new [building] constructed as a result of carrying out the Works;

**“Building Regulations”** means the Building Control Acts 1990 to 2014 and all relevant subordinate legislation made under the Acts including without limitation the Building Control (Amendment) Regulations 2014 and any amendment, update, replacement or repeal thereof including any Code of Practice for Inspecting and Certifying Buildings and Works issued by the relevant government minister;

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

**“Business Hours”** means 9am to 5pm on a Business Day;

**“Capital Contributions”** means a payment made or to be made to a Utilities Provider in respect of the provision of the permanent supply and connection of Utilities to a Site and, for the avoidance of doubt, excludes any costs associated with any civil works;

**“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;

**“Categories of Data Subject”** means the following categories: [please insert a list of the categories of data subject (i.e. customers, employees, suppliers etc)];

**“Certificate of Service Availability”** means the certificate of that name issued by the Independent Tester in accordance with Clause 13.4 (Independent Tester’s Certificates) of this Project Agreement and in accordance with the terms of the Independent Tester Contract;

**“Certification”** means the issue of the Certificate of Service Availability for each [Project Facility][Phase][Building][Open Space];

**“Certification Date”** means the date on which the Certificate of Service Availability is issued in respect of each [Project Facility][Phase][Building][Open Space];

**“Certificate of Compliance on Completion”** means a Certificate of Compliance on Completion as set out in the Building Regulations;

**“Certification Procedure”** means the procedure set out in Schedule 6 (Certification Procedure);

**“Change in Costs”** means in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated costs,

losses or liabilities of PPP Co. and/or any Principal Sub-Contractors (without double counting), including, as relevant, the following:

- (a) the reasonable costs of complying with the requirements of Clauses 42 (Compensation Events), 30 (Variation Procedure), 31 (Change in Law), 19 (Authority Step-in) and/or 56 (Financial Adjustments), including the reasonable costs of preparation of design and estimates;
- (b) the costs of continued employment of, or making redundant, Staff who are no longer required;
- (c) the costs of employing additional Staff;
- (d) reasonable professional fees;
- (e) the costs to PPP Co. of financing any Relevant Event (and the consequences thereof) including commitment fees and capital costs interest and hedging costs, lost interest on any of PPP Co.'s own capital employed and any finance required pending receipt of a lump sum payment or adjustments to the Unitary Charge;
- (f) the effects of costs on implementation of any insurance reinstatement in accordance with this Project Agreement, including any adverse effect on the insurance proceeds payable to PPP Co. (whether arising from physical damage insurance or business interruption insurance (or their equivalent)) in respect of that insurance reinstatement and any extension of the period of implementation of the insurance reinstatement;
- (g) operating costs, or life cycle, maintenance or replacement costs;
- (h) Capital Expenditure (or, in the case of a Relevant Event which is a Qualifying Change in Law, Capital Expenditure for which the Authority is responsible);
- (i) the costs required to ensure continued compliance with the Funding Agreements;
- (j) any deductible or increase in the level of deductible, or any increase in premium under or in respect of any insurance policy; and
- (k) losses including reasonable legal expenses on an indemnity basis.

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

- (a) any Law, other than any Law 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 Union ;
- (b) any Guidance; or

- (c) any applicable judgement of a court of law in Ireland which changes a binding precedent,

which was not foreseeable at the Commencement Date by an experienced Works Co., Services Co. or PPP Co.;

**“Change in Ownership”** means

- (a) any sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the shares in PPP Co. or the Shareholders (including the control over the exercise of voting rights conferred on those shares or the control over the right to appoint or remove directors or the rights to dividends);
- (b) any arrangements which have or may have the effect of a sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the shares in PPP Co. or the Shareholders (including the control over the exercise of voting rights conferred on those shares or the control over the right to appoint or remove directors or the rights to dividends); and/or
- (c) any other arrangements that have or may have or which result in the same effect as paragraphs (a) and (b) above;

**“Change in Revenue”** means in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated income of PPP Co. and/or any Principal Sub-Contractors from income committed from third parties (without double counting);

**“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 Works Direct Agreement, the Services Direct Agreement, the Management 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 to be provided by the Principal Sub-Contractors and the Professional Team in the form set out in Parts 3 (Professional Team Collateral Warranties) and 4 (Form of Principal Sub-Contractor Direct Agreement) of Schedule 9 (Professional Team);

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

**“Commercially Sensitive Information”** means the information set out in Schedule 30 (Commercially Sensitive Information) which is agreed by the Parties as being commercially sensitive in each case for the period set out in Schedule 30 (Commercially Sensitive Information);

**“Committed Standby Facility”** means [●]

**“Companies Acts”** means the Companies Acts 2014;

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

**“Compensation Date”** means either:

- (a) if paragraph 2 (Retendering Procedure) of Part 1 (Termination for PPP Co. Default) of Schedule 17 (Compensation on Termination) 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 (No Retendering Procedure) of Part 1 (Termination for PPP Co. Default) of Schedule 17 (Compensation on Termination) 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 or confirmations under this Project Agreement but excluding in all cases any breach by the Authority of its obligations pursuant to Clause 47.5 (Mitigation);

**“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 42 (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; and/or
- (d) Clause 46.4 (Risks that become Uninsurable): amount payable following a Risk becoming Uninsurable.

**“Compliant Tender”** means any tender submitted by a Compliant Tenderer that meets the qualification criteria notified under paragraph 2(d) of Part 1 (Termination for PPP Co. Default) of Schedule 17 (Compensation on Termination);

**“Compliant Tenderer”** means a tenderer who is a Suitable Substitute Contractor;

**“Confidential Information”** means:

- (a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, commercially sensitive Intellectual Property Rights and know-how of either party and all personal data and sensitive personal data within the meaning of the Data Protection Acts 1988 and 2003; and
- (b) Commercially Sensitive Information.

**“Construction Expert”** will have the meaning given to it in Clause 45.4(a) (Adjudication);

**“Construction Period”** means the period commencing on the Commencement Date and ending on the Final Service Commencement Date;

**“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 11 (Construction Programme);

**“Construction Regulations”** has the meaning given to it in Clause 14.4 (Health and Safety);

**“Contingent Funding Liabilities”** means all liabilities of the Shareholders in respect of obligations owed to PPP Co. and/or the Senior Lenders under the Funding Agreements which are triggered as a result of or in relation to the termination of this Project Agreement;

**“Contracting Associate”** means Works Co., Services Co., Management 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 a period of twelve (12) months commencing on 1 January provided that:

- (a) the first Contract Year will be the period commencing on the Commencement Date and ending on the day immediately following 31 December; and
- (b) the final Contract Year will be the period commencing on 1 January immediately preceding the last day of the Term and ending on that day;

**“Convictions”** means any previous or pending prosecutions or a conviction on an indictable offence (excluding offences under the Road Traffic Acts);

**“Damage Funding”** has the meaning given to it in Clause 18.10 (Repair Cost);

**“Data Categories”** means the following data: [please insert a list of all types of personal data that will be provided to the Authority and/or PPP Co.];

**“Data Protection Legislation”** means the data protection and information privacy laws of Ireland and the European Union and includes to the extent applicable to this Project Agreement, the data protection and information privacy laws of Ireland and the European Union and includes any legislation in force from time to time which implements Directive 95/46/EC or Directive 2002/58/EC of the European Community the Data Protection Acts 1988 to 2018 Regulation (EU) 2016/679, known as the General Data Protection Regulation (“**GDPR**”) and any replacement regulation;

**“Data Protection Acts”** means the Data Protection Acts 1988 to 2018;

**“Data Protection Commissioner”** means the Data Protection Commissioner as defined under the Data Protection Acts;

**“days”** means calendar days;

**“Deductions”** means any or all (as the case may be) of Unavailability Deductions, Service Performance Deductions and/or Reporting Deductions;

**“Deemed Liability”** means the amount of the reduction in Actual Tax Liability by the utilisation of a Tax Relief other than a Tax Relief derived from the Project but excluding any interest, surcharge, penalty or fine in connection therewith;

**“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 any Service Commencement Date, then the relevant Planned Service Commencement Date will be extended by a period to allow a New Contractor to achieve Service commencement by a new Planned Service Commencement Date;
- (b) any accrued Service Performance Deductions, Unavailability Deductions, Unavailability, Warning Notices and/or Final Warning Notices shall, for the purposes of termination only and without prejudice to the rights of the Authority to make financial deductions, be cancelled and where at the Termination Date the Ratchet was being applied pursuant to part V (Other Deductions) of Schedule 15 (Payment Mechanism), the Ratchet shall be reset for the purposes of termination only, with effect from the date of the Deemed New Contract; 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”** means any increased margin that is payable to the Senior Lenders or which accrues as a result of any payment due to the Senior Lenders not being made on the date on which it is due;

**“Default Interest Rate”** means:

- (d) 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 2012; and
- (e) in the case of PPP Co., three (3) percent above EURIBOR;

**“Defect”** means any defect or deficiency in the Project Facilities and/or the Off-Site Works or any part of them which arises due to the failure to design and/or construct the Project Facilities and/or the Off-Site Works in accordance with this Project Agreement including any failure of the PPP Co. Proposals to meet the requirements of Schedule 3 (Works Requirements) and/or Schedule 26 (Off-Site Works);

**“Design Checker”** means a principal, employee or agent of the Relevant Designer, or such other person, each of whom has been Approved, who is responsible for checking the design of the Works in accordance with PPP Co.’s Quality Plan for the Construction Period;

**“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”** means the procedure for development and finalisation of the design and specification of the Works referred to in Clause 9 (Design Review Procedure);

**“Designer”** means a member of the Professional Team as listed in Part 1 (Members of Professional Team) of Schedule 9 (Professional Team) who is responsible for carrying out the design of a part or parts of the Works;

**“Disclosed Data”** has the meaning given to it in Clause 5.5 (Disclosed Data and Disclaimer);

**“Disclosure Letter”** means the disclosure letter set out in Schedule 25 (Disclosure Letter);

**“Dispute”** means any disagreement between the Parties relating to this Project Agreement or the Project;

**“Disputed Amount”** has the meaning given to it in Clause 25.7(a) (Disputed Invoices);

**“Dispute Resolution Procedure”** means the procedure for resolving any Dispute as set out in Clause 45 (Dispute Resolution Procedure);

**“Distribution”** means:

- (f) 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; and/or
  - (v) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms, and/or
- (g) 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;

**“Distributions Account”** has the meaning given to it in the Senior Loan Agreement;

**“Early Certificate of Service Availability”** has the meaning given to it in Clause 13.9 (Early Certification);

**“EDMS”** means the electronic document management system used by the Authority in respect of the Project and details of which have been provided to PPP Co.;

**“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;

**“Electronic Communications Protocol”** means the electronic communications protocol set out in Part 3 (Electronic Communications Protocol) of Schedule 12 (Representatives);

**“Element Group”** means the general elemental summaries included in the matrix of the National Standard Building and Site Elements;

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

**“Employee”** 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 referred to in Clause 33.10;

“**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 set off, title transfer and retention arrangements) having a similar effect;

“**Environmental Information Regulations**” means the European Communities (Access to Information on the Environment Regulations) 2007 to 2014;

[“**Equipment**” means the Authority Equipment and PPP Co. Equipment, details of which are set out in Schedule 13 (Equipment);]

“**Equity IRR**” means the post-Tax (with respect to PPP Co.) projected blended rate of return for equity and Junior Debt 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);

“**Estimate**” has the meaning given to it in paragraph 1(d) of Schedule 20 (Variations);

“**Estimated Change in Project Costs**” means the aggregate of any estimated increased construction costs, operating costs and financing costs (which may take account of Claims made against PPP Co. as a direct result of the occurrence of a Compensation Event, to the extent that such a Claim is not covered by the Required Insurances) less the aggregate of any estimated reduction in construction costs, operating costs and financing costs taking into account a Relevant Event, in particular any change in revenue that results from a Relevant Event;

“**Estimated Fair Value of the Contract**” means the amount determined in accordance with paragraph 3(d) of Part 1 (Termination for PPP Co. Default) 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:

- (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;

“**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;

“**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 to the extent required for forecasts under the Funding Agreements
  - (vi) 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 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;
  - (vii) failure by PPP Co. to obtain any consent by statutory bodies required by the Senior Funding Agreements; or
  - (viii) 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 Qualifying Variation under this Project Agreement;
- (e) subject to Clause 50 (Change in Ownership) 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. or Hold Co. provided that this paragraph (e) shall, in respect of the shares of Hold Co., only apply for so long as Hold Co. holds one hundred per cent (100%) of the issued share capital of PPP Co.;
- (f) subject to Clause 48.8 (Refinancing), any sale or transfer of the Junior Lenders' existing rights and/or interests in the Junior Debt Documents or securitisation of the Junior Debt Documents or securitisation of the Junior Lenders' existing rights and/or interests under the Junior Debt Documents; or
- (g) any Qualifying Bank Transaction.

**“Expiry Date”** means in respect of each Project Facility the twenty fifth (25<sup>th</sup>) anniversary of the Planned Service Commencement Date for that Project Facility, or where a Project Facility has achieved an Early Certificate of Service Availability Date pursuant to Clause 13.9(a) (Early Certification), the Expiry Date shall be the twenty fifth (25<sup>th</sup>) anniversary of that Early Certificate of Service Availability Date;

**“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 45.8 (Fast Track Procedure);

**“Final Commissioning Programme”** means the programme to be developed in accordance with Clause 13 (Commissioning and Completion);

**“Final Service Commencement Date”** means the date which occurs on the first (1<sup>st</sup>) Business Day after the Certification Date of the last Project Facility to achieve Certification;

**“Final Warning Notice”** has the meaning given to it in Clause 34.2 (Persistent Breach);

**“Financial Close”** means the Commencement Date or such other Business Day following the Commencement Date as may be agreed between the Authority and PPP Co.;

**“Financial Expert”** has the meaning given to it in Clause 45.4(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;

**“First Handback Inspection”** has the meaning given to it in Clause 41.2 (First Handback Inspection);

**“First Party”** has the meaning given to it in Clause 28.6 (Ruling from the Relevant Taxation Authority);

**“Force Majeure Event”** means the occurrence after the Commencement Date 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 or any breach by 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;

**“Force Majeure Termination Sum”** has the meaning given to it in paragraph 1(a) of Part 3 (Compensation on Termination for Force Majeure, Risks Uninsurable and Change in Law) of Schedule 17 (Compensation on Termination);

**“Freedom of Information Acts”** means the Freedom of Information Act 2014;

**“Funder Direct Agreement”** means an agreement 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 Funders;

**“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 (Funding Agreements) 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 48 (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;

**“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 engaged 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 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 Facilities;

**“Ground Conditions”** means in relation to the Sites (and in relation to the Off-Site Works, the Off-Site Areas), any and every condition under, over, on, beside the Sites (and in relation to the Off-Site Works, the Off-Site Areas) that impacts upon it in any way including, hydrological, geological, geotechnical, subsurface, climatic, ecological and botanical conditions, 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 Sites (and in relation to the Off-Site Works, the Off-Site Areas) including 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 or policies of [the Authority] which PPP Co. is bound to comply in relation to the Project Facilities, the Works or the Services;<sup>48</sup>

**“Handback Amount”** has the meaning given to it in Clause 41.3(c) (Handback Amount);

**“Handback Bond”** has the meaning given to it in Clause 41.5(b) (Handback);

**“Handback Certificate”** means the certificate to be issued by the Authority in accordance with Clause 41 (Handback);

**“Handback Programme”** has the meaning given to it in Clause 41.3(b) (Handback Programme);

**“Handback Requirements”** has the meaning given to it in Clause 41.1 (Handback Requirements);

**“Handback Works”** has the meaning given to it in Clause 41.3(a) (Handback Works);

**“HICP”** has the same meaning as Index;

**“Highest Compliant Tender Price”** means the price offered by the Compliant Tenderer (if any) with the highest tender price and, if no Compliant Tenders or no bids are received, zero;

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<sup>48</sup> To be reviewed on a project-specific basis. May include reference to other relevant public sector entities in addition to the Authority.

**“Hold Co.”** means [insert holding company];

**“Holding Company”** has the meaning given to it in Section 8 of the Companies Acts. This definition will remain the same during the Term of this Project Agreement and will not change as a result of any amendment to the definition of “holding company” in the Companies Acts;

**“Independent Tester”** means the person or body appointed to act as the independent certifier of the Project in accordance with the Independent Tester Contract;

**“Independent Tester Contract”** has the meaning given to it in Clause 12.1 (Appointment);

**“Index”** means the Harmonised Index of Consumer Prices for Ireland published by the Central Statistics Office or any successor thereto;

**“Indexation Review Date”** has the meaning given to it in Part I (Definitions) of Schedule 15 (Payment Mechanism);

**“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 Review Date;

**“Indirect Losses”** means loss of profit, loss of use, loss of production, loss of business, loss of business opportunity or any claim for consequential loss or for indirect loss of any nature but excluding any of the same that relate to loss of revenue under this Project Agreement;<sup>49</sup>

**“Information”** means all materials, documents and data relating to the proposed design or construction of the Works, the operation and maintenance of the Project Facilities and other matters relevant thereto and the obligations to be undertaken by PPP Co. under this Project Agreement including information as to the activities carried on by the Authority, its assets, contractual arrangements, employees, the Sites (and in relation to the Off-Site Works, the Off-Site Areas), and further including 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 stage or BAFO stage relating to the procurement of the Project;

**“Insolvency Event”** shall have the meaning given to it in Clause 35.1 (PPP Co. Default);

**“Instalment Dates”** has the meaning given to it in Clause 40.4 (Method of Payment);

**“Insurance Term”** means any terms and/or conditions required to be included in a Required Insurances 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 46 (Insurance), proceeds paid by insurers of the policies referred to in paragraph 1 of Part 1 (Policies be taken out by PPP Co. and maintained during the Construction

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<sup>49</sup> To be reviewed on a project-specific basis.

Period) and paragraph 1 of Part 2 (Policies to be taken out by PPP Co. and maintained during the Service period) of Schedule 23 (Required Insurances) are to be paid;

**“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 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 the [Equity Documents] (as defined in the Senior Loan Agreement) 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;

**“Key Sub-Contractor”** means any Principal Sub-Contractor, the Professional Team and any Sub-Contractor with responsibility for piling, structural steel, mechanical and/or electrical engineering, curtain walling, pre-cast concrete, roof glazing, windows, cladding, roofing systems, lifts, ground improvements and reinforced earth;

**“Latest Service Element”** has the meaning given to it in Clause 26.1(c) (Benchmarking);

**“Law”** means any law applicable in Ireland and will include 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 an operating lease with any third party, as set out in Part 1 (PPP Co. Equipment) of Schedule 13 (Equipment) and will be deemed to include any replacement thereof from time to time;

**“Legal Expert”** has the meaning given to it in Clause 45.4(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);

**“Licences”** has the meaning given to it in Clause 6.1 (Licences) (and each a **“Licence”**);

**“Licensed Off-Site Area”** means any area of land near or adjacent to a Site (but which does not form part of the Site) required to be occupied by PPP Co. for the purpose of carrying out the Off-Site Works and in respect of which the Authority grants or agrees to procure the grant of a licence to PPP Co. and any PPP Co. Related Party under Clause 6.1 (Licences) of this Project Agreement, as the same is more particularly described in Schedule 26 (Off-Site Works), and **“Licensed Off-Site Areas”** shall be construed accordingly;

**“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 works or services (in each case the same as or similar to the Works and Services required under this Project Agreement) in Ireland for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value provided always that any vehicle controlled and established by the Senior Lenders specifically for the purposes of this Project and to which this Project Agreement may be novated will not be taken into account in assessing whether there are sufficient willing parties in the market for such purposes;



**“Lock-in Period”** means the period from the Commencement Date until expiry of the twelve (12) months’ defects’ liability period following the Final Service Commencement Date;

**“Longstop Date”** means the date twelve (12) months after the Planned Service Commencement Date for the last Project Facility which is expected to achieve Certification in accordance with the Construction Programme or such later date as may be allowed in accordance with the terms of this Project Agreement;

**“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 Indirect Losses;

**“Maintenance Surveys”** has the meaning given to them in Clause 18.3 (Maintenance Surveys);

**“Management Co.”** means [*insert details*], a company incorporated under the laws of Ireland with registered number [*insert details*] and having its registered office at [*insert details*] or such replacement as permitted in accordance with the provisions of Clause 52 (Sub-Contracting) of this Project Agreement;

**“Mandatory Exclusions”** means the circumstances set out in Regulation 57(1) of the Public Contracts Regulations;

**“Market Costs”** has the meaning given to it in Clause 26.1(c) (Benchmarking);

**“Market Testing Procedure”** means the procedure undertaken by PPP Co. pursuant to Clause 26.4 (Market Testing Procedure) in relation to the Testable Services;

**“Market Testing Review Dates”** means the fifth (5<sup>th</sup>) anniversary of the Final Service Commencement Date and every fifth (5<sup>th</sup>) anniversary thereafter and “Marketing Testing Review Date” will be construed accordingly;

**“Market Value Unavailability Deduction Amount”** means for any month or part of a month, an amount equal to the Unavailability Deduction that was made to the Unitary Charge in the month immediately preceding the Termination Date, less an amount equal to any Unavailability 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 Resolution”** has the meaning given to it in Clause 45.2(b) (Resolution through liaison);

**“Month”** means a calendar month and **“Monthly”** will be construed accordingly;

**“Monthly Unitary Charge”** has the meaning given to it in Part I (Definitions) of Schedule 15 (Payment Mechanism);

**“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;

**“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 Nominal 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 any Service Commencement Date, then the relevant Planned Service Commencement Date will be extended by a period to allow a New Contractor to achieve Certification;
- (b) any accrued Service Performance Deductions, Unavailability Deductions, Unavailability, Warning Notices and/ or Final Warning Notices shall, for the purposes of termination only and without prejudice to the rights of the Authority to make financial deductions, be cancelled and where at the Termination Date, the Ratchet was being applied pursuant to Part V (Other Deductions) of Schedule 15 (Payment Mechanism), for termination purposes only, the Ratchet shall be reset with effect from the date of the New Contract;
- (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. or the Authority;

**“New Contractor”** means the person who has entered or who will enter into the New Contract with the Authority;

**“Nominal Base Case Equity IRR”** means the nominal blended rate of return for equity and Junior Debt shown in the Base Case being [ ]<sup>50</sup>%;

**“Nominal Base Case Project IRR”** means the nominal pre-Tax internal rate of return of the net operating cashflows (before debt service or equity returns) as shown in the Base Case being [ ]<sup>51</sup>%;

**“Non-Rectifiable PPP Co. Defaults”** has the meaning given to it in Clause 34.4(e) (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 or determined pursuant to paragraph 3(e) of Part 1 (Termination for PPP Co. Default) of Schedule 17 (Compensation on Termination – Termination for PPP Co. Default);

**“Notice of Referral”** has the meaning given to it in Clause 45.2(c) (Resolution through Liaison);

**“Off-Site Areas”** means the Licensed Off-Site Areas and any Public Off-Site Areas and **“Off-Site Area”** shall be construed accordingly;

**“Off-Site Works”** means all of the works to be undertaken and completed by PPP Co. in order to satisfy Schedule 26 (Off-Site Works) including all ancillary, incidental and temporary works;

**“Off-Site Works Completion Certificate”** means the certificate issued by the Independent Tester in accordance with Clause 13.6(a) and in accordance with the terms of the Independent Tester Contract;

**“Operating Manual”** has the meaning given to it in Clause 17.5 (Operating Manual);

**“Option Period”** has the meaning given to it in Clause 46.4(f) (Risks that become Uninsurable);

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<sup>50</sup> Note to Tenderers: to be inserted before financial close.

<sup>51</sup> Note to Tenderers: to be inserted before financial close.

**“Original Senior Debt”** means the amount committed under the Senior Funding Agreements as at the Commencement Date (as adjusted to take account of any Qualifying Variation);

**“Outstanding Principal”** means the principal amount outstanding at the Termination Date of each borrowing under the Senior Loan Agreement;

**“Parties”** means PPP Co. and the Authority and the term **“Party”** will mean any of them as the case may be;

**“Payment Mechanism Report”** has the meaning given to it in Part I (Definitions) of Schedule 15 (Payment Mechanism);

**“Payment Period”** has the meaning given to it in Part I (Definitions) of Schedule 15 (Payment Mechanism);

**“Performance Standard”** has the meaning given to it in Part I (Definitions) of Schedule 15 (Payment Mechanism);

**“Permitted Borrowing”** means, without double counting, any:

- (a) advance to PPP Co. under the Senior Funding Agreements, disregarding any amendments that have not been approved for the purposes of Clause 40.3 (Changes to Funding Agreements);
- (b) Additional Permitted Borrowing; and/or
- (c) interest under the Senior Funding Agreements (disregarding any amendments that have not been approved for the purposes of Clause 40.3 (Changes to Funding Agreements)) and, in respect of the original Senior Funding Agreements only (as entered into at the Commencement Date prior to any subsequent amendment), other amounts accrued or payable under the terms of such original Senior Funding Agreements;

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 breach (for which a Final Warning Notice (referred to in Clause 34.2(b) (Persistent Breach)) has been issued, which has continued for more than fourteen (14) days or recurred in three (3) or more months within the six (6) month period after the date on which such Final Warning Notice is served on PPP Co.;

**“Person Week”** means each unit of thirty nine (39) hours worked by an individual worker or service provider in relation to the Works ;

**“Personal Data”** means personal data as defined in the Data Protection Acts 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 (Policies to be taken out by PPP Co. and maintained during the Construction Period) and paragraph 1 of Part 2 (Policies to be taken out by PPP Co. and maintained during the Service Period) of Schedule 23 (Required Insurances);

**“Planned Maintenance Programme”** means the annual programme for maintenance, repair, refurbishment and replacement of the Project Facilities prepared by PPP Co. in accordance with Clause 18.2 (Planned Maintenance Programme);

**“Planned Service Commencement Date”** means, in respect of each Project Facility, the date(s) set out here; [●]

in each case as such date may be varied in accordance with the terms of this Project Agreement;

**“Planning Permission”** means any planning permission [granted or to be granted]<sup>52</sup> in respect of each Project Facility by the Relevant Planning Permission for the design, construction, operation and use of each of the Project Facility in accordance with the terms of this Project Agreement;

**“Planning Regulations”** means Planning and Project Facility Regulations 2001 – 2015;

**“Post Termination Service Amount”** means for the purposes of paragraph 2 of Part 1 (Termination for PPP Co. Default) 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 Unavailability 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”** means public private partnership;

**“PPP Co. Change”** has the meaning given to it in paragraph 2 of Schedule 20 (Variations);

**“PPP Co. Default”** means any of the events set out in Clause 34.1 (PPP Co. Default);

**“PPP Co. Development Contribution Conditions”** has the meaning given to it in Clause 7.5 (Project Facility Contribution Conditions and Off-Site Works Planning Conditions);

**“PPP Co. Equipment”** means the equipment to be supplied and maintained by PPP Co., details of which are set out in Part 1 (PPP Co. Equipment) of Schedule 13 (Equipment);

**“PPP Co. Key Works Personnel”** means those persons identified in Schedule 12 (Representatives);

**“PPP Co. Necessary Consents”** means the Necessary Consents other than the Planning Permissions;

**“PPP Co. Notice of Change”** has the meaning given to it in paragraph 2 of Schedule 20 (Variations);

**“PPP Co. Offsite Works Planning Condition”** has the meaning given to it in Clause 7.5 (Project Facility Contribution Conditions and Off-Site Works Planning Conditions);

**“PPP Co. Systems”** means the equipment or software and systems used by, or under the control of, the PPP Co. (or any other member of the PPP Co. Company or PPP Co. Staff) to provide the Assigned Rights from time to time;

**“PPP Co. Proposals”** means PPP Co.’s proposals for the design, construction and maintenance of the Project Facilities as set out in Schedule 28 (PPP Co. Proposals);

**“PPP Co. Related Party”** means PPP Co.’s agents and contractors (including the Principal Sub-Contractor) and its or their Sub-Contractors of any tier and its or their directors, officers, employees

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<sup>52</sup> Amend as appropriate

and workmen in relation to the Project and any person on or at any of the Sites or the Off-Site Areas at the express or implied invitation of PPP Co. (other than the Authority and any Authority Related Party);

**“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 23 (Representatives);

**“PPP Co. Warranties”** means the representations and warranties of PPP Co. set out in Clause 5.2 (PPP Co. Warranties);

**“Pre-contractual Statement”** has the meaning given to it in Clause 61 (Entire Agreement);

**“Pre-Refinancing Equity IRR”** means the nominal blended Equity IRR calculated immediately prior to a Refinancing;

**“Principal Sub-Contract”** means the Works Contract, and/or the Services Contract;

**“Principal Sub-Contractors”** means Works Co., Management Co. and/or Services Co.;

**“Proceedings”** has the meaning given to it in Clause 66.1 (Jurisdiction);

**“Professional Appointment”** means each agreement in the form of the professional appointment set out in Part 2 (Professional Appointments) of Schedule 9 (Professional Team);

**“Professional Team”** means the professional team identified as such in Part 1 (Members of Professional Team) of Schedule 9 (Professional Team);

**“Professional Team Collateral Warranties”** means the collateral warranties set out at Part 3 (Professional Team Collateral Warranties) 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 State; and/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 State;
- (b) entering into this Project Agreement or any other contract with the State 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 1889-2010 or the Ethics in Public Office Act 1995 or the Lobbying Act 2015; and/or
- (d) defrauding or attempting to defraud or conspiring to defraud the State;

**“Prohibited Materials”** means any goods, products or materials not in conformity with relevant Irish or European Union standards or codes of practice which at the time of use are widely known to building contractors or members of the relevant design profession within the European Union to be deleterious to health and safety and/or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used;

**“Project”** means the design, construction and financing of the Works and the maintenance of the Project Facilities which includes the provision of the Services during the Term in accordance with the terms of this Project Agreement;

**“Project Facilities”** means the Project Facilities referred to in Recital A and **“Project Facility”** shall be construed accordingly;

**“Project Facility Representative”** means the person(s) specified in Clause 23.3 (Project Facility Representative);

**“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 Documents”** means those documents specified in Part 2 (Project Documents) of Schedule 11 (Required Documents);

**“Project Supervisor for the Design Process”** and **“Project Supervisor for the Construction Stage”** have the meaning given to them in the Construction Regulations;

**“Public Contracts Regulations”** means the European Union (Award of Public Authority Contracts) Regulations 2016;

**“Public Off-Site Area”** means any area of land near or adjacent to a Site (but which does not form part of the Site) required to be occupied by PPP Co. for the purpose of carrying out the Off-Site Works which is on a public road (within the meaning of the Roads Acts, 1993 to 2015), as the same is more particularly described in Schedule 26 (Off-Site Works), and **“Public Off-Site Areas”** shall be construed accordingly;

**“Qualification Criteria”** means the criteria that the Authority requires tenderers to meet as part of the Tender Process, which (subject to compliance with the procurement regulations) shall be;

- (a) the New Contract Terms;
- (b) tenderers should have the financial ability to pay the capital sum tendered for the New Contract and the financial ability to deliver the Works and/or the Services (as appropriate) for the price tendered;
- (c) the tenderers may only bid on the basis of a single capital payment to be made on the date of the New Contract;
- (d) the tenderer is experienced in providing the Services or similar services;
- (e) the technical solution proposed by the tenderers is capable of delivery and the tenderer is technically capable of delivery of the Services; and
- (f) any other tender criteria agreed by the Authority and PPP Co.;

**“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 2013/36/EU and Regulation (EU) No 575/2013 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 EU members 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 (2) years) assets of at least ten million euro (€10 million) (or its equivalent in any other currency at the relevant time);
  - (v) a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two (2) years) at least 50 members and assets under management of at least ten million euro (€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; or
- (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. or Hold 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; or
  - (iii) any Qualifying Institution; or
  - (iv) any other institution in respect of 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 to the 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 and not in relation to other persons; or
  - (v) PPP Co. and not other persons; and/or
- (b) any other Change in Law which comes into effect during the Service Period and which involves PPP Co. having to incur Capital Expenditure.

**“Qualifying Institution”** shall have the same meaning as the term Qualifying Lender is given in the Senior Loan Agreement;

**“Qualifying Refinancing”** means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing;

**“Qualifying Variation”** means either:

- (a) a change in the Works and/or the Services in respect of which either an Authority Notice of Change or a PPP Co. Notice of Change has been served and, in the case of:
    - (i) an Authority Notice of Change, the Authority has confirmed the Estimate and, where PPP Co. is not funding all or part of the required Capital Expenditure, the Authority has agreed to meet all or the remaining part (as appropriate) of such Capital Expenditure; and
    - (ii) a PPP Co. Notice of Change, the change has been accepted by the Authority; and/or
  - (b) a Qualifying Change in Law,
- and in respect of which any documents or amendments to the Project Documents which are required to give effect to such change in the Works and/or Services or Qualifying Change in Law have become unconditional in all respects;

**“Quality Plans”** means the quality plans for the provision of the Works and Services referred to in Clause 10.2 (Quality Plans);

**“Quotation Date”** means in relation to any period for which an interest rate is to be determined under this Project Agreement, the day that is two (2) TARGET Settlement Days preceding the first (1<sup>st</sup>) day of that period provided that, if for any such period, quotations would originally be given on more than one date, the Quotation Date for that period will be the last of those dates;

**“Ratchet”** has the meaning given to it in Part I (Definitions) of Schedule 15 (Payment Mechanism);

**“Real Base Case Equity IRR”** means the blended rate of return for equity and Junior Debt shown in the Base Case being [ ]<sup>53</sup>%;

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<sup>53</sup> Note to Tenderers: to be inserted before financial close.



**“Real Base Case Project IRR”** means the real pre-Tax internal rate of return of the net operating cashflows (before debt service or equity returns) as shown in the Base Case being [ ]<sup>54</sup>%;

**“Rectifiable PPP Co. Defaults”** has the meaning given to it in Clause 34.4(a) (Rectification);

**“Rectification Costs”** means, for the purposes of any Termination Date that occurs during the Service Period, an 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 34.4 (Rectification);

**“Rectification Period”** has the meaning given to it in Part I (Definitions) of Schedule 15 (Payment Mechanism);

**“Rectification Programme”** has the meaning given to it in Clause 34.4(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 or 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; and/or
- (d) any other arrangement put in place by PPP Co. or another person which has an effect similar to any of (a)-(c) above or which has the effect of limiting PPP Co.’s or any Associated Company’s ability to carry out any of (a)-(c) above;

**“Refinancing Gain”** means an amount equal to the greater of zero and (A-B), where:

- (A) is 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; and
- (B) is 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.

**“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;

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<sup>54</sup> Note to Tenderers: to be inserted before financial close.

**“Reinstatement Plan”** has the meaning given to it in Clause 46.2(c)(i) (Reinstatement);

**“Reinstatement Works”** has the meaning given to it in Clause 46.2(c)(i) (Reinstatement);

**“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 Designer”** means the member of the Professional Team who has responsibility for carrying out the relevant design aspect of a part of parts of the Works;

**“Relevant Event”** means an Authority Change, Qualifying Change in Law, Compensation Event, any event pursuant to Clause 26.5 (Adjustment to Unitary Charge), a Refinancing or other matter as a result of which there may be an adjustment to the Unitary Charge in accordance with Clause 56 (Financial Adjustments);

**“Relevant Incident”** has the meaning given to it in Clause 46.2(c) (Reinstatement);

**“Relevant Payment”** has the meaning given to it in Clause 46.4(f) (Risks that become Uninsurable);

**“Relevant Person”** means a Shareholder and any of its Associated Companies;

**“Relevant Proceeds”** has the meaning given to it in Clause 46.2(c)(ii)(C) (Reinstatement);

**“Relevant Planning Authority”** means the relevant planning authority with responsibility for planning in each area where each Project Facility is situated;

**“Relevant Tax Liability”** means an Actual Liability or Deemed Liability in respect of a Compensation Payment;

**“Relevant Trainee”** means an individual employed by PPP Co. or a PPP Co. Related Party who is employed in carrying out the Works under a registered scheme of apprenticeship or through some other similar national training or educational work placement arrangement accredited within the European Union;

**“Relevant Transfer”** means a relevant transfer for the purposes of the Transfer Regulations or a transfer which the Authority advises PPP Co. is to be treated as if it were a relevant transfer for the purposes of the Transfer Regulations;

**“Relevant Worker”** means an individual employed by PPP Co. or a PPP Co. Related Party who has been registered on a national unemployment register within the European Union (and countries covered by the EEA Agreement) for a continuous period of at least twelve (12) months immediately prior to their employment specifically for the purposes of the Works;

**“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 Sites or the roads servicing the Sites;

- (e) any failure or shortage of power, fuel or transport;
- (f) any blockade or embargo which does not constitute a Force Majeure Event;
- (g) exceptionally adverse weather conditions;
- (h) any Qualifying Change in Law;
- (i) 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**”);
- (j) any delay by a Relevant Authority in completion of any works required under detailed planning permission;
- (k) [the occurrence of an event as described in Clause 13.7(f) (Authority Fit-Out Works)],

unless any of the events listed in paragraphs (a) – (l) inclusive arise, directly or indirectly as a result of any wilful default or wilful act of PPP Co. or any Sub-Contractor;

“**Repair Cost**” means the cost of any repair or replacement needed to ensure that following any incident of damage any Project Facility is returned to the original standard (or equivalent) required in accordance with this Project Agreement;

“**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 32 (Employment Issues);

“**Reporting Deductions**” has the meaning given to it in Part I (Definitions) of Schedule 15 (Payment Mechanism);

“**Representatives**” means the Authority’s Representative and PPP Co. Representative;

“**Request for Information**” shall have the meaning set out in the Freedom of Information Acts or the Environmental Information Regulations as relevant (where the meaning set out for the term “request” shall apply);

“**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 Insurances**” means those insurances set out in Parts 1 (Policies to be taken out by PPP Co. and maintained during the Construction Period) and 2 (Policies to be taken out by PPP Co. and maintained during the Service Period) of Schedule 23 (Required Insurances);

“**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 the 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; and/or
- (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; and/or
- (f) in the reasonable opinion of the Authority is not a suitable shareholder in a company which operates and maintains a Project Facility;

**“Retention Fund Account”** shall have the meaning given to it in Clause 41 (Handback);

**“Re-Transfer Date”** means the date on which all or part of the tasks being carried out under this Project Agreement are transferred to a Replacement PPP Co. resulting in the transfer of the contracts of employment of the Re-Transferring Employees by virtue of the Transfer Regulations;

**“Revenue”** is defined as the projected Unavoidable Fixed Costs and Senior Debt Service Costs of PPP Co.;

**“Review Procedure”** means the procedure set out in Schedule 5 (Review Procedure);

**“Reviewable Design Data”** means the plans, drawings, samples, mock-ups, documents and information relating to the Works listed in Appendix 1 (Reviewable Design Data) to Schedule 5 (Review Procedure);

**“Reviewed 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 as noted” under the Review Procedure;

**“Revised Senior Debt Termination Amount”** means, subject to Clause 40.3 (Changes to Funding Agreements):

- (a) all amounts outstanding at the Termination Date, including interest and (other than in respect of Additional Permitted Borrowing) Default Interest accrued as at that date, from PPP Co. to the Senior Lenders 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 prepayment in respect of Permitted Borrowing or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Project Agreement, 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 or any investment accounts (but excluding the Joint Insurance Account and the Distributions 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 in respect of Permitted Borrowing or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Project Agreement;
- (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 46 (Insurance) and Schedule 23 (Required Insurances);

**“Ruling”** has the meaning given to it in Clause 28.6 (Ruling from the Relevant Taxation Authority);

**“Safety File”** has the meaning given to it in the Construction Regulations;

**“Second Handback Inspection”** has the meaning given to it in Clause 41.6(a);

**“Second Party”** has the meaning given to it in Clause 28.6 (Ruling from the Relevant Taxation Authority);

**“Security Measures”** has the meaning given to it in clause 55.5;

**“Senior Debt”** means the financing provided by the Senior Lenders under the Senior Funding Agreements;

**“Senior Debt Amount”** means [ ]<sup>55</sup>;

**“Senior Debt Rate”** means the non-default interest rate specified in Clause 8.1 of the Commercial Facility 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; and
- (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 (disregarding any changes to such amounts or dates that have not been

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<sup>55</sup> Note to Tenderers: to be inserted before financial close.

approved by the Authority other than changes giving rise to Additional Permitted Borrowing);

**“Senior Funding Agreements”** means [ ]<sup>56</sup> as at the date of this Project Agreement or as amended in accordance with Clause 40.3 (Changes to Funding Agreements);

**“Senior Lenders”** means the providers of senior debt to PPP Co. under the Senior Loan Agreement, being [ ]<sup>57</sup> 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 Credit Agreement being in the Agreed Form, as may be amended from time to time in accordance with the provisions of this Project Agreement;

**“Serious Infringement”** means where this Project Agreement should not have been awarded by the Authority to PPP Co. in view of a serious infringement of the obligations under the Treaties and Directive 2014/24/EU that has been declared by the Court of Justice of the European Union in a procedure under Article 258 TFEU;

**“Services”** means all of the services to be provided by PPP Co. so as to satisfy Schedule 10 (Services Requirements);

**“Services Co.”** means [Insert Services Co. details], a company incorporated under the laws of Ireland with registered number [ ] and having its registered office at [ ] or such replacement as permitted in accordance with the provisions of Clause 51 (Sub-Contracting) of this Project Agreement;

**“Service Commencement Date”** means in respect of each Project Facility the date which occurs on the first (1<sup>st</sup>) Business Day after the issue of the Certificate of Service Availability for that Project Facility;

**“Services Contract”** means the contract to be entered into on or before the Commencement Date between PPP Co. and Services Co. in respect of those elements of the Services relating to facilities management;

**“Services Contract Dispute”** has the meaning given to it in Clause 45.5 (Consideration of Sub-Contractor Disputes);

**“Services Direct Agreement”** means an agreement entered into on or before the Commencement Date between the Authority, PPP Co. and Services Co.;

**“Service Expert”** has the meaning given to it in Clause 45.4(a) (Adjudication);

**“Service Performance Deductions”** has the meaning given to it in Part I of Schedule 15 (Payment Mechanism);

**“Service Period”** means in respect of each Project Facility the period commencing on the Service Commencement Date for that Project Facility and ending on the Expiry Date for that Project Facility or the Termination Date;

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<sup>56</sup> Note to Tenderers: to be inserted before financial close.

<sup>57</sup> Note to Tenderers: to be inserted before financial close.

**“Services Requirements”** means the document setting out the Authority’s requirements relating to the Services set out at Schedule 10 (Services 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;

**“Sites”** means the land on which the Project Facilities are to be located as the same is more particularly described in Schedule 8 (Sites) which does not include any Off-Site Areas;

**“Small Works”** means any change to the Works requested by the Authority after the Service Commencement Date having an individual cost not exceeding five thousand euro (€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 Schedule 3 (Works Requirements) and Schedule 10 (Services Requirements) or materially and adversely affect 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 30.3 and 30.5 (Small Works);

**“Small Works Rates”** has the meaning given to it in Clause 30.4(b) (Small Works);

**“Snagging Items”** means minor defects, deficiencies or omissions of a snagging nature whose remediation cannot reasonably be expected to disrupt the use of the Project Facility, do not prevent the Independent Tester from issuing a Certificate of Service Availability in relation to a Project Facility and the remediation of which, in aggregate, for any Project Facility does not exceed the lesser of either [two hundred (200) man days or seventy five thousand euro (€75,000)]<sup>58</sup>;

**“Snagging Items Completion Certificate”** means the certificate issued by the Independent Tester in accordance with Clause 13.5 (Snagging Items) and in accordance with the terms of the Independent Tester Contract;

**“Snagging List”** means a list to be prepared by the Independent Tester in accordance with Clause 13.5 (Snagging Items) containing Snagging Items;

**“Snagging Programme”** has the meaning given to it in Clause 13.5 (Snagging Items);

**“Social Partners”** has the meaning ascribed to it in the Towards 2016 Ten-Year Framework Social Partnership Agreement 2006 - 2015 and in any social partnership agreement that succeeds it;

**“Staff”** means any current or former employees, directors, officers, independent contractors and/or agents of PPP Co. or any of its Subsidiaries and of any Sub-Contractor engaged in connection with the Project who is obliged to personally provide services to PPP Co. or any Subsidiary;

**“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 or supplier appointed or to be appointed in connection with the carrying out of the Works or the provision of the Services and for the avoidance of doubt includes the Professional Team, the Principal Sub-Contractors, the Key Sub-Contractors and sub-contractors or suppliers of any tier of PPP Co.;

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<sup>58</sup> To be reviewed on a project specific basis.

**“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 goods ordered or Sub-Contracts placed that cannot be cancelled without such Losses being incurred;
  - (ii) any expenditure incurred in anticipation of the provision of services 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;
- (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;
- (c) PPP Co. and the relevant Sub-Contractor has each used its reasonable endeavours to mitigate the Losses; and
- (d) save where the breach is a direct consequence of termination of this Project Agreement, the Losses have not arisen as a result of the breach of this Project Agreement or any Sub-Contract by PPP Co. or any Sub-Contractor relating to the Project;

**“Submitted Item”** has the meaning given to it in paragraph 1 of Schedule 5 (Review Procedure);

**“Subsidiary”** has the meaning given to it in Section 7 of the Companies Acts and **“Subsidiaries”** will be interpreted accordingly. 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;

**“Substantial Modification”** means a modification to this Project Agreement in respect of which the Authority would have been required pursuant to Regulation 72(8) of the Public Contracts Regulations to conduct a new procurement procedure;

**“Successful Tenderer”** has the meaning given to it in Clause 26.5 (Adjustments to Unitary Charge);

**“Suitable Substitute Contractor”** means a person approved by the Authority (such approval not to be unreasonably withheld or delayed) as:

- (a) having the legal capacity, power and authority to become a party to and to perform the obligations of PPP Co. under this Project Agreement; and
- (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of PPP Co. under this Project Agreement;

**“Supply Only Equipment”** means the equipment identified as supply only equipment in Appendix 1 of Schedule 13 (Equipment);



**“Target Settlement Day”** means any day on which the Trans-European Automated Real-Time Gross Express Transfer (“TARGET”) system is operated;

**“Taxable Supply”** means any supply (as defined in the VAT Act) other than an exempt supply;

**“Taxation”** means all forms of tax, duties, imposts, levies or other charge including income tax, corporation tax, capital gains tax, capital acquisitions tax, rates, VAT, customs and other import and export duties, excise duties, stamp 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 **“Tax”**, and **“Taxes”** will be construed accordingly;

**“Taxation Authority”** means any revenue, customs, fiscal or governmental authority competent to impose or collect any Taxation, duty, impost, withholding or levy (or any interest, fine, surcharge or penalty relating thereto);

**“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 of Part 1 (Retendering Procedure) of Schedule 17 (Compensation on Termination);

**“Tender Process Monitor”** means a third party appointed by PPP Co. under paragraph 2(f) of Part 1 of Schedule 17 (Compensation on Termination);

**“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 34 (Termination for PPP Co. Default) to 39 (Termination for Corrupt Gifts and Fraud) (inclusive) and **“Terminate”** and **“Terminating”** shall be construed accordingly;

**“Termination Date”** means any date of early Termination of this Project Agreement in accordance with Clauses 34 (Termination for PPP Co. Default) to 39 (Termination for Corrupt Gifts and Fraud) (inclusive);

**“Termination Date Discount Rate”** means a discount rate expressed as (Nominal Base Case Project IRR + Bond B – Bond A):

where

**“Bond A”** is the nominal yield to maturity on an Irish benchmark government bond or equivalent instrument of the same maturity as the average life of the outstanding Senior Debt Amount as shown in the Financial Model at Financial Close; and

**“Bond B”** is the nominal yield to maturity on an Irish benchmark government bond or equivalent instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model as on the Termination Date;

**“Termination Notice”** means a notice served by the Authority or PPP Co. (as the case may be) pursuant to Clauses 34.4 (Rectification), 35.2 (Termination for Authority Default), 36.2 (Voluntary Termination by the Authority), 37.1 (Force Majeure), 38.2 (Termination for Breach of the Refinancing Provisions) and 39.2 (Termination for Corrupt Gifts and Fraud);

**“Termination Payment”** means a payment on Termination in accordance with the provisions of Clause 34 (Termination for PPP Co. Default), Clause 35 (Termination for Authority Default), Clause 36 (Voluntary Termination by the Authority), Clause 37 (Termination for Force Majeure, Risks Uninsurable and Change in Law), Clause 38 (Termination for Breach of the Refinancing Provisions) and Clause 39 (Termination for Corrupt Gifts and Fraud);

**“Termination Sum”** means any Termination Payment excluding the Adjusted Highest Compliant Tender Price and any Compensation on Termination Payment payable as a result of Termination for Authority Default;

**“Testable Services”** means those Services listed in Schedule 10 (Services Requirements);

**“Tests on Completion”** means those tests set out in Schedule 7 (Tests on Completion) to be carried out before the issue of a Certificate of Service Availability, in accordance with Clause 13 (Commissioning and Completion);

**“Third Party Damage”** means any damage caused to a Building by a User or third party, save to the extent such damage constitutes Authority Damage;

**“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’ on Transfer of Undertakings) Regulations, 2003 (SI No. 131 of 2003);

**“Transferring Employees”** has the meaning given to it in Clause 32.1(a) (Transfer Regulations);

**“Treaties”** means the Treaty on the European Union and the Treaty on the Functioning of the European Union;

**“Unavailability”** has the meaning given to it in Schedule 15 (Payment Mechanism);

**“Unavailability Deductions”** has the meaning given to it in Part I (Definitions) of Schedule 15 (Payment Mechanism);

**“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:

- (c) costs which could have reasonably been mitigated or avoided by PPP Co.;
- (d) payments to PPP Co.’s Associated Companies;
- (e) payments which are not entirely at arm’s length;
- (f) payments to holders of equity in PPP Co., Junior Lenders and any other financing costs other than Senior Debt Service Costs;
- (g) indirect losses suffered or allegedly suffered by any person;

- (h) fines, penalties or damages for unlawful acts, breaches of contract or other legal obligations;
- (i) 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;
- (j) payments to the extent that PPP Co. has available to it:
  - (i) reserves which PPP Co. can draw upon without breaching the Senior Funding Agreements; or
  - (ii) standby or contingent facilities or funds of Senior Debt or equity which PPP Co. is entitled to have available; and/or
- (k) 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:

- (l) 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
- (m) 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 I (Definitions) of Schedule 15 (Payment Mechanism);

**“Unprogrammed Maintenance Work”** will have the meaning given to that term in Clause 18.2(b) (Planned Maintenance Programme);

**“Users”** means the persons who are lawfully entitled to enter and use the Project Facilities including members of the public;

**“Utilities”** means all utilities and services necessary to procure and provide the Project Facility and the Services in accordance with Schedule 3 (Works Requirements), Schedule 10 (Services Requirements), Schedule 26 (Off-Site Works), Schedule 28 (PPP Co. Proposals) 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;

**“Utilities Provider”** means a provider of water, telecommunications, gas, electricity or sewage disposal;

**“Utilities Services”** means the water, telecommunications, gas, electricity or sewage disposal provided by the relevant Utilities Provider;

**“Variation”** means an Authority Change or a PPP Co. Change, as the case may be, in accordance with Schedule 20 (Variations);

**“VAT Act”** means the Value Added Tax Consolidation Act 2010;

**“VAT”** means value added tax within the meaning of the VAT Act or any Tax similar to or replacing same;

**“VAT Invoice”** means an invoice or other document which PPP Co. is obliged to issue in compliance with Law and which is in the form of the pro-forma invoice set out in Appendix I (Pro Forma Invoice) of Schedule 15 (Payment Mechanism), or such other form as is agreed by the Parties from time to time and, which contains all appropriate information required for it to be a valid invoice or other document for VAT purposes in compliance with Law;

**“VAT Sum”** has the meaning given to it in Clause 28.8 (Obligation to Pay on Receipt of a Ruling);

**“Warning Notice”** has the meaning given to it in Clause 34.2(a) (Persistent Breach);

**“Works”** means all of the works to be undertaken and completed by PPP Co. in order to satisfy Schedule 3 (Works Requirements) including all ancillary, incidental and temporary works and the Off-Site Works;

**“Works Co.”** means [ insert works Co], a company incorporated under the laws of Ireland with registered number [ ] whose registered office is at [ ] or such replacement as permitted in accordance with the provisions of Clause 51 (Sub-Contracting) of this Project Agreement;

**“Works Contract”** means the contract to be entered into between PPP Co. and Works Co. for the carrying out of the Works;

**“Works Contract Dispute”** has the meaning given to it in Clause 45.5 (Consideration of Sub-Contractor Disputes);

**“Works Direct Agreement”** means the agreement entered into between the Authority, Works Co. and PPP Co.;

**“Works Requirements”** means the relevant specifications, standards, procedures and other requirements for the design and construction of the Project Facilities as set out in Schedule 3 (Works Requirements).