



Llywodraeth Cymru
Welsh Government

**Standard Form Education
Design & Build Development
Agreement
(WEP Strategic Partnering
Framework)**

**December 2018
(Engagement Version)**

Standard Form Education D&B Development Agreement, WEP Strategic Partnering Framework Version

Important Notice

1. This is the template agreement for use on education sector design and build projects (the "**Template Education D&B Agreement**") as referred to in and set out in Section 2 of Schedule 7 (*Design and Build Development Agreement*) of the WEP Strategic Partnering Agreement ("**SPA**"). Under the terms of the SPA, the parties are obliged to use this Template Education D&B Agreement in connection with Approved Projects (as such term is defined in the SPA) which are publicly financed design and build projects in the education sector, subject to the amendments described below.
2. The drafting approach follows that of the template 'Project Agreement for Education Sector MIM Projects' (as referred to and set out in Section 1 of Schedule 7 (*MIM Projects*) of the SPA (the "**Template MIM Education PA**")). Please refer to the explanatory note at the start of the Template MIM Education PA for further background to the origins of that document. However, a number of the provisions present in the Template MIM Education PA have necessarily required to be removed, amended and, in some instances, substituted in the Template Education D&B Agreement to reflect the different approach to the funding of the Works and the absence of long-term maintenance obligations. Of particular note are the following design and build specific provisions:
 - (a) Application for Payment, Project Bank Account and Retention drafting in Clause 29 (*Payment*); and
 - (b) Defects drafting in Clause 19 (*Defects*).
3. This Template Education D&B Agreement assumes that:
 - (a) in respect of further education college projects, the relevant "Further Education Corporation" or "Designated Institution" shall be the "Authority" (and a Participant under the SPA);
 - (b) in respect of schools projects, the relevant local authority shall be the "Authority" (and a Participant under the SPA).
4. The Template Education D&B Agreement has been drafted on the basis of a community school project with some alternative drafting and/or drafting notes provided where it is to be used on a further education college project. Amendments may be required where the Template Education D&B Agreement is to be used for different educational facilities such as a voluntary aided school. The Template Education D&B Agreement has been prepared on the basis of a single facility new build project. It is assumed that the works will be completed in two phases, being the 'Main Works' phase (required for the school or college to become operational) and a second 'Post Completion Works' phase (required in order to complete demolition of existing buildings and/or external works/pitches). It is also assumed that the Authority will engage an ICT contractor to fit out the facility with the relevant ICT Assets in a 4 week pre-completion commissioning phase. On the basis that the draft assumes a standard schools approach, the "ICT Handover" provisions may not be appropriate for all types of further education college projects and should be specifically considered by further education institutions and their advisers. Where there are no Post Completion Works, more than one Facility and/ or a different approach to project phasing, project specific tailoring will

be required. There is no standard form of Authority's Construction Requirements but there is an expectation that these will align with the Authority's Construction Requirements in the Template MIM Education PA, where appropriate. Similarly, the contents of other technical schedules such as the Outline Commissioning Programme and Equipment schedule will require to be developed on a project specific basis, aligned to the extent appropriate with the Template MIM Education PA.

5. Whilst drafting and guidance has been included in the footnotes of this Template Education D&B Agreement, Authorities should note:

- (a) Use of the Template Education D&B Agreement is not a substitute for project specific advice and Authorities must take appropriate legal, financial and technical advice when using them.
- (b) The footnotes in the Template Education D&B Agreement do not represent an exhaustive list of project specific matters that need to be considered by each Authority and its advisers, who must analyse and review them in detail to ensure that they are tailored to the requirements of the specific project and that their terms (and their impact) are clearly understood by the Authority.
- (c) The Template Education D&B Agreement should be used in conjunction with any further guidance issued/adopted by the Welsh Government from time to time. It should also be read in conjunction with the accompanying SPA.
- (d) All changes to the Template Education D&B Agreement require the prior approval of the Welsh Government, acting through the relevant officials. For the avoidance of doubt, this includes approval of developed "technical" schedules, such as the Authority's Construction Requirements and the Outline Commissioning Programme and relates to the process for the procurement of the "WEPCo", as well as stage 1 and stage 2 approvals under the SPA.
- (e) It should be noted derogations to the Template Education D&B Agreement are strongly discouraged and it is expected Welsh Government approval will be strictly limited to changes that represent value for money and are required for project specific reasons, or to reflect a change to Welsh Government guidance or demonstrable changing market circumstances.
- (f) Authorities must propose a detailed timetable indicating when requests for derogations to the Template Education D&B Agreement will be presented to the Welsh Government, and such programme shall then be updated in discussion with the Welsh Government, as required. An Authority/the project team must give Welsh Government no less than one (1) month notice of when it intends to submit a request for derogations and the dates should generally tie in with Commercial Approval Point ("**CAP**") dates. The Welsh Government will endeavour to respond to a request for approval to derogations within two (2) weeks of receipt. In requesting derogations the Authority must provide its amended version of the Template Education D&B Agreement (including the Schedules) and provide explanations for the proposed amendments by way of accompanying commentary. Authorities should liaise with Welsh Government regarding the level of detail required. The Welsh Government will do a comparison of the document submitted against its master version of the Template Education D&B Agreement. It will then decide whether to approve each derogation, or whether to decline to do so, and in each case will inform the Authority and the relevant project team of its decision in writing.

- (g) As noted above, this Template Education D&B Agreement contains optional/required drafting to deal with matters that are specific to the education sector and in some instances specific to schools (only) or colleges (only) and particularly circumstances that are commonly encountered. Use of such drafting must nevertheless be reported to the Welsh Government and approval obtained.

- (h) All footnotes (and optional drafting) should be used/implemented/deleted as appropriate before the document is issued for a specific project. For ease of future contract management, the Welsh Government does not expect to see the Template Education D&B Agreement amended to any individual law firm's house style. Clause and paragraph numbering should be preserved through the use of lettered additions and "not used" deletions. Automatic numbering and hyperlinked cross references should be maintained.

AGREEMENT

between

[AUTHORITY]

and

[D&B CO]

[Project]

[Date]

TABLE OF CONTENTS

Clause	Heading	Page No.
1.	DEFINITIONS AND INTERPRETATION	11
2.	EXECUTION AND DELIVERY OF DOCUMENTS	11
3.	COMMENCEMENT AND DURATION	11
4.	PROJECT DOCUMENTS	11
5.	GENERAL OBLIGATIONS.....	12
6.	GENERAL OBLIGATIONS AND RESPONSIBILITIES OF D&B CO.....	14
7.	AUTHORITY'S DATA.....	15
8.	REPRESENTATIVES	16
9.	NATURE OF LAND INTERESTS	20
10.	THE SITE	22
11.	CONSENTS & PLANNING APPROVAL.....	24
12.	THE DESIGN CONSTRUCTION AND COMMISSIONING PROCESS	28
13.	RIGHT OF ACCESS OF AUTHORITY'S REPRESENTATIVE	31
14.	PROGRAMME AND DATES FOR COMPLETION.....	34
15.	INDEPENDENT TESTER	40
16.	EQUIPMENT	41
17.	PRE-COMPLETION COMMISSIONING AND COMPLETION	42
18.	[POST COMPLETION COMMISSIONING]	47
19.	DEFECTS	49
20.	FOSSILS AND ANTIQUITIES.....	51
21.	QUALITY ASSURANCE	53
22.	COMMUNITY BENEFITS	56
23.	INFORMATION TECHNOLOGY.....	58
24.	DELAY EVENTS	59
25.	RELIEF EVENTS	63
26.	FORCE MAJEURE	65
27.	CHANGES IN LAW	68
28.	VARIATION PROCEDURE.....	69
29.	PAYMENT	70
30.	VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION SCHEME.....	82
31.	RECORDS AND OPEN BOOK ACCOUNTING	86
32.	AUTHORITY EVENTS OF DEFAULT	87
33.	D&B CO EVENT OF DEFAULT	88
34.	TERMINATION RESULTING FROM FORCE MAJEURE	92
35.	NOT USED.....	93
36.	CORRUPT GIFTS AND PAYMENTS	93

TABLE OF CONTENTS

Clause	Heading	Page No.
37.	CONSEQUENCES OF TERMINATION.....	95
38.	INDEMNITIES	100
39.	TAX ON INDEMNITY PAYMENTS	104
40.	WARRANTIES	104
41.	INSURANCE	106
42.	EXCLUSIONS AND LIMITATIONS ON LIABILITY.....	114
43.	INTELLECTUAL PROPERTY	117
44.	DISPUTE RESOLUTION PROCEDURE	118
45.	SUB-CONTRACTING AND ASSIGNMENT.....	119
46.	MITIGATION	122
47.	DATA PROTECTION	122
48.	CONFIDENTIALITY	123
49.	FREEDOM OF INFORMATION.....	126
50.	INFORMATION AND AUDIT ACCESS.....	129
51.	NOTICES	130
52.	NO WAIVER.....	132
53.	NO AGENCY.....	132
54.	ENTIRE AGREEMENT	132
55.	THIRD PARTY RIGHTS.....	133
56.	SEVERABILITY.....	133
57.	CONFLICTS OF AGREEMENTS	133
58.	COSTS AND EXPENSES.....	133
59.	AMENDMENTS.....	133
60.	COUNTERPARTS	134
61.	FURTHER ASSURANCE.....	134
62.	GOVERNING LAW AND JURISDICTION	134
	SCHEDULES	135
	SCHEDULE 1 DEFINITIONS AND INTERPRETATION	135
	Section 1 Definitions	135
	Section 2 Interpretation.....	163
	SCHEDULE 2 COMPLETION DOCUMENTS	166
	Section 1 Documents to be Delivered by D&B Co.....	166
	Section 2 Documents to be Delivered by the Authority	168
	SCHEDULE 3 KEY PERSONNEL	169
	SCHEDULE 4 LAND MATTERS.....	170
	Section 1 Title Conditions	170

TABLE OF CONTENTS

Clause	Heading	Page No.
	Reserved Rights.....	171
	Ancillary Rights	172
	SCHEDULE 5 CONSTRUCTION MATTERS	175
	Section 1 Planning/Consents	175
	Section 2 Safety During Construction	176
	Section 3 Authority's Construction Requirements.....	178
	Section 4 D&B Co's Proposals.....	179
	Section 5 Reviewable Design Data.....	180
	Section 6 [AREA Data Sheets]	181
	Section 7 Thermal and Energy Efficiency Testing Procedure	182
	Section 8 Quality Plans (Design and Construction).....	183
	Section 9 BIM Protocol.....	184
	SCHEDULE 6 THE PROGRAMME	185
	SCHEDULE 7 REVIEW PROCEDURE	187
	SCHEDULE 8 COLLATERAL AGREEMENTS	197
	Section 1 Contractor's Collateral Agreement.....	198
	Section 2 KEY SUB-Contractor Collateral agreement.....	219
	SCHEDULE 9 INDEPENDENT TESTER CONTRACT	225
	APPENDIX 1 SCOPE OF SERVICES - INDEPENDENT TESTER CONTRACT	239
	APPENDIX 2	244
	SECTION 1 SCHEDULE OF DRAWDOWN FEES.....	245
	SECTION 2 SCHEDULE OF DAILY RATES	246
	APPENDIX 3 KEY PERSONNEL	247
	SCHEDULE 10 OUTLINE COMMISSIONING PROGRAMME.....	248
	APPENDIX A COMMISSIONING RESPONSIBILITIES	249
	APPENDIX B COMPLETION CRITERIA.....	250
	SCHEDULE 11 EQUIPMENT	251
	SCHEDULE 12 INSURANCE REQUIREMENTS	252
	Section 1 Policies to be taken out by D&B Co and maintained FROM commencement of the works and to be maintained for the periods specified in this Schedule 12	252
	Section 2 Policies to be taken out by the Authority and maintained prior to commencement of the works and to be maintained for the periods specified in this schedule 12	257
	Section 3 Endorsements.....	260
	Section 4 Broker's Letter of Undertaking	264
	SCHEDULE 13 VARIATION PROCEDURE	268
	Section 1 Interpretation	268
	Section 2 variations	269

TABLE OF CONTENTS

Clause	Heading	Page No.
	Section 3 Payment in respect of variations.....	275
SCHEDULE 14	RECORD PROVISIONS	276
	Section 1 General Requirements.....	276
	Section 2 Records to be Kept	278
SCHEDULE 15	DISPUTE RESOLUTION PROCEDURE	280
SCHEDULE 16	CERTIFICATES	286
SCHEDULE 17	COMMERCIALY SENSITIVE INFORMATION	294
	Section 1	294
	Section 2	294
SCHEDULE 18	DEVELOPMENT AMOUNT ANALYSIS	295
SCHEDULE 19	PROJECT BANK ACCOUNT	296
	Section 1 Deed of Trust	296
	Section 2 Application Schedule	297
SCHEDULE 20	COMMUNITY BENEFITS.....	298
SCHEDULE 21	JOINT OPERATING PROTOCOL.....	299
	Section 1 General	299
	Section 2 Construction Phase Access Protocol.....	301
	Section 3 Access to Work Protocol.....	306
SCHEDULE 22	LIAISON PROCEDURE	308
SCHEDULE 23	PLANNING RESPONSIBILITIES MATRIX	309

THIS AGREEMENT is made on the _____ day of _____

BETWEEN:

- (1) [♦] (the "**Authority**"); and
- (2) [♦] (registered under number [♦]) whose registered office is [♦] ("**D&B Co**¹").

RECITALS:

- (A) The Authority wishes to procure the design and construction of [♦]² (the "**Project**");
- (B) The Authority and WEPCo are parties to a strategic partnering agreement dated [♦] which establishes a long-term strategic partnering relationship within Wales between the Authority and inter alios, WEPCo ("**Strategic Partnering Agreement** or **SPA**");
- (C) Pursuant to the Strategic Partnering Agreement, the Authority issued a new project request in respect of the Project to which WEPCo submitted its stage 1 submission and stage 2 submission, as required by the approval process for new projects detailed therein;
- (D) Following approval by the Authority of WEPCo's stage 2 submission, the Authority has appointed D&B Co to design and build [♦]³;
- (E) The Authority, D&B Co and the Contractor wish to adopt a mechanism which allows for payments in connection with the Project to be made to D&B Co, the Contractor and Sub-Contractors (other than the Consultants) through the operation of a Project Bank Account; and
- (F) The Project has been approved by the [Cabinet Secretary for Finance and Local Government [and] the Cabinet Secretary for Education] [and the Minister for Welsh Language and Lifelong Learning⁴], on behalf of the Welsh Ministers.

¹ Adjust to reflect the identity of the Project Service Provider (as defined under the SPA). Consideration will be required to whether D&B Co is to be WEPCo or a WEPCo subsidiary.

² Insert description of project i.e. name and location of the School/College.

³ Insert name of Facilities.

⁴ Applicable in the case of further education college projects.

NOW IT IS HEREBY AGREED as follows:

PART 1: GENERAL

1. DEFINITIONS AND INTERPRETATION

This Agreement shall be interpreted according to the provisions of Schedule 1 (*Definitions and Interpretation*).

2. EXECUTION AND DELIVERY OF DOCUMENTS

On or prior to execution of this Agreement:

- 2.1 D&B Co shall deliver to the Authority the documents referred to in Section 1 (*Documents to be Delivered by D&B Co*) of Schedule 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by the Authority by written notice to D&B Co); and
- 2.2 the Authority shall deliver to D&B Co the documents referred to in Section 2 (*Documents to be Delivered by the Authority*) of Schedule 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by D&B Co by written notice to the Authority).

3. COMMENCEMENT AND DURATION

This Agreement, and the rights and obligations of the parties, shall commence on the date of execution of this Agreement and, without prejudice to Clause 37.5 (*Continuing Obligations*), shall terminate automatically on the Termination Date.

4. PROJECT DOCUMENTS

Documents

- 4.1 D&B Co shall perform its obligations under, and observe all of the provisions of, the Project Documents to which it is a party and shall not:
 - 4.1.1 terminate or agree to the termination of all or part of any Project Document;
 - 4.1.2 make or agree to any material variation to, or extension or renewal of any Project Document;
 - 4.1.3 in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others

in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Project Document; or

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

unless the proposed course of action (and any relevant documentation) has been submitted to the Authority's Representative for review under Schedule 7 (*Review Procedure*) and either:

- (a) there has been no objection in accordance with paragraph 3 of Schedule 7 (*Review Procedure*) within twenty (20) Business Days of receipt by the Authority's Representative of the submission of the proposed course of action (and any relevant documentation), or such shorter period as may be agreed by the parties; or
- (b) D&B Co is acting in accordance with the comments of the Authority as provided in paragraph 4.2 of Schedule 7 (*Review Procedure*);

and, in the circumstances specified in Clause 4.1.1, D&B Co has complied with Clause 45 (*Sub-Contracting and Assignment*).

Delivery

- 4.2 Without prejudice to the provisions of this Clause 4 (*Project Documents*), if at any time an amendment is made to any Project Document, or D&B Co enters into a new Project Document (or any agreement which affects the interpretation or application of any Project Document), D&B Co shall deliver to the Authority a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation, certified as a true copy by an officer of D&B Co.

5. GENERAL OBLIGATIONS

Scope

- 5.1 Subject to and in accordance with the provisions of this Agreement, D&B Co shall perform its duties under this Agreement at its own cost and risk without recourse to the Authority except as otherwise expressly provided in this Agreement.

General Standards

- 5.2 D&B Co shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed:
- 5.2.1 in compliance with all Law and Consents (including without limitation the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents;⁵
 - 5.2.2 in a manner that is not likely to be injurious to health or to cause damage to property;
 - 5.2.3 in a manner consistent with the Authority discharging its statutory duties and other functions undertaken by it as the same may be notified to D&B Co from time to time; and
 - 5.2.4 insofar as not in conflict with an express obligation of D&B Co under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on D&B Co under this Agreement, in accordance with Good Industry Practice.

In the event that any ambiguity, uncertainty, dispute or discrepancy arises in the nature and scope of D&B Co's obligations under this Clause 5.2 (*General Standards*), the provisions of this Clause 5.2 (*General Standards*) will be given meaning and have effect in descending order of precedence set out in this Clause 5.2 (*General Standards*).

Authority's Undertaking

- 5.3 [The Authority undertakes to D&B Co that it shall:
- 5.3.1 not wilfully impede D&B Co in the performance of its obligations under this Agreement (having regard always to the interactive nature of the activities of the Authority and/or Authority Parties and of D&B Co and to the Authority's use of the Facilities to provide the relevant Authority Services and any other operations or activities carried out by the Authority and/or Authority Parties on or at the Site for the purposes contemplated by this Agreement and any other of the Authority's statutory functions),

provided that, to avoid doubt, nothing in this Clause 5.3 (*Authority's Undertaking*) shall in any way fetter the discretion of the Authority in fulfilling its statutory functions.]

⁵ Refer to guidance in footnote at Clause 11.3.

Notification of Terms and Examination Periods

- 5.4 The Terms for the [first] Academic Year are [◆].
- 5.5 No later than [31st December] in each year prior to [the later to occur of] the Actual Completion Date [and the Actual Post Completion Works Date], the Authority must notify D&B Co of the dates for Terms (including any half-term holidays) in the period [1st September] to [31st August] following that notice.
- 5.6 The Examination Periods for the current [and subsequent]⁶ Academic Year[s] following the date of this Agreement have been notified by the Authority to D&B Co.
- 5.7 Where such dates have not already been notified pursuant to Clause 5.6 (*Notification of Terms and Examination Periods*), then no later than [31 August] in each Academic Year prior to [the later to occur of] the Actual Completion Date [and the Actual Post Completion Works Date], the Authority shall notify D&B Co of the dates of the Examination Periods for the next Academic Year.

Co-operation

- 5.8 Each party agrees to cooperate, at its own expense, with the other party in the fulfilment of the purposes and intent of this Agreement. To avoid doubt, neither party shall be under any obligation to perform any of the other's obligations under this Agreement.

6. GENERAL OBLIGATIONS AND RESPONSIBILITIES OF D&B CO

[Other Business

- 6.1 D&B Co shall not engage in any business or activity other than the business or activities related to, and conducted for, the purpose of the Project Operations]⁷.

D&B Co Parties

- 6.2 Subject to the provision of Clause 25.1.6, D&B Co shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any D&B Co Party. D&B Co shall, as between itself and the Authority, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all D&B Co Parties. All references in this Agreement to any act, default, omission, breach or negligence of D&B Co shall be construed accordingly to include any such act, default, omission, breach or negligence of a D&B Co Party.

⁶ Depending on when in the Academic Year the date of execution falls.

⁷ This provision will not be appropriate where the Project Operations are to be delivered by WEPCo.

Safety

- 6.3 D&B Co shall, in carrying out the Project Operations, have full regard for the safety of all persons on the Site (whether lawfully or not) and keep the Site, the Works and the Facilities in an orderly state, appropriate in accordance with Good Industry Practice, to avoid danger to such persons.

Authority Policies

- 6.4 D&B Co shall, and shall procure that all D&B Co Parties shall, comply at all times with the Authority Policies.
- 6.5 The Authority shall notify D&B Co of any proposed change to the Authority Policies as soon as practicable (and, in any event, prior to such change taking effect) and consult with D&B Co. Subject to Clause 6.6 such change shall take effect as an Authority Works Variation Enquiry in accordance with Schedule 13 (*Variations*).
- 6.6 The Authority may, at its sole option, notify D&B Co that D&B Co shall not be obliged to comply with any change to any Authority Policy and that D&B Co should continue to comply with the relevant Authority Policy prior to any change in which case such change shall not take effect as a Variation in accordance with Schedule 13 (*Variations*).

7. AUTHORITY'S DATA

No Liability

- 7.1 [Subject to Clause 40 (*Warranties*),]⁸ the Authority shall not be liable to D&B Co for and D&B Co shall not seek to recover from the Authority (or from any Authority Party) any damages, losses, costs, liabilities or expenses which may arise (whether in contract, tort or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, D&B Co, the Independent Tester or any D&B Co Party.

No Warranty

- 7.2 [Subject to Clause 40 (*Warranties*),] the Authority gives no warranty or undertaking of whatever nature in respect of the Disclosed Data and, specifically (but without limitation), the Authority does not warrant that the Disclosed Data represents all of the information in its possession or power (either during the conduct of the tender process for the Project or at the time of execution of this Agreement) relevant or material to or in connection with the Project or the obligations of D&B Co under this Agreement or under any of the Project Documents. In addition, without prejudice to the application of [Clause 40 (*Warranties*),] Clause 24.10.1 (*Compensation*), and/or Clause 24.3.2 (*Delay Events*) to the extent that such

⁸ Any warranties to be given by the Authority must be justified on a project specific basis. See further comment at Clause 40. The drafting in square brackets should be deleted where there are no warranties.

provisions may apply in respect of any breach on the part of the Authority of Clauses 9.1 (*Access During Construction*) or 9.2 (*Access Following Construction*), the Authority shall not be liable to D&B Co in respect of any failure to disclose or make available to D&B Co (whether before, on or after the execution of this Agreement) any information, documents or data, nor any failure to review or to update the Disclosed Data, nor any failure to inform D&B Co (whether before, on or after execution of this Agreement) of any inaccuracy, error, omission, defects or inadequacy in the Disclosed Data.

D&B Co Investigation

7.3 [Without prejudice to its rights and remedies under Clause 40 (*Warranties*),] D&B Co acknowledges and confirms that:

7.3.1 it has conducted its own analysis and review of the Disclosed Data and has, before the execution of this Agreement, satisfied itself as to the accuracy, completeness and fitness for purpose of any such Disclosed Data upon which it places reliance; and

7.3.2 it shall not be entitled to and shall not (and shall procure that no D&B Co Party shall) make any claim against the Authority or any Authority Party whether in contract, tort or otherwise including, without limitation, any claim in damages, for extensions of time or for additional payments under this Agreement on the grounds:

(a) of any misunderstanding or misapprehension in respect of the Disclosed Data; or

(b) that incorrect or insufficient information relating to the Disclosed Data was given to it by any person, whether or not an Authority Party,

nor shall D&B Co be relieved from any obligation imposed on, or undertaken by it, under this Agreement on any such ground.

8. REPRESENTATIVES

Representatives of the Authority

8.1 The Authority's Representative shall be [♦] or such other person appointed pursuant to this Clause. The Authority's Representative shall exercise the functions and powers of the Authority in relation to the Project Operations which are identified in this Agreement as functions or powers to be carried out by the Authority's Representative. The Authority's Representative shall also exercise such other functions and powers of the Authority under this Agreement as may be notified to D&B Co from time to time.

- 8.2 The Authority's Representative shall be entitled at any time, by notice to D&B Co, to authorise any other person to exercise the functions and powers of the Authority delegated to him pursuant to this Clause, either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Authority's Representative and all references to the "**Authority's Representative**" in this Agreement (apart from this Clause) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.
- 8.3 The Authority may by notice to D&B Co change the Authority's Representative. The Authority shall (as far as practicable) consult with D&B Co prior to the appointment of any replacement for the Authority's Representative, taking account of the need for liaison and continuity in respect of the Project. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to D&B Co in the execution of its obligations under this Agreement).
- 8.4 During any period when no Authority's Representative has been appointed (or when the Authority's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Authority shall carry out the functions which would otherwise be performed by the Authority's Representative.
- 8.5 No act or omission of the Authority, the Authority's Representative or any officer, employee or other person engaged by the Authority shall, except as otherwise expressly provided in this Agreement:
- 8.5.1 in any way relieve or absolve D&B Co from, modify, or act as a waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement; or
- 8.5.2 in the absence of an express order or authorisation under Schedule 13 (*Variation Procedure*), constitute or authorise a Variation.
- 8.6 Except as previously notified in writing before such act by the Authority to D&B Co, D&B Co and D&B Co's Representative shall be entitled to treat any act of the Authority's Representative which is authorised by this Agreement as being expressly authorised by the Authority and D&B Co and D&B Co's Representative shall not be required to determine whether an express authority has in fact been given.

Representative of D&B Co

- 8.7 D&B Co's Representative shall be [♦] or such other person appointed pursuant to Clause 8.8 (*Representative of D&B Co*). D&B Co's Representative shall have full authority to act on behalf of D&B Co for all purposes of this Agreement. Except as previously notified in writing before such act by D&B Co to the Authority, the Authority and the Authority's Representative shall be entitled to treat any act of D&B Co's Representative in connection with this Agreement as being expressly authorised by D&B Co and the Authority and the Authority's Representative shall not be required to determine whether any express authority has in fact been given.

- 8.8 D&B Co may by reasonable notice to the Authority change D&B Co's Representative. Where D&B Co wishes to do so it shall by written notice to the Authority propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Authority (not to be unreasonably withheld or delayed).
- 8.9 D&B Co's Key Personnel are identified in Schedule 3 (*Key Personnel*). D&B Co shall, as far as it is within D&B Co's control, ensure that such persons retain their involvement in the Works and, in particular, will not, for the duration of the Works, require or request any of them to be involved in any other project on behalf of D&B Co or any of the Shareholders or its or their Associated Companies if, in the reasonable opinion of the Authority, this would adversely affect the Project. In the event that due to matters outwith D&B Co's control it is necessary for there to be a change in any Key Personnel, D&B Co shall by written notice to the Authority propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Authority (not to be unreasonably withheld or delayed).

[Liaison Procedures

- 8.10 The Authority and D&B Co shall establish and maintain throughout the Construction Phase (or, if earlier, until the Termination Date) a joint Liaison Committee and shall initiate, develop, agree, distribute, implement, control and maintain liaison procedures, all in accordance with the provisions of Schedule 22 (*Liaison Procedure*)).⁹

8.11 [Facility Representative

- 8.11.1 The [head teacher/principal] of the Facility or such other member of staff of a Facility as the [head teacher/principal] may notify in advance to D&B Co from time to time, shall undertake the role of a Facility representative (the "**Facility Representative**"), which Facility Representative shall provide a day to day contact with D&B Co for the routine operation of this Agreement.
- 8.11.2 Unless pursuant to a specific delegation under Clause 8.11.3 or otherwise specifically provided for in terms of this Agreement, the Facility Representative shall have no power or authority to bind the Authority or vary the terms of this Agreement in any way and D&B Co acknowledges that it shall not act on the instructions of or as a consequence of or otherwise rely upon any act or omission of a Facility Representative for the purposes of this Agreement unless under a specific [delegation issued pursuant to Clause 8.11.3 or otherwise specifically provided for in this Agreement].
- 8.11.3 The Authority's Representative may from time to time by notice to D&B Co in writing, delegate any of his powers, duties or responsibilities under

⁹ Liaison procedures may be adopted where this is considered beneficial to a specific project. The role of the Liaison Committee should only be to make recommendations to the parties, which they may accept or reject in their complete discretion. Neither the Liaison Committee itself, nor the members acting in that capacity, should have the authority to vary any of the provisions of the Education D&B Agreement or make any decision that is binding on the parties

this Agreement to a Facility Representative, subject to such terms and conditions, and for such duration as may be specified by the Authority's Representative.]

PART 2: LAND ISSUES

9. NATURE OF LAND INTERESTS¹⁰

Access During Construction¹¹

9.1 From the Commencement Date until the Actual Completion Date [and from the Actual Completion Date until the Actual Post Completion Works Date in respect of the Post Completion Works Areas], or (if earlier) the Termination Date, the Authority shall grant to D&B Co and D&B Co Parties, or procure that D&B Co and the D&B Co Parties are granted:

9.1.1 access to the Site; and

9.1.2 the Ancillary Rights;

in each case subject only to the Reserved Rights, the Title Conditions and the Authority's rights under this Agreement and solely for the purposes of implementing the Works and carrying out D&B Co's Pre-Completion Commissioning.

Access Following Construction

9.2 After the occurrence of the Actual Completion Date [and the Actual Post Completion Works Date in respect of the Post Completion Works Areas] the Authority shall grant to D&B Co and D&B Co Parties, or procure that D&B Co and D&B Co Parties are granted, access to the Facilities subject only to the Reserved Rights, the Title Conditions and the provisions of this Agreement and solely for the purposes of:

9.2.1 carrying out D&B Co's Post-Completion Commissioning during the period permitted therefor and subject to the terms of the Final Commissioning Programme;

9.2.2 remedying Defects pursuant to Clause 19 (*Defects*) during the [relevant] Defects Liability Period and the period of [♦] months specified in Clause 19.2 (*Defects*);

¹⁰ The Authority must arrange for suitable title due diligence to be carried out by its own or external legal advisors prior to or (at the latest) during, stage 2 of the New Project Approval Process under the SPA in order to determine whether any title matters might reasonably be expected to interfere with the carrying out of the Works. Where D&B Co would reasonably be expected to be the party best placed to manage any identified issues, these issues should be disclosed as Reserved Matters or Title Conditions associated with the relevant Site, in Schedule 5 (*Construction Matters*). See further guidance at Schedule 5 (*Construction Matters*) below. The drafting assumes a licence structure. This will need to be kept under review.

¹¹ To be reviewed on a project specific basis. Where a project involves phased construction or post completion works, a phased programme of access may be required.

- 9.2.3 exercising the Ancillary Rights; and
- 9.2.4 addressing any Snagging Items in accordance with the Snagging Programme.

Extent of Rights

- 9.3 The rights referred to at Clauses 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) shall not operate or be deemed to operate as a lease of the Facilities or the Site or any part of the Facilities or the Site and D&B Co shall not have or be entitled to exclusive possession (save to the extent expressly included within the Ancillary Rights) or any estate, right, title or interest in and to the Site or the Facilities except as provided herein and shall occupy the Site as a licensee only.
- 9.4 The rights referred to at Clause 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) are personal to D&B Co and the D&B Co Parties.
- 9.5 D&B Co shall procure that:
 - 9.5.1 all Project Operations carried out at the Site by or on behalf of D&B Co (whether before, during or after the completion of the Works) shall be carried out in a manner which does not breach any of the Title Conditions and/or the Reserved Rights; and
 - 9.5.2 there shall be no action, or omission to act by D&B Co or a D&B Co Party, which shall give rise to a right for any person to obtain title to the Site or any part of it.
- 9.6 Notwithstanding the terms of Clauses 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) or any other rights granted under this Agreement, the Authority shall (if it is the legal owner of the Site), or (if it is not the legal owner of the Site) shall procure that the legal owner of the Site shall, enter into such wayleaves, deeds of easement and grant or other similar agreements with any third party that D&B Co or any D&B Co Party may require to be granted in favour of or by any third party, in order to exercise its rights or perform its obligations under this Agreement. The Authority shall enter into (or, where appropriate, shall procure that the legal owner of the Site shall enter into) any such wayleave, deed of easement and grant or other similar agreement, as soon as reasonably practicable after D&B Co has provided to the Authority all relevant information in connection therewith provided always that D&B Co has obtained at its own cost the prior agreement of the third party in terms acceptable to the Authority (acting reasonably). D&B Co shall reimburse the Authority for all costs and expenses reasonably and properly incurred by the Authority (and/or the legal owner of the Site) in connection with entering into such wayleaves, deeds of easement and grant or other similar agreements at the request of D&B Co.

10. THE SITE¹²

- 10.1 Without prejudice to Clause 19 (*Defects*) the condition of the Site shall[, subject to Clauses 10.3 and 10.4 (*Responsibility for Ground Conditions and Contamination*),] between the Commencement Date and the Actual Completion Date [or, in respects of areas of the Site where Post Completion Works are undertaken, until the Actual Post Completion Works Date,] be the sole responsibility of D&B Co. Accordingly (without prejudice to any other obligation of D&B Co under this Agreement), D&B Co shall be deemed to have:
- 10.1.1 carried out a Ground Physical and Geophysical Investigation and to have inspected and examined the Site and its surroundings and (where applicable) any existing structures or works on, over or under the Site;
 - 10.1.2 satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Site, the load bearing and other relevant properties of the Site, the risk of injury or damage to property affecting the Site, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution of the Works;
 - 10.1.3 satisfied itself as to the extent and adequacy of the Site and of the rights of access to and through the Site granted hereunder and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Site) without prejudice to D&B Co's rights under this Agreement in respect of a breach by the Authority of its obligations under Clause 9.1 (*Access During Construction*) and/or Clause 9.2 (*Access Following Construction*);
 - 10.1.4 satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties; and
 - 10.1.5 satisfied itself as to the conditions, burdens, restrictions and reservations set out in the Title Conditions and the Reserved Rights.

¹² To the extent that it is not practical to investigate areas of the Site (for example, due to Authority occupation of existing premises on the Site which is to be developed in order to construct the Facilities), the drafting at Clauses 10.3 and 10.4 can be included to provide D&B Co with appropriate relief. These Clauses provide that the Authority bears any additional costs arising out of unforeseen conditions in areas which D&B Co cannot investigate and which cannot be reasonably identified by D&B Co. Areas of the Site to which this carve out applies should be clearly identified in this Template Education D&B Agreement.

It may be appropriate, where updated or additional surveys are required by WEPCo or D&B Co (acting in accordance with Good Industry Practice and in good faith during the New Project Approval Process under the SPA) but were not instructed by the Authority or permitted by the Authority to be carried out, that these should be specifically carved out of Clause 10.3.

The risk that an Authority assumes in terms of Clauses 10.3 and 10.4 where relevant (i.e. where there are areas of the Site(s) under existing buildings that are not capable of survey) will include the risk of asbestos. The risk of asbestos on other areas of the Site(s) should be considered on a project specific basis. The Template Education D&B Agreement assumes, and it will ordinarily be expected, that D&B Co takes this risk (including on projects that involve the demolition of existing buildings where D&B Co ought to be in a position, on the basis of its knowledge and expertise, to evaluate the need for asbestos removal and factor this in to its demolition proposals).

- 10.2 To avoid doubt, D&B Co accepts full responsibility for all matters referred to in Clause 10.1 and [subject to Clause 10.3 and Clause 10.4 (*[Responsibility for Ground Conditions and Contamination]*) [and Clause 40 (*Warranties*)],] D&B Co shall:
- 10.2.1 not be entitled to make any claim against the Authority of any nature whatsoever save, if applicable, as expressly provided in Clause 24 (*Delay Events*), on any grounds including (without limitation) the fact that incorrect or insufficient information on any matter relating to the Site was given to it by any person, whether or not the Authority or an Authority Party; and
- 10.2.2 be responsible for, and hold the Authority harmless from, cleaning up and/or otherwise dealing with any Contamination at the Site prior to the Actual Completion Date[, or where there are Post Completion Works, the Actual Post Completion Works Date,] so that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with, at its own cost, any applicable Laws and any Consents, orders, notices or directions of any regulatory body (whether made against the Authority or D&B Co).

[Responsibility for Ground Conditions and Contamination

- 10.3 To the extent that unforeseen ground conditions and/or Contamination exist in any parts of the Site which are under existing buildings as at the Commencement Date and which it is not practical for D&B Co to investigate or survey, D&B Co shall not be responsible for them unless they were discovered by the Ground Physical and Geophysical Investigation and accordingly identified in Section 3 (*Authority's Construction Requirements*) of Schedule 5 (*Construction Matters*) or unless they should reasonably have been discoverable if the Ground Physical and Geophysical Investigation had been properly carried out or unless they would have been identified had D&B Co carried out such additional surveys as it would have been reasonable to expect an experienced contractor to have carried out in the circumstances. The Authority shall be responsible for any ground conditions and/or Contamination for which D&B Co is not responsible by virtue of this Clause 10.3 (*[Responsibility for Ground Conditions and Contamination]*). This Clause 10.3 (*[Responsibility for Ground Conditions and Contamination]*) applies to the following areas: [♦].
- 10.4 Where pursuant to Clause 10.3 (*[Responsibility for Ground Conditions and Contamination]*) the Authority is responsible for any of the matters referred to then the following provisions shall apply:
- 10.4.1 any such matter shall be deemed to be a Compensation Event for the purposes of this Agreement;
- 10.4.2 where any such matter is Contamination the Authority shall further hold D&B Co harmless from cleaning up and otherwise dealing with the Contamination and shall indemnify D&B Co in respect of all Direct Losses incurred by D&B Co resulting from such Contamination.]

- 10.5 Until the Actual Completion Date [or, where there are Post Completion Works, the Actual Post Completion Works Date in respect of Post Completion Works Areas] but without prejudice to Clause 19 (*Defects*), D&B Co shall, in relation to the Utilities required or affected as a result of carrying out the Works:
- 10.5.1 be responsible for determining the location of such Utilities as may be at the Site and for the maintenance of access to such Utilities at the Site;
 - 10.5.2 make and rely upon all necessary investigations and surveys as to such Utilities at the Site;
 - 10.5.3 be responsible and make provision for lawfully diverting, disconnecting or otherwise dealing as may be necessary with any Utilities not within the Site;
 - 10.5.4 pay to all Relevant Authorities or undertakings all costs and expenses incurred in diverting, disconnecting or otherwise carrying out works in respect of such Utilities within the Site; and
 - 10.5.5 otherwise do all that is required in relation to the Utilities required for the purpose of the carrying out of the Works [including but not limited to using all reasonable endeavours to conclude with each Utilities Third Party the terms of the relevant Utilities Agreement, subject to Clause 9.6 (*Extent of Rights*)].
- 10.6 Without prejudice to Clause 19 (*Defects*), following the Actual Completion Date [or, where there are Post Completion Works, the Actual Post Completion Works Date in respect of the Post Completion Works Areas,] D&B Co shall be responsible for the costs of cleaning up and/or otherwise dealing with any Contamination which subsequently occurs on any part(s) of the Site (whether arising from a source on or off the Site) to the extent that such Contamination has been caused by D&B Co or a D&B Co Party either by a breach of D&B Co's obligations under this Agreement or otherwise due to an act or omission in carrying out the Project Operations and shall reimburse the Authority within [♦] Business Days in respect of all Direct Losses resulting from such Contamination.

11. CONSENTS & PLANNING APPROVAL¹³

- 11.1 D&B Co shall be responsible for:
- 11.1.1 obtaining all Consents which may be required for the performance of the Project Operations¹⁴; and

¹³ It is anticipated that Authorities will require WEPCo to deal with Outline Planning under the SPA in most instances. Outline planning will be required before OBC approval (and full planning prior to FBC approval and entry into the D&B Agreement).

¹⁴ Where, on a project specific basis, there are certain Consents which only the Authority can obtain, or Consents which D&B Co can obtain only with input from the Authority, appropriate drafting should be included in this Clause 11 (*Consents & Planning Approval*) and cross referred to in Clause 5.2.1. Acceptance of any such responsibility by the Authority should be narrowly prescribed. A similar approach should be followed where there are legislative requirements in relation to the Facilities which

11.1.2 implementing each Consent within the period of its validity in accordance with its terms¹⁵.

11.2 In the event that:

11.2.1 a Consent that has been granted is subsequently amended, repealed, revoked or otherwise ceases to be in full force and effect in accordance with its terms as a consequence of any action by a Relevant Authority;

11.2.2 affected persons are entitled to claim compensation for the adverse effects of such action under a statutory scheme of compensation; and

11.2.3 D&B Co is not entitled in its own name to claim under that scheme but the Authority is so entitled,

the Authority must use all reasonable endeavours, at the request and at the cost of D&B Co, to claim or to include within its claim such sums as D&B Co acting reasonably requests and shall pay to D&B Co the part of any compensation that it receives under that scheme that relates to the sums claimed at the request of D&B Co.

11.3 Each party shall, at its own cost, comply with its responsibilities for complying with or discharging the conditions attached to the Planning Approval, as determined by reference to the table set out at Schedule 23 (*Planning Responsibilities Matrix*).¹⁶

11.4 ¹⁷[Judicial Proceedings

11.4.1 Either party shall notify the other forthwith upon becoming aware of any Judicial Proceedings.

11.4.2 If in accordance with Clause 11.4.1 either party serves a notice then:

(a) the Authority shall be entitled by notice in writing to D&B Co (the "**Suspension Notice**") to require D&B Co to suspend the Works (or the relevant part thereof) and D&B Co shall forthwith suspend the Works (or the relevant part thereof) upon receipt of the Suspension Notice and such suspension shall subsist

can only be complied with by, or that require the input or co-operation of the Authority as occupier or user of the Facilities or any part of them. Again, acceptance of any such responsibility by the Authority should be narrowly prescribed.

¹⁵ The costs associated with any planning agreements etc should be for the account of D&B Co.

¹⁶ The parties should agree the Planning Responsibilities Matrix before signing the Education D&B Agreement. If the detailed planning permission includes conditions with which the Authority (as owner/occupier of the Facilities) must comply, appropriate drafting should be included at Clause 11.3 and cross referred to in Clause 5.2.1. Authorities should seek advice on the extent and consequences of any such obligations.

¹⁷ This drafting must be used where entry into the D&B Agreement less than six (6) weeks after detailed planning permission is granted. In line with market practice, this drafting places the risk of judicial review of the planning permission within that six (6) week period with the Authority. Thereafter judicial review risk transfers to D&B Co. The risk transferred to the Authority excludes any judicial review or challenge that arises from D&B Co's conduct during or compliance with the planning process.

subject to Clause 11.4.5(a) until such time as (i) such Judicial Proceedings are finally dismissed or withdrawn leaving in place a valid planning permission; or (ii) provided there is no subsisting Judicial Proceedings Action the Authority informs D&B Co that the Works (or the relevant part thereof) should be resumed (whichever is the earlier); and/or

- (b) D&B Co must suspend the Works (or the relevant part thereof) and forthwith give notice of such suspension in writing to the Authority (the "**D&B Co Suspension Notice**") and such suspension shall subsist subject to Clause 11.4.5(b) until such time as (i) such Judicial Proceedings Action is finally overturned leaving in place a valid planning permission; (ii) this Agreement is varied by means of an Authority Works Variation in order to permit D&B Co to lawfully to resume the Works (or the relevant part thereof) and/or perform its obligations under this Agreement; or (iii) the parties otherwise agree in writing that the Works (or the relevant part thereof) should be resumed (whichever is the earlier).

11.4.3 Save for where D&B Co or a D&B Co Party (and for the purposes of this Clause 11.4.3 only "D&B Co or a D&B Co Party" shall exclude an employee or agent of D&B Co or of a D&B Co Party acting in a personal capacity) has brought or caused to be brought on its behalf Judicial Proceedings, any suspension of the Works (or the relevant part thereof) pursuant to Clause 11.4.2(a) or 11.4.2(b) shall be deemed to be a Compensation Event (in respect of the Works pertaining to the relevant part of the Site) from the date of the Suspension Notice or D&B Co Suspension Notice as appropriate (and for the purposes of the provisions of Clause 51 (*Notices*) D&B Co is deemed to have become aware that there will be or is likely to be a delay in the commencement or completion of the Works on the date of receipt of the Suspension Notice or the date of D&B Co Suspension Notice as appropriate).

11.4.4 Where a D&B Co Party (and for the purposes of this Clause 11.4.4 only "D&B Co Party" shall exclude an employee or agent of D&B Co or any D&B Co Party acting in a personal capacity) has brought or caused to be brought on its behalf Judicial Proceedings any suspension of the Works (or the relevant part thereof) pursuant to Clause 11.4.2(a) or 11.4.2(b) shall be deemed to be a Relief Event from the date of the Suspension Notice or D&B Co Suspension Notice as appropriate and the provisions of Clause 25 (*Relief Events*) shall apply but solely for the purpose of entitling D&B Co to apply for relief from any rights of the Authority to terminate this Agreement for a D&B Co Event of Default pursuant to Clauses 33.1.2 (*Long Stop*), 33.1.3 (*Default*) and/or 33.1.4 (*Default*).

11.4.5 If by the date falling [twelve (12)]¹⁸ months after the date of the:

- (a) Suspension Notice, the Works (or the relevant part thereof) are still suspended pursuant to Clause 11.4.2(a); or

¹⁸ The time limit must be realistic and take into account the likely time for the Judicial Proceedings to be heard.

- (b) D&B Co Suspension Notice, the Works (or the relevant part thereof) are still suspended pursuant to Clause 11.4.2(b),

then unless agreed otherwise in writing between the parties, the Authority shall either (i) issue an Authority Works Variation Enquiry to vary the Authority's Construction Requirements to remove those requirements relating to the affected part of the Facility to which the Judicial Proceedings relate; or (ii) serve notice of termination under Clause 32 (*Authority Events of Default*) of this Agreement.]

PART 3: DESIGN AND CONSTRUCTION

12. THE DESIGN CONSTRUCTION AND COMMISSIONING PROCESS

Overall Responsibility

- 12.1 D&B Co shall carry out the Works:
 - 12.1.1 so as to procure satisfaction of the Authority's Construction Requirements;
 - 12.1.2 in accordance with D&B Co's Proposals;
 - 12.1.3 in accordance with the Quality Plans; and
 - 12.1.4 in accordance with the terms of this Agreement.
- 12.2 To avoid doubt, the obligations in Clauses 12.1.1, 12.1.2, 12.1.3 and 12.1.4 are independent obligations. In particular:
 - 12.2.1 the fact that D&B Co has complied with D&B Co's Proposals and/or the Quality Plans shall not be a defence to an allegation that D&B Co has not satisfied the Authority's Construction Requirements; and
 - 12.2.2 the fact that D&B Co has satisfied the Authority's Construction Requirements shall not be a defence to an allegation that D&B Co has failed to comply with D&B Co's Proposals and/or the Quality Plans.

Design Responsibility

- 12.3 D&B Co warrants that it has used, and will continue to use, the degree of skill and care in the design of the Facilities that would reasonably be expected of a competent professional designer experienced in carrying out design activities of a similar nature, scope and complexity to those comprised in the Works.

Corporate Identity and Signage

- 12.4 The parties acknowledge that the Authority may, from time to time during the Construction Phase, be required to procure the erection of hoarding, site boards, plaques and/or other signage in connection with the Project. Accordingly:
- 12.4.1 where requested by the Authority (acting reasonably), D&B Co shall procure the erection and maintenance of such hoarding, site boards, plaques and/or other signage as the Authority may require; and
 - 12.4.2 the size, design, information disclosed, position and materials used in connection with such hoarding, site boards, plaques or other signage shall be approved by the Authority, such approval not to be unreasonably withheld; and
 - 12.4.3 for the purposes of this Clause 12.4 (*Corporate Identity and Signage*), the Authority shall be deemed to be acting reasonably where any proposals made by it and/or any approvals exercised by it conform with the Welsh Language Standards and any further relevant guidance, amendments or supplements issued by the Welsh Government from time to time in connection with bilingual use of the Welsh and English language.

Authority Design Review¹⁹

- 12.5 D&B Co shall develop and finalise the design and specification of the Works and the Authority shall review the Reviewable Design Data in accordance with Schedule 7 (*Review Procedure*) and the provisions of this Clause 12.5 (*Authority Design*):
- 12.5.1 D&B Co shall submit the Reviewable Design Data and the design of any Variations developed in accordance with [the Reviewable Design Data Programme] and the procedure set out in Schedule 13 (*Variation Procedure*) to the Authority's Representative for review under Schedule 7 (*Review Procedure*). D&B Co shall not commence or permit the commencement of construction of the part or parts of the Facilities to which such Reviewable Design Data relates until it has submitted the appropriate Reviewable Design Data and either it is confirmed by the Authority's Representative that D&B Co is entitled to proceed with construction in accordance with paragraph 3.3 of Schedule 7 (*Review Procedure*) or D&B Co is:
 - (a) disputing the status of such Reviewable Design Data pursuant to paragraph 1.3.1 or paragraph 4.3 of Schedule 7 (*Review Procedure*); and

¹⁹ A timetable for submission of RDD will need to be developed by D&B Co and agreed by the Authority. This can be developed along with a process protocol and should tie in with the BIM Protocol.

(b) proceeding at risk pursuant to paragraph 1.3.2 of Schedule 7 (*Review Procedure*).

- 12.5.2 with effect from the date at which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with Schedule 7 (*Review Procedure*), D&B Co is entitled to proceed with construction of the relevant part or parts of the Works (subject to the need to submit any associated Reviewable Design Data to review) in accordance with that Approved RDD Item;
- 12.5.3 D&B Co shall allow the Authority's Representative, at any time, a reasonable opportunity to view any items of Design Data, which shall be made available to the Authority's Representative as soon as practicable following receipt of any written request from the Authority's Representative; and
- 12.5.4 D&B Co shall procure that the Contractor establishes and maintains a computerised design database which D&B Co and the Authority's Representative may access remotely by computer to view drawings comprised within the Design Data (including Reviewable Design Data) and electronically store and/or print copies of such Design Data. In the event of the Authority's Representative being unable to access such design database, D&B Co shall procure that it is made available for inspection by the Authority's Representative, or any other person authorised by the Authority's Representative.

Rectification of D&B Co's Proposals

- 12.6 Without prejudice to Clause 12.1 (*Overall Responsibility*), if it should be found that D&B Co's Proposals do not meet the requirements of the Authority's Construction Requirements, D&B Co shall at its own expense, and in accordance with Clause 12.7 (*Rectification of D&B Co's Proposals*) below, amend D&B Co's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:
- 12.6.1 D&B Co's Proposals shall satisfy the Authority's Construction Requirements; and
- 12.6.2 following the amendment or rectification, the structural, mechanical and electrical performance of the Facilities will be of an equivalent standard of performance to that set out in D&B Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made).
- 12.7 Where Clause 12.6 (*Rectification of D&B Co's Proposals*) applies, D&B Co shall submit its proposal for amending D&B Co's Proposals and rectifying the Works (or any part affected) to the Authority's Representative for review under Schedule 7 (*Review Procedure*) and shall not amend D&B Co's Proposals or commence or allow the commencement of the rectification of the Works (or any part affected) until it is permitted to proceed in accordance with Schedule 7 (*Review Procedure*).

Construction Skills Certification Scheme

- 12.8 D&B Co shall ensure that all persons engaged in carrying out the Works (or part thereof) on the Site are accredited under the Construction Skills Certification Scheme or an equivalent scheme and where D&B Co enters into a sub-contract for the purposes of carrying out the Works, D&B Co shall cause a term to be included in such sub-contract:
- 12.8.1 which requires the Sub-Contractor to ensure that such persons are accredited under the Construction Skills Certification Scheme or an equivalent scheme; and
- 12.8.2 in the same terms as that set out in this Clause 12.8 (*Construction Skills Certification Scheme*) (including for the avoidance of doubt this Clause 12.8.2) subject only to modification to refer to the correct designation of the equivalent party as D&B Co and sub-contractor as the case may be.

Building Information Model²⁰

- 12.9 The Authority and D&B Co shall:
- 12.9.1 comply with their respective obligations set out in the BIM Protocol;
- 12.9.2 have the benefit of any rights granted to them in the BIM Protocol; and
- 12.9.3 have the benefit of any limitations or exclusions of their liability contained in the BIM Protocol.

13. RIGHT OF ACCESS OF AUTHORITY'S REPRESENTATIVE²¹

Access to the Site

- 13.1 D&B Co shall procure that:
- 13.1.1 subject to complying with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety

²⁰ Welsh Government requires the use of Building Information Modelling on all BIM Projects delivered under the SPA. The drafting associated with Building Information Modelling in this Template Education D&B Agreement is subject to a separate consultation paper.

²¹ Authorities are reminded of the duty they ultimately owe to the public to ensure the provision of a safe environment. Authorities should therefore consider what internal resource and/or specialist technical support is needed to perform the role of the 'intelligent client' and carry out the appropriate degree of internal assurance, notwithstanding the services being provided by the Independent Tester. Authorities should discuss their intended approach with the Welsh Government and seek guidance in relation to assurance processes.

plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time, the Authority's Representative (together with any specialist advisers) shall have unrestricted access at all reasonable times during normal working hours to:

- (a) monitor and view the Works at the Site on reasonable prior notice appropriate to the circumstances, provided that the notice procedures in this Clause 13.1.1(a) shall not apply to the right of access for the Authority's Representative and his staff and visitors to the office and other facilities provided at the Site for his use; and
- (b) subject to obtaining the consent of the relevant manufacturer or supplier (which D&B Co agrees to use all reasonable endeavours to obtain), visit any site or workshop where materials, plant or equipment are being manufactured, prepared or stored for use in the Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works;

13.1.2 the Authority's Representative shall have such rights of access to the Site in an emergency as he (acting reasonably) considers suitable in the circumstances;

13.1.3 monthly progress meetings and site meetings are held and that the Authority's Representative and Facility Representative shall have the right to attend such monthly progress meetings and site meetings and to attend such other meetings as the Authority's Representative may reasonably request; and

13.1.4 satisfactory facilities are made available to accommodate the Authority's Representative and his staff or visitors (when accompanied by a representative of the Authority) for the purposes of Clause 13.1.1(a) and (b) (*Access to the Site*), subject to D&B Co and the Contractor's construction obligations not being adversely affected and the Authority reimbursing D&B Co for any reasonable costs or expenses incurred in connection with the accommodation of the Authority under this Clause 13.1 (*Access to the Site*).

Increased Monitoring

13.2 If, following any viewing, visit or inspection made pursuant to Clause 13.1.1, it is discovered that there are Defects in the Works or that D&B Co has failed to comply with the Authority's Construction Requirements or D&B Co's Proposals, the Authority's Representative may (without prejudice to any other right or remedy available to the Authority) by notice to D&B Co increase the level of monitoring of D&B Co until such time as D&B Co shall have demonstrated to the satisfaction of the Authority that it is capable of performing and will perform all its obligations to the Authority under this Agreement. D&B Co shall compensate the Authority for any reasonable additional costs incurred as a result of such increased monitoring.

Right to Open Up

13.3 Subject to Clause 13.4 (*Right to Open Up*), the Authority's Representative shall have the right at any time prior to[:

13.3.1 the Actual Completion Date to request D&B Co to open up and inspect any part or parts of the [Main] Works[; and

13.3.2 the Actual Post Completion Works Date, to request D&B Co to open up and inspect any part or parts of the Post Completion Works]²²

where the Authority's Representative reasonably believes that such part or parts of the [Main] Works [or the Post Completion Works (as appropriate)] is or are defective and D&B Co shall comply with such request.

13.4 Prior to exercising his right pursuant to Clause 13.3 (*Right to Open Up*) above, the Authority's Representative shall notify D&B Co of his intention to exercise such right, setting out detailed reasons.

13.5 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3 (*Right to Open Up*), the inspection shows that the relevant part or parts of the Works are not defective then Clause 24.3.4 (Delay Events) shall apply.

13.6 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3 (*Right to Open Up*), the inspection shows that the relevant part or parts of the Works is or are defective, D&B Co shall rectify and make good such Defect(s) and any consequence of such rectification and/or making good Defect(s) shall be carried out by D&B Co at no cost to the Authority and D&B Co shall not be entitled to any extension of time in relation to such rectification and making good of the Works.

13.7 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3 (*Right to Open Up*), the Authority's Representative is of the opinion that the inspection shows that the relevant part or parts of the Works is or are defective and D&B Co does not agree with such opinion, the matter shall be determined in accordance with Schedule 15 (*Dispute Resolution Procedure*).

13.8 Without prejudice to the rights of the Authority's Representative pursuant to this Clause 13 (*Right of Access of Authority's Representative*) the parties acknowledge that the exercise of such rights shall not in any way affect the obligations of D&B Co under this Agreement save as expressly set out in this Clause 13 (*Right of Access of Authority's Representative*).

Safety during Construction

²² An Authority should decide whether to require a right to open up in respect of Post Completion Works (if relevant to the Project depending on the nature of those Works).

- 13.9 The provisions of Section 2 (*Safety During Construction*) of Schedule 5 (*Construction Matters*) shall apply to matters of safety.

14. PROGRAMME AND DATES FOR COMPLETION

Dates for Completion

- 14.1 D&B Co shall:
- 14.1.1 [satisfy the ICT Handover Requirements by the ICT Handover Date; and]
 - 14.1.2 complete the [Main] Works by the Completion Date [; and]
 - 14.1.3 [complete the Post Completion Works and satisfy the Post Completion Works Requirements by the Post Completion Works Date.]

Without prejudice to [Clause 14.9 (*Provision of Temporary Accommodation*)], [Clause 14.10 (*Unavailability of Existing Facilities*)], [Clause 14.11 (*Post Completion Works Phase*)], Clause 33 (*D&B Co Event of Default*) and Clause 37 (*Consequences of Termination*), the Authority shall not be entitled to claim [liquidated or] general damages in respect of any delay which elapses between the ICT Handover Date and the corresponding Actual ICT Handover Date[, or] the Completion Date and the Actual Completion Date [or the Post Completion Works Date and Actual Post Completion Works Date].

- 14.2 [The Certificate of Practical Completion shall not be issued any less than [twenty (20)] Business Days after the issue of the ICT Handover Acceptance Certificate.]²³

The Programme

- 14.3 Any Programme submitted in accordance with the provisions set out below shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail so as to enable the Authority's Representative to monitor the progress including all commissioning activities and likely future progress of the Works.
- 14.4 The initial Programme is set out at Schedule 6 (*The Programme*). Any change to the Programme shall only be made in accordance with this Clause 14 (*Programme and Dates for Completion*) and Schedule 7 (*Review Procedure*). D&B Co shall promptly submit to the Authority's Representative a copy of any version of the Programme varied in accordance with this Clause 14 (*Programme and Dates for Completion*) and Schedule 7 (*Review Procedure*).
- 14.5 If it appears to the Authority's Representative at any time that the actual progress of the Works has significantly fallen behind the Programme, then the Authority's Representative shall be entitled to require D&B Co to submit to the Authority's

²³ To be reviewed in the context of college commissioning needs.

Representative a report identifying the reasons for the delay and, unless the event causing the delay is still subsisting and it is not possible to predict with any certainty when the delay might come to an end, require D&B Co (at the Authority's option):

- 14.5.1 to produce and submit to the Authority's Representative in accordance with Schedule 7 (*Review Procedure*) a revised Programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or
- 14.5.2 to produce and submit to the Authority's Representative in accordance with Schedule 7 (*Review Procedure*) a revised Programme showing the steps which are to be taken to eliminate or reduce the delay.

[Early Completion²⁴

- 14.6 Notwithstanding that the [Main] Works [or Post Completion Works] may have been completed in accordance with this Agreement[:
 - 14.6.1 the Actual Completion Date may only occur on a date on or (subject to Clause 14.8 (*Handover Dates*)) after the Completion Date[; and
 - 14.6.2 the Actual Post Completion Works Date may only occur on a date on or after the Post Completion Works Date],

[unless the Authority, in its absolute discretion, agrees otherwise in writing].]

- 14.7 D&B Co shall notify the Authority's Representative if at any time the actual progress of the Works is significantly ahead of the Programme such that D&B Co anticipates that the Actual Completion Date [or Post Completion Works Date, as appropriate] could occur earlier than the Completion Date [or Post Completion Works Date, as appropriate] in which case the Authority's Representative shall be entitled to require D&B Co to produce and submit to the Authority's Representative a revised Programme showing the manner and the periods in which the relevant Works will be carried out and what the revised date for completion would be to enable:
 - 14.7.1 the Authority to consider (at its absolute discretion) whether to agree an earlier date for completion if requested by D&B Co to do so; and

²⁴ Provision for notification of early completion has been included to restrict early completion but enable the parties (at their discretion) to consider early occupation by the Authority of the Facilities. The need for any restriction at all (in a D&B context) should be considered on a project specific basis in light of ICT Handover and decant activities. Where this Clause is adopted, the consequential amendments required as a result of agreeing to early completion during the construction period (e.g. in relation to commissioning, completion criteria, equipment procurement, scheduled payment profile etc) would have to be considered and agreed at the time and Authorities will be required to seek Welsh Government approval prior to agreeing to early completion. If the Authority is not willing to accept early completion of the Facilities under any circumstances, the final line of this Clause may be deleted. However, an Authority should be mindful that there may be circumstances where these provisions are useful e.g. where a Delay Event has impacted upon the Completion Date and D&B Co has subsequently made up time in its Programme.

- 14.7.2 the parties to consider what modifications (if any) will be required to the Agreement in order to accommodate such earlier date for completion [if agreed to by the Authority pursuant to Clause 14.6 (*Early Completion*).]

[Handover Dates

- 14.8 [Subject to Clause 14.6 (*Early Completion*),] the Actual ICT Handover Date shall be the date on which the ICT Handover Acceptance Certificate is issued, provided that if:
- 14.8.1 the ICT Handover Acceptance Certificate is not issued by the ICT Handover Date, it shall not thereafter be issued until the [twenty-fifth (25th)] Business Day before the first day of the half term (other than the summer half term) or Term commencing after the ICT Handover Date, and, if not issued by that date, it shall not thereafter be issued until the [twenty-fifth (25th)] Business Day before any subsequent start of half term (other than summer half term) or Term; and
- 14.8.2 a Certificate of Practical Completion is not issued by the Completion Date, it shall not thereafter be issued until the [fifth (5th)] Business Day before the first day of the half term (other than the summer half term) or Term commencing after the Completion Date and, if not issued by that date it shall not thereafter be issued until the [fifth (5th)] Business Day before any subsequent start of half term (other than summer half term) or Term.]²⁵

[Provision of Temporary Accommodation²⁶

- 14.9 If for any reason a Certificate of Practical Completion [in respect of the Main Works] is not issued by the Completion Date then:
- 14.9.1 from the Completion Date until:
- (a) the Actual Completion Date; or
 - (b) if earlier, the Termination Date; or
 - (c) the date on which the Actual Completion Date would otherwise have occurred if a Compensation Event occurs following the Completion Date and this delays the achievement of the Certificate of Practical Completion,

²⁵ Approach to be reviewed on a project specific basis in the case of colleges.

²⁶ In the event the Certificate of Practical Completion has not been issued by the Completion Date, the Authority may need recourse to either liquidated damages or the provision of temporary accommodation. Drafting has been included above in relation to provision of temporary accommodation in respect of delay to the main facility. The Authority must decide which option is the most appropriate for its project. It will not generally be appropriate to include provision for temporary accommodation where LADs are payable.

other than where Clause 14.9.4(a) applies, D&B Co shall be responsible for ensuring that suitable temporary accommodation is available to the Authority that (i) complies with the Authority's Construction Requirements; and (ii) can be used without interfering with the provision of education to all Students including any increase in Student numbers due to be accommodated at the Facility.

- 14.9.2 Where this Clause 14.9 applies and an Existing Facility is proposed for use as temporary accommodation (with or without additional temporary accommodation within the curtilage of the site of the Existing Facility), D&B Co shall be responsible for and shall procure (at its cost) a survey of the Existing Facility to ascertain the extent to which such accommodation is suitable for temporary use in accordance with Clause 14.9.1.
- 14.9.3 To the extent that D&B Co is seeking to utilise an Existing Facility as temporary accommodation, pursuant to Clause 14.9.1, the Authority shall not be required to accept such temporary accommodation unless and until the survey referred to in Clause 14.9.2 has been carried out and D&B Co has completed all necessary remedial works.
- 14.9.4 If the provision of temporary accommodation in accordance with Clauses 14.9.2 and 14.9.3 is not possible or practical [to accommodate some or all Students of [the Authority]/[the School Entity]] at the option of the Authority, D&B Co shall either:
- (a) reimburse to the Authority, on demand, the proper costs reasonably incurred by the Authority in the provision of alternative accommodation and any additional or alternative ancillary services as may be required to enable that accommodation to be used for the provision of Educational Services, including, if relevant, the cost of providing temporary facilities or accommodation and/or the costs of transportation to and from any facilities or accommodation so provided; or
 - (b) provide at D&B Co's expense equivalent alternative accommodation that meets the requirements of Clause 14.9.1 in a location within one (1) mile of the Facility and provide such additional or alternative ancillary services as may be required to enable that accommodation to be used for the provision of Educational Services.

[Unavailability of Existing Facilities²⁷

- 14.10 If a Disruption Event occurs at an Existing Facility (or part thereof) prior to the Actual Completion Date:

²⁷ Only applicable where Works are being carried out on existing sites.

- 14.10.1 where the Disruption Event arises from a breach by D&B Co of the site conduct requirements set out in [♦] of Section 3 (*Authority's Construction Requirements*) of Schedule 5 (*Construction Matters*) and the Disruption Event will cease upon suspension of the part of the Works which are the subject of that breach, the Authority may require a suspension of that part of the Works. D&B Co shall comply with such request until such time as it can carry out such Works in accordance with this Agreement and shall not be entitled to claim any relief or compensation in respect of any delay to the Works arising in such circumstances; and
- 14.10.2 where the Disruption Event arises from a breach by D&B Co of the site conduct requirements set out in [♦] of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) and the Works are not suspended in accordance with Clause 14.10.1 D&B Co and the Authority shall agree (acting reasonably) as expeditiously as possible the steps to be taken to ensure any unavailable parts of an Existing Facility may be re-provided as soon as practicable. The steps the parties agree to consider are the following (in the agreed order of preference set out below) or any combination of the following as appropriate:
- (a) remediation of the Disruption Event through temporary and/or permanent measures;
 - (b) use of other facilities at the Existing Facility;
 - (c) use of temporary accommodation at the Existing Facility;
 - (d) use of facilities at another [school] / [college] or Authority property;
 - (e) use of temporary accommodation at another [school] / [college] or Authority property; and/or
 - (f) use of commercial facilities (in the case only if specialist facilities cannot be otherwise provided under this Clause).]
- 14.10.3 D&B Co shall be responsible for providing such facilities or accommodation as are agreed appropriate pursuant to Clause 14.10.2 and shall be responsible for all proper costs arising from all administrative arrangements associated with providing such facilities or accommodation, including, if relevant, the cost of providing temporary facilities or accommodation and/or costs of transportation to and from any facilities or accommodation so provided. Whenever D&B Co fails to implement any steps in the manner agreed pursuant to Clause 14.10.2, the Authority may (provided it has first served written notice on D&B Co to that effect) take such steps itself and D&B Co shall reimburse to the Authority the costs incurred by the Authority in so doing, on demand.
- 14.10.4 where the Authority requires suspension of part of the Works pursuant to Clause 14.10.1 and notifies D&B Co that this is because the Works are

interfering with or otherwise disrupting examinations at an Existing Facility during the Examination Period, D&B Co shall immediately cease such part of the Works and/or take or refrain from taking such other steps as are necessary to cease interference with examinations until the end of the Examination Period in question (or such other time is reasonably decided by the Authority [or the relevant School Entity]).]

[Post Completion Works Phase²⁸

14.11 Subject to Clauses 14.12 and 14.13 following issue of a Certificate of Practical Completion, D&B Co shall or shall procure that the Contractor shall carry out the Post Completion Works at the Site so that such Post Completion Works are completed by the Post Completion Works Date provided:

14.11.1 where the Certificate of Practical Completion for the Post Completion Works has not been issued by the Post Completion Works Date, the Authority shall be entitled to levy liquidated and ascertained damages in respect of each calendar week (or part thereof) that elapses after the Post Completion Works Date up to and including the date that a Certificate of Practical Completion for the Post Completion Works is issued, for the following amounts:

For the first calendar week following the Post Completion Works Date (the "First Week")	£[INSERT FIGURE] ²⁹
For each subsequent week (or part thereof) following the First Week	An increase of £[INSERT FIGURE] on all amounts prevailing at the end of the immediately preceding week

and

14.11.2 after the date that falls [♦]³⁰ after the Post Completion Works Date the Authority shall be entitled to employ an alternative contractor to carry out the Post Completion Works and shall be entitled to be reimbursed by D&B Co for all costs properly and reasonably incurred in the carrying out of any such Post Completion Works.

14.12 Where the Authority employs an alternative contractor to carry out any Post Completion Works in accordance with Clause 14.11.2 it shall cease to have the right to levy liquidated damages in accordance with Clause 14.11.1 once a reasonable period of time for completing the relevant Post Completion Works (having regard to the nature and extent of the relevant Post Completion Works outstanding and the programme for carrying out of such Post Completion Works by the Authority's alternative contractor) has expired.

²⁸ Where Post Completion Works are required to demolish Existing Facilities and/or build playing fields for example this drafting should be considered to allow the Authority to recover the costs it would incur in respect of securing use alternative facilities, such as playing fields.

²⁹ Where the Post Completion Works are sports pitches the LADs figure will need to include all costs to be incurred in hiring alternative facilities, transporting pupils to the alternative facilities etc.

³⁰ Insert number of days.

- 14.13 Without prejudice to Clause 19 (*Defects*), Clause 14.11, Clause 14.12, Clause 14.14 and Clause 29 (*Payment*) shall be the Authority's sole remedy in connection with any delays to the completion of the Post Completion Works prior to the Actual Post Completion Works Date.
- 14.14 If a Disruption Event occurs between the Actual Completion Date and the Actual Post Completion Works Date, where a Disruption Event arises from a breach by D&B Co of the site conduct requirements set out in [♦] of Section 3 (Authority's Construction Requirements) of Schedule 5 (Construction Matters) the Authority may by written notice require suspension of that part of the Post Completion Works on the basis that the Post Completion Works are interfering with or otherwise disrupting examinations at the Facility during the Examination Period, D&B Co shall immediately cease such part of the Post Completion Works and/or take or refrain from taking such other steps as are necessary to cease interference with examinations until the end of the Examination Period in question (or such other time as is reasonably decided by the Authority [or the School Entity] and D&B Co shall not be entitled to claim any relief or compensation in respect of any delay to the Post Completion Works arising in such circumstances.)
- 14.15 It is acknowledged and agreed by the Authority and D&B Co that the damages provided for in Clause 14.11 (*Post Completion Works Phase*) are in all respects fair and reasonable and represent a genuine pre estimate of the losses, damages and expenses, arising out of any breach by D&B Co if its obligations under this Agreement to complete the Post Completion Works by the Post Completion Works Date.
- 14.16 In the event that the provisions of Clause 14.12 (*Post Completion Works Phase*) are unenforceable so that the Authority is unable to recover any payment to which the Authority would otherwise have been entitled under Clause 14.12 (*Post Completion Works Phase*) the Authority shall be entitled to claim general damages from D&B Co in respect of the loss and/or damage and/or expense suffered or incurred by the Authority up to, but not exceeding the sum that would have been payable under Clause 14.12 (*Post Completion Works Phase*) had the same been enforceable.

15. INDEPENDENT TESTER

Appointment

- 15.1 The parties have on or prior to the date of this Agreement, in compliance with all Law relating to procurement which is applicable to either party, appointed a suitably qualified and experienced consultant to act as the Independent Tester for the purposes of this Agreement upon the terms of the Independent Tester Contract.

Changes to Terms of Appointment

- 15.2 Neither the Authority nor D&B Co shall without the other's prior written approval (not to be unreasonably withheld or delayed):

- 15.2.1 terminate, repudiate or discharge the Independent Tester Contract or treat the same as having been terminated, repudiated or otherwise discharged;
 - 15.2.2 waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Tester; or
 - 15.2.3 vary the terms of the Independent Tester Contract or the service performed or to be performed by the Independent Tester.
- 15.3 The parties shall comply with and fulfil their respective duties and obligations arising under or in connection with the Independent Tester Contract.

Co-operation

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

Replacement

- 15.5 If the Independent Tester's appointment is terminated otherwise than for full performance, the parties shall liaise and co-operate with each other in order to appoint, in accordance with this Clause 15.5 (*Replacement*), a replacement consultant to act as the Independent Tester as soon as reasonably practicable. The identity of any such replacement shall be as agreed by the parties and the terms of his appointment shall, unless otherwise agreed, be as set out in the Independent Tester Contract.
- 15.6 If the parties fail to agree the identity and/or terms of a replacement Independent Tester in accordance with Clause 15.5 (*Replacement*) within ten (10) Business Days of the original Independent Tester's appointment being terminated then such disagreement shall be referred for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*).

16. EQUIPMENT

The provisions of Schedule 11 (*Equipment*) shall apply in respect of the procurement, installation and commissioning of Equipment.

17. PRE-COMPLETION COMMISSIONING AND COMPLETION³¹

- 17.1 Not less than [six (6)] months before the Completion Date [and the Post Completion Works Date], D&B Co shall provide the Authority with a draft of the Final Commissioning Programme in respect of the Works relative thereto, as jointly developed by the Authority and D&B Co in accordance with the provisions of Clause 17.2 and 17.3 (*Pre-Completion Commissioning and Completion*) and Schedule 10 (*Outline Commissioning Programme*). The Authority shall provide D&B Co with comments on the draft Final Commissioning Programme submitted to it within [fifteen (15)] Business Days. The parties shall, within [fifteen (15)] Business Days of receipt by D&B Co of the Authority's comments agree the terms of the Final Commissioning Programme provided that the Authority may by prior notice to D&B Co change the scope and time of the Authority's Commissioning or the Authority's Post Completion Commissioning and reimburse D&B Co its reasonable costs incurred as a result of such change in scope or time of the Authority's Commissioning. If the parties are unable to agree the Final Commissioning Programme or the change in scope or time of the Authority's Commissioning by [♦], the matter shall be referred for determination in accordance with Schedule 15 (*Dispute Resolution Procedure*).
- 17.2 The Final Commissioning Programme[s] [in respect of the Main Works and the Post Completion Works] shall be in accordance with the [relevant] Outline Commissioning Programme and shall impose no greater or more onerous obligations on the Authority than those set out in the [relevant] Outline Commissioning Programme (unless otherwise agreed by the Authority in its absolute discretion). The Final Commissioning Programme shall then replace the [relevant] Outline Commissioning Programme.
- 17.3 [The] [Each] Final Commissioning Programme shall describe the steps necessary, the party responsible for taking each of such steps and the timing and sequence of each of such steps to ensure insofar as relevant to the applicable Works]:
- 17.3.1 that D&B Co's Pre-Completion Commissioning and the Authority's Commissioning will not delay:
- (a)]the Actual Completion Date occurring by the Completion Date[;
or
- (b) the Actual Post Completion Works Date occurring by the Post Completion Works Date;]

³¹ The Template Education D&B Agreement assumes the Authority and D&B Co will each undertake inspection and commissioning activities both prior to and after completion. Parties need to consider which commissioning activities have to occur before and which after completion (and, in each case, by whom) on a project specific basis. In the case of schools projects, the approach to commissioning that is to be followed is set out in Table A, Appendix A (*Commissioning Responsibilities*) of Schedule 10 (*Outline Commissioning Programme*). The Template Education D&B Agreement envisages that the Final Commissioning Programme(s) will set out all requirements and obligations in relation to the development, nature, principles and performance of the completion tests to be performed to enable certification of completion to take place. Parties need to consider which commissioning activities have to occur before and which after completion (and, in each case, by whom) on a project specific basis on further education college projects. Template drafting has been provided here for Post Completion Works, to be used where relevant. Authorities will need to consider whether further project specific drafting is required, including amendments to accommodate multi-facility projects where relevant.

- 17.3.2 that D&B Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning in respect of the [Main] Works [and D&B Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning in respect of the Post Completion Works] are [each] completed by the relevant Commissioning End Date.
- 17.4 The parties shall procure that the steps that they are responsible for carrying out and completing pursuant to the Final Commissioning Programme include, the activities described in Schedule 10 (*Outline Commissioning Programme*) [and in the case of D&B Co's activities, the activities described at paragraph [♦] of the Authority's Construction Requirements].³²
- 17.5 D&B Co shall notify the Independent Tester and the Authority's Representative of the date when D&B Co (acting reasonably) considers that the Works will achieve the [ICT Handover Requirements,] the [Main] Works Requirements [and the Post Completion Works Requirements] not less than [♦] months prior to such anticipated completion. Such notification shall trigger the completion activities of the Independent Tester under this Clause.
- 17.6 The parties each undertake to co-operate with the Independent Tester to ensure that the Independent Tester is familiar with all necessary aspects of the Project for the purposes of its role as described in this Clause.

Commissioning prior to Completion Date

- 17.7 D&B Co shall:
- 17.7.1 undertake D&B Co's Pre-Completion Commissioning in accordance with the [relevant] Final Commissioning Programme; and
- 17.7.2 permit the Authority to undertake the Authority's Commissioning [including permitting specialist contractors engaged by the Authority to deliver and install equipment] on such dates as agreed between the Authority and D&B Co, in accordance with the [relevant] Final Commissioning Programme,³³

and the Authority shall undertake the Authority's Commissioning in accordance with the [relevant] Final Commissioning Programme and so as not to cause material damage to the Works.

- 17.8 D&B Co shall:

³² The Authority should describe any other core requirements to be complied with in relation to D&B Co's commissioning activities, including in respect of decant of ICT Equipment under the Authority's Construction Requirements.

³³ The Authority should consider what the Authority's commissioning activities, if any, will entail. Parties will need to consider when the Authority's commissioning activities (including, for example, installing of its own equipment) will be carried out.

- 17.8.1 give not less than [♦] Business Days written notice to the Independent Tester, the Facility Representative and the Authority Representative of the commencement of D&B Co's Pre-Completion Commissioning in respect of the [Main] Works Requirements [and in respect of the Post Completion Works Requirements] and shall ensure that the Independent Tester, the Facility Representative, the Authority's Representative [and the ICT Installer] are invited to witness all of, and are provided with all information they may reasonably require in relation to such D&B Co's Pre-Completion Commissioning and that the Independent Tester is invited to comment on D&B Co's Pre-Completion Commissioning; and
- 17.8.2 if so requested, attend the inspection referred to at Clause 17.10 (Pre-Completion Inspection).
- 17.9 D&B Co shall (or shall procure that the Contractor shall), give the Authority access to the Facilities at such times as may be set out in the [relevant] Final Commissioning Programme to enable the Authority and Authority Parties to undertake the Authority's Commissioning in accordance with the such Final Commissioning Programme for the period prior to completion of the [Main] Works [or the Post Completion Works (as applicable)]. When exercising such rights the Authority shall and shall procure the Authority Parties shall comply with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.

Pre-Completion Inspections

- 17.10 D&B Co shall give the Independent Tester, [the Facility Representative] and the Authority's Representative not less than [twenty (20)] Business Days' notice and not more than [thirty (30)] Business Days' notice of the date upon which D&B Co considers that [the ICT Handover Requirements,] [Main] Works Requirements [and Post Completion Works Requirements] will be complete and the relevant tests on completion required to be performed in accordance with the [relevant] Final Commissioning Programme will be carried out. Following receipt of the notice specified in this Clause 17.10 (*Pre-Completion Inspection*) the Authority's Representative, [the Facility Representative], [a representative of the ICT Installer] and the Independent Tester shall be entitled to inspect the relevant Works on the date or dates reasonably specified by D&B Co in accordance with this Clause 17.10 (*Pre-Completion Inspection*), and to attend any of the tests on completion. D&B Co shall, if so requested, accompany the Authority's Representative, the Facility Representative, [the representative of the ICT Installer] and the Independent Tester on any such inspection.

Pre-Completion Matters

- 17.11 The parties shall procure that the Independent Tester, within [five (5)] Business Days of any inspection made pursuant to ClauseClause 17.10 (*Pre-Completion Inspection*), notifies D&B Co and the Authority of any outstanding matters (including, without limitation, the repetition of any of the commissioning tests or tests on completion (as applicable) which are required to be carried out and passed in accordance with the [relevant] Final Commissioning Programme) which are required to be attended to before the [ICT Handover Requirements], [Main]

Works Requirements [and/ or Post Completion Works Requirements] can be considered to be complete. D&B Co shall attend to such matters and shall, if necessary, give the Independent Tester further notices in accordance with Clause Clause 17.10 (*Pre-Completion Inspection*) (as applicable) (but dealing only with matters raised in the notification under this Clause 17.11 (*Pre-Completion Matters*)) so that the procedures in Clause 17.10 (*Pre-Completion Inspection*) (as applicable) and this Clause 17.11 (*Pre-Completion Matters*) are repeated as often as may be necessary to ensure that all outstanding matters in relation to the [ICT Handover Requirements,] [Main] Works Requirements [and/ or Post Completion Works Requirements] are attended to.

Completion Certificate[s]

- 17.12 Pursuant to the terms of the Independent Tester Contract and subject to Clauses 17.14 to 17.18 (*Snagging Items*), the parties shall procure that the Independent Tester shall when he is satisfied that: (i) the [ICT Handover Requirements are satisfied, issue the ICT Handover Acceptance Certificate; (ii) the [Main] Works Requirements are satisfied, issue a Certificate of Practical Completion [in respect of the Main Works]; [(iii) the Post Completion Works Requirements are satisfied, issue a Certificate of Practical Completion in respect of those Post Completion Works]; and (iv) the Snagging Items in respect of the relevant Works have been completed to his satisfaction in accordance with Clauses 17.14 to 17.18 (*Snagging Items*), issue a Snagging Items Completion Certificate, each to that effect, to the Authority and D&B Co.
- 17.13 Without prejudice to Clauses 17.14 and 17.19 (*Snagging Items*), or Clause 19 (*Defects*) (or either party's right to make a claim under the Independent Tester Contract) the issue of the [ICT Handover Acceptance Certificate,] Certificate of Practical Completion [in respect of the Main Works] [and/or Certificate of Practical Completion in respect of the Post Completion Works (as applicable)] shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence, for the purpose of ascertaining the Actual Completion Date [,ICT Handover Date,] [and/or the Actual Post Completion Works Date (as applicable)], that the Works are complete in accordance with the [Main] Works Requirements [ICT Handover Requirements] [and/or Post Completion Works Requirements] [(as the case may be)] on the date stated in the [relevant] Certificate of Practical Completion [or ICT Handover Certificate].

Snagging Items³⁴

- 17.14 [The Independent Tester shall on the same day as the date of issue of the ICT Handover Acceptance Certificate issue to D&B Co and the Authority a list of any relevant Snagging Items (the "**Snagging List**"). Within [five (5)] Business Days after the date of receipt from the Independent Tester of the Snagging List, D&B 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 provided that the Snagging Programme will require that each Snagging Item will be made good within fifteen (15) Business Days after the date of provision of the Snagging Programme or, where it is not reasonably practicable to make good within fifteen (15) Business Days due to the lead times for supplies or materials, or to avoid interference with the ICT Installer, within such time as is

³⁴ Clauses 17.14 to 17.18 may require to be tailored for College projects, where the standard School phasing approach is not adopted.

reasonably practicable (up to a maximum of [three (3) months]). The parties will seek to agree the Snagging Programme or in default of agreement will refer the matter for determination under Clause 44 (*Dispute Resolution Procedure*).]

- 17.15 [The Independent Tester shall on the same day as the date of issue of the Certificate of Practical Completion in relation to the [Main] Works issue an update to the Snagging List prepared pursuant to Clause 17.14 (*Snagging Items*). Within [five (5)] Business Days after the date of receipt from the Independent Tester of that updated Snagging List, D&B Co will provide to the Authority and the Independent Tester an updated Snagging Programme for making good each new or outstanding Snagging Item set out on the Snagging List, provided that the Snagging Programme will require that each Snagging Item included on the original Snagging List will be made good within such period as is provided under the original Snagging Programme and, in the case of new Snagging Items, within [fifteen (15)] Business Days after the date of provision of the updated Snagging Programme or, where it is not reasonably practicable to make good within [fifteen (15)] Business Days due to the lead times for supplies or materials, within such time as is reasonably practicable (up to a maximum of [three (3) months]). The parties will seek to agree the Snagging Programme or in default of agreement will refer the matter for determination under Clause 44 (*Dispute Resolution Procedure*).]
- 17.16 [The Independent Tester shall on the same day as the date of issue of the Certificate of Practical Completion in relation to the Post Completion Works issue a list of any relevant Snagging Items in respect of the Post Completion Works, (the "**PCW Snagging List**"). Within [five (5)] Business Days after the date of receipt from the Independent Tester of that PCW Snagging List, D&B Co will provide to the Authority and the Independent Tester a reasonable programme (the "**PCW Snagging Programme**") for making good each Snagging Item set out on the PCW Snagging List provided that the PCW Snagging Programme will require that each Snagging Item will be made good within [fifteen (15)] Business Days after the date of provision of the PCW Snagging Programme or, where it is not reasonably practicable to make good within [fifteen (15)] Business Days due to the lead times for supplies or materials, within such time as is reasonably practicable (up to a maximum of [three (3) months]). The parties will seek to agree the PCW Snagging Programme or in default of agreement will refer the matter for determination under Clause 44 (*Dispute Resolution Procedure*).]
- 17.17 D&B Co shall, in consultation with the Authority's Representative and in such a manner as to cause as little disruption as reasonably practicable to the Authority's Post Completion Commissioning and the Authority's use of the Facilities [and so as not to interfere with the activities of the ICT Installer to be carried out pursuant to Section 2 (*Construction Phase Access Protocol*) of Schedule 21 (*Joint Operating Protocol*)] and otherwise in accordance with the requirements of Schedule 21 (*Joint Operating Protocol*),] make good each Snagging Item in accordance with the [relevant] Snagging Programme [or PCW Snagging Programme (as applicable),] to the satisfaction of the Independent Tester. Upon satisfactory completion of the [relevant] Snagging List [or PCW Snagging List (as applicable)], the Independent Tester will issue the [relevant] Snagging Items Completion Certificate in accordance with the Independent Tester Contract and Schedule 16 (*Certificates*).
- 17.18 If any Snagging Item has not been rectified within the time periods permitted pursuant to Clause 17.14, Clause 17.15 or Clause 17.16 (*Snagging Items*), as applicable, then the Authority will be entitled to effect such repairs as may be

necessary to rectify the Snagging Item(s) and recover the costs of effecting such repairs from D&B Co as a debt.

- 17.19 The issue of [the ICT Handover Acceptance Certificate and] [the]/[a] Certificate of Practical Completion [in respect of the Main Works or Post Completion Works (as applicable)] shall in no way affect or diminish the obligations of D&B Co under this Agreement including in respect of any Defects.

As-built specification

- 17.20 Prior to issue of [the]/[a] Certificate of Practical Completion [in respect of the Main Works] [and in respect of the Post Completion Works] D&B Co shall provide to the Authority a hard copy and an electronic copy (in accordance with the BIM Protocol) of the "as-built" drawings, "as-built" specification and all ["final issue" construction drawings] relating to the relevant Works, together with a written statement from D&B Co's Representative to the Authority's Representative certifying that all such items are true and accurate.]³⁵
- 17.21 Pursuant to the terms of the Independent Tester Contract, the parties shall procure the Independent Tester shall, when he is satisfied that the WiFi Post-Completion Tests have been passed and the WiFi PC Criteria met, issue a Certificate of WiFi Completion to that effect. The issue of the Certificate of WiFi Completion shall in the absence of manifest error, bad faith or fraud, be conclusive evidence that the WiFi PC Criteria have been satisfied on the date stated in such certificate.³⁶

18. [POST COMPLETION COMMISSIONING]

[Commissioning]

- 18.1 D&B Co and the Authority shall, within:
- 18.1.1][♦] Business Days following the Actual Completion Date]; and
- 18.1.2][♦] Business Days following the Actual Post Completion Works Date,]

respectively undertake and complete D&B Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning, in accordance with the [relevant] Final Commissioning Programme. Both parties shall, at all times, and in particular in the period between the Actual Completion Date and the Actual Commissioning End Date [or the Actual Post Completion Works Date and Actual Commissioning End Date, as relevant,] use reasonable endeavours to assist the other party

³⁵ Documentation to be specified on a project by project basis. Documents should, as a minimum, include "as-built" drawings and "final issue" construction drawings. Authorities should monitor compliance with this important provision, through the relevant completion requirements. Note the drafting assumes use of BIM. Where this is not the case, the Authority should discuss approach with Welsh Government.

³⁶ This would need to be tested shortly after the Actual Completion Date, when the Facility is occupied (and in any event significantly ahead of the end of the relevant Defects Liability Period).

to ensure compliance with the [relevant] Final Commissioning Programme.]

Information

- 18.2 D&B Co shall ensure that the Authority's Representative is provided with all the information he may reasonably require in relation to D&B Co's Post-Completion Commissioning and the Authority shall ensure that D&B Co is provided with all information D&B Co may reasonably require in relation to the Authority's Post Completion Commissioning.
- 18.3 If the Authority's Representative, acting reasonably, makes any comment in relation to the carrying out of D&B Co's Post-Completion Commissioning, such comments shall be taken into account by D&B Co and if D&B Co, acting reasonably, makes any comment in relation to the carrying out of the Authority's Post Completion Commissioning, such comment shall be taken into account by the Authority.
- 18.4 On the completion of D&B Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning [in respect of the Main Works and, in respect of and the Post Completion Works] the Independent Tester shall issue the Commissioning Completion Certificate [in respect of that aspect of the Works].

[Operational Manuals³⁷

- 18.5 D&B Co shall make available on the Site to the Authority's Representative:
- 18.5.1 at least [◆] weeks prior to the anticipated Actual Completion Date [◆] [paper] copies and [electronic copies (in accordance with the BIM Protocol)] of a draft operation and maintenance manual in sufficient detail to allow the Authority to plan for the safe and efficient operation of the Facilities;
- 18.5.2 on or before the Actual Completion Date [◆] [paper] copies [and electronic copies (in accordance with the BIM Protocol)] of a final draft operation and maintenance manual in sufficient detail to allow the Authority to operate and use the Facilities safely and efficiently;
- 18.5.3 within [twenty (20) Business Days]³⁸ following the Actual Completion Date, [◆] [paper] copies [and electronic copies (in accordance with the BIM Protocol)] of the principal operation and maintenance manual;

³⁷To be discussed on a project specific basis, whether/to what extent D&B Co will have a role in the preparation of Operational Manuals.

³⁸Note that drafting for the final operation and maintenance manual in respect of the final Phase of a School/College Facility should tie in with the timescale referred to in Appendix B (Completion Criteria) Schedule 10 (*Dispute Resolution Procedure*).

and including all manufacturers' instructions relating to Equipment installed by D&B Co and [♦].³⁹

- 18.6 D&B Co shall provide to the Authority such information after the Actual Completion Date [and the Actual Post Completion Works Date as relates to any Snagging Items or rectification of Defects relative thereto, as is reasonably necessary to allow for the updating of any of the items listed in Clause 18.5 (*Operational Manuals*).
- 18.7 On termination of this Agreement (howsoever arising) prior to the provision by D&B Co in accordance with Clause 18.5 (*Operational Manuals*) of the items listed therein, D&B Co shall within ten (10) Business Days of such termination provide a copy of any operating and maintenance manual not yet provided (completed as appropriate to the date of termination) to the Authority.]

[Decanting, Decommissioning and Equipment Transfer

- 18.8 The Authority and D&B Co shall, as appropriate, undertake any necessary decanting and decommissioning activities in accordance with the requirements of the [relevant] Final Commissioning Programme and Appendix B of Schedule 10 (*Outline Commissioning Programme*) and any Equipment transfer in accordance with Schedule 11 (*Equipment*) such that D&B Co is able to perform its obligations in respect of the Works.]⁴⁰

19. DEFECTS

D&B Co to Make Good

- 19.1 D&B Co shall procure that all Defects which are present or shall appear in the Works during the [relevant] Defects Liability Period for those Works shall be made good by D&B Co to the standards required by this Agreement within a reasonable time. The Authority and D&B Co both acting reasonably and subject to Schedule 21 (*Joint Operating Protocol*), shall agree a programme for access for this purpose with the intention to cause the least practicable disruption to users of the Facilities.

Schedule of Defects

³⁹ To be amended on a project specific basis. For example, operational manuals may need to be made available at an earlier date depending on the timing of commissioning activities. Further, it may be possible, for D&B Co to provide draft manuals to the Authority for comment prior to finalisation and suitable amendments should be made to the Clause where relevant. It is expected that substantially complete manuals will be available by the Actual Completion Date with final drafts being made available within an agreed time thereafter. The Authority should list any other manuals required.

Please note that in accordance with Welsh Language Standards certain documents may need to be translated and/or produced in bi-lingual form. Advice should be sought on this at the time, and at the New Project development stage so that D&B Co can be appraised of the project's specific requirements and any timescales for production.

⁴⁰ In the case of a school project, the Authority will need to liaise with the Schools on their decant requirements which are to be reflected in the Equipment Schedule.

- 19.2 Without prejudice to Clause 19.1 (*D&B Co to Make Good*), not later than [◆] Business Days after the expiry of the [relevant] Defects Liability Period, the Authority shall procure that the Authority's Representative shall prepare a schedule of Defects ("**Schedule of Defects**") specifying any Defects in the [Main] Works [or the Post Completion Works (as applicable)] apparent as at the date of expiry of the [relevant] Defects Liability Period which have not been made good by D&B Co by such date in accordance with Clause 19.1 (*D&B Co to Make Good*) and shall deliver such Schedule of Defects to D&B Co. Subject always to Clause 19.3 (*D&B Co Failure to Comply*), D&B Co shall, at its own expense, as soon as reasonably practicable after the date of issue of the relevant Schedule of Defects taking into account the requirements of Schedule 21 (*Joint Operating Protocol*) make good all such Defects.

D&B Co Failure to Comply

- 19.3 Where D&B Co fails to comply with the provisions of Clause 19.1 (*D&B Co to Make Good*) or Clause 19.2 (*Schedule of Defects*) [in respect of the Main Works or the Post Completion Works (as relevant)], the Authority may appoint or instruct any third party contractor to execute and complete the remedial, repair or other works as may be necessary to make good any Defect [in the relevant Works], in which event D&B Co shall reimburse the Authority, on demand, its reasonable costs of doing so (which costs shall include any cost premium applied by the relevant third party to account for the requirements and restrictions for its access of the same or a similar nature to those restrictions and requirements set out in Schedule 21 (*Joint Operating Protocol*)).

Certificate of Making Good Defects

- 19.4 Without prejudice to D&B Co's continuing obligations under this Agreement, when, following[:
- 19.4.1]the Actual Completion Date, all Defects in the Schedule of Defects in respect of the [Main] Works have been made good]; and
- 19.4.2 the Actual Post Completion Works Date all Defects in the Schedule of Defects in respect of the Post Completion Works have been made good,
- [in each case] the Authority's Representative shall issue a statement to that effect to D&B Co (a "**Certificate of Making Good Defects**").

Liability

- 19.5 Following the expiry of the [relevant] Defects Liability Period, D&B Co shall be liable to the Authority for the reasonable costs of, and reasonably foreseeable expenses properly incurred in, procuring the repair of the [relevant] Defects. For the avoidance of doubt, the provisions of this Clause 19 (*Defects*) shall not be construed as limiting or excluding in any way the Authority's general right to claim damages for any breach of this Agreement by D&B Co.

Limitation

- 19.6 For the avoidance of doubt, the provisions of this Clause 19 (*Defects*) shall not in any manner or way serve to limit, reduce, satisfy, discharge, negate, avoid or otherwise affect the obligations and/or liability (including in respect of *Defects*) of D&B Co to the Authority specified or referred to elsewhere in this Agreement.

20. FOSSILS AND ANTIQUITIES

Property

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

Discovery

- 20.2 Upon the discovery of any such item during the course of the Works, D&B Co shall:
- 20.2.1 immediately notify the Authority's Representative of such discovery;
 - 20.2.2 take all steps not to disturb the object and, if necessary, cease any Works in so far as the carrying out of such Works would endanger the object or prevent or impede its excavation; and
 - 20.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.

Action

- 20.3 The Authority shall procure that the Authority's Representative promptly, and in any event within ten (10) Business Days of receipt of notice pursuant to Clause 20.2.1, issues an instruction to D&B Co specifying what action the Authority's Representative requires D&B Co to take in relation to such discovery.
- 20.4 D&B Co shall promptly and diligently comply with any instruction issued by the Authority's Representative referred to in Clause 20.3 (*Action*) above (except and to the extent that such instruction constitutes an Authority Works Variation pursuant to Clause 20.6 (*Action*) below, in which case the provisions of Schedule 13 (*Variations*) shall apply, at its own cost.
- 20.5 If directed by the Authority's Representative, D&B Co shall allow representatives of the Authority to enter the Site for the purposes of removal or disposal of such discovery provided that such entry shall be subject to the Authority complying with all relevant safety procedures, which shall include any relevant construction phase

plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.

- 20.6 If, in relation to such discovery, the Authority requires D&B Co to carry out works (being any work of alteration, addition, demolition or extension or variation in the Works) which are not works which would be necessary for the purpose of compliance with Law or any Consents, it must issue an Authority Works Variation Enquiry in accordance with the provisions of Schedule 13 (*Variation Procedure*).⁴¹

⁴¹ The discovery of fossils and antiquities is treated as a Relief Event entitling D&B Co to an extension of time in accordance with Clause 24 (*Delay Events*) but leaving the financial risks of such discovery with D&B Co. If there is a known problem on the/a Site the provisions relating to discoveries may need to be reviewed and amended on a project specific basis.

PART 4: QUALITY ASSURANCE

21. QUALITY ASSURANCE

Quality Plans and Systems

- 21.1 D&B Co shall procure that all aspects of the Project Operations are the subject of quality management systems in accordance with the provisions of this Clause 21 (*Quality Assurance*).
- 21.2 The quality management systems referred to in Clause 21.1 (*Quality Plans and Systems*) above shall be reflected in appropriate quality plans, the standard of which shall be consistent with [BS EN ISO 9001] (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them).
- 21.3 Without limitation to the generality of Clause 21.2 (*Quality Plans and Systems*), there shall be:
- 21.3.1 a Design Quality Plan; and
- 21.3.2 a Construction Quality Plan,
- provided that the Design Quality Plan and the Construction Quality Plan may be incorporated into one document.
- 21.4 D&B Co shall procure that the Project Operations are carried out in compliance with the Quality Plans. All Quality Plans shall be submitted to the Authority's Representative in accordance with Schedule 7 (*Review Procedure*) and D&B Co shall not be entitled to implement or procure the implementation of any Quality Plan unless D&B Co is entitled to proceed with such implementation pursuant to Schedule 7 (*Review Procedure*).
- 21.5 D&B Co shall implement the quality management systems referred to in Clause 21.1 (*Quality Plans and Systems*) and shall procure that:
- 21.5.1 the Contractor implements the Design Quality Plan; and
- 21.5.2 the Contractor implements the Construction Quality Plan.
- 21.6 Where any aspect of the Project Operations is performed by more than one contractor or subcontractor, then the provisions of this Clause 21 (*Quality Assurance*) (in so far as relevant or appropriate to the activities to be performed by such contractor or subcontractor) shall apply in respect of each of such contractors or subcontractors, and references in this Clause 21 (*Quality Assurance*) to the

"Contractor" shall be construed accordingly. To avoid doubt, this Clause shall not be construed as requiring subcontractors of the Contractor to have their own Quality Plans but only to comply with the Design Quality Plan and the Construction Quality Plan (as the case may be).

- 21.7 D&B Co shall from time to time submit to the Authority's Representative in accordance with Schedule 7 (*Review Procedure*) any changes to any of the Quality Plans required for such Quality Plan to continue to comply with the requirements set out in Clause 21.2 (*Quality Plans and Systems*). The Authority's Representative may raise comments on any such proposed change only on the grounds set out in paragraph 3 of Schedule 7 (*Review Procedure*).
- 21.8 If there is no objection under Schedule 7 (*Review Procedure*) to a change to any Quality Plan proposed pursuant to Clause 21.7 (*Quality Plans and Systems*), the Quality Plan shall be amended to incorporate such change.

Quality Manuals and Procedures

- 21.9 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 shall 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 7 (*Review Procedure*), and the contents of such quality manual or procedure shall 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 7 (*Review Procedure*).

Quality Management

- 21.10 D&B Co shall maintain a quality management system which shall:
- 21.10.1 ensure the effective operation of the quality systems described in this Clause 21 (*Quality Assurance*);
 - 21.10.2 cause an audit of the quality systems at regular intervals and the findings of such audit will be reported to the Authority's Representative;
 - 21.10.3 require review of all quality systems at intervals agreed with the Authority's Representative to ensure their continued suitability and effectiveness;
 - 21.10.4 require liaison with the Authority's Representative on all matters relating to quality management; and
 - 21.10.5 require production of reports and their delivery to the Authority's Representative.

Quality Monitoring

- 21.11 The Authority's Representative may carry out audits of D&B Co's quality management system (including all relevant Quality Plans and any quality manuals and procedures) to establish that D&B Co is complying with Clauses 21.1 and 21.3 (*Quality Plans and Systems*). The Authority's Representative may carry out such audits at approximate intervals of three (3) months and may carry out other periodic monitoring, spot checks and auditing of D&B Co's quality management systems. D&B Co shall procure that the Authority's Representative shall have an equivalent right in respect of the Contractor's quality management systems. D&B Co shall cooperate, and shall procure that any Sub-Contractor co-operates, with the Authority's Representative including providing him with all information and documentation which he reasonably requires in connection with his rights under this Clause.

Hazardous Substances and Materials⁴²

- 21.12 Except as expressly provided otherwise in this Agreement, D&B Co shall not install, keep or use in or on the Site any materials, equipment or apparatus the installation, keeping or use of which is likely to cause (or in fact causes):

21.12.1 material damage to the Site and/or Facilities;

21.12.2 dust, noise or vibration constituting a nuisance to the owners and/or occupiers of any property adjoining or near to the Site; or

21.12.3 the generation, accumulation or migration of any hazardous substance in an unlawful manner whether within or outside the Site,

and shall use all reasonable endeavours to ensure (by directions to staff and otherwise) that all materials, equipment or apparatus in or on the Site are operated so as to minimise noise and vibration likely to cause annoyance or disturbance and the unlawful generation or migration of any hazardous substance.

- 21.13 D&B Co shall not bring in or on to (or keep or maintain in or on) the Site any hazardous materials or equipment without the prior written consent of the Authority and unless D&B Co has complied with all relevant Law.

- 21.14 Without prejudice to the generality of its obligations, D&B Co shall:

21.14.1 procure that all hazardous materials and equipment used, by it or by a Sub-Contractor or used on behalf of any of them, or stored, by it or by a Sub-Contractor or stored on behalf of any of them, on the Site are kept in accordance with all relevant Law and Good Industry Practice, properly

⁴² Where the Authority considers it appropriate, a carve-out may be provided to cover the case of phased construction and handover for the Site.

and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent staff; and

21.14.2 use all practicable and reasonable means to:

- (a) prevent or counteract, to the satisfaction of the Authority's Representative, the unlawful emission of any such hazardous substance;
- (b) avoid the unlawful discharge into any conducting media serving the Site of any hazardous substance;
- (c) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Site; and
- (d) prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

in so far as any such hazardous substance is, or should be, under the control of D&B Co pursuant to this Agreement.

22. COMMUNITY BENEFITS⁴³

22.1 D&B Co shall comply with the Authority's Community Benefits Requirements in accordance with D&B Co's Community Benefits Method Statements.

22.2 If, in relation to the Works and prior to the issue of the Certificate of Practical Completion in respect of the [Main] Works [and the Post Completion Works], D&B Co does not:

22.2.1 [*insert target*] then D&B Co shall pay to the Authority the sum of [*insert amount*] (indexed);

22.2.2 [*insert target*] then D&B Co shall pay to the Authority the sum of [*insert amount*] (indexed);

22.2.3 [*insert target*] then D&B Co shall pay to the Authority the sum of [*insert amount*] (indexed);

22.2.4 provide the [*quarterly / annual*] information in accordance with [♦] then on the occurrence of each such failure D&B Co shall pay to the Authority the sum of [*insert amount*] (indexed);

⁴³ Separate Community Benefits Consultation Paper published.

provided that in each case the Authority has first served notice on D&B Co notifying it of its non-compliance and D&B Co has failed to rectify such non-compliance within [twenty(20)] Business Days of such notice.

- 22.3 The Authority's sole and exclusive remedy in respect of a breach of Clause 22.2.1 to Clause 22.2.3 above shall be the payments provided for in Clause 22.2.1 to Clause 22.2.3, respectively [and D&B Co's maximum liability in this respect shall be [insert amount] (indexed)].
- 22.4 All payments due by D&B Co to the Authority under this Clause shall be payable within [◆] Business Days of written demand.

Sustainable Development

- 22.5 D&B acknowledges that the Authority is subject to the Well-being of Future Generations Act and shall assist and cooperate with the Authority to facilitate the Authority's compliance with its obligation to carry out sustainable development.
- 22.6 D&B further acknowledges that the information contained in or supplied in connection with Clauses 22.1 to 22.4 (*Community Benefits*) and Schedule 20 (*Community Benefits*) may be published in whole or in part and/or supplied by the Authority to a Relevant Authority, as the Authority in its sole discretion considers necessary for compliance with its obligations to supply, produce and/or publish information under the Well-being of Future Generations Act.
- 22.7 Where the Authority requests information from D&B Co in connection with D&B Co's obligations under this Agreement (including without limitation Clauses 22.1 to 22.4 (*Community Benefits*) and Schedule 20 (*Community Benefits*)) in relation to any duty or obligation on the Authority under the Well-being of Future Generations Act, D&B Co shall supply such information as soon as possible and in any event within [◆] Business Days of receiving such request.
- 22.8 D&B Co shall⁴⁴:
- 22.8.1 comply with the Ethical Employment Code and any similar applicable schemes or codes of practice which apply to D&B Co;
- 22.8.2 encourage all Sub-Contractors to sign up to the Ethical Employment Code and any similar applicable schemes or codes of practice promoted by the Welsh Government; and
- 22.8.3 ensure that the [Contractor and] all Sub-Contractors who have signed up to the Ethical Employment Code comply with that code of practice and any similar applicable schemes or codes of practice which apply to that Sub-Contractor.

PART 5: INFORMATION TECHNOLOGY

23. INFORMATION TECHNOLOGY⁴⁵

- 23.1 The Authority shall procure that the Authority Parties shall, carry out the works and activities identified as its responsibility in the [ICT Design Requirements] contained in [◆] of Section [◆] of Schedule 5 (*Authority's Construction Requirements*) in respect of the specification, design, construction, provision, installation, test and integration of ICT Infrastructure and ICT Assets.
- 23.2 D&B Co shall, or shall procure that the D&B Co Parties shall carry out the Works and the activities identified as its responsibility in the [ICT Design Requirements] contained in [◆] of Section [◆] of Schedule 5 (*Authority's Construction Requirements*) in respect of the specification, design, construction, provision, installation, test and integration of ICT Infrastructure and ICT Assets.
- 23.3 D&B Co and the Authority shall each comply with their respective obligations in this Agreement in respect of the commissioning of ICT Infrastructure and ICT Assets including (without limitation) Schedule 10 (*Outline Commissioning Programme*), Schedule 11 (*Equipment*) and Section 2 (*Construction Phase Access Protocol*) of Schedule 21 (*Joint Operating Protocol*).

⁴⁴ Where the Contractor has signed up to the Welsh Government's Code of Practice - Ethical Employment and Supply Chains, compliance with the code shall be mandatory.

⁴⁵ Provisions relating to Information Technology are to be included on a project specific basis, where required (or marked 'not used', where not required).

PART 7: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

24. DELAY EVENTS⁴⁶

- 24.1 If, at any time, D&B Co becomes aware that there will be (or is likely to be) a delay in completion of the Works, D&B Co shall forthwith give notice to the Authority's Representative to that effect specifying the relevant delay or impediment. In relation to any such delay or impediment if the Authority's Representative is satisfied, or it is determined in accordance with Schedule 15 (*Dispute Resolution Procedure*), that such delay or impediment has arisen as a result of the occurrence of a Delay Event, then, subject to Clause 24.2 (*Delay Events*) and Clause 24.14 (*Term Dates*), the Authority's Representative shall allow D&B Co an extension of time equal to the delay or impediment caused by such Delay Event (taking into account reasonably foreseeable consequences of the Delay Event) and shall revise the Completion Date, [the ICT Handover Date] [and/or the Post Completion Works Date (as appropriate)].
- 24.2 If D&B Co is (or claims to be) affected by a Delay Event:
- 24.2.1 it shall (and shall procure that the D&B Co Parties shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of such an event upon the performance of its obligations under this Agreement and, where relevant, resume performance of its obligations affected by the Delay Event as soon as practicable; and
- 24.2.2 it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 24 (*Delay Events*) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 24.2.1 above.
- 24.3 For the purposes of this Agreement, a Delay Event means any of the following to the extent in each case that there will be (or is likely to be) a delay to the [Main] Works or to achievement of the Completion Date [or Post Completion Works Date (as applicable)]:
- 24.3.1 an Authority Works Variation initiated by an Authority Works Variation Enquiry in accordance with paragraph 2 of Section 2 of Schedule 13 (*Variation Procedure*) in relation to which D&B Co has issued a response pursuant to paragraph 3.2.2(b) of Section 2 of Schedule 13 (*Variation Procedure*) specifying and providing evidence that implementation of the Authority Works Variation would delay the completion of the Facilities if this has been agreed between the parties or determined to be the case in accordance with Schedule 15 (*Dispute Resolution Procedure*);⁴⁷

⁴⁶ Delay Events may apply after the original completion date.

⁴⁷ The issue of an Authority Works Variation will not, in itself, give rise to a Delay Event as D&B Co will be obliged to continue to carry out the Project Operations until such time as the Variation is agreed. The Authority may wish to consider whether the Project Operations ought to be suspended whilst the Variation process is ongoing e.g. to avoid abortive works and costs being incurred, in which case it would be appropriate to factor the time/cost implications of such suspension in D&B Co's claim for a Delay Event and Compensation Event.

- 24.3.2 any breach by the Authority and/or any Authority Party of any of the Authority's express obligations under this Agreement to the extent in each case that any such breach is not caused, or contributed to, by D&B Co or any D&B Co Party;
 - 24.3.3 the execution of works on the Site not forming part of this Agreement by the Authority or any contractors employed by the Authority;
 - 24.3.4 opening up of the Works pursuant to Clauses 13.3 to 13.7 (*Right to Open Up*) (inclusive) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Schedule 15 (*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other Defects previously discovered by the Authority);
 - 24.3.5 Force Majeure;
 - 24.3.6 a Relief Event;
 - 24.3.7 the suspension by D&B Co pursuant to Clause 29.13 (*Right to Suspend*) of any or all obligations as a result of the non-payment by the Authority of sums properly due to D&B Co under this Agreement; or
 - 24.3.8 the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 10.4 (*[Responsibility for Ground Conditions and Contamination]*).⁴⁸
- 24.4 Without prejudice to the generality of Clause 24 (*Delay Events*), D&B Co shall give notice in writing to the Authority's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event occurring or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event. D&B Co shall within ten (10) Business Days after such notification, give further written details to the Authority's Representative which shall include:
- 24.4.1 a statement of which Delay Event the claim is based upon;
 - 24.4.2 details of the circumstances from which the Delay Event arises;
 - 24.4.3 details of the contemporary records which D&B Co will maintain to substantiate its claim for extra time;
 - 24.4.4 details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event may have upon completion of the [Facilities/Main Works] [, the ICT Handover Date] [and/or the Post Completion Works if relevant]; and

⁴⁸ Include where Clauses 10.3 and 10.4 are used.

- 24.4.5 details of any measures which D&B Co proposes to adopt to mitigate the consequences of such Delay Event.
- 24.5 As soon as possible but in any event within [five (5)] Business Days of D&B Co (or the Contractor) receiving, or becoming aware of, any supplemental information which may further substantiate or support D&B Co's claim then, provided that the Completion Date[, ICT Handover Date] [and/or the Post Completion Works Date (if relevant)] has not otherwise already been revised pursuant to Clause 24.7 (*Delay Events*), D&B Co shall submit further particulars based on such information to the Authority's Representative.
- 24.6 The Authority's Representative shall, after receipt of written details under Clause 24.4 (*Delay Events*), or of further particulars under Clause 24.5 (*Delay Events*), be entitled by notice in writing to require D&B Co to provide such further supporting particulars as he may reasonably consider necessary. D&B Co shall afford the Authority's Representative reasonable facilities for investigating the validity of D&B Co's claim including, without limitation, onsite inspection.
- 24.7 Subject to the provisions of this Clause, the Authority's Representative shall revise the Completion Date[, ICT Handover Date] [and/or the Post Completion Works Date (as appropriate)] in accordance with Clause 24.1 (*Delay Events*) as soon as reasonably practicable and in any event within [five (5)] Business Days of the later of:
- 24.7.1 the date of receipt by the Authority's Representative of D&B Co's notice given in accordance with Clause 24.4 (*Delay Events*) and the date of receipt of any further particulars (if such are required under Clause 24.6 (*Delay Events*)), whichever is the later; and
- 24.7.2 the date of receipt by the Authority's Representative of any supplemental information supplied by D&B Co in accordance with Clause 24.5 (*Delay Events*) and the date of receipt of any further particulars (if such are required under Clause 24.6 (*Delay Events*)), whichever is the later.
- If D&B Co has failed to comply with the requirements as to the giving of notice under Clause 24.4 (*Delay Events*), or has failed to maintain records or afford facilities for inspection to the Authority's Representative, then D&B Co shall not be entitled to any extension of time (and the Completion Date[, ICT Handover Date] [and/or the Post Completion Works Date] shall not be revised) in respect of any period of delay by D&B Co in giving notice or providing information under Clause 24.4 (*Delay Events*) and/or to the extent that its failure to maintain records or afford facilities for inspection to the Authority's Representative has prevented the Authority's Representative from assessing the consequences of the Delay Event.
- 24.8 If:
- 24.8.1 the Authority's Representative declines to fix a revised Completion Date[, ICT Handover Date] [and/or the Post Completion Works Date (as relevant)]; or

24.8.2 D&B Co considers that a different Completion Date[, ICT Handover Date] [and/or the Post Completion Works Date] should be fixed; or

24.8.3 there is a disagreement as to whether a Delay Event has occurred,

then D&B Co shall be entitled to refer the matter for determination in accordance with Schedule 15 (*Dispute Resolution Procedure*).

Compensation

24.9 If the Delay Event is a Compensation Event D&B Co's sole right to compensation shall be as provided for in Clauses 24.11 to 24.13 (*Compensation*) inclusive. To avoid doubt, no other Delay Event shall entitle D&B Co to receive any compensation save as otherwise expressly provided in Schedule 13(*Variation Procedure*) in the case of a Delay Event referred to in Clause 24.3.1.

24.10 For the purposes of Clause 24.9 (*Compensation*), a Compensation Event means:

24.10.1 any Delay Event referred to in Clause 24.3.2, Clause 24.3.3, Clause 24.3.4 of Clause 24.3.7 for which, in each case, it has been agreed or determined pursuant to this Clause 24 (*Delay Events*) that D&B Co is entitled to an extension of time; or

24.10.2 in the period prior to the Actual Completion Date[, or the Post Completion Works Date in respect of the Post Completion Works], in circumstances where there is no delay in completion of the [Main Works/Facilities] [or the Post Completion Works, as applicable], any breach by the Authority and/or any Authority Party of any of the Authority's express obligations under this Agreement to the extent that such breach is not caused, or contributed to, by D&B Co or any D&B Co Party; or

24.10.3 the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 10.4 (*[Responsibility for Ground Conditions and Contamination]*)⁴⁹.

24.11 Subject to Clause 24.12 (*Compensation*), if it is agreed, or determined, that there has been a Compensation Event, and D&B Co has incurred loss (including loss of revenue) and/or expense as a direct result of such Compensation Event, D&B Co shall be entitled to such compensation as would place D&B Co in no better or worse position than it would have been in had the relevant Compensation Event not occurred. D&B Co shall promptly provide the Authority's Representative with any additional information he may require in order to determine the amount of such compensation.

⁴⁹ Include where Clauses 10.3 and 10.4 are used.

- 24.12 D&B Co shall take all reasonable steps so as to minimise the loss and/or expense referred to in Clause 24.11 (*Compensation*) in relation to any Compensation Event and any compensation payable shall:
- 24.12.1 exclude any amounts incurred or to be incurred as a result of any failure of D&B Co (or any D&B Co Party) to comply with this Clause 24.12 (*Compensation*); and
- 24.12.2 be reduced by any amount which D&B Co has recovered or will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement) which amount, to avoid doubt, shall not include any excess or deductibles or any amount over the maximum amount insured applicable to any such insurance policy.
- 24.13 The amount of any compensation due to D&B Co under Clause 24.11 (*Compensation*) shall be agreed between the parties or, failing agreement, determined pursuant to Schedule 15 (*Dispute Resolution Procedure*) and such compensation shall be payable within twenty (20) Business Days of receipt of a written demand accompanied by a valid VAT invoice for the same by D&B Co, supported by all relevant information, following such agreement or determination of the amount due.

[Term Dates

- 24.14 The Authority agrees that when assessing the effect of any Delay Event for the purpose of Clause 24.7 (*Delay Events*) and assessing the effect of any Compensation Event for the purpose of Clause 24.11 (*Compensation*), any delay to the achievement of a revised Completion Date[, ICT Handover Date] [and/or the Post Completion Works Date (as applicable)] shall be taken into account provided that: the ICT Handover Date shall only ever move to the [twenty fifth (25th)] Business Day, and the Completion Date shall only ever move to the [fifth (5th)] Business Day, before the first day of a Term or half term (other than the summer half term).]⁵⁰

25. RELIEF EVENTS

- 25.1 For the purposes of this Agreement, subject to Clause 25.4 (*Mitigation*), Relief Events mean any of the following events:
- 25.1.1 fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute Force Majeure), earthquake, riot or civil commotion;
- 25.1.2 failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;

⁵⁰ See note at Clause 14.8.

- 25.1.3 accidental loss or damage to the Works and/or Facilities or any roads servicing the same;
- 25.1.4 blockade or embargo falling short of Force Majeure;
- 25.1.5 the discovery of fossils, antiquities and human remains requiring action in accordance with Clause 20 (*Fossils and Antiquities*); or
- 25.1.6 official or unofficial strike, lockout, go slow or other dispute in each case generally affecting the construction industry (or a significant sector of that industry),

provided in each case that such event does not arise (directly or indirectly) as a result of any wilful act or default of the party claiming relief and/or (i) in the case of D&B Co claiming relief, any D&B Co Party and (ii) in the case of the Authority claiming relief, any Authority Party.

- 25.2 Subject to Clauses 25.3 (*Relief Events*) and 25.4 (*Mitigation*), no right of termination shall arise under this Agreement by reason of any failure by a party to perform any of its obligations under this Agreement to the extent that such failure to perform occurs because of the occurrence of a Relief Event (and, to avoid doubt, and without prejudice to Clause 25.9 (*Mitigation*), unless expressly stated to the contrary in this Agreement, it is acknowledged that all other rights and obligations of the parties under this Agreement remain unaffected by the occurrence of a Relief Event).
- 25.3 Without prejudice to D&B Co's rights under Clause 24 (*Delay Events*), D&B Co shall only be relieved of its obligations under Clauses 12 (*The Design Construction and Commissioning Process*), 13 (*Right of Access of Authority's Representative*), 14 (*Programme and Dates for Completion*), 17 (*Pre-Completion Commissioning and Completion*) and 24 (*Delay Events*) by Delay Events in accordance with Clause 24 (*Delay Events*).

Mitigation

- 25.4 Where a party is (or claims to be) affected by a Relief Event:
 - 25.4.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Relief Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
 - 25.4.2 it shall not be entitled to rely upon the relief afforded to it pursuant to Clause 25.2 (*Relief Events*) of this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 25.4.1 above.

- 25.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- 25.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days of the notice referred to in Clause 25.5 (*Mitigation*) which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Relief Event on the ability of the party to perform, the action being taken in accordance with Clause 25.4 (*Mitigation*), the date of the occurrence of the Relief Event and an estimate of the period of time required to overcome it (and/or its effects).
- 25.7 The party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- 25.8 If, following the issue of any notice referred to in Clause 25.6 (*Mitigation*), the party claiming relief receives or becomes aware of any further information relating to the Relief Event (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 25.9 To avoid doubt, and subject to any other express provision of this Agreement, the occurrence of a Relief Event shall not entitle D&B Co to any compensation.

26. FORCE MAJEURE

- 26.1 For the purposes of this Agreement, Force Majeure means any of the following events or circumstances:
- 26.1.1 war, civil war, armed conflict or terrorism; or
- 26.1.2 nuclear contamination unless in any case D&B Co and/or any D&B Co Party is the source or the cause of the contamination; or
- 26.1.3 chemical or biological contamination of the Works and/or Facilities and/or Site from any of the events referred to in Clause 26.1.1 above; or
- 26.1.4 pressure waves caused by devices travelling at supersonic speeds,

which directly causes either party to be unable to comply with all or a material part of its obligations under this Agreement.

- 26.2 Subject to Clauses 26.3 and 26.4 (*Force Majeure*) the party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Force Majeure it is not able to perform its obligations under this Agreement. For the avoidance of doubt (but without prejudice to Clause 34 (*Termination Resulting from Force Majeure*)) the Authority shall not be entitled to terminate this Agreement for a D&B Co Event of Default if such D&B Co Event of Default arises from an event of Force Majeure.
- 26.3 Where a party is (or claims to be) affected by an event of Force Majeure:
- 26.3.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
- 26.3.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 26.3.1.
- 26.4 Without prejudice to D&B Co's rights under Clause 24 (*Delay Events*), D&B Co shall only be relieved from its obligations under Clauses 12 (*The Design Construction and Commissioning Process*), 13 (*Right of Access of Authority's Representative*), 14 (*Programme and Dates for Completion*) and 24 (*Delay Events*) by Delay Events in accordance with Clause 24 (*Delay Events*).
- 26.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 26.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the party to perform, the action being taken in accordance with Clause 26.3 (*Force Majeure*), the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).
- 26.7 The party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- 26.8 If, following the issue of any notice referred to in Clause 26.6 (*Force Majeure*), the party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.

- 26.9 The parties shall endeavour to agree any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule 15 (*Dispute Resolution Procedure*) shall not apply to a failure of the Authority and D&B Co to reach agreement pursuant to this Clause 26.9 (*Force Majeure*).
- 26.10 Without Prejudice to Clause 37.8 (*Payments Following Termination*), the occurrence of an event of Force Majeure shall not entitle D&B Co to any compensation.

PART 8: CHANGES IN LAW & VARIATIONS

27. CHANGES IN LAW⁵¹

General

- 27.1 D&B Co shall take all steps necessary to ensure that the Project Operations are performed in accordance with the terms of this Agreement (including, without limitation, Clause 5.2.1) following any Change in Law.

Variation to be Agreed

- 27.2 Either party may give notice to the other of the need for a Variation which is necessary in order to enable D&B Co to comply with any Change in Law in which event:

27.2.1 the parties shall meet within [fifteen (15)] Business Days of the notice referred to in Clause 27.2 to consult on the occurrence of and effect of the Change in Law and any Variation required as a consequence. If the parties, within [ten (10)] Business Days of this meeting, have not agreed the occurrence or the effect of the relevant Change in Law, either party may refer the question of whether a Change in Law has occurred or the effect of the Change in Law for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*); and

27.2.2 within [ten (10)] Business Days of the agreement or determination referred to in Clause 27.2.1 above the Authority's Representative shall, if it is agreed or determined that a Variation is required in order to comply with the Change in Law, issue an Authority's Variation Enquiry and the relevant provisions of Schedule 13 (*Variation Procedure*) shall apply except that:

- (a) D&B Co may give notice to the Authority's Representative that it objects to such an Authority's Variation Enquiry only on the grounds that the implementation of the Variation would not give effect to or comply with the Change in Law;
- (b) the Authority shall issue a Variation Confirmation in respect of the Variation in accordance with the relevant provisions of Schedule 13 (*Variation Procedure*);
- (c) the provisions of Clause 11 (*Consents & Planning Approval*) shall apply and, to avoid doubt, paragraph 5 of Section 2 of Schedule 13 (*Variation Procedure*) shall not apply;

⁵¹ Where a Project involves Post Completion Work adjustment to the phasing drafting will be required to capture the Post Completion Works in Clause 27.

- (d) the Authority shall not be entitled to withdraw any Authority's Variation Enquiry or Variation Confirmation issued in accordance with this Clause 27.2 (*Variation to be Agreed*); and
- (e) D&B Co shall not be entitled to any payment or other compensation or relief from any performance of its obligations under this Agreement in respect of such Change in Law or associated Variation (or the consequences of either).

28. VARIATION PROCEDURE

The provisions of Schedule 13 (*Variation Procedure*) shall have effect in respect of Variations except as otherwise expressly provided in this Agreement.

PART 9: FINANCIAL

29. PAYMENT⁵²

Development Amount

- 29.1 The Authority shall, in accordance with the provisions of this Clause 29 (*Payment*) pay to D&B Co the Development Amount in consideration of the performance by D&B Co of its obligations under this Agreement in accordance with this Agreement.
- 29.2 The Development Amount shall be a lump sum fixed price for the carrying out of D&B Co's obligations under the Agreement and shall not be altered or adjusted in any way whatsoever (and D&B Co shall not be entitled to any payment in respect of the Works or this Agreement) except in accordance with the express provisions of this Agreement.

Project Development Fee

- 29.3 The Authority shall pay the Project Development Fee to D&B Co. The due date for payment of the Project Development Fee shall be the date of the Authority's receipt of the relevant invoice which may be issued by D&B Co on [◆]. Within five (5) days after the due date for payment the Authority's Representative shall issue a payment notice detailing the sum that the payer considers to be or to have been due at the payment due date and the basis on which that sum is calculated. The final date for payment shall be five (5) days after the due date.

Applications for Payment⁵³

- 29.4 No later than each Application Date, D&B Co shall make an application ("**Application for Payment**") to the Authority's Representative for an Interim Certificate of payment in respect of that Relevant Month. [Each Application for payment shall be split into two sections, one section which relates to the Main Works and another section which relates to the Post Completion Works.] [Each Section of the] Application for Payment shall be in accordance with Clause 29.5 (*Form of Application*) and include such supporting information and documentation as is reasonably required by the Authority in order to prepare and issue an Interim Certificate (as defined in Clause 29.7 (*Issue of Interim Certificate*)). The payment due date for an Interim Certificate (as defined in Clause 29.7 (*Issue of Interim Certificate*)) in respect of a Relevant Month shall be the Application Date (the "**Due Date**").

⁵² Authorities must seek consent from the Welsh Government to any and all public financing proposals, at each stage of the New Project Approval Process under the SPA.

⁵³ The Application for Payment drafting will require review on a project specific basis. The present drafting assumes that there will be an overlap in applications for Applications for Payments being made in respect of the Main Works and the Post Completion Works.

Form of Application

29.5 Without prejudice to Clause 29.6 (*Value of Goods and Materials*), each Application for Payment shall specify[, separately in respect of the Main Works and the Post Completion Works,]:

29.5.1 the cumulative value claimed by D&B Co of each of the [Main] Works [and the Post Completion Works] that have been properly executed up to the end of the Relevant Month as set out in Schedule 18 (*Development Amount Analysis*) as amended from time to time in accordance with this Agreement;

29.5.2 the cumulative amount of any other payments to which D&B Co claims to be entitled under this Agreement up to the end of the Relevant Month;

29.5.3 the relevant Retention, if applicable , pursuant to Clauses 29.8 to 29.10 (*Retention*); and

29.5.4 the amount D&B Co considers is due on the Due Date and the basis upon which that amount has been calculated including a breakdown of the cumulative value of the [Main] Works [and the cumulative value of the Post Completion Works (separately)] that have been properly executed up to the end of the Relevant Month by specific reference to each of the elements set out in the Development Amount Analysis; and

29.5.5 the breakdown of the amount D&B Co considers is due on the Due Date into the separate amounts that D&B Co considers to be due to:

- (a) D&B Co in accordance with this Agreement but excluding the amounts due under Clause 29.5.5(b), (c) and (d) and, for the avoidance of doubt, the Project Development Fee;
- (b) the Contractor in accordance with the Construction Contract but excluding the amounts due under Clause 29.5.5(c) and (d);
- (c) each PBA Sub-Contractor in accordance with its Sub-Contract; and
- (d) each Non-PBA Sub-Contractor in accordance with its Sub-Contract,

[Where the amounts or sums due that are referred to in Clause [29.5.1] above do not relate specifically to the Main Works or the Post Completion Works (or relate to both in indeterminate proportions), in recording such sums in the Application for Payment D&B Co shall attribute [◆]% of such amounts or sums to the Main Works and [◆]% to the Post Completion Works.]

Value of Goods and Materials

- 29.6 If an Application for Payment includes any amount in respect of payment for goods or materials before incorporation thereof in the relevant Works, the following provisions shall apply:
- 29.6.1 D&B Co shall provide the Authority with proof that property in such goods or materials is vested in D&B Co;
 - 29.6.2 D&B Co shall ensure that the goods or materials are set apart from other goods or materials at the place where they are manufactured or stored and that they are clearly identified as being the property of the Authority without damaging or defacing them, and shall provide proof of compliance with this requirement. D&B Co shall bear the risk of loss or damage to such materials or goods;
 - 29.6.3 unless and until D&B Co has complied with Clauses 29.6.1 and 29.6.2 above, D&B Co shall not be entitled to any payment in respect of such goods or materials;
 - 29.6.4 such goods or materials shall become the property of the Authority upon payment therefor;
 - 29.6.5 D&B Co shall permit the Authority, the Authority's Representative and any other persons authorised by the Authority at any time upon reasonable notice to inspect the materials or goods which have become the property of the Authority and shall grant or procure the grant of access to the Authority, the Authority's Representative and any other person authorised by the Authority for such purpose to the premises where such goods or materials may be located; and
 - 29.6.6 payment by the Authority for such goods or materials shall not prejudice the rights of the Authority in relation to goods or materials which are not in accordance with this Agreement.

Issue of Interim Certificate

- 29.7 Within two (2) Business Days (which for the purposes of this Clause 29.7 only shall include bank holidays in Cardiff) of the Due Date, the Authority's Representative shall issue an interim certificate of payment (an "**Interim Certificate**") setting out the sum that the Authority or the Authority's Representative considers to be or to have been due at the Due Date, and the basis on which that sum is calculated[, including, in each case separately for the Main Works and the Post Completion Works]:
- 29.7.1 the cumulative value of each of the [Main] Works [and the Post Completion Works (as applicable)] that have been properly executed as at the end of the Relevant Month in question;

29.7.2 the cumulative value of any Variation instructed in accordance with Schedule 13 (*Variation Procedure*)(to the extent such sum is not captured under Clause 29.7.1 above; and

29.7.3 the cumulative amount of any other payments to which D&B Co is entitled under this Agreement as at the end of the Relevant Month in question to the extent not paid under another provision of this Agreement;

LESS

29.7.4 the relevant Retention, if applicable, pursuant to Clauses 29.8 to 29.10 (*Retention*);

29.7.5 any sums due from D&B Co to the Authority or deductions to be made under this Agreement; and

29.7.6 the amounts certified for payment in Interim Certificates previously issued,

and stating the balances (if any) due from the Authority to D&B Co or from D&B Co to the Authority in respect of [each of the Main Works and the Post Completion Works and] cumulatively the Works as a whole.

[Where the amounts or sums due that are referred to in Clause [29.7.1], [29.7.3], [29.7.5] and/or [29.7.6] above do not relate specifically to the Main Works or the Post Completion Works (or relate to both in indeterminate proportions), in recording such sums in the Application for Payment the Authority shall attribute [◆]% of such amounts or sums to the Main Works and [◆]% to the Post Completion Works.]

It is immaterial that the sum referred to in this Clause 29.7 may be zero. If D&B Co fails submit an Application for Payment and supporting information and documentation in accordance with Clause 29.4 (*Applications for Payment*) and Clause 29.5 (*Form of Application*) above in respect of a Relevant Month by the relevant Application Date then the balances referred to in this Clause 29.7 shall be zero. If the Authority fails to give an Interim Certificate in accordance with Clause 29.7 and D&B Co has given an Application for Payment in accordance with Clause 29.4 (*Applications for Payment*) and Clause 29.5 (*Form of Application*), the sum to be paid by the Authority shall, subject to any Pay Less Notice given under Clause 29.23 (*Pay Less Notice*), be the sum specified in the Application for Payment.

Retention

29.8 The Authority shall be entitled to deduct and retain[:

29.8.1][◆] per cent ([◆]%) of the total aggregate amounts specified in Clause 29.7.1 to 29.7.3 (*Issue of Interim Certificate*) which relate to the [Main] Works from time to time (provided that credit shall be given in respect of amounts retained previously in respect of the [Main] Works) [(the "[Main] Retention")]; and

29.8.2 [◆] per cent ([◆]%) of the total aggregate amounts specified in Clause 29.7.1 to 29.7.3 (*Issue of Interim Certificate*) which relates to the Post Completion Works from time to time (provided that credit shall be given in respect of amounts retained previously in respect of the Post Completion Works) (the "**Post Completion Retention**");]

[(together, the "**Retentions**")]

29.9 The following provisions shall apply to the Retention[s]:-

29.9.1 the Authority shall owe no fiduciary duty to D&B Co in respect of the Retentions;

29.9.2 any interest earned on the Retention[s] shall be permanently retained by the Authority;

29.9.3 no later than ten (10) Business Days after the Actual Completion Date, the Authority shall pay to D&B Co [◆]% of the [Main] Retention deducted and retained (less any amounts or liabilities duly paid or incurred by the Authority in respect of the [Main] Works in accordance with Clause 29.10);

29.9.4 [no later than ten (10) Business Days after the Actual Post Completion Works Date, the Authority shall pay to D&B Co [◆]% of the Post Completion Retention deducted and retained (less any amounts or liabilities duly paid or incurred by the Authority in respect of the Post Completion Works in accordance with Clause 29.10);]

29.9.5 no later than ten (10) Business Days after the issue of[:

(a)]the Certificate of Making Good Defects in respect of the [Main] Works, the Authority shall pay to D&B Co the balance of the [Main] Retention deducted and retained (less any amounts or liabilities duly paid or incurred by the Authority in accordance with Clause 29.10); [and

- (b) the Certificate of Making Good Defects in respect of the Post Completion Works, the Authority shall pay to D&B Co the balance of the Post Completion Retention deducted and retained (less any amounts or liabilities duly paid or incurred by the Authority in accordance with Clause 29.10);]

29.9.6 the Authority shall not hold the Retention[s] in the Project Bank Account.

29.10 In the event that D&B Co fails to comply with its obligations under Clause 19 (*Defects*) to rectify a Defect, the Authority shall be entitled to[:

29.10.1]deduct from the balance of the [Main] Retention from time to time such amounts as are equal to the costs, reasonably and properly incurred by the Authority in rectifying, or procuring the rectification of any such Defect in respect of the [Main] Works[; and

29.10.2 deduct from the balance of the Post Completion Retention from time to time such amounts as are equal to the costs, reasonably and properly incurred by the Authority in rectifying, or procuring the rectification of any such Defect in respect of the Post Completion Works].

Non-Compliant Works

29.11 By each Interim Certificate the Authority gives notice to D&B Co specifying the amount of the payment proposed to be made and the basis upon which it is calculated. For the avoidance of doubt, no sum shall be included in any Interim Certificate if, in the reasonable opinion of the Authority, any Works to which the Interim Certificate relates do not comply with the provisions of this Agreement, in which event the amount relating to such non-compliant Works shall be omitted from such Interim Certificate and such sum shall only be included in an Interim Certificate following rectification of such Works by D&B Co to the satisfaction of the Authority (acting reasonably).

Date for Payment

29.12 Following receipt of an Interim Certificate from the Authority, D&B Co shall, within two (2) Business Days of the date of issue of such Interim Certificate, submit an invoice to the Authority for the amount certified in such Interim Certificate together with a Payment Instruction. The final date for payment of such amount (the "**Final Date**") shall be seven (7) Business Days after the Authority's receipt of D&B Co's invoice and Payment Instruction.

Right to Suspend

- 29.13 Without prejudice to any other rights and remedies which D&B Co may possess, if:-
- 29.13.1 the Authority fails to pay any sum due pursuant to Clause 29.12 (*Date for Payment*) by the Final Date; and
 - 29.13.2 it has not given a notice pursuant to Clause 29.23 (*Pay Less Notice*) in respect of such sum: and
 - 29.13.3 such failure continues for a period of seven (7) days after D&B Co has given to the Authority written notice of its intention to suspend performance of any or all of its obligations under this Agreement and the ground or grounds on which it is intended to suspend performance,
- then D&B Co may, following the expiry of such seven (7) day period, suspend performance of any or all of its obligations under this Agreement until payment in full of the sum payable occurs.
- 29.14 Where D&B Co exercises its right of suspension under Clause 29.13.3 (*Right to Suspend*), it shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by it as a result of the exercise of the right.
- 29.15 Applications in respect of any such costs and expenses shall be made to the Authority and D&B Co shall with its Application for Payment provided for in Clause 29.4 (*Application for Payment*), in the month following the month in which the right arose, submit such details of the costs and expenses as are reasonably necessary to enable D&B Co's entitlement to be ascertained.

Statement of Final Accounts and Issue of Payment Certificates

- 29.16 A final account shall be required for [each of] the [Main] Works [(the "**Main Works Final Account**")]] [and the Post Completion Works (the "**Post Completion Works Final Account**")], each a "**Statement of Final Account**". Without prejudice to Clause 29.4 (*Applications for Payment*), within [one month] of the date of issue of the Certificate of Practical Completion in respect of [each of] the [Main] Works [and the Post Completion Works], D&B Co shall submit to the Authority's Representative the [relevant] Statement of Final Account and supporting documents showing in detail the value in accordance with this Agreement of all relevant work executed and all further sums which D&B Co considers to be due to it in respect of the relevant Works in accordance with this Agreement.
- 29.17 If D&B Co has not submitted the [relevant] Statement of Final Account and supporting documents to the Authority's Representative by the date [one month] after the date on which it was required to do so pursuant to Clause 29.16, the Authority's Representative may give notice to D&B Co in writing that if such a Statement of Final Account is not prepared and submitted by D&B Co after: a

further [one month] the Authority's Representative may do so itself. Upon the expiry of the later of:

29.17.1 that [one month] period of notice; and

29.17.2 a [one month] period from the issue of[:

- (a)]the Certificate of Making Good Defects in respect of the [Main] Works, in respect of the Main Works Final Account; [or
- (b) the Certificate of Making Good Defects in respect of the Post Completion Works, in respect of the Post Completion Works Final Account],

the Authority's Representative may prepare the relevant Statement of Final Account and issue it to D&B Co.

29.18 The Due Date for payment of the [relevant] Statement of Final Account shall be within [] Business Days after whichever is the later of:

29.18.1 the date of issue of[:

- (a)]in respect of the [Main Works/Statement of] Final Account, the Certificate of Making Good Defects in respect of the [Main] Works[; or
- (b) in respect of the Post Completion Works Final Account, the date of issue of the Certificate of Making Good Defects in respect of the Post Completion Works]; and

29.18.2 receipt of D&B Co's relevant Statement of Final Account pursuant to Clause 29.16 or alternatively the Authority issuing a Statement of Final Account under Clause 29.17 (the "**Payment Certificate Due Date**").

Within five (5) days of the [relevant] Payment Certificate Due Date the Authority's Representative shall issue to D&B Co a certificate in respect of the [relevant] Statement of Final Account (a "**Payment Certificate**") stating the sum that the Authority or the Authority's Representative considers to be or have been due at the [relevant] Payment Certificate Due Date and the basis on which that sum is calculated including the value in accordance with this Agreement, of all [Main] Works [or Post Completion Works (as relevant to that Statement of Final Account)] carried out by D&B Co and all the sums due to D&B Co in accordance with this Agreement less the sum of the amounts already certified by Interim Certificates and all sums due from D&B Co to the Authority or deductions to be made under this Agreement, and showing the balance payable from D&B Co to the Authority or from the Authority to D&B Co, as the case may be. It is immaterial that the sum referred to in this Clause 29.18 may be zero.

- 29.19 If the Authority fails to issue the relevant Payment Certificate in accordance with Clause 29.18 (where D&B Co has submitted the [relevant] Statement of Final Account pursuant to Clause 29.16) D&B Co's Statement of Final Account shall take effect as if it were the Payment Certificate in respect of the [Main Works/Statement of] Final Account [or Post Completion Works Final Account (as relevant)].
- 29.20 If either Payment Certificate under Clause 29.18 provides that D&B Co requires to make a payment to the Authority, the Authority may recover the same as a debt.
- 29.21 Following receipt of a Payment Certificate D&B Co shall submit an invoice to the Authority for the amount certified in such Payment Certificate. The final date for payment of such amount (the "**Payment Certificate Final Date**") shall be fifteen (15) Business Days after the Authority's receipt of an invoice from D&B Co in respect of the relevant Payment Certificate.
- 29.22 A Payment Certificate issued pursuant to Clause 29.16 to this Clause 29.22 shall at the expiry of one month after it is issued (save in respect of fraud) have effect in any proceedings arising out of or in connection with this Agreement as:
- 29.22.1 conclusive evidence that all and only such extensions of time, if any, as are due have been given in respect of the relevant Works; and
- 29.22.2 conclusive evidence that the payment to D&B Co of all and any additions to or increases in the Development Amount shall be in full and final settlement of all and any claims which D&B Co has or may have arising out of or in connection with this Agreement or in relation to the relevant Works whether such claims may be for breach of contract, in tort, for breach of statutory duty or otherwise.

Pay Less Notice

- 29.23 If the Authority intends in good faith to pay less than the sum notified pursuant to a Payment Certificate or Interim Certificate (or Application for Payment if the final sentence of Clause 29.7 (*Issue of Interim Certificate*) applies), the Authority or the Authority's Representative shall, at least four (4) Business Days before the Final Date or Payment Certificate Final Date give a notice (a "**Pay Less Notice**") to D&B Co. Such Pay Less Notice shall specify both the sum that it considers to be due to D&B Co at the date the Pay Less Notice is given and the basis on which that sum has been calculated. It is immaterial that the sum referred to in this Clause 29.23 (*Pay Less Notice*) may be zero.

Revised Payment Instruction

- 29.24 If the Authority gives a Pay Less Notice to D&B Co in accordance with Clause 29.23 (*Pay Less Notice*) then D&B Co shall submit a revised Payment Instruction to the Authority by no later than the date falling one (1) Business Day prior to the Final Date.

- 29.25 If D&B Co does not comply with Clause 29.24 (*Revised Payment Instruction*) then the PBA Beneficiary Amounts shall be deemed to be reduced on an equal pro rata basis based on the difference between the amount the amount certified in an Interim Certificate and the amount specified as considered by the Authority to be due pursuant to a Pay Less Notice issued in accordance with Clause 29.23 (*Pay Less Notice*) (a “**Deemed Allocation**”).

Adjustments to Certificates

- 29.26 If any sum shall become due to D&B Co under this Agreement otherwise than for work executed, the amount thereof shall (provided D&B Co has submitted an Application for Payment therefore in accordance with Clause 29.4 (*Applications for Payment*)) be included in the next Interim Certificate. If any sum shall become payable under this Agreement by D&B Co to the Authority, whether by deduction from the Development Amount or otherwise, the same shall become due on the date on which D&B Co receives a written demand for the same from the Authority and shall be paid by D&B Co to the Authority within twenty (20) Business Days (being the Final Date for payment) of such written demand or, at the option of the Authority, the amount thereof may be deducted from the next Interim Certificate (or Application for Payment if the final sentence of Clause 29.7 (*Issue of Interim Certificate*) applies) and (if necessary) from subsequent Interim Certificates (or Applications for Payment if the final sentence of Clause 29.7 (*Issue of Interim Certificate*) applies).

Correction of Certificates

- 29.27 The Authority may in any Interim Certificate or Payment Certificate make any correction or modification that should properly have been made in respect of any previous Interim Certificate.

Effect of Certificates

- 29.28 No certificate shall of itself be conclusive evidence that any design, works, materials or goods to which it relates are in accordance with this Agreement and, without prejudice to the generality of the foregoing, the issue of an Interim Certificate or of the Payment Certificate shall not prejudice any right of the Authority against D&B Co in respect of any defect in the Works (including the Authority's rights under Clause 19 (*Defects*)).

Manner of Payment⁵⁴

- 29.29 Subject to Clause 29.30 (*Manner of Payment*), all payments under this Agreement shall be made in Pounds Sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice (or otherwise notified to the payer by the recipient), quoting the invoice number against which payment is made.

⁵⁴ D&B Co to specify the manner of payment.

- 29.30 Any sum due by the Authority pursuant to Clause 29.12 (*Date for Payment*) shall be made in Pounds Sterling by electronic transfer of funds for value on the day in question to the Project Bank Account, quoting the invoice number against which payment is made. Payments made by the Authority into the Project Bank Account are deemed to be payments from the Authority to D&B Co in accordance with this Agreement and discharge the Authority's payment obligations under this Agreement in equal proportion to the sums paid by the Authority to the Project Bank Account.

Disputes

- 29.31 If either party (acting in good faith) disputes all or any part of the Interim Certificate calculated in accordance with this Clause 29 (*Payment*) or the Payment Certificate (subject to Clause 29.22 (*Statement of Final Accounts and Issue of Payment Certificate*)), the undisputed amount of the Interim Certificate or Payment Certificate (as the case may be) shall be paid by the Authority in accordance with Clause 29.12 (*Date for Payment*) or 29.21 (*Statement of Final Accounts and Issue of Payment Certificate*) (as the case may be) and the provisions of this Clause 29.22 (*Statement of Final Accounts and Issue of Payment Certificate*) shall apply. The parties shall use all reasonable endeavours to resolve the Dispute in question within [◆] Business Days of the Dispute arising. If they fail so to resolve it, either party may refer the matter to the Dispute Resolution Procedure. Following resolution of the Dispute, any amount agreed or determined to have been payable shall be paid forthwith by the Authority to D&B Co, together with interest on such amount calculated in accordance with Clause 29.32 (*Late Payments*).

Late Payments

- 29.32 Each party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not duly made pursuant to the terms of this Agreement on the Final Date or Payment Certificate Final Date (as the case may be) calculated from day to day at a rate per annum equal to the Default Interest Rate from the Final Date or Payment Certificate Final Date (as the case may be) up to and including the date of payment.

Set Off

- 29.33 Whenever any sum of money shall be agreed, or determined, as due and payable by D&B Co to the Authority, such sum may at the Authority's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, to D&B Co from the Authority under this Agreement provided that the Authority has issued a Pay Less Notice.
- 29.34 Whenever any sum of money shall be agreed, or determined, as due and payable by the Authority to D&B Co, such sum may at D&B Co's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, from D&B Co to the Authority under this Agreement provided that D&B Co has given the Authority not less than [] Business Days' notice of its intention to deduct or apply such sum.

Project Bank Account⁵⁵

- 29.35 Within five (5) Business Days of the earlier of:
- 29.35.1 the date of appointment of each Qualifying Sub-Contractor by the Contractor to undertake sub-contract works (including off-site fabrication) in connection with the Project; and
 - 29.35.2 the date falling five (5) Business Days prior to each Qualifying Sub-Contractor commencing sub-contract works (including off-site fabrication) in connection with the Project,
- 29.36 D&B Co shall procure and deliver to the Authority an original version of a Joining Declaration duly executed by D&B Co, the Contractor and the relevant Qualifying Sub-Contractor.
- 29.37 the Authority shall execute the relevant Joining Declaration within five (5) Business Days of receipt of the same from D&B Co.
- 29.38 Where any Qualifying Sub-Contractor declines to enter into a Joining Declaration, D&B Co shall procure that the Contractor uses all reasonable endeavours to obtain disclosure from the Qualifying Sub-Contractor of the reasons for such refusal. D&B Co shall procure that the Contractor seeks to persuade the Qualifying Sub-Contractor to re-consider its position. D&B Co shall procure that the Contractor shall record this process and provide copies of such records to D&B Co who shall, in turn, provide such records to the Authority.
- 29.39 D&B Co shall procure that the Contractor informs each Below Threshold Sub-Contractor that the Below Threshold Sub-Contractor may make a Joining Request at any time.
- 29.40 D&B Co shall procure that the Contractor communicates every Joining Request by a Below Threshold Sub-Contractor to D&B Co within five (5) Business Days of such Joining Request being received by the Contractor.
- 29.41 D&B Co shall communicate each Joining Request by a Below Threshold Sub-Contractor to the Authority's Representative within five (5) Business Days of such Joining Request being communicated to D&B Co by the Contractor.
- 29.42 Following the receipt of any Joining Request by a Below Threshold Sub-Contractor, the Authority and D&B Co shall discuss with the Contractor whether it is practicable and desirable for payments to the Below Threshold Sub-Contractor to be made through the Project Bank Account having regard to the number, timing and value of such payments. If the Authority, D&B Co and the Contractor agree that payments to the Below Threshold Sub-Contractor should be made through the Project Bank Account then D&B Co shall procure and deliver to the Authority an

⁵⁵ Reference should be made to applicable guidance on Project Bank Accounts.

original version of a Joining Declaration duly executed by D&B Co, the Contractor and the relevant Below Threshold Sub-Contractor. The Authority shall thereafter execute the relevant Joining Declaration within five (5) Business Days of receipt of the same from D&B Co. If the Authority, D&B Co and the Contractor do not agree that payments to the Below Threshold Sub-Contractor should be made through the Project Bank Account then D&B Co shall write to the Authority and fully explain the reasons for the failure to so agree.

29.43 If this Agreement is terminated no further monies shall be payable into the Project Bank Account.

29.44 Within [two (2) months] of the date of issue of the [each] Certificate of Practical Completion, D&B Co shall submit to the Authority's Representative a summary report relating to the use and operation of the Project Bank Account specifying (as a minimum):

29.44.1 the total amount of payments made through the Project Bank Account to PBA Beneficiaries;

29.44.2 the total amount of payments made through the Project Bank Account to PBA Sub-Contractors;

29.44.3 the total amount of payments made through the Project Bank Account to the Contractor in respect of Non-PBA Sub-Contractors;

29.44.4 the reasons for any Qualifying Sub-Contractor failing to be paid through the Project Bank Account; and

29.44.5 lessons learned from the use and operation of the Project Bank Account, including feedback from the Contractor and PBA Sub-Contractors.

30. VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION SCHEME

30.1 All amounts stated to be payable by either party under this Agreement shall be exclusive of any VAT properly chargeable on any amount.

30.2 Each party shall pay to the other party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

30.3 If either party (referred to in this Clause as the "**First Party**") shall consider that any VAT which the other party (referred to in this Clause as the "**Second Party**") claims to be properly chargeable to the First Party in connection with this Agreement is not in fact properly so chargeable, the First Party shall be entitled to require the Second Party to obtain clearance from HM Revenue and Customs (or, if relevant, such other body as is charged at the time with the collection and

management of VAT) as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request HM Revenue and Customs for such clearance.

- 30.4 The following further provisions shall apply in respect of the application for clearance in accordance with Clause 30.3 (*VAT and Construction Industry Tax Deduction Scheme*):
- 30.4.1 prior to submitting its request for such clearance and any further communication to HM Revenue and Customs in connection with the obtaining of the clearance, 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;
 - 30.4.2 the Second Party shall provide to the First Party copies of all communications received from HM Revenue and Customs in connection with the application for clearance as soon as practicable after receipt; and
 - 30.4.3 the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as HM Revenue and Customs may require) to obtain such clearance as soon as reasonably practicable following the initial request.
- 30.5 If clearance is required by the First Party under Clause 30.3 (*VAT and Construction Industry Tax Deduction Scheme*), the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until clearance is received from HM Revenue and Customs which states that a sum of VAT (the "**VAT Sum**") is properly so chargeable or HM Revenue and Customs state that they are not prepared to give any clearance on the matter. In this case, then subject to Clauses 30.6 (*VAT and Construction Industry Tax Deduction Scheme*) and 30.7 (*VAT and Construction Industry Tax Deduction Scheme*) and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III VAT Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum (and any interest or penalties attributable to the VAT Sum) to the Second Party.
- 30.6 If the First Party disagrees with any clearance obtained pursuant to Clause 30.3 (*VAT and Construction Industry Tax Deduction Scheme*) by the Second Party from HM Revenue and Customs, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses including interest and penalties which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such clearance or otherwise to resist or avoid the imposition of VAT on the relevant supply.
- 30.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 30.6 (*VAT and Construction Industry Tax Deduction Scheme*):

- 30.7.1 the action which the First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of HM Revenue and Customs before any VAT tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;
- 30.7.2 if the Second Party shall be required to pay to or deposit with HM Revenue and Customs a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to HM Revenue and Customs 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 HM Revenue and Customs the First Party shall pay such sum to the Second Party;
- 30.7.3 save as specifically provided in Clause 30.5 (*VAT and Construction Industry Tax Deduction Scheme*), the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party 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
- 30.7.4 the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal, for any sum paid to or deposited with HM Revenue and Customs in accordance with Clause 30.7.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

Changes in Recoverability of VAT

- 30.8 Subject to Clause 30.9 (*Changes in Recoverability of VAT*), if, following a Change in Law, D&B Co becomes unable to recover VAT attributable to supplies to be made to the Authority by D&B Co pursuant to this Agreement, the Authority shall ensure that D&B Co is left in no better and no worse position than it would have been had such Change in Law not occurred (including but not limited to making such amendments to this Agreement as D&B Co and the Authority shall agree acting reasonably), provided that D&B Co shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.
- 30.9 The provisions of Clause 30.8 (*Changes in Recoverability of VAT*) shall apply only if (and to the extent that) the Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Works on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:
- 30.9.1 prior to the date of this Agreement; and

30.9.2 in substantially the same form as the Change in Law.

Construction Industry Tax Deduction Scheme

30.10 This Clause 30.10 (*Construction Industry Tax Deduction Scheme*) relates to the Construction Industry Tax Deduction Scheme:

30.10.1 In this Clause 30.10 (*Construction Industry Tax Deduction Scheme*) (but not otherwise):

- (a) **"the Act"** means the Finance Act 2004;
- (b) **"the Regulations"** means the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045);
- (c) **"the Legislation"** means Chapter 3 Part 3 of the Act and the Regulations, taken together;
- (d) **"Contractor"** means a person who is a contractor for the purposes of Chapter 3 Part 3 of the Act; and
- (e) **"sub-contractor"** means a person who is a sub-contractor for the purposes of Chapter 3 Part 3 of the Act.

30.10.2 Each of the Authority and D&B Co shall comply with the Legislation.

30.10.3 If any payment due from the Authority to D&B Co under this Agreement is a contract payment under section 60(1) of the Act, then the Authority, as Contractor, shall (not later than fifteen (15) Business Days before the first such payment is due to be made) verify, in accordance with paragraph 6 of the Regulations, whether the sub-contractor is registered for gross payment or for payment under deduction or is not registered under Chapter 3 Part 3 of the Act.

30.10.4 If any payment due from the Authority to D&B Co under this Agreement is a contract payment under section 60(1) of the Act, then:

- (a) if D&B Co is registered for gross payment under section 63(2) of the Act, the Authority shall make a payment to D&B Co without any deduction;
- (b) if D&B Co is not registered for gross payments under section 63(2) of the Act, the Authority shall make a payment to D&B Co, subject to the deduction of the relevant percentage in accordance with section 61(1) of the Act, and thereupon Clause 30.10.6 below shall apply.

- 30.10.5 If any dispute arises between the Authority and D&B Co as to whether any payment due by the Authority to D&B Co under this Agreement is or is not a contract payment by virtue of the exemption in Regulation 23 of the Regulations, the parties will jointly apply to HM Revenue and Customs for a written clearance and until such clearance is received it shall be assumed that such payment is a contract payment and the provisions of Clause 30.10 (*Construction Industry Tax Deduction Scheme*) shall apply accordingly.
- 30.10.6 The Authority shall be entitled to make a deduction at the rate specified in section 61(1) of the Act or at such other rate as may be in force from time to time from the whole of any payment to D&B Co (and not just that part of such payment which does not represent the direct cost to D&B Co or any other person of materials used or to be used in carrying out the construction operations to which the relevant payment relates) unless prior to making such payment the Authority shall have received written confirmation from HM Revenue and Customs (obtained by and at the expense of D&B Co) in a form which is reasonably satisfactory to the Authority directing the Authority to make the deduction against only a specified amount or proportion of any such payment to D&B Co.
- 30.10.7 Where any error or omission has occurred in calculating or making any payment under this Clause 30.10 (*Construction Industry Tax Deduction Scheme*) then:
- (a) in the case of an over deduction, the Authority shall correct that error by repayment of the sum over deducted to D&B Co; and
 - (b) in the case of an under deduction, D&B Co shall correct that error or omission by repayment of the sum under deducted to the Authority.
- 30.10.8 The Authority shall send promptly to H M Revenue & Customs any returns required by the Legislation, and shall provide to D&B Co a payment statement (where appropriate) and/or such other information as may be required by the Legislation in relation to any contract payment.
- 30.10.9 If compliance with this Clause 30.10 (*Construction Industry Tax Deduction Scheme*) involves the Authority or D&B Co in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail.

31. RECORDS AND OPEN BOOK ACCOUNTING

Records and Reports

The provisions of Schedule 14 (*Record Provisions*) shall apply to the keeping of records and the making of reports.

PART 10: TERMINATION

32. AUTHORITY EVENTS OF DEFAULT

- 32.1 For the purposes of this Agreement, Authority Events of Default means any of the following events or circumstances:
- 32.1.1 the Authority is in material breach of its obligations under Clause 9 (*Nature of Land Interests*) (other than as a consequence of a breach by D&B Co of its obligations under this Agreement) and such breach materially adversely affects the ability of D&B Co to perform its material obligations under this Agreement for a continuous period of not less than thirty (30) Business Days; or
 - 32.1.2 the Authority fails to pay any sum or sums due to D&B Co under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) £[♦] (index linked) from time to time and such failure continues for thirty (30) Business Days from receipt by the Authority of a notice of non payment from D&B Co; or
 - 32.1.3 the Authority is in breach of its obligations under Clause 45.7 (*Assignment*); or
 - 32.1.4 an expropriation sequestration or requisition of a material part of the assets and/or shares of D&B Co by the Authority or a Relevant Authority.

D&B Co's Options

- 32.2 On the occurrence of an Authority Event of Default, or within a reasonable time after D&B Co becomes aware of the same, and while the same is still subsisting, D&B Co may, at its option:
- 32.2.1 suspend performance by it of its obligations under this Agreement until such time as the Authority shall have demonstrated to the reasonable satisfaction of D&B Co that it is capable of performing, and will perform, its obligations under this Agreement; or

32.2.2 serve notice⁵⁶ on the Authority (or such other party as may be notified in advance in writing by the Authority to D&B Co) of the occurrence (and specifying details) of such Authority Event of Default. If the relevant matter or circumstance has not been rectified or remedied by the Authority (or otherwise) in respect of Clause 32.1.1, Clause 32.1.3 or Clause 32.1.4 within sixty (60) Business Days of such notice, and in respect of Clause 32.1.2 within thirty (30) Business Days of such notice, D&B Co may serve a further notice on the Authority (or its substitute notified in accordance with this Clause 32.2.2) terminating this Agreement with immediate effect.

32.3 D&B Co shall not exercise or purport to exercise any right to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly set out in this Agreement.

33. D&B CO EVENT OF DEFAULT

D&B Co Event of Default

33.1 For the purposes of this Agreement, D&B Co Event of Default means any of the following events or circumstances listed in this Clause 33.1 (*D&B Co Event of Default*):

Insolvency

33.1.1 the occurrence of any of the following events in respect of D&B Co, namely:

- (a) any arrangement or composition with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act 1986) being entered into by or in relation to D&B Co;
- (b) a receiver, administrator, administrative receiver or other encumbrancer taking possession of or being appointed over, or any distress, execution or other process being levied or enforced (and not being discharged within ten (10) Business Days) upon, the whole or any material part of the assets of D&B Co;
- (c) D&B Co ceasing to carry on business;
- (d) a petition being presented (and not being discharged within twenty (20) Business Days), or a resolution being passed or an

⁵⁶ Certain notices of importance (including a notice of an Authority Default) require to be issued to Welsh Government (as well as the Authority) pursuant to the notice provisions in Clause 51.

order being made for the administration or the winding up, bankruptcy or dissolution of D&B Co; or

- (e) if D&B Co shall suffer any event analogous to the events set out in Clauses 33.1.1(a) to (d) in any jurisdiction in which it is incorporated or resident;⁵⁷

Long Stop⁵⁸

- 33.1.2 [D&B Co failing to achieve the Actual Completion Date within a period of [[nine (9)]] months after Completion Date ("**Longstop Date**")], provided that where, but for the terms of Clause 14.8.2 (*[Handover Dates]*), the Actual Completion Date could have occurred, the Longstop Date shall be extended to the next date on which such Actual Completion Date may occur pursuant to Clause 14.8.2 (*[Handover Dates]*);⁵⁹

Default

- 33.1.3 D&B Co committing a material breach of its obligations under this Agreement;
- 33.1.4 D&B Co Abandons the Works at any time (other than as a consequence of a continuing breach by the Authority of its obligations under this Agreement).

Assignment

- 33.1.5 D&B Co failing to comply with the provisions of Clauses 45.6 (*Assignment*) or 45.1 (*Sub-Contractors*);

Payment

- 33.1.6 D&B Co failing to pay any sum or sums due to the Authority under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) £[♦] (index linked) and such failure continues for sixty (60) Business Days from receipt by D&B Co of a notice of non payment from the Authority;

⁵⁷ Delete limb (e) if all relevant parties are incorporated and resident in the jurisdiction of England and Wales.

⁵⁸ If it is critical for project specific reasons to meet the scheduled date for completion, the Authority may need to include an earlier trigger which would enable it to terminate prior to the Longstop Date if it became clear at a given point in time that the Longstop Date was incapable of being met.

⁵⁹ Where phasing is adopted, a project specific approach will need to be considered.

Insurance

- 33.1.7 a breach by D&B Co of its obligation to take out and maintain the Insurances required by Clause 41.1(*D&B Co Insurances*);

Corrupt Gifts

- 33.1.8 D&B Co has:
- (a) committed a Prohibited Act, in relation to which Clause 36.3.1 (*Remedies*) applies; or
 - (b) D&B Co has committed a Prohibited Act, in relation to which Clause 36.3.2, 36.3.3, 36.3.4 or 36.3.5 (*Remedies*) applies; or

Tax Compliance

- 33.1.9 in the circumstances described at Clause 40.1.5 (*Tax Compliance*), Clause 40.1.6 (*Tax Compliance*) and/or Clause 40.1.7 (*Tax Compliance*); or

Notification

- 33.2 D&B Co shall notify the Authority of the occurrence, and details, of any D&B Co Event of Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a D&B Co Event of Default, in either case promptly on D&B Co becoming aware of its occurrence.

Authority's Options

- 33.3 On the occurrence of a D&B Co Event of Default, or within a reasonable time after the Authority becomes aware of the same, and while the same is subsisting, the Authority may:
- 33.3.1 in the case of the D&B Co Events of Default referred to in Clauses 33.1.1 (*Insolvency*), 33.1.2 (*Long Stop*), (*Default*), 33.1.5 (*Assign*), 33.1.6 (*Payment*), 33.1.8 (*Corrupt Gifts*) terminate this Agreement in its entirety by notice in writing having immediate effect;
 - 33.3.2 in the case of any D&B Co Event of Default referred to in Clause 33.1.3 and 33.1.4 (*Default*), serve notice of default on D&B Co requiring D&B Co at D&B Co's option either:

- (a) to remedy the D&B Co Event of Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or
 - (b) to put forward within twenty (20) Business Days of such notice of default a reasonable programme (set out, if appropriate, in stages) for remedying the D&B Co Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such D&B Co Event of Default is proposed to be remedied (D&B Co shall only have the option of putting forward a programme in accordance with this Clause 33.3.2(b) if it first notifies the Authority within ten (10) Business Days of such notice of default that it proposes to do so).
- 33.3.3 in the case of any D&B Co Event of Default referred to in Clause 33.1.7 (*Insurance*) serve notice of default on D&B Co requiring D&B Co to remedy the D&B Co Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default;
- 33.3.4 in the case of any D&B Co Event of Default referred to in Clause 33.1.9 (*Tax Compliance*), serve notice of default on D&B Co requiring D&B Co to remedy the D&B Co Event of Default (if the same is continuing) within thirty (30) Business Days of such notice of default; and
- 33.3.5 in the case of any D&B Co Event of Default referred to in Clause 33.1.8(b), serve notice of default on D&B Co requiring D&B Co to remedy the D&B Co Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default, on the terms required pursuant to Clause 36.3.2, 36.3.3, 36.3.4 or 36.3.5, as appropriate.

Remedy Provisions

- 33.4 Where D&B Co puts forward a programme in accordance with Clause 33.3.2(b), the Authority shall have twenty (20) Business Days from receipt of the same within which to notify D&B Co (acting reasonably) that it does not accept the programme, failing which the Authority shall be deemed to have accepted the programme. Where the Authority notifies D&B Co that it does not accept the programme as being reasonable, the parties shall endeavour within the following five (5) Business Days to agree any necessary amendments to the programme put forward. In the absence of agreement within five (5) Business Days, the question of whether the programme (as the same may have been amended by agreement) will remedy the D&B Co Event of Default in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable programme) may be referred by either party for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*).
- 33.5 If:

- 33.5.1 the D&B Co Event of Default notified in a notice of default served under Clause 33.3.2, Clause 33.3.3 or Clause 33.3.4 or 33.3.5 (as the case may be) is not remedied before the expiry of the period referred to in Clause 33.3.2(a), Clause 33.3.3, Clause 33.3.4 or 33.3.5 (as appropriate); or
- 33.5.2 where D&B Co puts forward a programme pursuant to Clause 33.3.2(b) which has been accepted by the Authority or has been determined to be reasonable and D&B Co fails to achieve any element of the programme or the end date for the programme (as the case may be); or
- 33.5.3 any programme put forward by D&B Co pursuant to Clause 33.3.2(b) is rejected by the Authority as not being reasonable, and the Dispute Resolution Procedure does not find against that rejection,

then the Authority may terminate this Agreement in its entirety by written notice to D&B Co with immediate effect. Provided that for the purposes of Clause 33.5.2 if D&B Co's performance of the programme is adversely affected by the occurrence of Force Majeure or a Relief Event then, subject to D&B Co complying with the mitigation and other requirements in this Agreement concerning Force Majeure, or a Relief Event (as the case may be), the time for performance of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by Force Majeure or the Relief Event (as the case may be) which is agreed by the parties or determined in accordance with Schedule 15 (*Dispute Resolution Procedure*).

Authority's Costs

- 33.6 D&B Co shall reimburse the Authority for all reasonable costs incurred by the Authority in exercising any of its rights pursuant to this Clause 33 (*D&B Co Event of Default*) (including, without limitation, any relevant increased administrative expenses). The Authority shall take reasonable steps to mitigate such costs.
- 33.7 The Authority shall not exercise, or purport to exercise, any right to terminate this Agreement except as expressly set out in this Agreement. The rights of the Authority (to terminate or otherwise) under this Clause are in addition (and without prejudice) to any right which the Authority may have to claim the amount of loss or damage suffered by the Authority on account of the acts or omissions of D&B Co (or to take any action other than termination of this Agreement).

34. TERMINATION RESULTING FROM FORCE MAJEURE

If, in the circumstances referred to in Clause 26 (*Force Majeure*), the parties have failed to reach agreement on any modification to this Agreement pursuant to Clause 26 (*Force Majeure*) within six (6) calendar months of the date on which the party affected serves notice on the other party in accordance with Clause 26 (*Force Majeure*) either party may at any time afterwards terminate this Agreement by written notice to the other party having immediate effect provided always that the effects of the relevant event of Force Majeure continues to prevent either party from performing any material obligation under this Agreement.

35. NOT USED

36. CORRUPT GIFTS AND PAYMENTS

Prohibition on Corruption

36.1 The term "**Prohibited Act**" means:

36.1.1 offering, giving or agreeing to give to the Authority or any other public body or to any person employed by or on behalf of the Authority or any other public body any gift or consideration of any kind as an inducement or reward:

(a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with the Authority or any other public body; or

(b) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with the Authority or any other public body;

36.1.2 entering into this Agreement or any other agreement with the Authority or any other public body in connection with which commission has been paid or has been agreed to be paid by D&B Co or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Authority;

36.1.3 committing any offence:

(a) under the Bribery Act 2010;

(b) under any Law creating offences in respect of fraudulent acts; or

(c) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with the Authority or any other public body;

36.1.4 defrauding or attempting to defraud or conspiring to defraud the Authority or any other public body;

- 36.1.5 committing any breach of the Employment Relations 1999 Act (Blacklists Regulations) 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992;
- 36.1.6 committing any breach of the Data Protection Laws by unlawfully processing Personal Data in connection with any blacklisting activities; or
- 36.1.7 committing any offence under the Modern Slavery Act 2015.

Warranty

- 36.2 D&B Co warrants that in entering into this Agreement it has not committed any Prohibited Act.

Remedies

- 36.3 If D&B Co or any D&B Co Party (or anyone employed by or acting on behalf of them) commits any Prohibited Act, then the Authority shall be entitled to act in accordance with Clauses 36.3.1 to 36.3.6 below:
 - 36.3.1 if a Prohibited Act is committed by D&B Co or by an employee not acting independently of D&B Co, then the Authority may terminate this Agreement with immediate effect by giving written notice to D&B Co;
 - 36.3.2 if the Prohibited Act is committed by an employee of D&B Co acting independently of D&B Co, then the Authority may give written notice to D&B Co of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice D&B Co terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Project Operations by another person;
 - 36.3.3 if the Prohibited Act is committed by a Contracting Associate or by an employee of that Contracting Associate not acting independently of that Contracting Associate then the Authority may give written notice to D&B Co of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice D&B Co terminates the relevant Sub-Contract and procures the performance of the relevant part of the Project Operations by another person, where relevant, in accordance with Clause 45 (*Sub-Contracting and Assignment*);
 - 36.3.4 if the Prohibited Act is committed by an employee of a Contracting Associate acting independently of that Contracting Associate, then the Authority may give notice to D&B Co of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice D&B Co procures the termination of the employee's employment and (if necessary) procures the performance of the relevant part of the Project Operations by another person;

36.3.5 if the Prohibited Act is committed by any other person not specified in Clauses 36.3.1 to 36.3.4 above, then the Authority may give notice to D&B Co of termination and this Agreement will terminate unless within twenty (20) Business Days D&B Co procures the termination of such person's employment and of the appointment of their employer (where the employer is not the Authority and where such person is not employed by D&B Co or the Contracting Associate) and (if necessary) procures the performance of the relevant part of the Project Operations by another person; and

36.3.6 any notice of termination under this Clause shall specify:

- (a) the nature of the Prohibited Act;
- (b) the identity of the party who the Authority believes has committed the Prohibited Act; and
- (c) the date on which this Agreement will terminate in accordance with the applicable provisions of this Clause.

36.4 Without prejudice to its other rights or remedies under this Clause, the Authority shall be entitled to recover from D&B Co:

36.4.1 the amount or value of any such gift, consideration or commission; and

36.4.2 any other loss sustained in consequence of any breach of this Clause.

Permitted Payments

36.5 Nothing contained in this Clause shall prevent D&B Co from paying any proper commission or bonus to its employees within the agreed terms of their employment.

Notification

36.6 D&B Co shall notify the Authority of the occurrence (and details) of any Prohibited Act promptly on D&B Co becoming aware of its occurrence.

37. CONSEQUENCES OF TERMINATION

Continued Performance

37.1 Subject to any exercise by the Authority of its rights to perform, or to procure a third party to perform, the obligations of D&B Co, the parties shall continue to

perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the Termination Date.

Transfer to Authority of Assets, Contracts etc.⁶⁰

37.2 On the service of a notice of termination in accordance with this Agreement for any reason:

37.2.1 in so far as any transfer shall be necessary fully and effectively to transfer property to the Authority, D&B Co shall transfer to, and there shall vest in, the Authority, such part of the Works and/or the Facilities as shall have been constructed and such items of the Plant [and [♦⁶¹]] as shall have been procured by D&B Co if the Authority so elects:

37.2.2 all goods and all materials on or near to the Site not yet incorporated in the Works shall remain available to the Authority for the purposes of completing the Works and if the cost of such goods and materials has not been reflected in the payments that have been made by the Authority to D&B Co prior to the service of a notice of termination subject to the payment by the Authority to D&B Co in respect of such goods and materials (determined as between a willing vendor and willing purchaser with any disputes determined pursuant to Clause 44 (*Dispute Resolution Procedure*));

37.2.3 the construction plant shall remain available to the Authority for the purposes of completing the Works, subject to payment of the Contractor's reasonable charges;

37.2.4 if the Authority so elects, D&B Co shall procure that either or both the Construction Contract and Independent Tester Contract⁶² shall be novated or assigned to the Authority, provided that where termination occurs under Clause 32 (*Authority Events of Default*) the consent of the Contractor and Independent Tester (in respect of the Independent Tester Contract only) shall be required;

37.2.5 D&B Co shall deliver to the Authority (as far as not already delivered to the Authority) one (1) complete set of:

(a) "as built drawings" showing all alterations made to the Facilities since the commencement of operation of the Facilities; and

(b) maintenance, operation and training manuals for the Facilities;

⁶⁰ The Authority should include project specific provisions (e.g. relating to equipment, IT, planning, land and Authority assets or information etc). The Authority should consider what protection is required to ensure compliance with the handover provisions on a project specific basis (taking into account the nature, importance and value of the assets that the handover provisions will apply to).

⁶¹ The Authority should add other project specific items.

⁶² Authorities should consider whether other contracts to which D&B Co is party should be listed here on a project specific basis.

- 37.2.6 D&B Co shall use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical plant and equipment used or made available by D&B Co under this Agreement and included in the Facilities are assigned, or otherwise transferred, to the Authority with full title guarantee; and
- 37.2.7 D&B Co shall deliver to the Authority the records referred to in Clause 31 (*Records and Open Book Accounts*) except where such documents are required by Law to be retained by D&B Co or its Contracting Associates (in which case complete copies shall be delivered to the Authority).
- 37.3 D&B Co shall ensure that provision is made in all contracts of any description whatsoever to ensure that the Authority will be in a position to exercise its rights, and D&B Co will be in a position to comply with its obligations, under Clause 37.2 (*Transfer to Authority of Assets, Contracts etc.*) and Clause 37.4.

Transitional Arrangements

- 37.4 On the termination of this Agreement for any reason, for a reasonable period both before and after any such termination, D&B Co shall have the following duties:
- 37.4.1 D&B Co shall as soon as practicable remove from the Site all property not acquired by the Authority pursuant to Clause 37.2 (*Transfer to Authority of Assets, Contracts etc.*) (or not belonging to the Authority or any Authority Party) and if it has not done so within forty (40) Business Days after any notice from the Authority requiring it to do so the Authority may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of D&B Co;
- 37.4.2 D&B Co shall forthwith deliver to the Authority's Representative:
- (a) any security passwords, access codes and other keys to the Facilities and the Equipment; and
 - (b) without prejudice to Clause 43 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities; and
- 37.4.3 D&B Co shall as soon as practicable vacate the Site and shall leave the Site and the Facilities in a safe, clean and orderly condition.

Continuing Obligations

37.5 Save as otherwise expressly provided in this Agreement:

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

37.5.2 [termination of this Agreement shall not affect the continuing rights and obligations of D&B Co and the Authority under Clauses 26 (*Force Majeure*), 29 (*Payment*), 31 (*Records and Open Book Accounting*), 37.2 (*Transfer to Authority of Assets, Contracts etc.*), 37.4, [◆] (*Transitional Arrangements*), 42 (*Exclusions and Limitations on Liability*), 43 (*Intellectual Property*), 44 (*Dispute Resolution Procedure*), 46 (*Mitigation*), 48 (*Confidentiality*), 51 (*Notices*) and Clause 62 (*Governing Law and Jurisdiction*) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.]

Payments Following Termination Upon D&B Co Event of Default

37.6 If the Authority terminates D&B Co's employment under this Agreement in accordance with Clause 33 (*D&B Co Events of Default*), or, Clause 36 (*Corrupt Gifts and Payments*);

37.6.1 D&B Co shall indemnify the Authority and keep the Authority fully indemnified against all reasonable expense, loss, damage and liabilities suffered or incurred by the Authority associated with or arising from the termination including any additional expense (above the amount that would reasonably have been paid to D&B Co had its employment not been terminated) incurred by the Authority in completing the Works (if applicable) including the cost of finding an alternative contractor or contractors and any additional amounts charged by them for completing the Works;

37.6.2 D&B Co shall be entitled to be paid the total value of work properly executed at, and of any design work properly carried out before, the Termination Date, ascertained in accordance with this Agreement, together with any other amounts due to D&B Co under this Agreement less any amounts previously paid to D&B Co under this Agreement; and

37.6.3 no payment shall be made to D&B Co in respect of Clause 37.6.2 until such time as the Works are complete.

Payments Following Termination Upon Authority Default

37.7 If this Agreement is terminated pursuant to Clause 32 (*Authority Events of Default*) D&B Co shall be entitled to be paid:

- 37.7.1 the total value of the Works properly executed at the Termination Date, ascertained in accordance with this Agreement under deduction of all amounts certified for payment in Interim Certificates previously issued under Clause 29.7 (*Issue of Interim Certificate*);
- 37.7.2 the reasonable cost of removal of D&B Co's property from the Site;
- 37.7.3 any Direct Losses caused to D&B Co by the termination; and
- 37.7.4 to the extent not already included in the amount calculated in accordance with Clause 37.7.1, the cost of materials or goods properly ordered for the Works for which D&B Co shall have paid or for which D&B Co is legally bound to pay, and on such payment in full by the Authority such materials or goods shall become the property of the Authority provided always that D&B Co arranges for any such goods or materials to be delivered to the Site.

Payments Following Termination Upon Force Majeure

- 37.8 If this Agreement is terminated pursuant to Clause 34 (*Termination Resulting from Force Majeure*), D&B Co shall be entitled to be paid:
 - 37.8.1 the total value of the Works properly executed at the Termination Date, ascertained in accordance with this Agreement under deduction of all amounts certified for payment in Interim Certificates previously issued under Clause 29.7 (*Issue of Interim Certificate*); and
 - 37.8.2 to the extent not already included in the amount calculated in accordance with Clause 37.8.1, the cost of materials or goods properly ordered for the Works for which D&B Co shall have paid or for which D&B Co is legally bound to pay, and on such payment in full by the Authority such materials or goods shall become the property of the Authority provided always that D&B Co arranges for any such goods or materials to be delivered to the Site.

Payments Under Clauses 37.6, 37.7 and 37.8 to be Exhaustive

- 37.9 Without prejudice to Clause 37.5.1 (*Continuing Obligations*), the making of those payments following a termination which are required to be made by Clauses 37.6 (*Payments Following Termination Upon D&B Co Event of Default*), 37.7 (*Payments Following Termination Upon Authority Default*) and 37.8 (*Payments Following Termination Upon Force Majeure*) shall be in full satisfaction of any claim in respect of the termination of, and the circumstances leading to, the termination of this Agreement or D&B Co's employment under this Agreement and neither D&B Co nor the Authority shall be entitled to any other rights or remedies in that regard.

PART 11: INDEMNITIES, RELIEF, WARRANTIES & INSURANCE

38. INDEMNITIES

D&B Co Indemnities to Authority

- 38.1 D&B Co shall indemnify and keep the Authority indemnified at all times from and against all Direct Losses sustained by the Authority in consequence of:
- 38.1.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, D&B Co or any D&B Co Party notwithstanding any act or omission of the Authority or any Authority Party;⁶³
 - 38.1.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 38.2.1) arising out of, or in the course of, the Project Operations, save to the extent caused (or contributed to) by any Unreasonable Act by the Authority or any Authority Party, breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate⁶⁴ or negligent act or omission of the Authority or any Authority Party;
 - 38.1.3 any physical loss of or damage to Authority Assets arising by reason of any act or omission of D&B Co or any D&B Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party; and
 - 38.1.4 any loss of or damage to property or assets of any third party arising by reason of any act or omission of D&B Co or any D&B Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party.

Authority Indemnities to D&B Co

- 38.2 The Authority shall indemnify and keep D&B Co indemnified at all times from and against all Direct Losses sustained by D&B Co in consequence of:

⁶³ This mirrors the indemnity given by the Authority in relation to its employees in Clause 38.2.1. D&B Co should manage the risks covered by the indemnity (and the fact that there is no carve out for causation) by putting appropriate insurance cover in place (which it is required by law to do), which contains satisfactory non-vitiation provisions (see Clause 46 (*Mitigation*)).

⁶⁴ Deliberate acts or omissions do not include acts or omissions which are within the contemplation of the parties or provided for in this Agreement (see paragraph 11 of Section 2 (*Interpretation*) of Schedule 1 (*Definitions and Interpretation*)).

- 38.2.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, the Authority or any Authority Party notwithstanding any act or omission of D&B Co or any D&B Co Party;
- 38.2.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 38.1.1) arising by reason of any act or omission of the Authority or any Authority Party in the course of provision of the Authority Services, [any Unreasonable Act by the Authority or any Authority Party,] breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of D&B Co or any D&B Co Party;
- 38.2.3 any physical damage to any part of the Works or any assets or other property of D&B Co or any D&B Co Party arising by reason of any breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of D&B Co or any D&B Co Party; and
- 38.2.4 any loss of or damage to property or assets of any third party arising by reason of any breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of D&B Co or any D&B Co Party;

provided that in the case of Clauses 38.2.3 and 38.2.4 there shall be excluded from the indemnity given by the Authority any liability:

- (a) for the occurrence of risks against which and to the extent to which D&B Co is obliged to insure under this Agreement (but for the avoidance of doubt, not such liability to the extent within any applicable excess or deductible or over the maximum amount insured or to be insured under such insurance); or
- (b) in respect of a matter which is a Compensation Event.

Conduct of Claims

38.3 This Clause 38.3 (*Conduct of Claims*) shall apply to the conduct, by a party from whom an indemnity is sought under this Agreement, of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity. The party having, or claiming to have, the benefit of the indemnity is referred to as the "**Beneficiary**" and the party giving the indemnity is referred to as the "**Indemnifier**". Accordingly:

38.3.1 if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become, entitled to indemnification under this Agreement, the

Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of the same;

38.3.2 subject to Clauses 38.3.3, 38.3.4 and 38.3.5 below, on the giving of a notice by the Beneficiary pursuant to Clause 38.3.1 above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with an indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim;

38.3.3 with respect to any claim conducted by the Indemnifier pursuant to Clause 38.3.2 above:

- (a) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
- (b) the Indemnifier shall not bring the name of the Beneficiary into disrepute; and
- (c) the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;

38.3.4 the Beneficiary shall be free to pay or settle any claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:

- (a) the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 38.3.2 above; or
- (b) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under Clause 38.3.1 above or notifies the Beneficiary that it does not intend to take conduct of the claim; or
- (c) the Indemnifier fails to comply in any material respect with the provisions of Clause 38.3.3 above;

- 38.3.5 the Beneficiary shall be free at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which Clause 38.3.2 above applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Clause 38.3.5, then the Indemnifier shall be released from any liability under its indemnity under Clause 38.1 (*D&B Co Indemnities to Authority*) or Clause 38.2 (*Authority Indemnities to D&B Co*) (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 38.3.2 in respect of such claim;
- 38.3.6 if the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:
- (a) an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out of pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
 - (b) the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,
- 38.3.7 provided that there shall be no obligation on the Beneficiary to pursue such recovery and that the Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose indirect or consequential losses or claims for loss of profits which are excluded by this Agreement from being recovered from the Indemnifier); and
- 38.3.8 any person taking any of the steps contemplated by Clauses 38.3.1 to 38.3.5 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

Mitigation – Indemnity Claims

- 38.4 To avoid doubt the provisions of Clause 46 (*Mitigation*) apply to any indemnity given under this Agreement and any such indemnity shall not apply to the extent that such part or parts of Direct Losses could have been reduced or avoided by the Beneficiary complying with the provisions of such Clause 46 (*Mitigation*).

39. TAX ON INDEMNITY PAYMENTS

If any payment by one party under an indemnity in this Agreement is subject to income tax or corporation tax (or any tax replacing them) in the hands of the recipient, the recipient may demand in writing to the party making the payment that the payment shall be increased by such amount as would ensure that, after taking into account any such tax payable in respect of such additional amount, the recipient receives and retains a net sum equal to the amount it would have otherwise received had the payment not been subject to such tax. The party making the payment shall pay such additional amount within ten (10) Business Days of receipt of such demand.

40. WARRANTIES⁶⁵

40.1 Tax Compliance

- 40.1.1 D&B Co represents and warrants to the Authority that at the date of this Agreement, it has notified the Authority in writing of any Occasions of Tax Non-Compliance and any litigation in connection with any Occasions of Tax Non-Compliance that it or, so far as it is aware having made reasonable enquiries, any of the Shareholders (other than [♦]⁶⁶) is involved in.
- 40.1.2 If at any time an Occasion of Tax Non-Compliance occurs in relation to it or any Shareholder other than [♦]⁶⁷ (a "**Non-Compliant Shareholder**"), D&B Co shall:
- (a) notify the Authority in writing of such fact within five (5) Business Days of it becoming aware of that occurrence; and
 - (b) provide to the Authority:
 - (i) promptly, and in any event within twenty (20) Business Days of its becoming aware of that occurrence, details of the steps which it, or as the case may be, the Non-Compliant Shareholder is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors that it considers relevant (together '**Proposed Mitigating Measures**'); and
 - (ii) such other information in relation to the Occasion of Tax Non-Compliance as the Authority may reasonably require within five (5) Business Days of receipt of notice from the Authority to do so.

⁶⁵ Subject to review in light of the entity that is party to the Agreement.

⁶⁶ Reference to be made to the public sector shareholder entities, under the WEPCo Shareholders' Agreement.

⁶⁷ Reference to be made to the public sector shareholder entities, under the WEPCo Shareholders' Agreement.

- 40.1.3 The Authority will notify D&B Co in writing if the Proposed Mitigating Measures are acceptable to it, in its reasonable opinion, within fifteen (15) Business Days of receipt of all information required to be provided in accordance with Clause 40.1.2.
- 40.1.4 Where the Authority notified D&B Co that the Proposed Mitigating Measures are not acceptable, the Authority may, in that notice, request that D&B Co provides details of further measures it, or as the case may be, the Non-Compliant Shareholder, would take to prevent the same from recurring, together with any further mitigating factors that it considers relevant. Within twenty (20) Business Days of receipt of a notice from the Authority requesting further measures, D&B Co will either provide details of the further measures it, or as the case may be, the Non-Compliant Shareholder, is willing to take or notify the Authority that it is not willing to take further measures. The Authority will consider any further measures proposed by D&B Co and notify D&B Co within fifteen (15) Business Days if those further measures, taken together with the Proposed Mitigating Measures, are acceptable to the Authority acting reasonably.
- 40.1.5 If:
- (a) the warranty by D&B Co contained in Clause 40.1.1 is untrue and Proposed Mitigating Measures are not agreed in accordance with Clauses 40.1.2 to 40.1.4 (inclusive); and/or
 - (b) D&B Co commits a material breach of its obligation to notify the Authority of any Occasion of Tax Non-Compliance and / or D&B Co fails to provide details of Proposed Mitigating Measures each as required by Clause 40.1.2; and/or
 - (c) the Authority otherwise becomes aware that an Occasion of Tax Non-Compliance has occurred in relation to D&B Co or a Shareholder (other than [♦]⁶⁸) and D&B Co fails to provide details of Proposed Mitigating Measures within twenty (20) Business Days of its being required by the Authority to do so; and/or
 - (d) the Authority notifies D&B Co under Clause 40.1.4 that the Proposed Mitigating Measures are not acceptable and, if D&B Co is requested to provide details of further measures pursuant to Clause 40.1.4 the further measures (if any) are not acceptable to the Authority, in its reasonable opinion and the Authority notifies D&B Co to that effect; and / or
 - (e) in any such case D&B Co fails to implement, or procure the implementation by a Non-Compliant Shareholder of, any Proposed Mitigating Measures agreed to by the Authority in any material respect (including as to timetable),

⁶⁸ Reference to be made to the public sector shareholder entities, under the WEPCo Shareholders' Agreement.

then the Authority shall be entitled to give to D&B Co:

- (i) where the Occasion of Tax Non-Compliance has occurred in relation to D&B Co, a notice under Clause 33.3.4 (*Authority's Options*); and
- (ii) where the Occasion of Tax Non-Compliance has occurred in relation to a Shareholder, a notice under Clause 40.1.6.

40.1.6 Where the Occasion of Tax Non-Compliance applies to a Non-Compliant Shareholder, the Authority may by written notice (a "**Shareholder Tax Non-compliance Notice**") require that the Non Compliant Shareholder transfers all its shares and Shareholder loan notes in D&B Co to a person who is not a Restricted Person within one hundred and eighty (180) days commencing on the date the Shareholder Tax Non-compliance Notice is served. If the Non Compliant Shareholder does not effect such transfer of shares and Shareholder loan notes in D&B Co to a person who is not a Restricted Person within such one hundred and eighty (180) day period (or such longer period as may be agreed by the Authority in its absolute discretion) then the Authority will be entitled to give a notice to D&B Co under Clause 33.3.4 (*Authority's Options*).

40.1.7 If D&B Co fails to implement, or procure the implementation by a Non-Compliant Shareholder of, any Proposed Mitigating Measures agreed to by the Authority in any material respect (including as to timetable) following an Occasion of Tax Non-Compliance which applies to a Non-Compliant Shareholder, the Authority may by written notice (a "**Shareholder Tax Mitigation Measures Non-Compliance Notice**") require that the Non-Compliant Shareholder transfers all its shares and Shareholder loan notes in D&B Co to a person who is not an Restricted Person within ninety (90) days commencing on the date the Shareholder Tax Mitigation Measures Non-Compliance Notice is served. If the Non-Compliant Shareholder does not effect such transfer of shares and Shareholder loan notes to a person who is not an Restricted Person within such ninety (90) day period (or such longer period as may be agreed by the Authority in its absolute discretion) then the Authority will be entitled to give a notice to D&B Co under Clause 33.3.4 (*Authority's Options*).

41. INSURANCE

D&B Co Insurances

- 41.1 D&B Co shall procure that the Insurances, details of which are set out in Section 1 of Schedule 12 (*Insurance Requirements*), are taken out prior to the commencement of the Works and are maintained for the periods specified in Section 1 of Schedule 12 (*Insurance Requirements*).
- 41.2 Without prejudice to the other provisions of this Clause 41 (*Insurance*), D&B Co shall, at all relevant times, at its own cost, effect and maintain in full force those insurances which it is required to effect by any applicable Law.

- 41.3 D&B Co shall discharge all its obligations under The Insurance Act 2015 when placing, renewing, maintaining or amending any of the Insurances referred to in Clauses 41.1 and 41.2 (*D&B Co Insurances*) and including complying with the duty of fair presentation to insurers, and taking the actions needed to protect the Authority's separate interests where appropriate.
- 41.4 All Insurances referred to in Clauses 41.1 (*D&B Co Insurances*) shall:
- 41.4.1 be maintained in the names of the parties specified in Schedule 12 (*Insurance Requirements*) and shall be composite policies of insurance (and not joint) unless stated otherwise in Schedule 12 (*Insurance Requirements*);
 - 41.4.2 be placed with insurers who are acceptable to the Authority (such acceptance not to be unreasonably withheld or delayed);
 - 41.4.3 in so far as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value;
 - 41.4.4 comply with the relevant provisions of Section 1 of Schedule 12 (*Insurance Requirements*); and
 - 41.4.5 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 Section 3 (*Endorsements*) of Schedule 12 (*Insurance Requirements*).
- 41.5 D&B Co shall ensure that its brokers give the Authority a letter of undertaking substantially in the form set out in Section 4 (*Broker's Letter of Undertaking*) of Schedule 12 (*Insurance Requirements*) on or before the date of signature of this Agreement.

Subrogation and Vitiating

- 41.6 D&B Co shall in respect of the Insurances referred to in Clause 41.1 (*D&B Co Insurances*):
- 41.6.1 procure that all policies of insurance to be effected by it pursuant to this Clause shall contain a provision to the effect that the insurers have agreed to waive all rights of subrogation against the Authority (and all Authority Parties in accordance with Endorsement 2 in Section 3 (*Endorsements*) of Schedule 12 (*Insurance Requirements*); and
 - 41.6.2 provide for non-vitiating protection in respect of any claim made by the Authority as co-insured in accordance with Endorsement 2 in Section 3 (*Endorsements*) of Schedule 12 (*Insurance Requirements*);

provided that, to avoid doubt, this Clause 41.6 (*Subrogation and Vitiating*) shall not by itself prevent D&B Co from claiming against the Authority (or any Authority Party) under an express provision of this Agreement for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent such loss or damage exceeds the maximum of such insurance required by this Agreement.

- 41.7 Neither party shall take any action or fail to take any reasonable action or (in so far as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) as a result of which any of the Insurances may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

Evidence of D&B Co Insurance

- 41.8 Not less than twenty (20) Business Days prior to the amendment [or expiry] of any relevant insurance policy D&B Co shall submit to the Authority a request for approval from the Authority of the insurer and the principal terms and conditions of such insurance policy (and any revision to such terms and conditions or change in identity of such insurer), such approval not to be unreasonably withheld or delayed.

- 41.9 D&B Co shall provide to the Authority:

41.9.1 copies on request of all insurance policies referred to in Clauses 41.1 (*D&B Co Insurances*) (together with any other information reasonably requested by the Authority relating to such insurance policies) and the Authority shall be entitled to inspect them during ordinary business hours; and

41.9.2 evidence that the premiums payable under all insurance policies have been paid and that the Insurances are in full force and effect in accordance with the requirements of this Clause 41 (*Insurance*) and Schedule 12 (*Insurance Requirements*).

- 41.10 [Renewal certificates or such other evidence of renewal in relation to the Insurances shall be obtained as and when necessary and copies (certified in a manner acceptable to the Authority) shall be forwarded to the Authority as soon as possible but in any event within twenty (20) Business Days of the Renewal Date.]⁶⁹

- 41.11 If D&B Co defaults in insuring or continuing to maintain the Insurances, the Authority may insure against any risk in respect of which such default has occurred and recover any premiums from *D&B Co* as a debt.

Acceptance and Compliance

⁶⁹ This requirement applies only if project specific insurance policies are not placed for the Insurances required by Clause 41.1.

- 41.12 The supply to the Authority of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 41 (*Insurance*) shall not imply acceptance by the Authority (or the Authority's Representative) that the extent of insurance cover is sufficient and its terms are satisfactory.
- 41.13 Neither failure to comply, nor full compliance, with the insurance provisions of this Agreement shall relieve D&B Co of its liabilities and obligations under this Agreement.

Risk Management

- 41.14 With effect from the date of this Agreement, the Authority and D&B Co shall each designate or appoint an insurance and risk manager and notify details of the same to the other party. Such person shall:
- 41.14.1 be responsible for dealing with all risk management matters on behalf of its appointing or designating party including (without limitation) ensuring compliance by that party with this Clause 41.14 (*Risk Management*);
 - 41.14.2 advise and report to that party on such matters; and
 - 41.14.3 ensure that any report or survey conducted by any insurer of any relevant procedures in relation to the Project is disclosed to the parties.
- 41.15 Without prejudice to the provisions of Clause 41.14 (*Risk Management*), the parties shall notify one another, and in D&B Co's case the relevant insurer, of any circumstances which may give rise to a claim of a value equal to or in excess of [♦] pounds (£[♦]) (index linked) under the Insurances within [♦] Business Days of becoming aware of the same (or earlier, if so requested by the terms of the relevant insurance policy). If any insurer disputes any such claim, D&B Co shall provide the Authority with full details of any disputed claim and the parties shall liaise with one another to ensure that the relevant claim is preserved or pursued.

Application of Proceeds

- 41.16 All insurance proceeds received by D&B Co under the Contractors' 'All Risks' Insurance referred to in Section 1 of Schedule 12 (*Insurance Requirements*) shall be paid into the Insurance Proceeds Account and shall be applied in accordance with this Agreement.
- 41.17 D&B Co shall apply any proceeds of any policies of Insurance:
- 41.17.1 in the case of third party legal liability or employers' liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable; and

41.17.2 in the case of any other insurance, so as to ensure the performance by D&B Co of its obligations under this Agreement, including where necessary the reinstatement, restoration or replacement of the Facilities, assets, materials or goods affected by the event giving rise to the insurance claim and consequent payment of proceeds.

41.18 Where reinstatement monies are required to be released from the Insurance Proceeds Account D&B Co shall obtain the Authority's consent. The Authority shall give its consent (or confirm that it is withholding its consent) to the release of monies from the Insurance Proceeds Account within one (1) Business Day of a request from D&B Co (provided that such consent must not be unreasonably withheld).

41.19 If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, D&B Co will make good any deficiency forthwith.

41.20 Reinstatement

41.20.1 [Without prejudice to Clause 38 (*Indemnities*) D&B Co shall be responsible for repairing, rectifying and/or reinstating all damage caused to the Facilities by D&B Co or a D&B Co Party in the conduct of the Project Operations after the Actual Completion Date].

41.20.2 Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the "**Relevant Incident**") in an amount in excess of [♦] pounds (£[♦]) (index-linked):

(a) D&B Co shall deliver to the Authority as soon as practicable and in any event within twenty-eight (28) days after the making of the claim a plan prepared by D&B Co for the carrying out of the works necessary (the "**Reinstatement Works**") to repair, reinstate or replace (the "**Reinstatement Outline**") the relevant Works which are the subject of the relevant claim or claims in accordance with Clause 41.20.3 (*Works Carried Out*) below. The Reinstatement Outline shall set out:

(i) the identity of the person proposed to effect the Reinstatement Works, which (if note D&B Co or a D&B Co Party) shall be subject to the prior written approval of the Authority; and

(ii) the proposed terms and timetable or, if not then established, the reasonably anticipated terms and timetable upon which the Reinstatement Works are to be effected (including the date by which the Reinstatement Works will be completed), the final terms of which shall be subject to the prior written approval of the Authority (such approval not to be unreasonably withheld or delayed);

- (b) the Authority shall within ten (10) Business Days of receipt of the Reinstatement Outline notify D&B Co in writing that:
- (i) it is satisfied that the Reinstatement Outline will enable D&B Co to comply with its obligations to carry out the Reinstatement Works within a reasonable timetable, and (if not D&B Co or a D&B Co Party) that the identity of any person (set out in the Reinstatement Outline) that may be appointed to effect the Reinstatement Works is approved;
 - (ii) the identity of any person (set out in the Reinstatement Outline) that may be appointed to effect the Reinstatement Works (if not D&B Co or a D&B Co Party) is not approved together with its reasons for such non-approval in sufficient detail to enable D&B Co to understand the nature and extent of such non-approval and to assess whether the Authority's approval under Clause 41.20.2(a)(ii) has been unreasonably withheld;
 - (iii) it does not approve the Reinstatement Outline together with its reasons for such non-approval, in sufficient detail so as to enable D&B Co to understand the nature and extent of such non-approval and to assess whether the Authority's approval under Clause 41.20.2(a)(ii) has been unreasonably withheld; or
 - (iv) if the Authority does not make one of the above responses within the period specified in Clause 41.20.3, it shall be deemed to have approved the Reinstatement Outline, save where the Authority has reasonably requested any further information from D&B Co, in which case the time limit outlined in Clause 41.20.3 will be deemed to commence upon receipt of such information by the Authority;
- (c) if the Authority gives notice of non-approval in accordance with Clauses 41.20.2(b)(ii) or 41.20.2(b)(iii), D&B Co may amend and re-submit the Reinstatement Outline (the "**Amended Reinstatement Outline**") to the Authority for its reconsideration and the Authority shall give its approval or non-approval within five (5) Business Days of the submission of the Amended Reinstatement Outline to the Authority. If the Authority does not approve the Amended Reinstatement Outline, it shall provide reasons for such non-approval in sufficient detail so as to enable D&B Co to understand the nature and extent of such non-approval and to assess whether the Authority's approval has been unreasonably withheld;
- (d) if the Amended Reinstatement Outline or a person proposed to carry out the Reinstatement Works is not approved by the Authority in accordance with Clause 41.20.2(c) D&B Co may

submit the Amended Reinstatement Outline to the Dispute Resolution Procedure in order for it to be determined whether the Authority's approval under Clause 41.20.2(c) was unreasonably withheld;

- (e) the Reinstatement Outline or the Amended Reinstatement Outline (as the case may be) as approved by the Authority pursuant to this Clause 41.20 or as determined pursuant to the Dispute Resolution Procedure shall become the Reinstatement Plan;
- (f) D&B Co shall effect the Reinstatement Works in accordance with the Reinstatement Plan, and:
 - (i) D&B Co shall enter into contractual arrangements to effect the Reinstatement Works with the person(s) identified in the Reinstatement Plan;
 - (ii) the insurance proceeds received under any Physical Damage Policy in respect of the Relevant Incident (together with any interest accrued) may be applied by D&B Co as required to enable it to make payments in accordance with the terms of the contractual arrangements entered into to effect the Reinstatement Works and to meet any other reasonable costs and expenses of D&B Co for the sole purposes of financing the Reinstatement Works;
 - (iii) the Authority agrees and undertakes that, subject to compliance by D&B Co with its obligations under this Clause, and provided that D&B Co procures that the Reinstatement Works are carried out and completed in accordance with this Clause 41.20, it shall not exercise any right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim under the Physical Damages Policy;
 - (iv) the Authority undertakes to use reasonable endeavours to assist D&B Co in the carrying out of the Reinstatement Plan;
 - (v) subject to Clause 38 (*Indemnities*) D&B Co shall be solely responsible for the payment of any deficiency between the insurance proceeds and the cost of carrying out the Works.

Works Carried Out

41.20.3 Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace the whole or any part of the Works or Facility, D&B Co shall carry out the work in accordance with the Authority's Construction Requirements so that on completion of the work, the provisions of this Agreement are complied with.

Contractor's Insurance

41.21 D&B Co shall procure that the Contractor at its own cost takes out, or procures the taking out of, professional indemnity insurance with reputable insurers carrying on business in the [European Union] with a limit of indemnity of not less than £[],000,000 ([] million pounds) [in respect of any one claim without limit to the number of claims in any annual policy period, but £[◆] ([◆]million pounds any one claim and in the aggregate per annum for liability arising out of pollution or Contamination] [in respect of any on claim and in the aggregate per annum] with at least one annual reinstatement], in relation to the Works, provided always that:

41.21.1 such insurance shall be in place from the commencement of the Works until no less than

(a) in respect of the Main Works, twelve (12) years after the Actual Completion Date; and

(b) in respect of the Post Completion Works, twelve (12) years after the Actual Post Completion Works Date,

or in either case, if earlier, 12 years after the date of termination of the Construction Contract;

41.21.2 the insurance premiums in respect of the insurance shall, as between the Authority and D&B Co at all times be the responsibility of D&B Co;

41.21.3 if such insurance is not available to the Contractor (and/or design and build contractors engaged in projects of a similar scope, size, nature and complexity as the Contractor) at commercially reasonable rates and terms (excluding any increase in premiums attributable to the actions, omissions, errors or defaults of the Contractor), the Contractor, D&B Co and the Authority will meet and the Contractor will outline the steps it intends to take to manage such risks. If the steps proposed by the Contractor are not acceptable to the Authority (acting reasonably), the Contractor, D&B Co and the Authority shall agree an alternative method of managing such risk.

41.22 D&B Co will procure that the Contractor will, upon request, provide the Authority with reasonable evidence that the policy referred to in Clause 41.21 (*Contractor's Insurance*) is in full force and effect in accordance with the requirements of Clause 41.21 (*Contractor's Insurance*).

42. EXCLUSIONS AND LIMITATIONS ON LIABILITY

Exclusions

- 42.1 The indemnities under this Agreement shall not apply and there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever to the extent that any loss claimed by either party is for loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or is a claim for consequential loss or for indirect loss of any nature ("**Indirect Losses**") suffered or allegedly suffered by either party. The Authority agrees that, notwithstanding the foregoing, any losses of D&B Co arising under the Construction Contract⁷⁰ as originally executed (or as amended in accordance with and subject to Clause 4.1 (*Documents*)) which are not Indirect Losses shall not be excluded from such a claim solely by reason of this Clause 42.1 (*Exclusions*).
- 42.2 The Authority shall not be liable in tort to D&B Co or any D&B Co Party in respect of any negligent act or omission of the Authority or any Authority Party relating to or in connection with this Agreement and D&B Co shall procure that no D&B Co Party shall bring such a claim against the Authority. D&B Co has accepted this on the basis that it and each D&B Co Party will cover the risk of negligent acts or omissions by insurance or in such other manner as it (or they) may think fit.
- 42.3 Nothing in this Clause 43(*Exclusions*) shall exclude any right of the Authority to seek damages from D&B Co for breach of contract in respect of any losses it incurs as a direct result of the loss of use of all or any part of the Facilities arising out of any Defect.

No Double Recovery

- 42.4 Nothing in Clauses 42.5 to 42.8 shall prevent or restrict the right of the Authority to seek an injunction or an order for specific performance or other discretionary remedies of the court.
- 42.5 Notwithstanding any other provision of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement or otherwise.
- 42.6 Neither party shall have the right to terminate this Agreement for breach of contract save as expressly set out in this Agreement.
- 42.7 Subject to Clause 32.1 (*Authority Events of Default*) and any other express right of D&B Co pursuant to this Agreement, D&B Co's sole remedy in respect of any

⁷⁰ As a matter of good practice, the Authority should review the relevant subcontract(s) prior to entry into the Template Education D&B Agreement to ensure that they contain mirror provisions excluding the right to claim Indirect Losses. Assurances on the contents of the sub-contract(s) will be required to be provided to Welsh Government, whether or not equity is being invested by the public sector.

breach of this Agreement which is a Compensation Event shall be pursuant to Clause 24 (*Delay Events*).

Limitation on Liability

42.8 [Subject to Clause 42.9, but notwithstanding any other provision of this Agreement the maximum aggregate liability of D&B Co to the Authority pursuant to and arising out of this Agreement shall not exceed the Liability Cap.]⁷¹

42.9 [The limitation of D&B Co's liability under Clause 42.8 shall not apply to:

42.9.1 any liability in relation to death or personal injury; or

42.9.2 any liability where such is caused or contributed to by:

(a) the wilful default of D&B Co and/or any D&B Co Party or abandonment by D&B Co and/or any D&B Co Party;

(b) fraud of D&B Co and/or any D&B Co Party;

42.9.3 any liability, where and to the extent that D&B Co makes recovery from any other third party or from Insurances maintained by either party pursuant to Clause 41 (*Insurance*) in respect of such liability or where D&B Co would have made recovery:

(a) had the relevant third party or insurer met its obligations under the relevant agreement or policy; or

(b) had D&B Co complied with its obligations under this Agreement and/or the terms of any applicable insurance policy; or

(c) had D&B Co diligently pursued such recovery; or

42.9.4 had D&B Co or a D&B Co Party, through its acts or omissions, not caused the relevant insurance policy to become void, voidable, unenforceable, suspended or impaired,

and excluding in each case any non-recovery to the extent such non-recovery has occurred as a direct result of the act, omission, breach or negligence of the Authority (to the extent such breach or negligence was not caused by the act or omission of D&B Co or a D&B Co Party);

⁷¹ It is for Authorities to consider whether inclusion of a Liability Cap (and the level of such cap where included) represents value for money to the Authority or is otherwise acceptable.

42.9.5 any liability of D&B Co arising under paragraph 6.3 of Schedule 15 (*Dispute Resolution Procedure*) or in respect of any indemnity arising out of breach of Law by D&B Co or a D&B Co Party⁷².]

42.10 D&B Co's liability under this Agreement shall[:

42.10.1]in respect of the [Main] Works end on the date falling twelve (12) years after the Actual Completion Date]; and

42.10.2 in respect of the Post Completion Works end on the date falling twelve (12) years after the Actual Post Completion Works Date,]

or in either case if earlier, end on the date falling twelve (12) years after the Termination Date,

save, in each case, in respect of claims which have been made prior to such date and in respect of which actions or proceedings have been commenced within six months of such date.

⁷² Authorities may consider expanding the list of exclusions.

PART 12: MISCELLANEOUS

43. INTELLECTUAL PROPERTY

Project Data

- 43.1 D&B Co shall make available to the Authority free of charge (and hereby irrevocably licences the Authority to use) all Project Data that might reasonably be required by the Authority and D&B Co shall ensure that it can make the Project Data available to the Authority on these terms, for the purposes of:
- 43.1.1 the Authority carrying out the Authority Services (and its operations relating to the performance of the Authority Services including but not limited to the operation, maintenance or improvement of the Facilities), its duties under this Agreement and/or any statutory duties that the Authority may have; and
- 43.1.2 following completion of the Works, the design or construction of the Facilities and/or the carrying out of operations the same as, or similar to, the Project Operations,

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

Intellectual Property Rights

- 43.2 D&B Co:
- 43.2.1 hereby grants to the Authority, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in D&B Co; and
- 43.2.2 shall, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in Clause 43.2.1 above to the Authority,

in both cases, solely for the Approved Purposes.

D&B Co shall use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in D&B Co and D&B Co shall enter into appropriate agreements with any D&B Co Party

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

Maintenance of Data⁷³

- 43.3 To the extent that any of the data, materials and documents referred to in this Clause are generated by or maintained on a computer or similar system, D&B Co shall use all reasonable endeavours to procure for the benefit of the Authority, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Authority or its nominee to access and otherwise use (subject to the payment by the Authority of the relevant fee, if any) such data for such purposes as the Authority may at its sole discretion require. As an alternative, D&B Co may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format.
- 43.4 D&B Co shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 43.3 (*Maintenance of Data*) in accordance with Good Industry Practice. Without prejudice to this obligation, D&B Co shall submit to the Authority's Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and the Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. D&B Co shall comply, and shall cause all D&B Co Parties to comply, with all procedures to which the Authority's Representative has given its approval. D&B Co may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Authority's Representative, who shall be entitled to object on the basis set out above.

Claims

- 43.5 Where a claim or proceeding is made or brought against the Authority which arises out of the infringement of any rights in or to any Intellectual Property (other than any Disclosed Data) or because the use of any materials, Plant, machinery or equipment in connection with the Project Operations infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Intellectual Property by or on behalf of the Authority otherwise than in accordance with the terms of this Agreement, D&B Co shall indemnify the Authority at all times from and against all such claims and proceedings and the provisions of Clause 38.3 (*Conduct of Claims*) shall apply.

44. DISPUTE RESOLUTION PROCEDURE

Except where expressly provided otherwise in this Agreement, any dispute arising out of or in connection with this Agreement shall be resolved in accordance with the procedure set out in Schedule 15 (*Dispute Resolution Procedure*).

⁷³ If either party is to be given access to any of the other party's computer systems, as a matter of good practice and also to clarify potential liability for unauthorised access to those systems under the Computer Misuse Act 1990, the scope of each party's authorisation to access each other's computer systems will need to be defined clearly. The terms of such authorisation will be project specific.

45. SUB-CONTRACTING AND ASSIGNMENT

Sub-Contractors

- 45.1 D&B Co shall, without prejudice to Clause 45.5 (*Assignment*), procure that none of the persons listed below shall sub-contract all (or substantially all) of their obligations under or in the agreement set out next to its name:

Person	Contract
Contractor	Construction Contract

without the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed). To avoid doubt, (i) any failure to comply with Clause 45.3 (*Sub-Contractors*) shall be a reasonable ground for withholding consent and (ii) consent shall, without prejudice to the other provisions of Clause 45.1 (*Sub-Contractors*), not be required in respect of the appointment of any party currently approved by the Authority as a suitable replacement.

- 45.2 If the contract set out next to the name of any person referred to in Clause 45.1 (*Sub-Contractors*) shall at any time lapse, terminate or otherwise cease to be in full force and effect (whether by reason of expiry or otherwise), with the effect that such person shall cease to act in relation to the Project, D&B Co shall forthwith appoint a replacement (subject to compliance with Clause 45.1 (*Sub-Contractors*)).
- 45.3 D&B Co shall procure that any replacement for any person referred to in Clause 45.1 (*Sub-Contractors*) [or any Key Sub-Contractor] shall enter into a contract upon the same or substantially similar terms as the person so replaced and shall also enter into a collateral agreement on the same or substantially the same terms as the Collateral Agreement entered into by the person so replaced.
- 45.4 [Where D&B Co enters into a contract with a Sub-Contractor for the purposes of carrying out the Project Operations or any part of the Project Operations under this Agreement, D&B Co shall cause a term to be included in such contract:
- 45.4.1 which requires an application for an Interim Certificate in respect of a Relevant Month be made to the Sub-Contractor not later than the date falling one (1) Business Day before the relevant Due Date (under this Agreement); (ii) the Due Date for payment of interim payments under such contract to occur on the date falling one (1) Business Days after the Due Date (under this Agreement); and (iii) the Final Date for payment of interim payments under such contract to on the date falling fourteen (14) Business Days after the Due Date for payment of interim payments under such contract and provides that, for the purpose of payment alone, where the Authority has made payment to D&B Co and the sub-contractor's invoice includes Project Operations in relation to which payment has been made by the Authority then, to the extent that it relates to such Project Operations, the invoice shall be treated as valid and payment shall be made to the subcontractor without deduction (but

without prejudice to any right to deduct or set off validly arising under the terms of the contract with the Sub-Contractor); and

- 45.4.2 which notifies the Sub-Contractor that the contract forms part of a larger contract for the benefit of the Authority and that should the sub-contractor have any difficulty in securing the timely payment of an invoice that matter may be referred by the Sub-Contractor to the Authority's Representative; and
- 45.4.3 in the same terms as this Clause 45.4 (including for the avoidance of doubt this Clause 45.4.3) subject only to modification to refer to the correct designation of the equivalent party as the supplier and recipient of the relevant Project Operations as the case may be.
- 45.4.4 which requires any contract entered into by the Sub-Contractor and a sub-sub-contractor providing Project Operations to include a term in such contract:
- (a) which requires (i) an application for an Interim Certificate in respect of a Relevant Month to be made by the sub-sub-contractor not later than the date falling two (2) Business Days before the relevant Due Date (under this Agreement); (ii) the Due Date for payment of interim payments under such contract to occur on the date falling two (2) Business Days after the Due Date (under this Agreement); and (iii) the Final Date for payment of interim payments under such contract on the date falling sixteen (16) Business Days after the Due Date for payment of interim payments under such contract and provides that, for the purpose of payment alone, where the Authority has made payment to D&B Co and the sub-contractor's invoice includes Project Operations in relation to which payment has been made by the Authority then, to the extent that it relates to such Project Operations, the invoice shall be treated as valid and payment shall be made to the Sub-Contractor without deduction (but without prejudice to any right to deduct or set off validly arising under the terms of the contract with the sub-contractor); and
 - (b) which notifies the Sub-Contractor that the contract forms part of a larger contract for the benefit of the Authority and that should the Sub-Contractor have any difficulty in securing the timely payment of an invoice that matter may be referred by the Sub-Contractor to the Authority's Representative; and
 - (c) in the same terms as this Clause 45.4 (*Sub-Contractors*) (including for the avoidance of doubt this Clause 45.4.4(c)) subject only to modification to refer to the correct designation of the equivalent party as the supplier and recipient of the relevant Project Operations as the case may be.]⁷⁴

⁷⁴ Timing/process to be discussed in conjunction with PBA. Prompt payment is required in accordance with Welsh Government policy.

Assignment

- 45.5 This Agreement and any other agreement in connection with the Project to which both the Authority and D&B Co are a party shall be binding on, and shall enure to the benefit of, D&B Co and the Authority and their respective statutory successors and permitted transferees and assignees. [In the case of the Authority, its successors shall include any person to whom the Welsh Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Authority upon the Authority ceasing to exist, transfers the property, rights and obligations of the Authority under this Agreement and such other agreements in connection with the Project to which the Authority and D&B Co are both a party.]⁷⁵
- 45.6 D&B Co shall not, without the prior written consent of the Authority, assign, novate, transfer, sub-contract or otherwise dispose of any interest in this Agreement, [the Independent Tester Contract,] and the Construction Contract and [any other contract] entered into by D&B Co for the purposes of performing its obligations under this Agreement.
- 45.7 The rights and obligations of the Authority under this Agreement shall not be assigned, novated or otherwise transferred (whether by virtue of any Law or any scheme pursuant to any Law or otherwise) to any person other than to any [public] body (being a single entity) acquiring the whole of the Agreement and having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Agreement being:
- 45.7.1 the Welsh Ministers or a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975; or
- 45.7.2 in the case of any Further Education Corporation or Designated Institution (as defined in the Further and Higher Education Act 1992) any other Further Education Corporation or Designated Institution who has the legal capacity and sufficient financial resources to perform the obligations of the Authority and/or whose obligations are validly and enforceably guaranteed by the Welsh Ministers (in a form reasonably acceptable to D&B Co); or
- 45.7.3 any other public body whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to D&B Co) by the Authority, the Welsh Ministers or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Agreement,
- 45.8 without the consent of D&B Co. The prior written consent of D&B Co (not to be unreasonably withheld or delayed) shall be required for any other assignment, transfer or disposal by the Authority of the whole or any part of this Agreement.

⁷⁵ The inclusion of the words in square brackets should be considered on a project specific basis.

46. MITIGATION

Each of the Authority and D&B Co shall at all times take all reasonable steps to minimise and mitigate any loss for which the relevant party is entitled to bring a claim against the other party pursuant to this Agreement.

47. DATA PROTECTION

Data Protection

- 47.1 For the purpose of the following Clauses, the terms "**Data Controller**", "**Data Subject**", "**Personal Data Breach**" and "**Process/Processing**" shall have the meaning given to it in the Data Protection Laws.
- 47.2 D&B Co undertakes to the Authority that it shall comply with the obligations of a "**Data Controller**" under the provisions of the Data Protection Laws. In addition, D&B Co:
- 47.2.1 warrants that it has, or will have at all material times, (and it shall procure that all Sub-Contractors (and their agents and sub-contractors of any tier) have or will have at all material times) Protective Measures in place to protect against unauthorised or unlawful Processing or any Data Loss Event and that it has taken, or will take at all material times, all reasonable steps to ensure the reliability of any of its staff which will have access to Personal Data Processed as part of the Project Operations;
 - 47.2.2 undertakes that it will only obtain, hold, Process, use, store and disclose Personal Data as is necessary to perform its obligations or exercise its rights under this Agreement and (without prejudice to Clause 5.2 (*General Standards*)) that such data will be held, Processed, used, stored and disclosed only in accordance with the Data Protection Laws and any other applicable Law;
 - 47.2.3 undertakes that it will notify the Authority without undue delay upon becoming aware of any Data Loss Event in respect of the Personal Data;
 - 47.2.4 will co-operate with the Authority, to the extent reasonably requested, in relation to any notifications to the Information Commissioner or to Data Subjects which either party is required to make following a Personal Data Breach;
 - 47.2.5 will co-operate with the Authority, to the extent reasonably requested in relation to:
 - 47.2.5.1 a request to the Authority from a Data Subject to exercise any right under the Data Protection Laws;

- 47.2.5.2 any other communication from a Data Subject to the Authority concerning the Processing of their Personal Data; and
- 47.2.5.3 any communication from the Information Commissioner concerning the Processing of Personal Data, or compliance with the Data Protection Laws.
- 47.2.6 undertakes to allow the Authority access to any relevant premises on reasonable notice to inspect its procedures described at Clause 47.2.1 above.

48. CONFIDENTIALITY⁷⁶

48.1 The Authority shall, subject to Clause 48.2 (*Confidentiality*) be entitled to make the documents and information listed in this Clause 48.1 (*Confidentiality*) freely available to the public (which may include, without limitation, publication on the Authority's website):

48.1.1 this Agreement;

48.1.2 the Independent Tester Contract; and

48.1.3 the Collateral Agreements;⁷⁷

and D&B Co acknowledges and agrees that, subject to the exclusion of information referred to in Clause 48.2.2, the provision or publication of the documents and information listed in this Clause 48.1 (*Confidentiality*) shall not give rise to any liability under the terms of this Agreement or otherwise. The Authority shall notify D&B Co in writing not less than ten (10) Business Days prior to any intended provision or publication of information pursuant to this Clause 48.1 (*Confidentiality*).

48.2

48.2.1 The parties agree that the provisions of this Agreement and each Project Document shall, subject to Clause 48.2.2 below, not be treated as Confidential Information and may be disclosed without restriction and D&B Co acknowledges that the Authority shall, subject to Clause 48.2.2

⁷⁶ In line with the general approach taken by the Welsh Audit Commission, these Clauses support a general openness in regard to the project contracts and associated documentation. The Welsh Government considers there is a limited amount of the Project Data that can be properly regarded as falling under any of the exemptions in the freedom of information regime. These have been identified in Schedule 17 (*Commercially Sensitive Information*) with what are thought to be reasonable periods when the protection of confidentiality may be claimed. The Authority should be wary of attempts to widen the scope or extend the duration of the limited contractual confidentiality arrangements in these Clauses and should consider these Clauses in light of any other guidance with which it is required to comply.

⁷⁷ Any other information is to be listed on a project specific basis.

below, be entitled to make this Agreement and each Project Document available in the public domain.

- 48.2.2 Clause 48.2.1 above shall not apply to provisions of this Agreement or a Project Document designated as Commercially Sensitive Information and listed in Schedule 17 (*Commercially Sensitive Information*) to this Agreement which shall, subject to Clause 48.3 (*Permitted Disclosure*) be kept confidential for the periods specified in that Schedule 17 (*Commercially Sensitive Information*).
- 48.2.3 The parties shall keep confidential all Confidential Information received by one party from the other party relating to this 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.

Permitted Disclosure

48.3 Clauses 48.2.2 and 48.2.3 shall not apply to:

- 48.3.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the performance of those obligations;
- 48.3.2 any matter which a party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause;
- 48.3.3 any disclosure to enable a determination to be made under Schedule 15 (*Dispute Resolution Procedure*) or in connection with a Dispute between D&B Co and any of its sub-contractors;
- 48.3.4 any disclosure which is required pursuant to any Law or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 48.3.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 48.3.6 any provision of information to the parties' own 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 D&B Co to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in D&B Co in accordance with the provisions of this Agreement to that person or

their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;

- 48.3.7 any disclosure by the Authority of information relating to the design, construction, operation and maintenance of the Facilities and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new contractor, its advisers and lenders, should the Authority decide to retender this Agreement;
- 48.3.8 any registration or recording of the Consents and property registration required;
- 48.3.9 any disclosure of information by the Authority [or the School Entity] to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Authority for any purpose related to or ancillary to this Agreement;
- 48.3.10 any disclosure for the purpose of:
- (a) the examination and certification of the Authority's or D&B Co's accounts;
 - (b) any examination pursuant to the Public Audit (Wales) Act 2004 of the economy, efficiency and effectiveness with which the Authority has used its resources;
 - (c) Any disclosure required to be made to the Auditor General or the Wales Audit Office;
 - (d) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or
 - (e) (without prejudice to the generality of Clause 48.3.4) compliance with the FOIA and/or the Environmental Information Regulations;
- 48.3.11 [disclosure pursuant to Clause 48.1 (*Confidentiality*); or]
- 48.3.12 disclosure to the extent required pursuant to Clause 50.2 (*Information and Audit Access*); [or
- 48.3.13 *identify here disclosure requirements to other public bodies where Facilities are joint facilities;*]

provided that, to avoid doubt, neither Clause 48.3.10(e) nor Clause 48.3.4 above shall permit disclosure of Confidential Information otherwise prohibited by Clause 48.2.3 where that information is exempt from disclosure under section 41 of the FOIA.

- 48.4 Where disclosure is permitted under Clause 48.3 (*Permitted Disclosure*), other than under Clauses 48.3.2, 48.3.4, 48.3.5, 48.3.8 and 48.3.10, the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.
- 48.5 D&B Co shall not make use of this Agreement or any information issued or provided by or on behalf of the Authority in connection with this Agreement otherwise than for the purpose of this Agreement, except with the written consent of the Authority.
- 48.6 Where D&B Co, in carrying out its obligations under this Agreement, is provided with information relating to any Authority Party, D&B Co shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless D&B Co has obtained the prior written consent of that person and has obtained the prior written consent of the Authority.
- 48.7 On or before the expiry of the [relevant] Defects Liability Period, D&B Co shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any Authority Party including any documents in the possession, custody or control of a D&B Co Party, are delivered up to the Authority.
- 48.8 The parties acknowledge that [Welsh Audit Commission] has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament and/or National Assembly of Wales.
- 48.9 The provisions of this Clause 48 (*Confidentiality*) are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

Announcements

- 48.10 Unless otherwise required by any Law or any regulatory or governmental authority (but only to that extent), neither party shall make or permit or procure to be made any public announcement or disclosure (whether for publication in the press, the radio, television screen or any other medium) of any Confidential Information or in the case of D&B Co of its (or any D&B Co Party's) interest in the Project or, in any such case, any matters relating thereto, without the prior written consent of the other party (which shall not be unreasonably withheld or delayed).

49. FREEDOM OF INFORMATION

- 49.1 D&B Co acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and cooperate with the Authority to facilitate the Authority's compliance with its

Information disclosure requirements pursuant to the same in the manner provided for in Clauses 49.2 to 49.8 (*Freedom of Information*).

- 49.2 Where the Authority receives a Request for Information in relation to Information that D&B Co is holding on its behalf and which the Authority does not hold itself the Authority shall refer to D&B Co such Request for Information as soon as practicable and in any event within five (5) Business Days of receiving such Request for Information and D&B Co shall:
- 49.2.1 provide the Authority with a copy of all such Information in the form that the Authority requires as soon as practicable and in any event within five (5) Business Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and
 - 49.2.2 provide all necessary assistance as reasonably requested by the Authority in connection with any such Information, to enable the Authority to respond to the Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.
- 49.3 Following notification under Clause 49.2 (*Freedom of Information*), and up until such time as D&B Co has provided the Authority with all the Information specified in Clause 49.2.1, D&B 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:
- 49.3.1 whether Information is exempt from disclosure under the FOIA and the Environmental Information Regulations; and
 - 49.3.2 whether Information is to be disclosed in response to a Request for Information, and
- in no event shall D&B 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.
- 49.4 D&B Co shall ensure that all Information held on behalf of the Authority is retained for disclosure for at least the number of years (from the date it is acquired) [specified in the Authority Policy relating to records retention]⁷⁸ and shall permit the Authority to inspect such Information as requested from time to time. Following the expiry of such [◆] period, D&B Co shall be entitled to dispose of such records in circumstances which D&B Co has notified the Authority of such proposed disposal and the Authority has not requested within 20 Business Days of such notification that such information be handed over to the Authority.

⁷⁸ The Authority should ensure the appropriate policy is in place.

- 49.5 D&B Co shall transfer to the Authority any Request for Information received by D&B Co as soon as practicable and in any event within two (2) Business Days of receiving it.
- 49.6 D&B 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 FOIA and the Environmental Information Regulations.
- 49.7 In the event of a request from the Authority pursuant to Clause 49.2 (*Freedom of Information*) D&B Co shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of D&B Co's estimated costs of complying with the request to the extent these would be recoverable, if incurred by the Authority, under section 13(1) of the FOIA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in section 12(1) of the FOIA and as set out in the Fees Regulations (the "**Appropriate Limit**") the Authority shall inform D&B Co in writing whether or not it still requires D&B Co to comply with the request and where it does require D&B Co to comply with the request the five (5) Business Days period for compliance shall be extended by such number of additional days for compliance as the Authority is entitled to under section 10 of the FOIA. In such case, the Authority shall notify D&B Co of such additional days as soon as practicable after becoming aware of them and shall reimburse D&B Co for such costs as D&B Co incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.⁷⁹
- 49.8 D&B Co acknowledges that (notwithstanding the provisions of Clause 48 (*Confidentiality*)) the Authority may, acting in accordance with the Secretary of State's Code of Practice on the Discharge of Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000 (the "**Code**"), and/or having full regard to any guidance or briefings issued by the Information Commissioner or the Welsh Government, be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning D&B Co or the Project:
- 49.8.1 in certain circumstances without consulting with D&B Co; or
- 49.8.2 following consultation with D&B Co and having taken their views into account,
- provided always that where Clause 49.8.1 above applies the Authority shall, in accordance with the recommendations of the Code, draw this to the attention of D&B Co prior to any disclosure.

⁷⁹ It is up to the parties to decide whether costs associated with any future change in the Authority's FOIA cost recovery policy should go through Schedule 13 (*Variation Procedure*). If the Environmental Information Regulations are relevant to the project, the parties may include broadly equivalent provisions in the Agreement dealing with costs and based upon the Authority's policy towards reimbursement of such costs under section 10 of the Environmental Information Regulations.

- 49.9 In the event that the D&B Co is or becomes subject to the Environmental Information Regulations or the FOIA it shall comply with its obligations under the Environmental Information Regulations and the FOIA. In doing so, it will use reasonable endeavours to consult the Authority before disclosing Information about them or any agreement entered into between the Authority and D&B Co.

50. INFORMATION AND AUDIT ACCESS

- 50.1 D&B Co shall provide to the Authority's Representative all information, documents, records and the like in the possession of, or available to, D&B Co (and to this end D&B Co shall use all reasonable endeavours to procure that all such items in the possession of the Contractor shall be available to it and D&B Co has included, or shall include, relevant terms in all contracts with the Contractor to this effect) as may be reasonably requested by the Authority's Representative for any purpose in connection with this Agreement including in relation to the use and operation of the Project Bank Account.

- 50.2 For the purpose of:

50.2.1 the audit, examination and certification of the Authority's accounts; or

50.2.2 any examination pursuant to the Public Audit (Wales) Act 2004 of the economy, efficiency and effectiveness with which the Authority has used its resources,

the Wales Audit Office may examine such documents as it may reasonably require which are owned, held or otherwise within the control of D&B Co (and D&B Co shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require D&B Co to produce such oral or written explanations as he considers necessary.

- 50.3 D&B Co shall provide and shall procure that its Sub-Contractors shall provide such information as the Authority may reasonably require from time to time to enable it to meet its obligations to provide reports and returns pursuant to regulations, directions or guidance applicable to the Authority including, without limitation, reports and returns regarding the physical condition of buildings occupied by the Authority, health and safety, under the firecode, relating to environmental health, the operation and administration of the Project Bank Account and to comply with [requirements for the provision of information relating to achievement of customer service targets].

- 50.4 D&B Co shall indemnify the Authority at all times against all administrative fines arising from any claim by a third party (including, without limitation, by data subjects, whether individually or in groups) or any action by the Information Commissioner or other Relevant Authority arising from:

50.4.1 a breach by D&B Co of Clause 47 (*Data Protection*) or Clause 50 (*Information and Audit Access*); and/or

50.4.2 any act or omission of D&B Co or a D&B Co Party that results in a breach by the Authority of the Data Protection Laws and/or Laws applicable to a Reportable Incident,

and the provisions of Clause 38.3 (*Conduct of Claims*) shall apply.

50.5 D&B Co shall indemnify the Authority at all times against all losses, costs and expenses (including, without limitation, reasonable legal, investigatory and consultancy fees and expenses) arising from: any claim by a third party (including, without limitation, by data subjects, whether individually or in groups) or any action by the Information Commissioner or other Relevant Authority arising from:

50.5.1 a breach by D&B Co of Clause 47 (*Data Protection*) or Clause 50 (*Information and Audit Access*); and/or,

50.5.2 any act or omission of D&B Co or a D&B Co Party that results in a breach by the Authority of the Data Protection Laws and/ or Laws applicable to a Reportable Incident,

and the provisions of Clause 38.3 (*Conduct of Claims*) shall apply.]

51. NOTICES

51.1 All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class recorded post, by hand or by email, leaving the same at:

If to D&B Co:-

Address: [◆]

Email: [◆]

If to the Authority:-

Address: [◆]

Email: [◆]

51.2 Where any information or documentation is to be provided or submitted to the Authority's Representative or the D&B Co Representative it shall be provided or submitted by sending the same by first class recorded post, by hand or by email leaving the same at:

If to D&B Co's Representative:-

Address: [◆]

Email: [◆]

If to the Authority's Representative:-

Address: [◆]

Email: [◆]

(copied in each case to the Authority)

51.3 Either party to this Agreement (and either Representative) may change its nominated address (including email address) by prior notice to the other party.

51.4 Notices given by first class recorded post shall be effective upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after mailing, provided that a notice or other communication is received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place.

51.5 Notices delivered by hand shall be effective upon delivery, provided that a notice or other communication is received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place.

51.6 Notices given by email shall be deemed to have been received:

51.6.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the email address specified in Clause 51.1 or 51.2 (*Notices*), or notified from time to time under Clause 51.3 (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

51.6.2 by 11am on the next following Business Day, if the email enters the intended recipient's relevant Information System after 4pm, on a Business Day but before 9am on that next following Business Day,

and provided no error message indicating failure has been received by the sender and provided that in the case of notices required by or issued Clause 24 (*Delay Events*), Clause 25 (*Relief Events*), Clause 26 (*Force Majeure*), Clause 27 (*Changes in Law*), Clause 32 (*Authority Events of Default*), Clause 33 (*D&B Co Event of Default*), Clause 34 (*Termination Resulting from Force Majeure*),

Clause 36 (*Corrupt Gifts and Payments*); and/or Schedule 13 (*Variation Procedure*) that within 24 hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient in accordance with the provisions of Clauses 51.1 and 51.2 (*Notices*)] and where notice is issued to the Authority or the Authority's Representative copied to [◆]⁸⁰.

52. NO WAIVER

52.1 Any relaxation, forbearance, indulgence or delay (together "**indulgence**") of any party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right (whether against that party or any other person).

Continued effect – no waiver

52.2 Notwithstanding any breach of this Agreement by either party, and without prejudice to any other rights which the other party may have in relation to it, the other party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement. The failure of either party to exercise any right under this Agreement, including any right to terminate this Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

53. NO AGENCY

53.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Authority and D&B Co.

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

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

54. ENTIRE AGREEMENT

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

⁸⁰ Insert Welsh Government details.

54.2 Each of the parties acknowledges that:

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

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

55. THIRD PARTY RIGHTS

It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provision contained in this Agreement save to the extent expressly provided in this Agreement and, to avoid doubt, without prejudice to the rights of any permitted successor to the rights of D&B Co or of any permitted assignee.

56. SEVERABILITY

If any provision of this Agreement shall be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.

57. CONFLICTS OF AGREEMENTS

In the event of any conflict between this Agreement and the Project Documents, the provisions of this Agreement shall prevail.

58. COSTS AND EXPENSES

Each party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement and any Project Document.

59. AMENDMENTS

This Agreement may not be varied except by an agreement in writing signed by duly authorised representatives of the parties.

60. COUNTERPARTS

60.1 This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

61. FURTHER ASSURANCE

Each party shall do all things and execute all further documents necessary to give full effect to this Agreement.

62. GOVERNING LAW AND JURISDICTION

62.1 This Agreement shall be considered as a contract made in England and Wales and shall be subject to the laws of England and Wales.

62.2 Subject to the provisions of the Dispute Resolution Procedure, both parties agree that the courts of England and Wales shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or Dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

IN WITNESS WHEREOF the parties have executed this Agreement as a Deed the day and year first above written:

SCHEDULES

SCHEDULE 1

DEFINITIONS AND INTERPRETATION

SECTION 1 DEFINITIONS

In this Agreement unless the context otherwise requires:

"Abandons"	means a failure to carry out the Works at the Site in accordance with the Programme for any consecutive period of [♦] Business Days in any Contract Year or for [♦] Business Days (whether consecutive or not);
"Academic Year"	means the period from [1 September] to [31 August] and comprising the Terms published from time to time prior to the commencement of each Academic Year, in accordance with Clauses 5.4 and 5.5 (<i>Notification of Terms and Examination Periods</i>); ⁸¹
"Access to Work Permit"	means a permit issued pursuant to paragraph [4] of Section 2 of Schedule 21 (<i>Joint Operating Protocol</i>);
"Access to Work Protocol"	means the protocol set out in Section 2 of Schedule 21 (<i>Joint Operating Protocol</i>);
"Active ICT Infrastructure"	means [◆];
"Actual Commissioning End Date"	means the date specified in the Commissioning Completion Certificate [for the Main Works or the Post Completion Works, as applicable] issued by the Independent Tester pursuant to Clause 18.4;
"Actual Completion Date"	means the later of: (a) the date stated in the Certificate of Practical Completion in respect of the [Main] Works Requirements issued by the Independent Tester pursuant to Clause 17.12 (<i>Completion Certificate[s]</i>); and (b) [subject to Clause 14.6 (<i>Early Completion</i>), the Completion Date]
"Actual ICT Handover Date"	means the date so determined in accordance with Clause 14.8 (<i>Handover Dates</i>);

⁸¹ Definition to be adjusted as appropriate for Schools/Colleges.

"Actual Post Completion Works Date"	<p>means the later of:</p> <ul style="list-style-type: none"> (a) the date stated in the Certificate of Practical Completion in respect of the Post Completion Works Requirements issued by the Independent Tester pursuant to Clause 17.12 (<i>Completion Certificate[s]</i>); and (b) [subject to Clause 14.6 (<i>Early Completion</i>), the Post Completion Works Date]⁸²
"Adjudication Panel"	has the meaning given in paragraph 4.2.1 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Adjudicator"	means such person selected in accordance with paragraph 4 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Agreement"	means this D&B Agreement including the schedules;
"Amended Reinstatement Outline"	has the meaning given in Clause 41.20(c) (<i>Reinstatement</i>);
"Ancillary Rights"	<p>means such rights as set out in Section 3 (Ancillary Rights) of Schedule 4 (<i>Land Matters</i>) as the same may be varied with the approval of the Authority such approval not to be unreasonably withheld;</p>
"Anti-Social Behaviour Orders"	<p>means the following which have been ordered, granted or issued (as appropriate):</p> <ul style="list-style-type: none"> (a) an anti-social behaviour order as defined in the Crime and Disorder Act 1998; (b) a civil injunction as defined in Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014; (c) a criminal behaviour order as defined in Part 2 of the Anti-social Behaviour, Crime and Policing Act 2014; (d) a direction excluding a person from an area

⁸² The Post Completion Works drafting in the Template Education D&B Agreement assumes that this is the only aspect of phasing that is required in respect of the Works. Further project specific amendment to the Post Completion drafting should however be considered by an Authority and its advisers where different phases of Post Completion Works are required.

as defined in Part 3 of the Anti-social Behaviour, Crime and Policing Act 2014;

(e) a community protection notice as defined in Chapter 1 of Part 4 of the Anti-social Behaviour, Crime and Policing Act 2014; or

(f) a public spaces protection order as defined in Chapter 2 of Part 4 of the Anti-social Behaviour, Crime and Policing Act 2014;

"Application Date"

means the date specified as such in respect of each Relevant Month in the Application Schedule⁸³ (Section 2 of Schedule 19 (*Project Bank Account*));

"Application for Payment"

has the meaning given in Clause 29.4 (*Applications for Payment*);

"Application Schedule"

means the document at Section 2 (*Application Schedule*) of Schedule 19 (*Project Bank Account*);

"Appropriate Limit"

has the meaning given in Clause 49 (*Freedom of Information*);

"Approved Purposes"

has the meaning given to it in Clause 43.1 (*Project Data*);

"Approved RDD Item"

means an item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed either "Level A – no comment" or "Level B – proceed subject to amendment as noted" by the Authority's Representative pursuant to the provisions of Clause 12 (*The Design Construction and Commissioning Process*) and Schedule 7 (*Review Procedure*) (provided that in the case of any item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed "Level B – proceed subject to amendment as noted" D&B Co has taken account of the Authority's Representative's comments), as such item of Reviewable Design Data may be varied or amended from time to time in accordance with Schedule 13 (*Variation Procedure*);

"Associated Companies"

means [(a)], in respect of a relevant company, a company which is a Subsidiary, a Holding Company or a company that is a Subsidiary of the ultimate Holding Company of that relevant company, and in the case of D&B Co shall include each of the Shareholders; [or (b) in respect of one of the initial shareholders [♦] Limited or any person which is a member of that [Investment Group], and the term "**Associate**" shall be interpreted

⁸³ Each Application Date must be an objectively fixed date (i.e. not contingent on an application being submitted).

	accordingly; ⁸⁴
"Articles of Association"	means D&B Co's articles of association and the term "Articles" shall be construed accordingly;
"Authority Assets"	means the [the ICT Assets] and [insert details of other Authority existing premises/sites etc] and any other assets and equipment or other property used by, or on behalf of, the Authority or any Authority Party;
"Authority Control Period"	has the meaning given to it in paragraph 4.1 of Section 2 (<i>Construction Phase Access Protocol</i>) of Schedule 21 (<i>Joint Operating Protocol</i>);
"Authority Events of Default"	has the meaning given in Clause 32.1 (<i>Authority Events of Default</i>);
"Authority Party"	means: <ul style="list-style-type: none"> (a) any of the Authority's agents, contractors and sub-contractors of any tier and its or their directors, officers and employees at the Facilities; and (b) in relation to any School Entity, any governor or member of that School Entity acting as such, or any teacher employed by that School Entity acting in the course of their employment⁸⁵ [in each case] with the authority of the Authority but excluding D&B Co, any D&B Co Party and statutory undertakers and utilities and "Authority Parties" shall be construed accordingly;
"Authority Policies"	means subject to Clause 6.6 (<i>Authority Policies</i>) the policies of the Authority set out in the document annexed to this Agreement as Attachment [◆], as amended from time to time in accordance with the provisions of Clause 27 and Schedule 13 (<i>Variations</i>), ⁸⁶
"Authority Services"	means all of: <ul style="list-style-type: none"> (a) the Educational Services; (b) services incidental thereto; and (c) such other services as may be notified to

⁸⁴ Insert details of investment funds on a project specific basis, if appropriate. If a fund or limited partnership or "50:50" owned vehicle (which is not a "Subsidiary") or similar is in the relevant ownership chain of D&B Co, this definition will need to be expanded to cover this instance.

⁸⁵ Definition to be tailored on a project specific basis to capture those providing Educational Services, community services and other services at the local authority/School/College invitation (as appropriate).

⁸⁶ Relevant policies will be reviewed on a project specific basis.

D&B Co by the Authority from time to time;

"Authority Works Variation"			has the meaning given in Schedule 13 (<i>Variation Procedure</i>);
"Authority Works Variation Confirmation"			has the meaning given in Schedule 13 (<i>Variation Procedure</i>);
"Authority Works Variation Enquiry"			has the meaning given in Schedule 13 (<i>Variation Procedure</i>);
"Authority's Commissioning"			means the Authority's pre-completion commissioning activities to be carried out by the Authority in accordance with Clause 17 (<i>Pre-Completion Commissioning and Completion</i>);
"Authority's Community Benefits Requirements"			means the requirements set out in Section 1 of Schedule 20;
"Authority's Construction Requirements"			means the requirements of the Authority set out or identified in Section 3 (<i>Authority's Construction Requirements</i>) of Schedule 5 (<i>Construction Matters</i>) as amended from time to time in accordance with the terms of this Agreement;
"Authority's Post Completion Commissioning"			means the Authority's post-completion commissioning activities to be carried out by the Authority in accordance with Clause 18.1 (<i>Post Completion Commissioning</i>);
"Authority's Representative"			means the person so appointed by the Authority pursuant to Clause 8 (<i>Representatives</i>);
"Barred List"			means the barred lists provided for under the Safeguarding Vulnerable Groups Act 2006 as amended by the Protection of Freedoms Act 2012;
"Beneficial Access"			means a non-exclusive right to access and use the Facilities;
"Beneficiary"			has the meaning given in Clause 38.3 (<i>Conduct of Claims</i>);
"Below Threshold Sub-Contractor"			means a Sub-Contractor [(other than a Consultant)] with a Sub-Contract Value of less than one per cent (1%) of the Development Amount;
["BIM Protocol"]			means the protocol attached at Section 9 of Schedule 5 (<i>Construction Matters</i>);]
"Business Day"			means a day other than a Saturday, Sunday or a bank holiday in England and Wales;
"CDM Regulations"			has the meaning given in Section 2 (<i>Safety During Construction</i>) of Schedule 5 (<i>Construction Matters</i>);
"Certificate of Making Good Defects"			has the meaning given in Clause 19.4.2 and in the

	form set out in Schedule 16 (<i>Certificates</i>);
"Certificate of Practical Completion"	means a certificate in the relevant form set out in Schedule 16(<i>Certificates</i>);
"Certificate of WiFi Completion"	means the certificate to be issued by the Independent Tester in accordance with Clause 17.21 in the form set out in Schedule 16 (<i>Certificates</i>);
"Change in Law"	means the coming into effect or repeal (without re-enactment or consolidation) in England and Wales or in Wales alone of any Law, or any amendment or variation to any Law, or any judgement of a relevant court of law which changes binding precedent in England and Wales or in Wales alone in each case after the date of this Agreement;
"Code"	has the meaning given in Clause 49.8;
"Collateral Agreements"	means the Contractor's Collateral Agreement [and the Key Sub-Contractor Collateral Agreement]; ⁸⁷
"Commencement Date"	means [the date of this Agreement];
"Commercially Sensitive Information"	means the sub set of Confidential Information listed in column 1 of Schedule 17 (<i>Commercially Sensitive Information</i>) in each case for the period specified in column 2 of Schedule 17 (<i>Commercially Sensitive Information</i>);
"Commissioning Completion Certificate"	means a certificate in the relevant form set out in Schedule 16(<i>Certificates</i>);
"Commissioning End Date"	means the date [in respect of the Main Works and in respect of the Post Completion Works] by which the parties' commissioning activities are programmed to be completed in accordance with the Final Commissioning Programme;
"Compensation Event"	has the meaning given in Clause 24.10 (<i>Compensation</i>);
"Completion Criteria"	means the completion criteria required to meet the Actual Completion Date[, ICT Handover Date] [and/or Actual Post Completion Works Date], set out in Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>);

⁸⁷ The Authority should specify on a project specific basis which professional team collateral warranties and key subcontractor (i.e. with design responsibility) collateral warranties are required.

"Completion Date"	means [in respect of the Main Works Requirements], the date described as such in Section 2 (<i>Phasing</i>) of Schedule 6 (<i>The Programme</i>), or such revised date as may be specified by the Authority's Representative pursuant to Clause 24 (<i>Delay Events</i>) or such other date as may be agreed by the parties;
"Confidential Information"	means: <ul style="list-style-type: none"> (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, Intellectual Property Rights and know-how of either party and all Personal Data and Sensitive Personal Data within the meaning of the Data Protection Laws and (b) Commercially Sensitive Information, provided that information supplied by D&B Co to the Authority pursuant to Clause 22.5 to 22.7 (<i>Sustainable Development</i>) shall not be Confidential Information.
"Consents"	means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations required by Law, and all necessary consents and agreements from any third parties (including, without limitation, any Planning Permission), needed to carry out the Project Operations in accordance with this Agreement;
"Consolidated Adjudication Costs"	has the meaning given in paragraph 4.15.3 of Schedule 15 (<i>Dispute Resolution Procedure</i>)
"Construction Contract"	means the design and build contract dated on or around the date of this Agreement between D&B Co and the Contractor (which, as at the date of this Agreement, is in the Agreed Form) as amended or replaced from time to time in accordance with this Agreement;
"Construction Contract Dispute"	has the meaning given in paragraph 6.1 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Construction Phase"	means the period from and including the Commencement Date to and including the Actual Completion Date[, or where there are Post Completion Works, the Actual Post Completion Works Date];
"Construction Quality Plan"	means [◆];

"Construction Skills Certification Scheme"	means the scheme operated by Construction Skills Certification Scheme Limited (registered number 03024675) to evidence the skills and competence of persons employed on construction sites;
"Consultants"	means [◆];
"Contamination"	means all or any pollutants or contaminants, including any chemical or industrial, radioactive, dangerous, toxic or hazardous substance, waste or residue (whether in solid, semi-solid or liquid form or a gas or vapour) and including without limitation genetically modified organisms;
"Contracting Associate"	means the Contractor [and any other entity which performs on behalf of D&B Co any material function in connection with this Agreement or the Project Operations];
"Contractor"	means [◆] ⁸⁸ engaged by D&B Co to carry out the Works and any substitute design and/or building contractor engaged by D&B Co as may be permitted by this Agreement;
"Contractor's Collateral Agreement"	means a collateral agreement among the Authority, D&B Co and the Contractor in the form set out in Section 1 (<i>Contractor's Collateral Agreement</i>) of Schedule 8 (<i>Collateral Agreements</i>);
"Contractor's Site Manager"	means the manager to be appointed by the Contractor for purposes of supervision of all day-to-day activities on the Site;
"Contractor's Site Rules"	means the Contractor's rules, applicable on the Site to the Authority, D&B Co, the Contractor and their respective sub-contractors and suppliers of every tier during the construction of the Facilities;
"Convictions"	means, other than in relation to any minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding orders (including any spent convictions as contemplated by section 1(1) of the Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order) and including any Anti-Social Behaviour Orders;
"D&B Co Event of Default"	has the meaning given in Clause 33 (<i>D&B Co Event of Default</i>);
"D&B Co Party"	means D&B Co's agents and Contractors (including without limitation the Contractor and its sub-contractors of any tier and its or their directors,

⁸⁸ Insert description of construction contractor

	officers, employees and workmen in relation to the Project and "D&B Co Parties" shall be construed accordingly;
"D&B Co Suspension Notice"	has the meaning given in Clause 11.4.2(b);
"D&B Co's Community Benefits Method Statements"	means those method statements set out in Section 2 of Schedule 20 (<i>Community Benefits</i>);
"D&B Co's Key Personnel"	means the personnel identified in Schedule 3 (<i>Key Personnel</i>);
"D&B Co's Post-Completion Commissioning"	means D&B Co's commissioning activities carried out in accordance with Clause 18.1 (<i>Post Completion Commissioning</i>);
"D&B Co's Pre-Completion Commissioning"	means D&B Co's commissioning activities to be carried out in accordance with Clause 17 (<i>Pre-Completion Commissioning and Completion</i>);
"D&B Co's Proposals"	means the document at Section 4 (<i>D&B Co's Proposals</i>) of Schedule 5 (<i>Construction Matters</i>) as amended from time to time in accordance with Clause 28 (<i>Variation Procedure</i>);
"D&B Co's Representative"	means the person appointed by D&B Co pursuant to Clause 8 (<i>Representatives</i>);
"Data Loss Event"	means any event that results or may result, in unauthorised access to Personal Data held by D&B Co under this Agreement, and/or actual or potential loss and/or destruction of Personal Data, in breach of this Agreement, including any Personal Data Breach;
"Data Protection Laws"	means Law protecting Personal Data of natural persons (including the Data Protection Act 2018, GDPR and codes of practice issued from time to time by relevant supervisory authorities);
"Decant"	means the completion by D&B Co of the removal of all equipment items and materials to be removed by D&B Co from the Existing Facilities in accordance with the Decant Protocol;
"Decant Protocol"	means the protocol set out in [◆], identifying the obligations and responsibilities of the parties in relation to the removal of items from the Existing Facilities and their relocation and installation in the Facilities;

"Deed of Trust"	means the deed of trust in the form set out in Section 1 (<i>Deed of Trust</i>) of Schedule 19 (<i>Project Bank Account</i>) dated on or around the date hereof among the Authority, D&B Co and the Contractor relating to facilitating the making of payments in connection with the Project to D&B Co, the Contractor and Sub-Contractors;
"Deemed Allocation"	has the meaning given in Clause 29.25 (<i>Revised Payment Instruction</i>);
"Default Interest Rate"	means [◆];
"Defects"	means any defect or fault in the Works and/or the Facilities which occurs due to a failure by D&B Co to meet the Authority's Construction Requirements and/or D&B Co's Proposals or otherwise to comply with its obligations under this Agreement;
"Defects Liability Period[s]"	means ⁸⁹ [: (a)]the period of twelve (12) months from the Actual Completion Date, in respect of the Main Works]; [and (b)]twelve (12) months from the Actual Post Completion Works Date, in respect of the Post Completion Works;]
"Delay Event"	has the meaning given in Clause 24.3 (<i>Delay Events</i>);
"Design Data"	means all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing and/or operation of the Facilities;
"Design Quality Plan"	means the document at Section 8 (<i>Quality Plans (Design and Construction)</i>) of Schedule 5 (<i>Construction Matters</i>);
"Development Amount"	means the sum of £[INSERT SUM];
"Development Amount Analysis"	means the development amount analysis set out at Schedule 18 (<i>Development Amount Analysis</i>);
"Direct Losses"	means, subject to the provisions of Clause 42.1 (<i>Exclusions and Limitations on Liability</i>), all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an agent/client, client paying basis), proceedings, demands and charges whether arising under statute, contract or at common law but, to avoid doubt, excluding Indirect Losses;

⁸⁹ A twelve month Defects Liability Period is the minimum Defects Liability Period to be applied.

"Disclosed Data"	means any Design Data and any other written information, survey reports, data and documents made available or issued to D&B Co or any D&B Co Party in connection with the Project by or on behalf of the Authority (or any Authority Party) whether on, before or after the execution of this Agreement;
"Disclosure and Barring Service"	means the non-departmental public body established pursuant to the Protection of Freedoms Act 2012;
["Disruption Event"	means a failure by D&B Co to carry out the Works in accordance with this Agreement the result of which is that an Existing Facility (or part thereof) cannot reasonably continue to be used for the provision of Educational Services;]
"Dispute"	has the meaning given in paragraph 1 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Dispute Resolution Procedure"	means the procedure set out in Schedule 15 (<i>Dispute Resolution Procedure</i>);
"DOTAS"	means the Disclosure of Tax Avoidance Schemes Rules which require a promoter of tax schemes to tell HM Revenue & Customs of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 as extended to National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868 made under Section 132A of the Social Security Administration Act 1992;
"Due Date"	has the meaning in Clause 29.4 (<i>Applications for Payment</i>);
"Educational Services"	means [the provision of teaching and pastoral support for school age children, the provision of careers advice, liaison with parents and guardians of Students and the carrying on of an extra-curricular activities for Students and the use of school accommodation by the local community;] [the provision of teaching, vocational training, careers advice, mentoring and associated support services for Students and the carrying on of extra-curricular activities for Students and the use of the Facilities by the local community]; ⁹⁰

⁹⁰ The first definition is the proposed starting point for a Schools Project, and the second, for a College Project. Each will require to be reviewed on a project specific basis and adjusted to reflect the educational/community activities to be undertaken at the relevant School or College including pre-school education where relevant.

"Environmental Information Regulations"	means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such regulations;
"Equipment"	has the meaning given to it in Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>);
"Ethical Employment Code"	means the Code of Practice - Ethical Employment in Supply Chains issued by the Welsh Government on [◆];
"Examination Period"	means the [external examination periods for Students at the Facility published by the Authority or the School Entity] for each Academic Year and notified by the Authority to D&B Co in accordance with Clause 5.6 and 5.7 (<i>Notification of Terms and Examination Periods</i>) of this Agreement] / [examination periods for Students at the Facility for each Academic Year notified by the Authority to D&B Co in accordance with Clause 5.6 and 5.7 (<i>Notification of Terms and Examination Periods</i>) of this Agreement];
["Existing Facility"	means a [◆]; ⁹¹
"Facility" or "Facilities"	means [the buildings and other facilities, together with all supporting infrastructure (including the Plant and [the Group 1 Equipment]), external hard-standings, specialist surfaces and other amenities located on the Site, as required to enable D&B Co to comply with its obligations under this Agreement, all as the same may be varied, amended or supplemented from time to time in accordance with this Agreement;]
["Facility Representative"	has the meaning given in Clause 8.11.1 (<i>[Facility Representative]</i>); ⁹²
"Fees Regulations"	means the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;
"Final Commissioning Programme"	means the programme jointly developed and agreed by the Authority and D&B Co in accordance with the provisions of Clause 17.1 (<i>Pre-Completion Commissioning and Completion</i>);

⁹¹ This drafting will require to be updated where there are Post Completion Works.

⁹² Please refer to comment at Clause 8.11.1.

"Final Date"	has the meaning given to it in Clause 29.12 (<i>Date for Payment</i>)
"Finishes"	means those finishes listed in the table set out in paragraph 1.2.3 of Schedule 7 (<i>Review Procedure</i>);
"Finishes Proposal Date"	means, in relation to a Finish, the relevant date identified in the table set out in paragraph 1.2.3 of Schedule 7 (<i>Review Procedure</i>);
"Finishes Selection Date"	means, in relation to a Finish, the relevant date identified in the table set out in paragraph 1.2.3 of Schedule 7 (<i>Review Procedure</i>);
"First Party"	has the meaning given in Clause 30.3 (<i>VAT</i>);
"FOIA"	means the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such Act;
"Force Majeure"	has the meaning given in Clause 26 (<i>Force Majeure</i>);
"GDPR"	means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to processing of Personal Data and on the free movement of such data;
"General Anti-Abuse Rule"	means: <ul style="list-style-type: none"> (a) the legislation in Part 5 of the Finance Act 2013; and (b) any future legislation introduced into Parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions;
"Good Industry Practice"	means using standards, practices, methods and procedures conforming to the Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances;
"Government"	means the government of the United Kingdom or the Welsh Ministers;
"Ground Physical and Geophysical Investigation"	means the investigation of all the conditions of and surrounding the Site and of any extraneous materials in, on or under the Site (including its surface and subsoil) to enable the Facilities to be

	designed and constructed and the Works to be carried out with due regard for those conditions and the seismic activity (if any) in the region of the Site;
["Group 1 Equipment"	means each item of equipment identified as Group 1 Equipment in column [♦] of the tables set out on each of the Loaded Room Layout Drawings;]
["Group 2 Equipment"	means [♦];]
["Group 3 Equipment"	means [♦];]
"Halifax Abuse Principle"	means the principle explained in the CJEU Case C 255/02 Halifax and others;
"Holding Company"	has the meaning given to it in section 1159 of the Companies Act 2006;
["ICT Assets"	means: <ul style="list-style-type: none"> (a) hardware, software, networking equipment, telecommunications equipment, telephone systems, projectors, screens, digital signage, interactive whiteboards, video playback equipment, stage lighting control systems, audio systems, assisted hearing systems, technological sports equipment, cashless catering equipment, registration systems, internal CCTV equipment, peripherals, manuals, documentation and related ICT products and materials [but excluding any Passive ICT Infrastructure]; and (b) the Active ICT Infrastructure;]
["ICT Handover"	means, in relation to the Facility satisfaction of the ICT Handover Requirements;]
["ICT Handover Acceptance Certificate"	means a certificate in the relevant form set out in Schedule 16 (<i>Certificates</i>);]
["ICT Handover Date"	means subject to Clause 24 (Delay Events), the date described as such in Schedule 6 (<i>The Programme</i>) or such other date as the parties may agree ⁹³ ;]
["ICT Handover Period"	means, the date commencing on the Actual ICT Handover Date and ending on the Actual Completion Date;]

⁹³ The date programmed for ICT Handover should be set out here.

["ICT Handover Requirements"	means the requirements set out in paragraphs [◆] of Appendix B (<i>Completion Criteria</i>) of Schedule 10 (<i>Outline Commissioning Programme</i>);]
["ICT Infrastructure"	has the meaning given to it in Section 3 of Schedule 5 (<i>Authority's Construction Requirements</i>);]
["ICT Installer"	has the meaning given to that term in [◆];]
["ICT Service Contract"	means the agreement(s) dated [◆]/ [on or around the date of this Agreement] between the [School Entity/ Authority] and the ICT Installer related to the provision of ICT at the Facility;]
["ICT Service Provider"	means [◆];]
"Indemnifier"	has the meaning given in Clause 38.3 (<i>Conduct of Claims</i>);
"Independent Tester"	means the [insert name of Independent Tester] or such substitute independent tester as may be permitted pursuant to this Agreement;
"Independent Tester Contract"	means the contract dated on or around the same date as this Agreement in the form set out in Schedule [◆] or any replacement thereof among D&B Co, the Authority, the Contractor and the Independent Tester;
"Indirect Losses"	has the meaning given in Clause 42.1 (<i>Exclusions and Limitations on Liability</i>);
"Information"	has the meaning given under section 84 of the Freedom of Information Act 2000;
"Information Commissioner"	has the meaning given in the Data Protection Laws;
"Information Manager Appointment"	has the meaning given to that term in Schedule [◆];
"Information System"	means a system for generating, sending, receiving, storing or otherwise processing electronic communications;
["Initial ICT Equipment"	means the legacy ICT Assets and new ICT Assets which are described in [◆] of the Authority's Construction Requirements;]
"Insurance Proceeds Account"	means the account numbered [◆] in the joint names of D&B Co and the Authority;
"Insurances"	means, as the context requires, all or any of the insurances required to be maintained by D&B Co pursuant to this Agreement;
"Intellectual Property"	means all registered or unregistered trademarks, service marks, patents, registered designs, utility models, applications for any of the foregoing,

	copyrights, unregistered designs, the sui generis rights of extraction relating to databases, trade secrets and other confidential information or know-how;
"Intellectual Property Rights"	means the Intellectual Property which (or the subject matter of which) is created, brought into existence, acquired, used or intended to be used by D&B Co, any D&B Co Party or by other third parties (for the use by or on behalf of or for the benefit of D&B Co) for the purposes of the design or construction of the Facilities, the operation, maintenance, improvement and/or testing of the Facilities or the conduct of any other Project Operations or otherwise for the purposes of this Agreement;
"Interim Certificate"	has the meaning given in Clause 29.7 (<i>Issue of Interim Certificate</i>);
"Joining Declaration"	means a joining declaration entered into by the Authority, D&B Co, the Contractor and a Sub-Contractor or Sub-Contractors in the form set out in Schedule 3 (<i>Deed of Adherence and Joining Deed</i>) of the Deed of Trust;
"Joining Request"	means a request by a Below Threshold Sub-Contractor to be added as a party to the Deed of Trust for the purpose of facilitating the receiving of payments in connection with the Project through the Project Bank Account;
"Joint Operating Protocol"	means the joint operating protocol set out at Schedule 21 (<i>Joint Operating Protocol</i>);
["Judicial Proceedings"	means the grant of permission for an application of judicial review within six (6) weeks of the date of a Planning Approval (and any subsequent application or related process) under Part 54 of the Civil Procedure Rules in respect of a Planning Approval;] ⁹⁴
["Judicial Proceedings Action"	means any court order or declaration made by a relevant court (including without limitation the granting of an injunction) arising out of or in connection with any Judicial Proceedings that renders unlawful and/or prevents the performance of all or part of D&B Co's obligations under this Agreement;] ⁹⁵
"Key Sub-Contractor"	means the architects, structural engineers, mechanical and electrical engineers, acoustic engineers, 'Principal Designer' under the CDM Regulations and [♦] ⁹⁶ employed by the Contractor

⁹⁴ Definition required where drafting in Clause 11.4 (*Judicial Proceedings*) is used.

⁹⁵ Definition required where drafting in Clause 11.4 (*Judicial Proceedings*) is used.

⁹⁶ This list should be reviewed and supplemented on a project specific basis.

	in connection with the Works and any employer's agent employed by D&B Co;
"Key Sub-Contractor Collateral Agreements"	means the collateral agreement among the Authority, D&B Co [, the Contractor] and the Key Sub-Contractors in the form set out in Section 2 of Schedule 8 (<i>Collateral Agreements</i>);
"Law"	means: <ul style="list-style-type: none"> (a) any applicable statute or proclamation or any delegated or subordinate legislation; (b) any enforceable community right within the meaning of section 2(1) of the European Communities Act 1972; (c) any applicable guidance, direction or determination with which the Authority and/or D&B Co is bound to comply (including the Welsh Language Standards) to the extent that the same are published and publicly available or the existence or contents of them have been notified to D&B Co by the Authority; and (d) any applicable judgement of a relevant court of law which is a binding precedent in England and Wales, in each case in force in England and Wales or Wales alone;
"Liability Cap"	means [[]% of the Development Amount; ⁹⁷
"Liaison Committee"	has the meaning given to it in Schedule 22 (<i>Liaison Committee</i>);
["Loaded Room Layout Drawings"]	has the meaning given in the Authority's Construction Requirements;]
"Longstop Date"	has the meaning given to it in Clause 33.1.2 (<i>Longstop Date</i>)
["Main Retention"]	has the meaning given in Clauses 29.8 (<i>Retention</i>);]
["Main Works"]	means the Works with the exception of the Post Completion Works;]
["Main Works Final Account"]	has the meaning given in Clause 29.16 (<i>Statement of Final Accounts and Issue of Payment Certificate</i>);]
"[Main] Works Requirements"	has the meaning given to it in paragraph [♦] of Appendix B of Schedule 10 (<i>Outline</i>

⁹⁷ To be completed by Authority on a project specific basis.

	<i>Commissioning Programme</i>);
"Non-Compliant Shareholder"	has the meaning given to it in Clause 40.1.2 (<i>Tax Compliance</i>);
"Non-PBA Sub-Contractor"	means a Sub-Contractor that is not a party to the Deed of Trust;
"Notice of Adjudication"	has the meaning given in paragraph 4.1 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Occasion of Tax Non-Compliance"	means: <ul style="list-style-type: none"> (a) any tax return of D&B Co or a Shareholder submitted to a Relevant Tax Authority on or after 1 October 2012 is found to be incorrect as a result of: <ul style="list-style-type: none"> (i) a Relevant Tax Authority successfully challenging D&B Co or the relevant Shareholder under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle; (ii) the failure of an avoidance scheme which D&B Co or the relevant Shareholder was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or (b) D&B Co's or the relevant Shareholder's tax affairs giving rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax-related offences which is not spent at the date of this Agreement or to a penalty for civil fraud or evasion;
"Outline Commissioning Programme"	means the programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the commissioning activities of the parties set out in outline in Schedule 10 (<i>Outline Commissioning Programme</i>);
"Passive ICT Infrastructure"	has the meaning given in [◆] of [the Authority's Construction Requirements];
"Pay Less Allocation"	means (i) a Pay Less Payment Instruction; or, where D&B Co does not comply with Clause [●];(ii) a Deemed Allocation;
"Pay Less Notice"	has the meaning given in Clause 29.23 (<i>Pay Less Notice</i>);

"Pay Less Payment Instruction"	means a document prepared by D&B Co specifying the sum due to each PBA Beneficiary in respect of a sum specified as considered by the Authority to be due pursuant to a Pay Less Notice issued in accordance with Clause 29.23 (<i>Pay Less Notice</i>);
"Payment Certificate"	has the meaning given in Clause 29.18 (<i>Pay Less Notice</i>);
"Payment Certificate Due Date"	has the meaning given in Clause 29.18 (<i>Statement of Final Accounts and Issue of Payment Certificate</i>);
"Payment Certificate Final Date"	has the meaning given in Clause 29.21 (<i>Statement of Final Accounts and Issue of Payment Certificate</i>);
"Payment Instruction"	means a document prepared by D&B Co specifying the sum due to each PBA Beneficiary in respect of a sum due pursuant to Clause 29.12 (<i>Date for Payment</i>);
"PBA Beneficiary"	means a beneficiary under the Deed of Trust;
"PBA Beneficiary Amount"	means the amount due to a PBA Beneficiary pursuant to: (i) a Payment Instruction; or, where a Pay Less Notice has been issued, (ii) a Pay Less Allocation;
"PBA Sub-Contractor"	means a Sub-Contractor that is a party to the Deed of Trust;
["PCW Snagging List"	means the list to be prepared by the Independent Tester in accordance with Clause 17.16 (<i>Snagging Items</i>) in respect of the Post Completion Works containing Snagging Items;]
["PCW Snagging Programme"	has the meaning given to it in Clause 17.16 (<i>Snagging Items</i>);]
"Performance Guarantee(s)"	means the guarantees to D&B Co in respect of the Construction Contract [insert details of any other guarantees to be given] which, as at the date of this Agreement are in the Agreed Form ⁹⁸ ;
"Personal Data"	means personal data (as that term is defined in the Data Protection Laws) processed by either Party in connection with their respective rights and obligations in this Agreement;
"Physical Damage Policies"	means the policies of insurance referred to in paragraph 1 of Section 1 of Schedule 12 (<i>Insurance Requirements</i>);

⁹⁸ Insert details of any other guarantees to be given.

"Planning Approval"	means detailed planning consent for the Project dated [insert date of Planning Approval] and annexed as Attachment [◆];
"Planning Permission"	means any planning permission, approval of reserved matters, listed building consent, conservation areas consent and/or other consent or approval reasonably required from time to time for construction and/or operation of the Facilities (including without limitation for any Authority Works Variation and the Planning Approval);
"Plant"	means the infrastructure systems, building systems, fixed, and immovable equipment systems, installed as part of the Works or pursuant to an Authority Works Variation, as replaced from time to time;
"Post Completion Commissioning"	means, as appropriate, D&B Co's Post-Completion Commissioning and/or the Authority's Post Completion Commissioning [in respect of the Main Works and/or the Post Completion Works, as applicable];
["Post Completion Retention"	has the meaning given in Clauses 29.8 (<i>Retention</i>);]
["Post Completion Works"	means those parts of the Works [described as such in the Authority's Construction Requirements and D&B Co's Proposals/highlighted as such on the Programme] ⁹⁹ to be completed after the Actual Completion Date in accordance with the Programme;]
["Post Completion Works Areas"	means [◆];]
["Post Completion Works Date"	means, the date shown as the Post Completion Works Date in Section 2 of Schedule 6 (<i>The Programme</i>), or such revised date as may be specified by the Authority's Representative pursuant to Clause 24 (<i>Delay Events</i>), or such other date as the parties may agree;]
["Post Completion Works Final Account"	has the meaning given in Clause 29.16 (<i>Statement of Final Accounts and Issue of Payment Certificate</i>);]
["Post Completion Works Requirements"	has the meaning given to it in paragraph [◆] of Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>);]
"Pounds Sterling"	means the currency issued by the Bank of England from time to time;
"Programme"	means the programme set out in Schedule 6 (<i>The Programme</i>) as revised and issued by D&B Co (or

⁹⁹ Where there are Post Completion Works on a Project, these must be clearly identified and distinguished from the Main Works.

	on its behalf) from time to time pursuant to Clause 14 (<i>Programme and Dates for Completion</i>);
"Prohibited Act"	has the meaning given in Clause 36 (<i>Corrupt Gifts and Payments</i>);
"Project"	has the meaning given to it in Recital (A);
"Project Bank Account"	means the bank account provided by the Project Bank Account Provider in the joint names of the Authority, D&B Co and the Contractor in relation to the Project;
"Project Bank Account Provider"	means <i>[INSERT DESIGNATION OF BANK PROVIDING THE PROJECT BANK ACCOUNT]</i> ;
"Project Data"	means: <ul style="list-style-type: none"> (a) all Design Data; (b) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the provision of the Works; and (c) any other materials, documents and or data acquired, brought into existence or used in relation to the Project Operations or this Agreement;
"Project Development Fee"	means <i>[correct figure reflecting terms of Strategic Partnering Agreement to be inserted on a project by project basis]</i> ;
"Project Documents"	means the Construction Contract and the Performance Guarantees, all as the same may be amended or replaced from time to time; ¹⁰⁰
"Project Operations"	means the carrying out of the Works, the carrying out of D&B Co's Pre-Completion Commissioning and D&B Co's Post-Completion Commissioning and the performance of all other obligations of D&B Co under this Agreement from time to time;
"Proposed Mitigating Measures"	has the meaning given in Clause 40.1.2(i) (<i>Tax Compliance</i>);
"Protective Measures"	means appropriate technical and organisational measures which may include: pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of such measures;

¹⁰⁰ Authority to consider if there are any other project significant documents.

"Qualifying Sub-Contractor"	means a Sub-Contractor (other than a Consultant) with a Sub-Contract Value of at least one per cent (1%) of the Development Amount;
"Quality Plans"	means the Design Quality Plan and Construction Quality Plan, prepared in accordance with Section 8 (<i>Quality Plans (Design and Construction)</i>) of Schedule 5 (<i>Construction Matters</i>), as required to be implemented by D&B Co in accordance with Clause 21 (<i>Quality Assurance</i>);
"Range of Finishes"	has the meaning given in paragraph 1.2.3(a) of Schedule 7 (<i>Review Procedure</i>);
"Referral"	has the meaning given in paragraph 4.3 of Schedule 15(<i>Dispute Resolution Procedure</i>);
"Referral Notice"	has the meaning given in paragraph 4.3 of Schedule 15(<i>Dispute Resolution Procedure</i>);
"Referring Party"	has the meaning given in Schedule 15(<i>Dispute Resolution Procedure</i>);
"Reinstatement Outline"	has the meaning given in Clause 41.20.2(a) (<i>Reinstatement</i>);
"Reinstatement Plan"	has the meaning given in Clause 41.20 (<i>Reinstatement</i>);
"Reinstatement Works"	has the meaning given in Clause 41.20.2(a) (<i>Reinstatement</i>);
"Related Adjudication"	has the meaning given in paragraph 4.11 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Related Adjudicator"	has the meaning given in paragraph 4.14 Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Related Agreements"	has the meaning given in paragraph 4.11 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Relevant Authority"	means any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom, or of the European Union, (or of the Welsh Ministers or the National Assembly for Wales);
"Relevant Incident"	has the meaning given in Clause 41.20.2 (<i>Reinstatement</i>);
"Relevant Month"	means each calendar month from the Commencement Date until (and including) the calendar month after the calendar month in which the [final] Certificate of Practical Completion is issued;

"Relevant Tax Authority"	means HM Revenue and Customs, or, if applicable, a tax authority in the jurisdiction in which D&B Co, or, as the case may be, the relevant person is established;
"Relief Events"	has the meaning given in Clause 25 (<i>Relief Events</i>);
"Renewal Date"	means [♦];
"Reportable Incident"	<p>means any incident or event having an adverse effect on:</p> <ul style="list-style-type: none"> (a) an electronic communications network relevant within the meaning of Section 32(1) of the Communications Act 2003; (b) any device or group of interconnected or related devices one or more of which, pursuant to a program, perform automatic processing of digital data; or (c) digital data stored, processed, retrieved or transmitted by elements covered under paragraph (a) or (b) above for the purpose of their operation, use, protection and maintenance; <p>and which has a significant impact on the continuity of Educational Services and/or the Authority [or School Entity] discharging its statutory duties or functions that affect the [School/College];</p>
"Request for Information"	has the meaning set out in the FOIA or the Environmental Information Regulations as relevant (where the meaning set out for the term "request" shall apply);
"Reserved Rights"	<p>means the matters referred to in Section 2 (</p> <p>Reserved Rights) at Schedule 4 (<i>Land Matters</i>);</p>
"Responding Party"	has the meaning given in paragraph 4.3 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Restricted Person"	<p>means either:</p> <ul style="list-style-type: none"> (a) a person providing or proposing to provide [♦] services of a similar nature to those provided or contemplated by the Authority at the time in question; or (b) any person who has a material interest in

the manufacture, production, sale or distribution of [pornography,] or [arms and weapons] or [the production of tobacco products and/or alcoholic beverages];

(c) a person who poses, or could pose (in the reasonable opinion of the Authority) a threat to national security;

(d) [any person whose tax returns submitted on or after 1 October 2012 have been found to be incorrect as a result of:

(i) HM Revenue and Customs successfully challenging it under the General Anti-Abuse Rule ("**GAAR**") or the Halifax Abuse Principle;

(ii) the Relevant Tax Authority challenging it under any tax rules or legislation that have an effect equivalent or similar to the GAAR or the Halifax Abuse Principle; and/or

(iii) the failure of an avoidance scheme which the person was involved in and which was, or should have been, notified under the DOTAS or any equivalent or similar regime in a jurisdiction in which the person is established;]

["Retention[s]"]

means the Main Works Retention and/or the Post Completion Works Retention as the context so requires;]

"Review Procedure"

means the procedure set out in Schedule 7 (*Review Procedure*);

"Reviewable Design Data"

means the Design Data listed at Section 5 (*Reviewable Design Data*) of Schedule 5 (*Construction Matters*);

"Reviewable Design Data Programme"

means the programme for submission and review of the Submitted Items as set out in Appendix 1 of Schedule 7 (*Review Procedure*);

"Schedule of Defects"	has the meaning given in Clause 19.2 (<i>Schedule of Defects</i>);
["School Entity"	means [a governing body constituted in accordance with Section 19 of the Education Act 2002];]
"Second Party"	has the meaning given in Clause 30.3 (VAT);
"Shareholder(s)"	means any person(s) who from time to time, as permitted by this Agreement, holds share capital in [D&B Co] which persons are, as at the date of this Agreement, listed as such in Schedule 2 (<i>Completion Documents</i>);
"Shareholder Tax Mitigation Measures Non-Compliance Notice"	has the meaning given to it in Clause 40.1.7 (<i>Tax Compliance</i>);
"Shareholder Tax Non-Compliance Notice"	has the meaning given to it in Clause 40.1.6 (<i>Tax Compliance</i>);
["Shareholders' Agreement"	means [♦];]
"Site"	means the land made available to D&B Co for the Project outlined in red on [♦] ¹⁰¹ ;
"Site Conditions"	means the condition of the Site including (but not limited to) climatic, hydrological, hydrogeological, ecological, environmental, geotechnical, topographical and archaeological conditions;
"Site Plan"	means the site plan attached at Appendix 2 of Schedule 4 (<i>Land Matters</i>);
"Snagging Completion Date"	means the date of the relevant Snagging Items Completion Certificate issued by the Independent Tester in respect of the [Main Works] [or the Post Completion Works (as applicable)] pursuant to Clause 17.17 (<i>Snagging Items</i>);
"Snagging Items"	means minor defects, deficiencies or omissions of a snagging nature whose remediation cannot reasonably be expected to affect the provision of the Authority Services, disrupt the use of the Facilities, prejudice the safe use of the Facilities or prevent the Independent Tester from issuing a Certificate of Practical Completion for the [Main] Works [or Post Completion Works (as applicable)] [or the ICT Handover Acceptance Certificate] and the remediation of which cannot reasonably be expected to exceed in aggregate twenty (20) Business Days from the [relevant] Certificate of Practical Completion [or ICT Handover Acceptance Certificate (as applicable)], or such longer period (up to a maximum of [three (3) months]) as may be reasonable taking into account the lead time for

¹⁰¹ Insert details of relevant plan.

	supplies or materials [or to avoid interference with the ICT Installer].
"Snagging Items Completion Certificate"	means the certificate(s) issued by the Independent Tester in accordance with Clause 17.17 (<i>Snagging Items</i>) and in accordance with the terms of the Independent Tester Contract;
"Snagging List"	means the list to be prepared by the Independent Tester in accordance with Clause 17.14 (<i>Snagging Items</i>) [in respect of the Main Works] containing Snagging Items, as updated pursuant to Clause 17.15 (<i>Snagging Items</i>) in respect of the Post Completion Works;
"Snagging Programme"	has the meaning given to it in Clause 17.14, as updated pursuant to Clause 17.16 (as applicable) (<i>Snagging Items</i>);
"Strategic Partnering Agreement" or "SPA"	has the meaning given in Recital (B);
"Student"	means a student of the Facility;
"Sub-Contract"	means any contract entered into, by or between D&B Co and/or the Contractor and other third parties, in relation to any aspect of the Project Operations;
"Sub-Contract Value"	means the original contract sum of a Sub-Contract;
"Sub-Contractor"	means any third party (including the Contractor) who enters into any Sub-Contract;
"Submitted Item"	has the meaning given to it in paragraph 1.2 of Schedule 7 (<i>Review Procedure</i>);
"Subsidiary"	has the meaning given to it in section 1159 of the Companies Act 2006;
"Suspension Notice"	has the meaning given to it in Clause 11.4.2 (<i>Judicial Proceedings</i>);
"Term"	the terms published by the Authority for each Academic Year and notified to D&B Co in accordance with Clauses 5.4 and 5.5 (<i>Notification of Terms and Examination Periods</i>) (and "half term" references shall be construed accordingly);
"Termination Date"	means the date on which termination of this Agreement takes effect in accordance with its terms;
"Title Conditions"	means title conditions set out in Section 1 (<i>Title Conditions</i>) of Schedule 4 (<i>Land Matters</i>);
["Unreasonable Act"	means any act or omission which is contrary to any reasonable instruction, guidance or rules for the operation or management of the Facilities;]

"Utilities"	means [♦];
"Utilities Agreement"	means: <ul style="list-style-type: none"> (a) those agreements listed in Schedule [♦] (<i>Utilities Agreements</i>); and (b) any other agreements with, or consents, releases, notices or variations properly required for the purposes of carrying out the Works to be obtained from and/or served on, any public or private utility, drainage, sewage, water, electricity, gas or telecommunications undertaker, authority or company or any service provider or company, body or authority for the requisitioning, design, commissioning, installation, laying, relaying, construction, repair, maintenance, use or diversion or disconnection and/or connection to any services and/or services media of any kind including without prejudice to the generality thereof gas, water, electricity, signals and pulses, telecommunications, drainage, sewers, wires, cables, conduits and apparatus;
"Utilities Third Party"	means a third party on whom a Utilities Agreement is to be served or from whom a Utilities Agreement is required to be given or executed;
"Variation"	has the meaning given in Schedule 13 (<i>Variation Procedure</i>);
"Variation Confirmation"	has the meaning given in Schedule 13 (<i>Variation Procedure</i>);
"Variation Enquiry"	has the meaning given in Schedule 13 (<i>Variation Procedure</i>);
"Variation Procedure"	means the procedure set out in Schedule 13 (<i>Variation Procedure</i>);
"VAT"	means value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994;
"VAT Sum"	has the meaning given in Clause 30.5 (<i>VAT and Construction Industry Tax Deduction Scheme</i>);
"Vitiating Act"	has the meaning given in Endorsement 2, Section 3 (<i>Endorsements</i>) of Schedule 12 (<i>Insurance Requirements</i>);
"Well-being of Future Generations Act"	means the Well-being of Future Generations (Wales) Act 2015;
"Welsh Language Standards"	means the Welsh Language Standards (No. 1) Regulations 2015;

"WEPCo"	means [♦]; ¹⁰²
"WiFi"	means [♦];
"WiFi Actual Completion Date"	means such date stated in the Certificate of WiFi Completion or, in the event of dispute, as such date may be determined in accordance with Schedule 15 (<i>Dispute Resolution Procedure</i>);
"WiFi PC Criteria"	means the WiFi Post Completion Tests have been passed;
"WiFi Post-Completion Tests"	means the tests described at [♦] of the Authority's Construction Requirements;
"Works"	means the design (including the preparation of all Design Data), construction, installation, testing, commissioning and completion of the Facilities (including any temporary works) [and the Group 2 Equipment, Group 3 Equipment] (to the extent provided for in [♦] and [♦] of the Authorities Construction Requirements) to be performed by D&B Co in accordance with this Agreement (as varied, amended or supplemented from time to time in accordance with this Agreement) [including the Post Completion Works].

¹⁰² Insert description of WEPCo entity.

SECTION 2 INTERPRETATION

This Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

1. The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
2. Except where the context expressly requires otherwise, references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedules are references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedules to this Agreement and references to Sections, Appendices and Attachments (if any) are references to Sections, Appendices and Attachments to or contained in this Agreement.
3. The Schedules (including Sections, Parts, Appendices and Attachments thereto, if any) to this Agreement are integral parts of this Agreement and a reference to this Agreement includes a reference to the Schedules (including Sections, Parts Appendices and Attachments thereto, if any).
4. Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.
5. Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.
6. The language of this Agreement is English. All correspondence, notices, drawings, Design Data, test reports, certificates, specifications and information shall be in English.¹⁰³ All name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Agreement shall comply with Welsh Language Standards (including any amending, supplemental or replacement Law from time to time) and shall be bilingual (in English and Welsh), where required by the Authority provided that all operating and maintenance instructions (and any other complex technical documents) are permitted in English only.
7. Save where stated to the contrary, references to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments to agreements or documents) a reference to that agreement or document as amended, supplemented, substituted, novated or assigned.

¹⁰³ Whilst the D&B Agreement will be in English, Authorities should stipulate their language of preference for instructions, notices etc and any Welsh language requirements ought to be priced as part of the Development Amount.

8. References to any Law are to be construed as references to that Law as from time to time amended or to any Law from time to time replacing, extending, consolidating or amending the same.
9. Without prejudice to Clause 45.5 (*Assignment*), references to a public organisation (other than the Authority) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the relevant functions and relevant responsibilities of such public organisation.
10. Without prejudice to Clause 45.5 (*Assignment*), references to other persons (other than the Authority and D&B Co) shall include their successors and assignees.
11. References to a deliberate act or omission of the Authority or any Authority Party shall be construed having regard to the interactive nature of the activities of the Authority and of D&B Co and the expression shall exclude acts or omissions which were within the contemplation of the parties or which were otherwise provided for in this Agreement.
12. The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
13. Reference to "parties" means the parties to this Agreement and references to "a party" mean one of the parties to this Agreement.
14. In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
15. All of D&B Co's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Authority and to be performed at D&B Co's own cost and expense.
16. References to "indexed" or "index-linked" shall mean [♦];
17. Reference to a document being in the Agreed Form is a reference to the form of the relevant document [(or where appropriate, the form of the relevant document on disk)] agreed between the parties and for the purpose of identification either (i) initialled by each of them or on their behalf or (ii) entered into on or around the Commencement Date.
18. Words in parenthesis and italics appearing after a Clause reference or a reference to a Schedule are inserted for ease of reference only. If there is any discrepancy between the Clause reference and the words appearing in parenthesis and italics after the Clause reference, the Clause reference shall prevail.
19. Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days after a stipulated date or event, or "no later

than" or "by" a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event, the latest time for performance shall be [5pm] on the last Business Day for performance of the obligations concerned.

20. Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days before a stipulated date or event, or "no later than" or "by" a stipulated date or event which is a prescribed number of Business Days before a stipulated date or event, the latest time for performance shall be [5pm] on the last Business Day for performance of the obligations concerned.

SCHEDULE 2

COMPLETION DOCUMENTS

SECTION 1

DOCUMENTS TO BE DELIVERED BY D&B CO

Unless an original document is specifically requested, a copy (certified by an officer of D&B Co as being a true copy) of each of the following documents is to be delivered by D&B Co to the Authority in accordance with Clause 2.1 (*Execution and Delivery of Documents*) of this Agreement:

1. The Consents and other authorisations, licences, permits, and approvals listed below:

[♦]¹⁰⁴
2. The Construction Contract and the Performance Guarantees, executed by the parties to such agreements.
3. An original of the Independent Tester Contract, the Collateral Agreements¹⁰⁵, [the Information Manager Appointment] and the brokers letters of undertaking relating to the Insurances referred to in paragraph 6 below in the Agreed Form, executed by the parties to such agreements (other than the Authority).
4. Extracts from the minutes of the meeting of the board of directors (certified as true and accurate by a director of the relevant company) of D&B Co, and each of the other parties to the documents listed in Section 1 (*Documents to be Delivered by D&B Co*) of Schedule 2 (*Completion Documents*), at which resolutions were passed approving the execution, delivery and performance of each relevant document to which such person is expressed to be a party and in each case authorising a named person or persons to execute and deliver each such document and any other documents to be delivered by it pursuant to it.
5. A certificate of a director of each of the companies referred to in paragraph 4 above setting out the names and specimen signatures of the person or persons named in the relevant certified extract.
6. The insurance broker's letter of undertaking, evidence of the Insurances required in accordance with Clause 41 (*Insurance*) having been taken out by D&B Co and that the policies comply with the requirements of this Agreement.
7. [D&B Co's Certificate of Incorporation and any Certificate of Incorporation on change of Name.]

¹⁰⁴ Project specific items to be listed.

¹⁰⁵ In the event that any Key Sub-Contractors have not been appointed at completion longstop drafting for delivery of the relevant Collateral Agreements should be considered.

8. [The Articles of Association of D&B Co.]
9. An original Deed of Trust duly executed by D&B Co and the Contractor.
10. Evidence that D&B Co has agreed to be treated as the only "client" for the Project for the purposes of the CDM Regulations.
11. Evidence that the Insurance Proceeds Account has been opened.
12. [♦]¹⁰⁶
13. An original duly executed copy of this Agreement.

¹⁰⁶ Authority to indicate other project specific documents, including any other Project Document, planning and property related agreements, where appropriate.

SECTION 2

DOCUMENTS TO BE DELIVERED BY THE AUTHORITY

The Authority shall deliver to D&B Co the following documents:

1. An original copy of the Collateral Agreements, the Independent Tester Contract, [the Information Manager Appointment] and this Agreement, duly executed by the Authority.
2. A certified copy of the resolution of the Authority approving the execution, delivery and performance of the documents referred to in paragraph 1 above and in each case authorising a named person or persons to execute and deliver each such document and any documents to be delivered by it pursuant thereto.
3. A certificate of the relevant officer of the Authority setting out the names and specimen signatures of the person or persons named in the resolution of the Authority referred to in paragraph 2 above.
4. Evidence that the Project Bank Account has been opened.
5. [◆]¹⁰⁷

¹⁰⁷ Authority to list other project specific documents to be included. Welsh Government are considering the need for comfort on covenant strength of further education institutions.

SCHEDULE 3
KEY PERSONNEL

SCHEDULE 4

¹⁰⁸LAND MATTERS

SECTION 1 TITLE CONDITIONS¹⁰⁹

1. [All title conditions, rights, real burdens, covenants and other rights identified in Appendix 1 of this Schedule 4 (*Land Matters*).
2. All third party rights and rights of way in respect of the Site which were or should have been apparent from a visual inspection of the Site or which were or should have been apparent from the Site investigations pursuant to Clause 7.3 (*D&B Co Investigation*) and Clause 10 (*The Site*).
3. All conditions contained in any agreements entered into pursuant to Clause 9.6 (*Extent of Rights*).]¹¹⁰

¹⁰⁹ This should include any restrictions on the use of any part of the Site(s) following title due diligence and must be completed during stage 2 of the New Project Approval Process under the SPA. Un-disclosed title issues will constitute a Compensation Event so the Authority must ensure adequate title diligence and appropriate disclosure through Section 1 of Schedule 5 (*Construction Matters*), on a value for money basis. The Authority will also need to be clear that, for any title Compensation Event proposed during the Project Approval Process that, (i) the rights subsist (ii) the rights would, if enforced, affect the Works (iii) WEPCo/ D&B Co could not reasonably have taken account of the problems in designing its solution and (iv) that insurance cover was not appropriate or available.

¹¹⁰ To be reviewed on a project specific basis.

SECTION 2
RESERVED RIGHTS¹¹¹

In relation to the Site, there are excepted and reserved the following rights to the Authority[, Authority Parties] and/or the Authority's Representative:

1. [◆].¹¹²

2. [◆]

and such rights as are set out under paragraphs [◆] are subject always to the terms of the Joint Operating Protocol.

¹¹¹ This should include any rights over any part of the Site(s) which have been or are being reserved for the Authority and/or any third party e.g. rights of access, wayleaves and must be completed during stage 2 of the New Project Approval Process under the SPA. Un-disclosed Reserved Rights will constitute a Compensation Event so the Authority must ensure adequate title diligence and appropriate disclosure through Section 2 of Schedule 5 (*Construction Matters*), on a value for money basis. The Authority will also need to be clear that, for any title Compensation Event proposed by D&B Co/WEPCo, (i) the rights subsist (ii) the rights would, if enforced, affect the Works (iii) D&B Co/WEPCo could not reasonably have taken account of the problems in designing its solution and (iv) insurance cover was not appropriate or available.

¹¹² To be completed on a project specific basis.

SECTION 3
ANCILLARY RIGHTS¹¹³

Ancillary Rights means:

- (a) a non-exclusive licence to enter and remain upon those parts of the Site that D&B Co and/or any D&B Co Party requires access to in order to carry out the Works;
- (b) such rights of access to and egress from the Site including those highlighted [◆] on the Site Plans, as are necessary for D&B Co and any D&B Co Party to perform their obligations and exercise their rights under this Agreement and in particular for the purposes of implementing the Works, provided that such rights may be varied by the Authority and such variation will be deemed to be an Authority Works Variation;
- (c) rights of free and uninterrupted passage and running of water, soil, gas, electricity, telephone and other services within the Site, including those highlighted [◆] on the Site Plans, provided that such rights of passage may be varied by the Authority to such alternative routes as the Authority may reasonably specify from time to time; and
- (d) the right where necessary to inspect, repair, maintain or renew the Utilities within the Site and the right (at the cost of D&B Co) to connect into the Utilities within the Site [or the [Utility Work Areas]] and to construct such new Utilities as may from time to time be necessary in connection with the Project Operations, provided that the prior written consent of the Authority is obtained (such consent not to be unreasonably withheld or delayed),

provided that:

- (i) such rights are subject to the Title Conditions, Reserved Rights and the Authority's rights under this Agreement; and
- (ii) without prejudice to paragraph (i) above, the rights shall not in any circumstances entitle D&B Co or any D&B Co Party to exclusive occupancy or exclusive possession of any part of the Site, save as may be required to the areas shaded [◆] on the Site Plans, for the periods shown on such plans (which, for the avoidance of doubt, shall not in any case extend beyond the Actual Completion Date [or, in respect of the Post Completion Works Date, the Actual Post Completion Works Date]) and such rights as are set out under paragraphs [◆] above are subject always to the terms of the Joint Operating Protocol).

¹¹³ Development of plans will be project specific, albeit the default position should be that D&B Co/the Contractor is entitled to exclusive access to construction areas up to the point where the Authority starts its commissioning activity in line with the Final Commissioning Programme.

APPENDIX 1
TITLE CONDITIONS

[♦]¹¹⁴

¹¹⁴ To be completed on a project specific basis.

APPENDIX 2 SITE PLAN¹¹⁵

¹¹⁵ To be completed on a project specific basis

SCHEDULE 5
CONSTRUCTION MATTERS

SECTION 1
PLANNING/CONSENTS

SECTION 2

SAFETY DURING CONSTRUCTION

1. In this Section 2 (*Safety During Construction*) of Schedule 5 (*Construction Matters*) and wherever used elsewhere in this Agreement:
 - 1.1 "**CDM Regulations**" means the Construction (Design and Management) Regulations 2015 (and "**CDM Regulation**" shall be construed accordingly); and
 - 1.2 "**the client**", "**the Principal Designer**" shall have the same meaning as are ascribed to them in the CDM Regulations.
2. In so far as not already done, within five (5) Business Days of the date of execution of this Agreement, D&B Co shall make and serve on the Authority a notice in writing pursuant to and in the form (if any) required by CDM Regulation 4(8) that D&B Co agrees to be treated as the only client in relation to the Works for the purposes of the CDM Regulations. Notwithstanding D&B Co agreeing in writing to be treated as the only client pursuant to CDM Regulation 4(8), the Authority will comply with its remaining duties as set out in CDM Regulation 4(8). For so long as D&B Co has obligations under the CDM Regulations in respect of the Works, D&B Co shall not, and shall not seek to, withdraw, terminate or in any manner derogate from its declaration that it will act as, and its acceptance of its responsibilities as, the client in relation to the Works for all the purposes of the CDM Regulations. The Authority will endorse its consent, in writing, to such election on the said election and return it to D&B Co within five (5) Business Days of receipt.
3. D&B Co warrants that it has observed, performed and discharged and shall continue to observe, perform and discharge and has the skills, knowledge, organisational capability and experience to observe, perform and discharge:
 - 3.1 all the obligations, requirements and duties of the client arising under the CDM Regulations in connection with the Works; and
 - 3.2 all obligations incumbent on the client under any code of practice or guidance for the time being approved by the Health and Safety Commission pursuant to the Health and Safety at Work etc Act 1974 issued in connection with the CDM Regulations.
4. D&B Co shall provide to the Authority's Representative:
 - 4.1 in a substantially complete form on the Actual Completion Date; and
 - 4.2 final form within [◆] of the Actual Completion Date,

[one] electronic copy (on computer disk, tape or other format) of the revised health and safety file and construction phase plan (current at that date) prepared by the Principal Designer pursuant to the CDM Regulations in relation to the Works and [◆] electronic or paper copies of every amendment or update made to such file until the later of the Actual Completion Date

and the Actual Post Completion Works Date and at any other time that D&B Co's activities in respect of the Works are subject to the CDM Regulations.

SECTION 3

AUTHORITY'S CONSTRUCTION REQUIREMENTS

SECTION 4
D&B CO'S PROPOSALS

SECTION 5
REVIEWABLE DESIGN DATA

SECTION 6
[AREA DATA SHEETS]

SECTION 7

THERMAL AND ENERGY EFFICIENCY TESTING PROCEDURE

SECTION 8
QUALITY PLANS (DESIGN AND CONSTRUCTION)

SECTION 9
BIM PROTOCOL

SCHEDULE 6
THE PROGRAMME¹¹⁶

[SECTION 1
PROGRAMME]

¹¹⁶ The contents of this Schedule 6 (*The Programme*) are project specific and need to be prepared by D&B Co and agreed with the Authority.

[SECTION 2

PHASING]

[ICT Handover Date	[◆]
Completion Date	[◆]
[Post Completion Works Date	[◆]

SCHEDULE 7
REVIEW PROCEDURE

1. Review

1.1 The provisions of this Schedule 7 (*Review Procedure*) shall apply whenever any item, document or course of action is required to be reviewed, approved or otherwise processed in accordance with Schedule 7 (*Review Procedure*).

1.2 Subject to [Clause 12.5.1 (*Authority Design*) and]¹¹⁷ any express provision of this Agreement, the manner, form and timing of any submission to be made by D&B Co to the Authority's Representative for review under this Schedule 7 (*Review Procedure*) shall be a matter for D&B Co to determine. Each submission under this Schedule 7 (*Review Procedure*) shall be accompanied by a copy of the proposed document to be reviewed (including, where applicable, any Reviewable Design Data) or a statement of the proposed course of action (the entire contents of a submission being referred to in this Schedule 7 (*Review Procedure*) as a "**Submitted Item**"). In relation to each Submitted Item, the following procedure shall apply:

1.2.1 as soon as possible and, if the Submitted Item comprises:¹¹⁸

- (a) an item of Reviewable Design Data;
- (b) a revised Programme submitted pursuant to Clause 14 (*Programme and Dates for Completion*); or
- (c) a document or proposed course of action submitted in the case of (an emergency),

within [♦] Business Days of the date of receipt of a submission (or re-submission, as the case may be) of the Submitted Item to the Authority's Representative (or such other period as the parties may agree), the Authority's Representative shall return one (1) copy of the relevant Submitted Item to D&B Co endorsed "no comment" or (subject to and in accordance with paragraph 3 (*Grounds Of Objection*)) "comments" as appropriate; and

1.2.2 if the Authority's Representative fails to return a copy of any Submitted Item (including any re-submitted Submitted Item) duly endorsed in accordance with paragraph 1.2.1, within [♦] Business Days (or within such other period as the parties may agree in writing) of the date of its submission to the Authority's Representative, then the Authority's Representative shall be deemed to have returned the

¹¹⁷ Please refer to comment at Clause 12.5.1.

¹¹⁸ The Authority should include any other items which are relevant on a project specific basis.

Submitted Item to D&B Co endorsed "no comment" (and, in the case of Reviewable Design Data, endorsed "Level A - no comment"); and

1.2.3 in relation to the aspects of each Finish identified in the table below:

- (a) D&B Co shall submit to the Authority a range or selection of finishes ("**Range of Finishes**") no later than the relevant Finishes Proposal Date;
- (b) the Authority's Representative shall by the relevant Finishes Selection Date notify D&B Co of its selection for the relevant Finish; and
- (c) if no selection of a Finish has been made by the Authority's Representative and notified to D&B Co in accordance with paragraph 1.2.3(b) by the relevant Finish Selection Date, D&B Co shall be entitled to make a selection from the Range of Finishes submitted in accordance with paragraph 1.2.3(a). After the relevant Finish Selection Date, should the Authority wish to vary any selection previously made by D&B Co or by the Authority, Schedule 13 (*Variation Procedure*) shall apply.

Table of Finishes¹¹⁹

Finishes	Aspects	Finishes Proposal Date	Finishes Selection Date
External finishes (roof, windows and external elevations)	colour and material		
wall finishes	colour		
floor finishes	colour and type		
ironmongery	style and colour		
tapware	style and content		
main public light fittings	specification and style		
external signage	size, style, colour and location		
internal signage	size, style, colour and location		

¹¹⁹ This is project specific. This table is intended to be for guidance only.

Finishes	Aspects	Finishes Proposal Date	Finishes Selection Date
light switches and sockets	style and colour		
light fittings	style and colour		
hard landscaping	colour and material		
<i>[others to be inserted on a project specific basis by the Authority]</i>			

1.3 If the Authority's Representative raises comments on any Submitted Item in accordance with paragraph 3 (*Grounds Of Objection*) he shall state the ground upon which such comments are based and the evidence or other information necessary to substantiate that ground. To the extent that the Authority's Representative comments on a Submitted Item other than on the basis set out in this Schedule 7 (*Review Procedure*), or fails to comply with the provisions of this paragraph, D&B Co may, in its discretion, either:

1.3.1 request written clarification of the basis for such comments and, if clarification is not received within [♦] Business Days of such request by D&B Co, refer the matter for determination in accordance with Schedule 15 (*Dispute Resolution Procedure*); or

1.3.2 in the case of a Submitted Item comprising Reviewable Design Data only, at its own risk, and without prejudice to Clause 12 (*The Design Construction and Commissioning Process*), proceed with further design or construction disregarding such comments pending the outcome of any reference to the Dispute Resolution Procedure that may be made by either party.

2. Futher Information

D&B Co shall submit any further or other information, data and documents that the Authority's Representative reasonably requires in order to determine whether he has a basis for raising comments or making objections to any Submitted Item in accordance with this Schedule 7 (*Review Procedure*). If D&B Co does not submit any such information, data and documents, the Authority's Representative shall be entitled to:

2.1 comment on the Submitted Item on the basis of the information, data and documents which have been provided; or

2.2 object to the Submitted Item on the grounds that insufficient information, data and documents have been provided to enable the Authority's Representative to determine whether he has a legitimate basis for commenting or objecting in accordance with this Schedule 7 (*Review Procedure*).

3. Grounds Of Objection¹²⁰

The expression "raise comments" in this paragraph shall be construed to mean "raise comments or make objections" unless the contrary appears from the context. The Authority's Representative may raise comments in relation to any Submitted Item on the grounds set out in paragraph 2 (*Futher Information*) above or on the ground that the Submitted Item would (on the balance of probabilities) breach any Law but otherwise may raise comments in relation to a Submitted Item only as follows:

- 3.1 in relation to any Submitted Item if:
 - 3.1.1 D&B Co's ability to perform its obligations under this Agreement would (on the balance of probabilities) be adversely affected by the implementation of the Submitted Item; or
 - 3.1.2 the implementation of the Submitted Item would (on the balance of probabilities) adversely affect any right of the Authority under this Agreement or its ability to enforce any such right;

- 3.2 in relation to any Submitted Item submitted pursuant to Clause 4.1 (*Documents*) if:
 - 3.2.1 the Authority's ability to perform its obligations under this Agreement would be adversely affected by the proposed course of action;
 - 3.2.2 the Authority's ability to provide the relevant Authority Services or to carry out any of its statutory functions would (on the balance of probabilities) be adversely affected by the proposed course of action;
 - 3.2.3 the proposed course of action would be likely to result in an increase to the Authority's liabilities or potential or contingent liabilities under this Agreement;
 - 3.2.4 the proposed course of action would adversely affect any right of the Authority under this Agreement or its ability to enforce any such right; or
 - 3.2.5 D&B Co's ability to perform its obligations under this Agreement would be materially adversely affected by the proposed course of action;

¹²⁰ This drafting has been included as a framework for guidance and should be amended as appropriate on a project specific basis, including, in particular, to take account of how commissioning of the Facilities is to be carried out (where relevant) and any other matters that are to be left to be agreed pursuant to the Review Procedure (such as proposals for self-monitoring systems etc).

3.3 in relation to Reviewable Design Data submitted pursuant to Clause 12.5 (*Authority Design*):

3.3.1 which does not comprise 1:50 scale room layout drawings the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 on the ground that the Submitted Item is not in accordance with:

- (a) the Authority's Construction Requirements;
- (b) D&B Co's Proposals; and/or
- (c) it would require the Authority [or a School Entity] to make changes to the ICT Services Contract.

3.3.2 which comprises a 1:50 scale Room Layout Drawing in respect of which there is a corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by the Authority's Representative in accordance with this Schedule 7 (*Review Procedure*)), the Authority's Representative may raise comments, subject to and in accordance with paragraph 4, on the ground that the Submitted Item does not conform to the generic 1:50 scale Room Layout Drawing; and

3.3.3 which comprises a 1:50 scale Room Layout Drawing in respect of which there is no corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by the Authority's Representative in accordance with this Schedule 7 (*Review Procedure*)), the Authority's Representative may raise comments, subject to and in accordance with paragraph 4, on the grounds that the Submitted Item is not in accordance with the Authority's Construction Requirements and/or D&B Co's Proposals and/or it would require the Authority [or a School Entity] to make changes to the ICT Services Contract;

3.4 in relation to a proposal to amend D&B Co's Proposals and rectify (part of) the Works submitted pursuant to Clause 12.7 (*Rectification of D&B Co's Proposals*), on the grounds that, following the amendment and rectification proposed:

3.4.1 D&B Co's Proposals would not satisfy the Authority's Construction Requirements;

3.4.2 the structural, mechanical and/or electrical performance of the Facilities would not be of an equivalent standard of performance to that set out in D&B Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made) and/or;

- 3.4.3 the Authority [or a School Entity] would require to make changes to the ICT Services Contract.
- 3.5 in relation to Finishes:
- 3.5.1 which have the effect of making a selection from the Range of Finishes (or any alternative range or selection of Finishes submitted by D&B Co to the Authority's Representative) pursuant to Clause 12.5.1; or
- 3.5.2 where the Submitted Item does not comply with the relevant provisions of the Authority's Construction Requirements and/or D&B Co's Proposals;
- 3.6 in relation to the submission of any revised Programme pursuant to Clause 14 (*Programme and Dates for Completion*) on the ground that the revised Programme:
- 3.6.1 would not (on the balance of probabilities) enable[:
- (a)]the Main Works to be completed by the Completion Date[;
- (b) the Post Completion Works to be completed by the Post Completion Works Date]; [and/or
- (c) the ICT Handover Requirements to be achieved by the ICT Handover Date;]
- 3.6.2 would render the Authority unable to comply with the Decant Protocol without material additional expense or disruption;
- 3.6.3 would materially increase the disruption to the provision of Educational Services by the Authority; or
- 3.6.4 would materially increase the cost or disruption to the Authority [or a School Entity] of any decanting from or within an Existing Facility; [or
- 3.6.5 would adversely affect the delivery of services under the relevant ICT Services Contract.]
- 3.7 in relation to the submission of any Quality Plan or part of a Quality Plan or any changes to any Quality Plan pursuant to Clause 21.4 (*Quality Plans and Systems*) or Clause 21.7 (*Quality Plans and Systems*) or any quality manual or procedure in accordance with Clause 21.9 (*Quality Manuals and Procedures*), on the grounds that such Quality Plans, or parts of or changes to such Quality Plans, quality manuals or procedures, or the quality management systems which they reflect,

would not comply with the requirements of Section 8 (*Quality Plans (Design and Construction)*) of Schedule 5 (*Construction Matters*).

4. Effect of Review

4.1 Any Submitted Item which is returned or deemed to have been returned by the Authority's Representative endorsed "no comment" (and in the case of Reviewable Design Data, endorsed "Level A - no comment") shall be complied with or implemented (as the case may be) by D&B Co.

4.2 In the case of any Submitted Item other than Reviewable Design Data, if the Authority's Representative returns the Submitted Item to D&B Co endorsed "comments", D&B Co shall comply with such Submitted Item after amendment in accordance with the comments unless D&B Co disputes that any such comment is on grounds permitted by this Agreement, in which case D&B Co or the Authority's Representative may refer the matter for determination in accordance with Schedule 15 (*Dispute Resolution Procedure*) and D&B Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed.

4.3 In the case of a Submitted Item comprising Reviewable Design Data, if the Authority's Representative returns the Submitted Item endorsed other than "Level A - no comment", D&B Co shall:

4.3.1 where the Authority's Representative has endorsed the Submitted Item "Level B - proceed subject to amendment as noted", either proceed to construct or proceed to the next level of design of the part of the Works to which the Submitted Item relates but take into account any amendments required by the Authority's Representative in his comments;

4.3.2 where the Authority's Representative has endorsed the Submitted Item "Level C - subject to amendment as noted" not act upon the Submitted Item, amend the Submitted Item in accordance with the Authority's Representative's comments and re-submit the same to the Authority's Representative in accordance with paragraph 4.4; or

4.3.3 where the Authority's Representative has endorsed the Submitted Item "Level D - rejected" not act upon the Submitted Item, amend the Submitted Item and re-submit the Submitted Item to the Authority's Representative in accordance with paragraph 4.4,

unless D&B Co disputes that any such comment or proposed amendment is on grounds permitted by this Agreement, in which case D&B Co or the Authority's Representative may refer the matter for determination in accordance with Schedule 15 (*Dispute Resolution Procedure*) and D&B Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed except at its own risk in accordance with paragraph 1.3.2.

4.4 Within ten (10) Business Days of receiving the comments of the Authority's Representative on any Submitted Item comprising Reviewable Design Data, D&B

Co shall (except in the case contemplated in paragraph 4.3.1) send a copy of the Submitted Item as amended to the Authority's Representative pursuant to paragraph 4.3 and the provisions of paragraphs 1.2.1, 4.1 and 4.3 shall apply (changed according to context) to such re-submission.

- 4.5 The return or deemed return of any Submitted Item endorsed "no comment" (or in the case of Reviewable Design Data endorsed "Level A - no comment" or otherwise endorsed in accordance with paragraph 4.3.1 or 4.3.2) shall mean that the relevant Submitted Item may be used or implemented for the purposes for which it is intended but, save to the extent expressly stated in this Agreement, such return or deemed return of any Submitted Item shall not otherwise relieve D&B Co of its obligations under this Agreement nor is it an acknowledgement by the Authority that D&B Co has complied with such obligations.

5. Documentation Management¹²¹

- 5.1 D&B Co shall issue [one (1)] paper copy and [one (1)] electronic copy of all Submitted Items to the Authority and compile and maintain a register of the date and contents of the submission of all Submitted Items.
- 5.2 D&B Co shall compile and maintain a register of the date of receipt and content of all Submitted Items that are returned or deemed to be returned by the Authority's Representative.
- 5.3 Save to the extent set out in this Schedule 7 (*Review Procedure*), no review, comment or approval by the Authority shall operate to exclude or limit D&B Co's obligations or liabilities under this Agreement (or the Authority's rights under this Agreement).

6. Variation

- 6.1 No approval or comment or any failure to give or make an approval or comment under this Schedule 7 (*Review Procedure*) shall constitute a Variation save to the extent provided in this Schedule 7 (*Review Procedure*).
- 6.2 If, having received comments from the Authority's Representative, D&B Co considers that compliance with those comments would amount to a Variation, D&B Co shall, before complying with the comments, notify the Authority of the same and, if it is agreed by the parties or determined pursuant to Schedule 15 (*Dispute Resolution Procedure*) that a Variation would arise if the comments were complied with, the Authority may, if it wishes, implement the Variation and it shall be dealt with in accordance with Schedule 13 (*Variation Procedure*). Any failure by D&B Co to notify the Authority that it considers compliance with any comments of the Authority's Representative would amount to a Variation shall constitute an irrevocable acceptance by D&B Co that any compliance with the Authority's comments shall be without cost to the Authority and without any extension of time.

¹²¹ This paragraph is intended as a framework basis only and should be developed on a project specific basis.

- 6.3 No alteration or modification to the design, quality and quantity of the Works arising from the development of detailed design or from the co-ordination of the design shall be construed or regarded as a Variation.

APPENDIX 1

[REVIEWABLE DESIGN DATA PROGRAMME]¹²²

¹²² Please refer to comment at Clause 12.5.1

SCHEDULE 8
COLLATERAL AGREEMENTS

**SECTION 1
CONTRACTOR'S COLLATERAL AGREEMENT**

COLLATERAL WARRANTY

AMONG:

- (1) [AUTHORITY] (the "**Authority**");
- (2) [CONSTRUCTION CONTRACTOR] (the "**Contractor**");
- (3) [D&B CO] ("**D&B Co**"); and
- (4) [GUARANTOR] (the "**Guarantor**").

WHEREAS:

- (A) The Authority and D&B Co have agreed the terms on which D&B Co will design, develop and construct [description of facilities] (the "**Development**") at the Site (as that expression is defined in the Education D&B Agreement) and, accordingly, have entered into the Education D&B Agreement and the Project Documents.
- (B) The Contractor and D&B Co have entered into an agreement of even date herewith relating to the provision of the Works (as defined in the Education D&B Agreement) by the Contractor to enable D&B Co to discharge its obligations to the Authority regarding such Works under the Education D&B Agreement (the "**Construction Contract**").
- (C) This Contractor's Collateral Agreement (the "**Agreement**") is one of the Contractor's Collateral Agreements contemplated by the Education D&B Agreement.
- (D) Pursuant to the Construction Contract, the Guarantor has entered into a Guarantee in favour of D&B Co in respect of the Contractor's obligations under the Construction Contract (the "**Parent Company Guarantee**").

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement, the following terms shall, unless the context otherwise requires, have the following meanings:

"Business Day"	means a day other than a Saturday, Sunday or a bank holiday in England and Wales;
"Construction Contract"	has the meaning given in Recital B of this Agreement;
"Education D&B Agreement"	means the Education Design and Build Development Agreement between (1) the Authority and (2) D&B Co, dated on or around the date hereof;

"Event of D&B Co Default"	has the meaning given in the Construction Contract;
"Guarantor"	[has the meaning given in the Construction Contract];
"Novation Agreement"	has the meaning given in Clause 4.5.1(c);
"Novation Effective Date"	means the date of performance of the obligations set out in Clause 4 (<i>Novation</i>);
"Parent Company Guarantee"	has the meaning given in Recital D of this Agreement;
"Project Documents"	has the meaning given in the Education D&B Agreement;
"Proposed Novation Date"	has the meaning given in Clause 4.1 (<i>Proposed Substitute</i>);
"Proposed Novation Notice"	has the meaning given in Clause 4.1 (<i>Proposed Substitute</i>);
"Proposed Step-in Date"	has the meaning given in Clause 3.1 (<i>Step-in Notice</i>);
"Proposed Substitute"	has the meaning given in Clause 4.1 (<i>Proposed Substitute</i>);
"Step-in Date"	means the date of issue of the Step-in Undertaking;
"Step-in Notice"	has the meaning given in Clause 3.1 (<i>Step-in Notice</i>);
"Step-in Period"	means the period commencing on the Step-in Date and ending on the earliest of: <ul style="list-style-type: none"> (a) the date of the first anniversary of the Step-in Date (but subject always to Clause 4.7 (<i>Extension of Step-In Period</i>)); (b) the Step-out Date; (c) the Novation Effective Date; and (d) termination of the Construction Contract under Clause [3.3 (<i>Restriction of Right of Termination</i>)];
"Step-in Undertaking"	has the meaning given in Clause 3.2.4;
"Step-out Date"	has the meaning given in Clause 3.4.1;
"Termination Notice"	has the meaning given in Clause 2.3 (<i>Termination Notice</i>).

1.2 Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all references to Clauses are references to Clauses of this Agreement;
- 1.2.3 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- 1.2.4 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- 1.2.5 any reference to time of day shall be a reference to Cardiff time;
- 1.2.6 the words "herein", "hereto" and "hereunder" refer to this Agreement as a whole and not to the particular Clause in which such word may be used;
- 1.2.7 words importing the singular include the plural and vice versa;
- 1.2.8 words importing a particular gender include all genders;
- 1.2.9 "person" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;
- 1.2.10 any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;
- 1.2.11 references to "Party" means a party to this Agreement and references to "Parties" shall be construed accordingly;

- 1.2.12 all monetary amounts are expressed in Pounds Sterling;
- 1.2.13 references to the word "includes" or "including" are to be construed without limitation;
- 1.2.14 the obligations of any Party under this Agreement are to be performed at that Party's own cost and expense;
- 1.2.15 terms used in this Agreement that are defined in the Education D&B Agreement or the Project Documents shall have the meanings given to them in the Education D&B Agreement or the Project Documents, as appropriate.

2. Termination Notice And Authority Termination

2.1 Contractor's Warranties and Undertakings

The Contractor warrants and undertakes to the Authority that it has complied with and fulfilled and shall continue to comply with and fulfil its duties and obligations arising under or by virtue of the Construction Contract, provided that (during the period prior to expiry of the [relevant] Defects Liability Period (as defined in the Education D&B Agreement)), the Authority shall only be entitled to make a claim against the Contractor under this Clause 2.1 (*Contractor's Warranties and Undertakings*) if the Education D&B Agreement has terminated and in any case shall not be entitled to do so during the Step-in Period or after the Construction Contract has been novated under Clause 4 (*Novation*).

2.2 Liability of Contractor

Any liability arising from any claim for breach of the warranty under or pursuant to Clause 2.1 (*Contractor's Warranties and Undertakings*) shall be in addition to and without prejudice to any other present or future liability of the Contractor to the Authority (including, without prejudice to the generality of the foregoing, any liability in negligence) and shall not be released, diminished or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by or on behalf of the Authority by any person nor by any action or omission of any person whether or not such action or omission might give rise to an independent liability of such person to the Authority provided always that the Contractor shall owe no greater duties or obligations to the Authority under this Agreement than it owes or would have owed to D&B Co under the Construction Contract. Without prejudice to Clause 12 (*Aggregate Liability*), the Contractor shall be entitled in any action or proceedings brought by the Authority under this Agreement to rely on any limitation or exclusion of liability in the Construction Contract and to raise equivalent rights in defence of liability (but excluding set-offs and counterclaims) as it would have against D&B Co under the Construction Contract.

2.3 Termination Notice

- 2.3.1 The Contractor undertakes not to terminate the Construction Contract on account of an Event of D&B Co Default without first giving the Authority not less than [◆] Business Days' prior written notice specifying the grounds for that termination.
- 2.3.2 Any such notice, other than one given in circumstances where there is no default under the Construction Contract by D&B Co or the Contractor, shall be a "**Termination Notice**".
- 2.3.3 Notwithstanding any provision of the Construction Contract to the contrary, on termination of the Education D&B Agreement by the Authority, the Parties agree that the Construction Contract shall not come to an end except in accordance with the terms of this Agreement.

3. STEP-IN AND STEP-OUT

3.1 Step-in Notice

- 3.1.1 If the Authority has terminated the Education D&B Agreement in accordance with the terms of the Education D&B Agreement or if the Authority has received a Termination Notice, then subject to the provisions of this Agreement, the Authority may give written notice to the Contractor (a "**Step-in Notice**") of the intention of the Authority to issue a Step-in Undertaking on a specified date (the "**Proposed Step-in Date**") provided that such Proposed Step-in Date shall be:
- (a) no later than [◆] Business Days after termination of the Education D&B Agreement where this has been terminated by the Authority; and
 - (b) no earlier than the date falling [◆] Business Days prior to the date of expiry of the Termination Notice and no later than the date of expiry of the Termination Notice where a Termination Notice has been given by the Contractor.
- 3.1.2 Without prejudice to Clause 3.2.5, unless the Contractor otherwise consents, only one (1) Step-in Notice may be given during the period of this Agreement. Subject to Clause 5.1 (*Rights of Termination*) below, the Contractor shall not be entitled to terminate the Construction Contract until after the Proposed Step-in Date.

3.2 Notice of Obligations and Step-in Undertaking

- 3.2.1 Within [◆] Business Days of receipt of any Step-in Notice, the Contractor shall give written notice to the Authority of any sums of which the Contractor has actual knowledge which are due and payable but unpaid by D&B Co and of any other material obligations or liabilities, of which the Contractor has actual knowledge, which

should have been performed or discharged by D&B Co under the Construction Contract, in each case, as at the date of the Step-in Notice.

3.2.2 The Contractor shall inform the Authority in writing as soon as reasonably practicable of:

- (a) any change in such sums, obligations or liabilities referred to in Clause 3.2.1; and
- (b) any further sums, obligations or liabilities thereafter falling due and payable but unpaid or falling due for performance or discharge and unperformed or undischarged (as the case may be);

in each case of which the Contractor has actual knowledge, before the Step-in Date.

3.2.3 The Contractor shall give the Authority the information referred to in Clauses 3.2.1 and 3.2.2 in good faith and may not give any further notifications pursuant to Clause 3.2.2 less than [◆] Business Days prior to the Proposed Step-in Date. The Authority shall not be required to assume any liability under a Step-in Undertaking for any outstanding obligations or liabilities of D&B Co to the Contractor which are not notified to the Authority pursuant to Clauses 3.2.1 or 3.2.2.

3.2.4 Not later than the Proposed Step-in Date the Authority shall decide if it is prepared to issue a Step-in Undertaking. If it does so decide, the Authority shall promptly give the Contractor written notification of such decision. The Authority shall deliver to the Contractor on the Proposed Step-in Date, a written undertaking in form and substance agreed with the Contractor (both the Authority and the Contractor acting reasonably) (the "**Step-in Undertaking**"), incorporating a Clause in terms similar to Clause 11 (*Default Interest*) (but only to the extent that there will not be double counting of default interest accruing under the Construction Contract and this Agreement), and undertaking to the Contractor:

- (a) to pay or procure the payment to the Contractor, within [◆] Business Days of demand by the Contractor, of any sum due and payable but unpaid by D&B Co to the Contractor under the Construction Contract before the Step-in Date and which has been notified by the Contractor to the Authority in accordance with Clause 3.2.1 or 3.2.2;
- (b) to perform or discharge or procure the performance or discharge of any unperformed or undischarged obligations of D&B Co under the Construction Contract which shall have fallen due for performance or discharge before the Step-in Date and which have been notified by the Contractor to the Authority

in accordance with Clause 3.2.1 or 3.2.2 within such period as the Contractor may reasonably require;

- (c) to pay or procure the payment of any sum due and payable by D&B Co under the Construction Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 (*Step-Out*) and [4.5.2(b) (*Implementation of Novation*)] but not, to avoid doubt, any sum due in respect of any Works carried out before the Step-in Date; and
- (d) to perform or discharge or procure the performance or discharge of any obligations of D&B Co under the Construction Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 (*Step-Out*) and 4.5.2(b) (*Implementation of Novation*)) but not, to avoid doubt, to perform or discharge or to procure the performance or discharge of any obligations in respect of any Works carried out before the Step-in Date.

3.2.5 D&B Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority in accordance with Clause [insert reference] of the same. The Guarantor acknowledges and agrees that upon intimation to it of such assignment the Guarantor shall owe its obligations under the Parent Company Guarantee to the Authority to the exclusion of D&B Co (but without prejudice to D&B Co's right to claim thereunder in respect of any course of action arising in respect of the period prior to the assignment) upon the terms and conditions of the Parent Company Guarantee.

3.2.6 If the Authority shall not have issued the Step-in Undertaking on or before the Proposed Step-in Date the Step-in Notice shall be deemed to have been withdrawn and the rights and obligations of the Parties shall be construed as if the Step-in Notice had not been given.

3.3 Restriction of Right of Termination

During or in respect of the Step-in Period, the Contractor confirms to the Authority that it shall continue to observe and perform its duties and obligations under the Construction Contract and shall, without prejudice to Clause 5.1 (*Rights of Termination*), only be entitled to exercise its rights of termination under the Construction Contract:

- 3.3.1 by reference to an Event of D&B Co Default arising during the Step-in Period provided that no event of default by D&B Co under the Education D&B Agreement (whether resulting in termination of the Education D&B Agreement or otherwise, and notwithstanding that it has occurred during the Step-in Period) shall entitle the Contractor to exercise such rights of termination during the Step-in Period; or

- 3.3.2 if the Authority, in breach of the terms of the Construction Contract, fails to pay when due any amount owed to the Contractor or fails to perform or discharge when falling due for performance or discharge any obligation under the Step-in Undertaking or fails to procure such payment or performance or discharge; or
- 3.3.3 if such rights of termination arise in circumstances where there is no default under the Construction Contract by the Authority or the Contractor.

3.4 Step-Out

- 3.4.1 the Authority may, at any time, give the Contractor at least [thirty (30)] days' prior written notice to terminate the Step-in Period on a date specified in the notice (the "**Step-out Date**");
- 3.4.2 the Authority shall give the Contractor at least [thirty (30)] days' prior written notice that (subject to Clause 4.4.2) the Step-in Period will end due to the occurrence (subject to Clause 4.7 (*Extension of Step-In Period*)) of the first anniversary of the Step-in Date;

provided that:

- (a) the Authority has performed and discharged in full or procured the performance and discharge in full of any obligations of D&B Co under the Construction Contract in relation to the maintenance of records and the provision of reports during the Step-in Period so as to permit the Contractor to monitor the performance of D&B Co's other obligations under the Construction Contract; and
- (b) all liability under the Step-in Undertaking pursuant to any claims made up to the date specified in either Clause 3.4.1 or Clause 3.4.2 (as the case may be) shall have been fully and unconditionally discharged,

the Authority shall be released from the Step-in Undertaking on the expiry of the Step-in Period in accordance with Clauses 3.4.1 and 3.4.2. Such release shall not affect the continuation of D&B Co's obligations towards the Contractor under the Construction Contract.

4. NOVATION

4.1 Proposed Substitute

At any time that the Authority is entitled to give a Step-in Notice pursuant to Clause 3.1 (*Step-in Notice*) or at any time during the Step-in Period the Authority may give notice (a "**Proposed Novation Notice**") to the Contractor that it wishes

itself or another person (a "**Proposed Substitute**") to assume, by way of sale, transfer or other disposal, the rights and obligations of D&B Co under the Construction Contract and specifying a date (the "**Proposed Novation Date**"):

- 4.1.1 falling not later than [fifteen (15)] Business Days after termination of the Education D&B Agreement where this has been terminated by the Authority;
- 4.1.2 falling not later than the expiry of the Termination Notice where a Proposed Novation Notice is given by the Authority at a time when it is entitled to give a Step-in Notice pursuant to Clause 3.1 (*Step-in Notice*); and
- 4.1.3 falling not later than [twenty-eight (28)] Business Days after the date of the Proposed Novation Notice, where a Proposed Novation Notice is given during a Step-in Period.

Save as provided in Clause 4.4 (*Consent Withheld*), only one (1) Proposed Novation Notice may be given during the period of this Agreement. Without prejudice to Clauses 3.3 (*Restriction of Right of Termination*) and Clause 5.1 (*Rights of Termination*), the Contractor shall not be entitled to terminate the Construction Contract during the notice period specified in a Proposed Novation Notice.

4.2 Information for Consent to Novation

If the Proposed Novation Notice specifies the Authority as the Proposed Substitute, the Contractor's consent to the novation shall be deemed to have been given automatically. Where the Proposed Substitute is not the Authority, a novation in accordance with a Proposed Novation Notice shall only be effective if the Contractor consents to that novation in writing in accordance with Clause 4.3 (*Grant of Consent*) and Clause 5.1 (*Rights of Termination*) the Authority shall (as soon as practicable) supply the Contractor with the following information:

- 4.2.1 the name and registered address of the Proposed Substitute;
- 4.2.2 the names of the Shareholders in the Proposed Substitute and the share capital owned by each of them;
- 4.2.3 the names of the directors and the secretary of the Proposed Substitute;
- 4.2.4 details of the means by which it is proposed to finance the Proposed Substitute (including the extent to which such finance is committed and any conditions precedent as to its availability for drawing); and

- 4.2.5 the resources (including contractual arrangements) which are to be available to the Proposed Substitute to enable it to perform its obligations under the Construction Contract.

4.3 Grant of Consent

The Contractor may withhold or delay consent to a novation only where the Proposed Substitute is not the Authority and the Authority has failed to show to the Contractor's satisfaction (acting reasonably) that:

- 4.3.1 the Proposed Substitute has the legal capacity, power and authorisation to become a party to and perform the obligations of D&B Co under the Construction Contract; and
- 4.3.2 the technical competence and financial standing of and the technical and financial resources available to the Proposed Substitute are sufficient to perform the obligations of D&B Co under the Construction Contract.

The Contractor shall notify the Authority in writing, within [five (5)] Business Days of the later of receipt of a Proposed Novation Notice and all information required under Clause 4.2 (*Information for Consent to Novation*), as to whether or not it has decided to grant such consent (together with an explanation of its reasons if it has decided to withhold its consent).

4.4 Consent Withheld

If, in accordance with Clause 4.3 (*Grant of Consent*), the Contractor withholds its consent to a Proposed Novation Notice, the Authority shall be entitled to give one or more subsequent Proposed Novation Notices, pursuant to the provisions of Clause 4.1 (*Proposed Substitute*), containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute which (where the replacement Proposed Substitute is not the Authority) the Authority has good cause to believe would fulfil the requirements of Clauses 4.3.1 and 4.3.2, provided that only one Proposed Novation Notice may be outstanding at any one time, and provided further that:

- 4.4.1 where a Step-in-Notice has not been issued, any revised Proposed Novation Date shall be a date falling no later than the date specified in Clause 4.1.1 or 4.1.2 as appropriate; and
- 4.4.2 if the Proposed Novation Notice was served during the Step-in Period, any revised Proposed Novation Date shall be a date falling not later than [] Business Days after the date of the revised Proposed Novation Notice.

4.5 Implementation of Novation

4.5.1 If the Contractor consents to a novation pursuant to a Proposed Novation Notice (whether automatically or otherwise), then on the Proposed Novation Date and without prejudice to Clause 5.1 (*Rights of Termination*) D&B Co shall:

- (a) immediately assign all its rights and powers under the Parent Company Guarantee to the Authority or other Proposed Substitute in accordance with Clause [insert reference] of the same and on the Proposed Novation Date and without prejudice to Clause 5.1 (*Rights of Termination*).
- (b) subject to the prior performance by D&B Co of its obligations under this Clause 4.5.1(b) the Proposed Substitute shall become a party to the Construction Contract in place of D&B Co and, thereafter, shall be treated as if it was and had always been named as a party to the Construction Contract in place of D&B Co; and
- (c) the Contractor, D&B Co and the Proposed Substitute shall enter into a novation agreement (the "**Novation Agreement**") and any other requisite agreements, in form and substance satisfactory to the Contractor (acting reasonably), pursuant to which:
 - (i) the Proposed Substitute shall be granted all of the rights of D&B Co under the Construction Contract (including those arising prior to the end of the Step-in Period);
 - (ii) subject to the Contractor giving to the Proposed Substitute within [◆] Business Days of receipt of the Proposed Novation Notice such notice as is referred to in Clause 3.2.1 and to the provisions of Clauses 3.2.2 and 3.2.3, mutatis mutandis, the Proposed Substitute shall assume all of the obligations and liabilities of D&B Co under the Construction Contract (including those arising prior to the end of any Step-in Period and those arising during the period of the Proposed Novation Notice);
 - (iii) the Guarantor acknowledges and agrees that it shall owe its obligations under the Parent Company Guarantee to the Authority to the exclusion of D&B Co (but without prejudice to D&B Co's right to claim thereunder in respect of any course of action arising in respect of the period prior to the novation) upon the terms and conditions of the Parent Company Guarantee,

provided that the Contractor will not be in breach of any of its obligations under this Agreement if the Proposed Substitute does not enter into one or other of such agreements.

4.5.2 On and after the Novation Effective Date:

- (a) the Contractor shall owe its obligations under the Construction Contract (whether arising before, on or after such date) to the Proposed Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge; and
- (b) if the Authority shall have entered into a Step-in Undertaking, the Authority will be released from the Step-in Undertaking, provided that:
 - (i) all obligations of the Authority under the Step-in Undertaking which have accrued up to the Novation Effective Date and are identifiable as at that date shall have been fully and unconditionally discharged; and
 - (ii) the Authority has performed and discharged in full or procured the performance and discharge in full of the obligations of D&B Co under the Construction Contract in relation to the maintenance of records and the provision of reports during the Step-in Period up to the Novation Effective Date so as to permit the Contractor to monitor the performance of D&B Co's other obligations under the Construction Contract.

4.5.3 the Authority and the Contractor shall use all reasonable endeavours to agree and the Authority shall use reasonable endeavours to procure that the Proposed Substitute agrees any amendments to the Construction Contract necessary to reflect Clause 3.2.2 and the fact that the Education D&B Agreement may have terminated at the time of the Novation Effective Date.

4.6 Termination After Novation

After the Novation Effective Date the Contractor shall only be entitled to exercise its rights of termination under the Construction Contract:

- 4.6.1 in respect of any Event of D&B Co Default arising after that date in accordance with the Construction Contract; or
- 4.6.2 if the Proposed Substitute does not discharge the obligations and liabilities assumed by it under Clause 4.5.1(c) which relate to matters arising prior to the end of the Step-in Period within [] Business Days following the Novation Effective Date.

4.7 Extension of Step-In Period

As at the date of the first anniversary of the Step-in Date, if the Step-in Period has not previously ended, and:

- 4.7.1 the Authority is in the course of conducting discussions in good faith with a Proposed Substitute (the novation to whom has been approved by the Contractor whether automatically or otherwise in accordance with Clause 4.3 (*Grant of Consent*)), the Step-in Period shall be extended and shall continue until such date as is proposed by the Authority and agreed by the Contractor; or
- 4.7.2 a contract has been entered into between the Authority and a Proposed Substitute (which has been approved by the Contractor in accordance with Clause 4.3 (*Grant of Consent*)) as at such date, the Step-in Period shall be extended and shall continue until the date such contract comes into force, provided that such date shall not be later than [◆] Business Days after the last date of execution of such contract.

5. RIGHTS AND OBLIGATIONS UNDER THE CONSTRUCTION CONTRACT

5.1 Rights of Termination

If:

- 5.1.1 no Step-in Notice or Proposed Novation Notice is given before a Termination Notice expires or within [◆] Business Days after termination of the Education D&B Agreement by the Authority; or
- 5.1.2 a Step-in Undertaking is not issued on the Proposed Step-in Date; or
- 5.1.3 the Step-in Notice is withdrawn or, pursuant to Clause 3.2.6, deemed to have been withdrawn; or
- 5.1.4 the Step-in Period ends before the occurrence of the Novation Effective Date; or
- 5.1.5 in the absence of a Step-in Undertaking, the Contractor withholds its consent to a novation pursuant to a Proposed Novation Notice, in accordance with Clause 4.3 (*Grant of Consent*), and does not subsequently grant consent to a novation in accordance with Clause 4.4 (*Consent Withheld*) on or before the Proposed Novation Date; or

- 5.1.6 in the absence of a Step-in Undertaking, the obligations of the Proposed Substitute set out in Clause 4.5 (*Implementation of Novation*) are not performed on the Proposed Novation Date; or
- 5.1.7 the Contractor is entitled to terminate the Construction Contract under Clause 3.3 (*Restriction of Right of Termination*) or 4.6 (*Termination After Novation*); or
- 5.1.8 the Authority exercises its right to Step-out under Clause 3.4.1,

the Contractor shall, on and from the Step-out Date, be entitled to:

- 5.1.9 exercise all of its rights under the Construction Contract and act upon any and all grounds for termination available to it in relation to the Construction Contract whenever occurring; and/or
- 5.1.10 pursue any and all claims and exercise any and all rights and remedies against D&B Co.

5.2 D&B Co's Obligations to Continue

Until completion of a novation pursuant to Clause 4.5 (*Implementation of Novation*) (unless the terms of such novation expressly preserve an obligation or liability of D&B Co), D&B Co shall continue to be liable for all its obligations and liabilities, whenever occurring, under or arising from the Construction Contract notwithstanding:

- 5.2.1 the service of a Step-in Notice or the issue of a Step-in Undertaking or the expiry of the Step-in Period or the release of a Step-in Undertaking; or
- 5.2.2 the service of a Proposed Novation Notice; or
- 5.2.3 any other provision of this Agreement.

6. REVOCATION OF NOTICES

A Termination Notice and a Step-in Notice may each be revoked (in writing to the recipient) by the Party giving them before the expiry of their respective notice periods. Upon any such revocation, the rights and obligations of the Parties shall be construed as if the relevant notice had not been given.

7. ASSIGNMENT

7.1 Binding on Successors and Assignees

This Agreement shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted assignees. In the case of the Authority, its successors shall include any person to which the Welsh Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Authority upon the Authority ceasing to exist, transfers the rights and obligations of the Authority under this Agreement.

7.2 Restriction on Assignment

No Party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others (such consent not to be unreasonably withheld or delayed), provided that:

7.2.1 D&B Co shall not assign this Agreement to any party other than a party to whom D&B Co's interests in the Education D&B Agreement and Construction Contract are assigned in accordance with the Education D&B Agreement and nConstruction Contract, respectively;

7.2.2 the Authority shall be entitled, without the consent of any other Party, to transfer all its rights and obligations hereunder, to any person to whom it assigns or otherwise disposes of the benefit of the Education D&B Agreement in accordance with Clause 45 (*Sub-Contracting and Assignment*) of the Education D&B Agreement and, otherwise, with D&B Co's and the Contractor's consent (not to be unreasonably withheld or delayed);

7.2.3 nothing in this sub-clause shall restrict the rights of the Welsh Ministers to effect a statutory transfer;

7.2.4 the Contractor shall assign this Agreement to any party to whom it assigns the Construction Contract (in accordance with the terms of that agreement);

7.3 No Loss

The Contractor agrees that it shall not at any time assert that any permitted assignee in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement by reason that such assignee is not an original party to this Agreement or that no loss or a different loss has been suffered by such assignee.

8. CONFIDENTIALITY

- 8.1 The parties shall be bound to observe, mutatis mutandis, the terms of Clause [insert reference] of the Construction Contract with respect to any information or document referred to in Clause [insert reference] of the Construction Contract which shall come into its possession pursuant to this Agreement.
- 8.2 The Contractor agrees that the Authority shall be entitled to disclose the terms of this Agreement in accordance with Clause 48 (*Confidentiality*) of the Education D&B Agreement.

9. NOTICES

- 9.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service.

- 9.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

9.2.1 if delivered by hand at the time of delivery; or

9.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place; or

- 9.3 Notices given by email shall be deemed to have been received:

9.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses 9.4 to 9.7 (Notices)), if sent on a Business Day between the hours of 9am and 4pm; or

9.3.2 by 11am on the next following Business Day, if the email enters the intended recipient's relevant Information System after 4pm, on a Business Day but before 9am on that next following Business Day,

and provided no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post

or delivered by hand to the intended recipient in accordance with the provisions of this Clause 9 (*Notices*) and where such notice is addressed to the Authority, copied to [♦]¹²³.

- 9.4 Any notice to be given to the [Authority] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing to the relevant party by the [Authority].
- 9.5 Any notice to be given to [D&B Co] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by [D&B Co].
- 9.6 Any notice to be given to the [Contractor] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Contractor].
- 9.7 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

10. PAYMENTS AND TAXES

10.1 Payments

All payments under this Agreement to any Party shall be made in Pounds Sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified to the other Parties from time to time.

10.2 VAT

- 10.2.1 All amounts stated to be payable by any Party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.
- 10.2.2 Each Party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

¹²³ Insert Welsh Government details.

10.3 Deductions from payments

All sums payable by a Party to any other Party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation, save as may be required by Law.

11. DEFAULT INTEREST

Each Party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not made on the due date calculated from day to day at a rate per annum equal to the Default Interest Rate from the day after the date on which payment was due up to and including the date of payment.

12. AGGREGATE LIABILITY

Notwithstanding any other provision of this Agreement, the Contractor's aggregate liability from time to time under this Agreement and the Construction Contract shall not at any time exceed its maximum liability as stated in the Construction Contract.

13. PROFESSIONAL INDEMNITY INSURANCE

13.1 The Contractor by this Agreement covenants with the Authority that it has at its own cost taken out, or procured the taking out of, professional indemnity insurance with reputable insurers carrying on business in the European Union with a limit of indemnity of not less than £[♦],000,000 ([♦] million pounds) [on an each and every claim basis][in the annual aggregate] with at least one (1) annual reinstatement, in relation to the Works, provided always that:

13.1.1 such insurance shall be in place from the commencement of the Works until no less than[:

(a)]in respect of the [Main] Works twelve (12) years after the Actual Completion Date or[; and

(b) in respect of the Post Completion Works, twelve (12) years after the Actual Post Completion Works Date,]

or in either case if earlier, after the date of termination of the Construction Contract;

13.1.2 the insurance premiums in respect of the insurance shall at all times be the responsibility of the Contractor; and

13.1.3 if such insurance is not available to the Contractor (and/or design and build contractors engaged in projects of a similar scope, size, nature and complexity as the Contractor) at commercially reasonable

rates and terms (excluding any increase in premiums attributable to the actions, omissions, errors or defaults of the Contractor), the Contractor and the Authority will meet and the Contractor will outline the steps it intends to take to manage such risks. If the steps proposed by the Contractor are not acceptable to the Authority (acting reasonably), the Contractor and the Authority shall agree an alternative method of managing such risk.

- 13.2 The Contractor will, upon request, provide the Authority with reasonable evidence that the policy referred to in this Clause 13 (*Professional Indemnity Insurance*) is in full force and effect in accordance with the requirements of this Clause 13 (*Professional Indemnity Insurance*).

14. THIRD PARTY RIGHTS

It is agreed that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained herein (whether under the Contracts (Rights of Third Parties) Act 1999 or otherwise) except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with Clause 7 (*Assignment*).

15. AGENCY

15.1 No Delegation

No provision of this Agreement shall be construed as a delegation by the Authority of any of its statutory authority to any other Party.

15.2 No Agency

Save as otherwise provided in this Agreement, no other Party shall be or be deemed to be an agent of the other Parties nor shall any party hold itself out as having authority or power to bind the other parties in any way.

15.3 Independent Contractor

The Parties shall, at all times, be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the Parties or any relationship of employer and employee between the Parties.

16. WHOLE AGREEMENT

- 16.1 This Agreement (when read together with the Education D&B Agreement, the Construction Contract and the Parent Company Guarantee) contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter of this Agreement and expressly excludes any warranty, condition or other undertaking implied at Law or by custom and supersedes all previous

agreements and understandings between the Parties with respect thereto and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

16.2 Nothing in this Agreement is intended to or shall operate so as to exclude or limit any liability for fraud or fraudulent misrepresentation.

17. WAIVER

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by the other Parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant Party to enforce any provision in accordance with its terms.

18. SEVERABILITY

If any condition, Clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

19. COSTS AND EXPENSES

Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

20. AMENDMENTS

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Parties.

21. COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

22. GOVERNING LAW AND JURISDICTION

22.1 Law

This Agreement shall be governed by and construed in all respects in accordance with the laws of England and Wales.

22.2 Jurisdiction

The Parties each submit to the jurisdiction of the Courts of England and Wales as regards any claim or matter arising in relation to this Agreement.

IN WITNESS WHEREOF the parties have executed this Agreement as a Deed the day and year first above written:

SECTION 2

KEY SUB-CONTRACTOR COLLATERAL AGREEMENT

COLLATERAL WARRANTY

AMONG:

[THE AUTHORITY] having its principal offices at [♦] (the "**Beneficiary**" which expression shall include its successors in title or permitted assignees under this Agreement and/or the Beneficiary's appointee);

and

[D&B Co], a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [♦]) and having its Registered Office at [♦] ("**D&B Co**" which expression shall include its successors in title or permitted assignees under this Agreement);

and

[♦] **LIMITED**, a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [♦]) and having its Registered Office at [♦] (the "**Contractor**" which expression shall include its successors in title or permitted assignees under this Agreement);

and

[♦] **LIMITED**, a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [♦]) and having its Registered Office at [♦] (the "**Consultant**").

WHEREAS:

- (A) The Beneficiary and D&B Co have entered into an agreement for the design and build of [*insert name of facilities*] (the "**Project**") on or about the date hereof (the "**Education D&B Agreement**").
- (B) D&B Co and the Contractor have entered into a contract (the "**Construction Contract**") on or about the date hereof for the design and construction of the Project (the "**Contract Works**").
- (C) The Contractor has entered or intends to enter into an agreement with the Consultant (the "**Appointment**") whereby the Consultant will provide certain [design] services (the "**Services**") in connection with the Project as more particularly described in the Appointment.
- (D) It is a condition of the Appointment that the Consultant enters this Agreement with the Beneficiary.
- (E) The Beneficiary shall be entitled to rely and is deemed to have relied on the Consultant's reasonable skill, care and diligence in respect of all matters covered by this Agreement insofar as they relate to the Services provided by the Consultant under the Appointment.

NOW IT IS AGREED as follows:

1. WARRANTY AND UNDERTAKING

- 1.1 The Consultant warrants and undertakes to the Beneficiary that it has complied and will continue to comply with all the terms and obligations under or arising out

of the Appointment on the Consultant's part to be performed and observed and shall complete the Services in accordance with the Appointment.

1.2 Without prejudice to Clause 1.1 (*Warranty And Undertaking*) of this Agreement, the Consultant further warrants and undertakes to the Beneficiary that:

1.2.1 it has exercised and will continue to exercise all the due skill, care and diligence to be expected from a properly qualified and competent consultant experienced in providing design services on projects similar in nature, size and complexity to the Project in:

(a) the [design] of the Contract Works;

(b) the specification of goods and materials for the Contract Works, and in particular in ensuring that it has not and will not specify for use in relation to the Contract Works any products or materials not in conformity with relevant British or European standards or Codes of Practice or which are at the time of specification generally known within the United Kingdom to an experienced designer of such works as the Contract Works to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used; and

(c) the performance of the Services to the Contractor under the Appointment.

1.2.2 the final [design] and all materials and goods specified therein will correspond as to description, quality and condition with the requirements of the Construction Contract; and

1.2.3 the final [design] will at practical completion or its equivalent under the Construction Contract, as the case may be, comply with all relevant legislation and Good Industry Practice.

1.3 The Consultant shall not without first giving the Beneficiary not less than twenty eight (28) days written notice exercise or seek to exercise any rights it may have to determine its employment under the Appointment or treat it as having been determined by the Contractor (which expression in this Clause shall include the appointment of a liquidator, receiver, administrator, administrative receiver or manager of the Contractor) or to discontinue performance of any service or obligations thereunder.

2. INSURANCE

2.1 The Consultant shall maintain throughout the duration of provision of the Services and for a period of twelve (12) years after the date of practical completion or its equivalent under the Construction Contract, professional indemnity insurance in an

amount of not less than [♦] million pounds (£[♦],000,000) sterling on an each and every claim basis and for any one (1) occurrence or series of occurrences arising out of any one (1) event with an insurer of good repute carrying on business in the European Union provided always that such insurance is available at rates which are commercially reasonable to consultants.

- 2.2 In determining whether or not insurance is available as aforesaid, the financial characteristics and claims' record of the Consultant shall be ignored.
- 2.3 The Consultant shall immediately inform the Beneficiary if such insurance ceases to be available at rates which are commercially reasonable in order that the Consultant and the Beneficiary can consider alternative means of best protecting their respective positions in respect of the Project in the absence of such insurance provided that the Beneficiary shall be entitled to require the Consultant to maintain such lesser amount of Professional Indemnity Insurance as is available to the Consultant at rates which are commercially reasonable.
- 2.4 As and when it is reasonably requested to do so by the Beneficiary the Consultant shall produce for inspection documentary evidence satisfactory to the Beneficiary (acting reasonably) that its Professional Indemnity Insurance is being maintained.
- 2.5 The Consultant confirms that this Agreement has been disclosed to and has been approved by the Consultant's Professional indemnity insurers or underwriters.
- 2.6 Should the Consultant be in breach of any of its obligations under this Clause 2 (*Insurance*), the Beneficiary may itself insure against any risk with respect to which the breach shall have occurred and may recover such sum or sums from the Consultant as a debt.

3. COPYRIGHT

- 3.1 The Consultant hereby grants to the Beneficiary or its appointee and all those authorised by the Beneficiary an irrevocable, transferable, non-exclusive and royalty-free licence (which shall be capable of assignment) to use and reproduce all information (whether or not stored in computer systems), drawings, models, bills of quantities, specifications, schedules, details, plans, programmes, budgets, reports, calculations or other documents, work or things including all applicable passwords or access codes whatsoever provided or to be provided by the Consultant in connection with the Services (the "**Documents**") for such purposes as the Beneficiary may at its sole discretion require.
- 3.2 Such licence shall carry the right to grant sub-licences and shall subsist notwithstanding that the Appointment is terminated or the obligations and duties there under have been completed. For the avoidance of doubt, the grant of such licence or sub-licences shall not impose any additional liability on the Consultant.
- 3.3 The Consultant shall on reasonable demand provide to the Beneficiary or its appointee and those authorised by the Beneficiary additional copies of any documents on receipt of reasonable copying costs. The Consultant will not be liable for any use by the Beneficiary or any appointee or sub-licensee of any of the

Documents for any purpose other than that for which the same were prepared and provided by the Consultant or for any improper or negligent use by the Beneficiary or any appointee or sub-licensee.

- 3.4 The Consultant agrees to indemnify and keep indemnified the Beneficiary from and against all loss, damage, cost, expense, liability or claim in respect of breach of the copyright or other intellectual property rights of any third party caused by or arising out of the carrying out of the Services or the use of the licence.

4. ASSIGNMENT

- 4.1 This Agreement may be assigned in whole or in part by the Beneficiary to any successor to the Beneficiary's interest in the Project or any part thereof without the consent of the Consultant being required and such assignment shall be effective upon written notice thereof being given to the Consultant. No assignment of this Agreement by any other party shall be permitted.
- 4.2 The Consultant agrees that it shall not at any time assert that any permitted assignee in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement by reason that such assignee is not an original party to this Agreement or that no loss or a different loss has been suffered by such assignee.

5. NO WAIVER OR VARIATION

- 5.1 No failure, approval, act or forbearance on the part of the Beneficiary in respect of any right of the Beneficiary pursuant to this Agreement shall constitute any waiver of any right of the Beneficiary under or arising out of this Agreement nor relieve the Consultant of any of its duties or obligations under or arising out of this Agreement.
- 5.2 The Consultant will not seek to modify or vary any of the obligations for which it is responsible under the Appointment in any respect if that modification or variation will be detrimental to the Beneficiary or affects the Beneficiary's rights or obligations under the Education D&B Agreement or affects the Consultant's obligations under this Agreement.

6. EQUIVALENT RIGHTS

The obligations of the Consultant under this Agreement shall be no greater in extent or quantity than if the Beneficiary had been named as joint employer with the Contractor under the Appointment. The Consultant shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation in the Appointment and to raise the equivalent rights in defence of liability as it would have against the Contractor under the Appointment (other than counterclaim, set-off or to state a defence of no loss or a different loss has been suffered by the Contractor).

7. NOTICES

7.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service.

7.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

7.2.1 if delivered by hand at the time of delivery; or

7.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place.

7.3 Notices given by email shall be deemed to have been received:

7.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses [7.4 to 7.7] (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

7.3.2 by 11am on the next following Business Day, if the email enters the intended recipient's relevant Information System after 4pm, on a Business Day but before 9am on that next following Business Day,

and provided no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient in accordance with the provisions of this Clause 7 (*Notices*) and where such notice is addressed to the Authority, copied to [♦¹²⁴].

7.4 Any notice to be given to the [Authority] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing to the relevant party by the [Authority].

¹²⁴ Insert Welsh Government details.

- 7.5 Any notice to be given to [D&B Co] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by [D&B Co].
- 7.6 Any notice to be given to the [Contractor] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Contractor].
- 7.7 Any notice to be given to the [Consultant] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Consultant].
- 7.8 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.
- 7.9 The definitions of words and phrases used in this Agreement shall be those set out in the Construction Contract and Appointment except where expressly defined in this Agreement.
- 7.10 This Agreement shall be governed by and construed in accordance with the Laws of England and Wales and the parties hereto submit to the exclusive jurisdiction of the Courts of England and Wales.
- 7.11 This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.
- 7.12 It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that save to the extent expressly provided in this Agreement no provision of this Agreement is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party or any liability whatsoever to any third party.

IN WITNESS WHEREOF the parties have executed this Agreement as a Deed the day and year first above written:

SCHEDULE 9
INDEPENDENT TESTER CONTRACT¹²⁵

AGREEMENT

AMONG:

- (1) [AUTHORITY] (the "**Authority**");
- (2) [D&B CO] ("**D&B Co**");
- (3) [INDEPENDENT TESTER] (the "**Independent Tester**"); and
- (4) [CONTRACTOR] (the "**Contractor**");

WHEREAS:

- (A) D&B Co and the Authority have entered into an agreement for the design and construction of [details of facilities] at the Site (the "**Project**") (the "**D&B Agreement**") under the terms of which they have jointly agreed to appoint an independent tester.
- (B) D&B Co has entered into the Construction Contract with the Contractor for the development of [details of facilities] at the Site.
- (C) The Independent Tester is an independent adviser willing to provide services to D&B Co and the Authority.
- (D) D&B Co and the Authority have jointly agreed to engage the Independent Tester to carry out the duties and obligations ascribed to the Independent Tester in the D&B Agreement upon the terms of this Agreement.

IT IS AGREED as follows:

1. INTERPRETATION

- 1.1 Unless the context otherwise requires, words and expressions defined in the D&B Agreement have the same meanings in this Agreement as in the D&B Agreement.
- 1.2 The headings in this Agreement do not affect its interpretation.
- 1.3 Unless the context otherwise requires, all references to Clauses and Appendices are references to Clauses of and appendices to this Agreement.

¹²⁵ Tailoring will be required to this contract on a sector specific basis. The Independent Tester Contract must be publicly tendered during stage 2 of the New Project Approval Process under the SPA. The evaluation criteria must recognise that all Key Personnel must have a minimum of 10 years' experience of completion testing in the relevant sector.

2. APPOINTMENT

- 2.1 D&B Co and the Authority jointly appoint the Independent Tester to perform the obligations and tasks which are ascribed to the Independent Tester under the D&B Agreement and which are set out in Appendix 1 upon the terms and conditions set out below. The Contractor is a party to this Agreement solely to make the commitments on its part as expressly made in this Agreement and, for the avoidance of doubt, the Independent Tester shall have no liability to the Contractor¹²⁶.
- 2.2 The Independent Tester shall provide the services under Clause 2.1 (*Appointment*) above (the "**Services**") independently, fairly and impartially to and as between D&B Co and the Authority in relation to the D&B Agreement at such times and at such locations as the parties shall agree from time to time. Whilst the Independent Tester shall take account of any representations made by D&B Co and the Authority and the Contractor (as appropriate) the Independent Tester shall not be bound to comply with any representations made by any of them in connection with any matter on which the Independent Tester is required to exercise his professional judgement.
- 2.3 The Independent Tester shall, as far as it is in its reasonable control, ensure that the Services and Varied Services are carried out by the Key Personnel listed in Appendix 3 only (the "**Key Personnel**"). In the event that, due to matters outwith the Independent Tester's control, it is necessary for there to be a change in any Key Personnel, the Independent Tester shall by written notice to the Authority and D&B Co propose a suitable substitute for approval, taking into account the experience of the Key Personnel. Such appointment shall be subject to the approval of D&B Co and the Authority (not to be unreasonably withheld or delayed).

3. SERVICES AND VARIED SERVICES

- 3.1 Subject to the prior written agreement of the Authority and D&B Co to the costs thereof, the Independent Tester shall carry out and perform any additional and/or varied services required for the implementation of the Project reasonably required by the Authority and D&B Co which are not included in, or which are omitted from, the Services (the "**Varied Services**") on the same terms as required for the Services pursuant to Clause 2.2 (*Appointment*). If the Independent Tester shall at any time be required to perform Varied Services, it shall give to the Authority and D&B Co a written quote of the cost thereof (taking into account any reduction in work or other expense which might also occur as a result of the circumstances giving rise to the Varied Services) pursuant to Clause 5.7 (*Fee*).
- 3.2 The written agreement by the Authority and D&B Co pursuant to Clause 3.1 (*Services And Varied Services*) shall state whether (and where applicable in what proportions) the Authority and/or D&B Co will be responsible for the payment of

¹²⁶ It has been suggested on some projects that the Contractor should receive the benefit of a duty of care from the Independent Tester (whether under this Agreement or through a collateral warranty). Authorities should consider the implications fully and seek advice from their legal advisers on this point. Authorities' interests are likely to be prejudiced as a result. Issues that need to be considered include: whether this would increase the fee; whether the financial liability of the IT would be diluted (e.g. consider any cap on liability); whether the IT's liability to the Authority may be prejudiced as a result of a claim made by the Contractor; whether there could be any adverse impact on the resources of the IT; whether the Contractor's remedy should lie against D&B Co in the event of any claim; and other project-specific considerations.

the fee agreed for the Varied Services. The Independent Tester acknowledges that the liability of D&B Co and the Authority to pay the Independent Tester for the Varied Services shall be several and not joint.

- 3.3 Where a change to the Project occurs pursuant to the terms of the D&B Agreement (whether by virtue of a Delay Event, Variation, change to the Programme or otherwise) which may materially impact on the Services or otherwise on the Independent Tester, the Authority and D&B Co shall promptly notify the Independent Tester of such change. The Independent Tester shall within [◆] Business Days of receiving such notification, notify the Authority and D&B Co of the impact of such change, if any, on the Services or otherwise, including whether such change gives rise to any Varied Services and the provisions of this Clause 3 (*Services And Varied Services*) shall apply accordingly.
- 3.4 The Independent Tester shall promptly and efficiently provide the Services and the Varied Services:
- 3.4.1 with the reasonable care, skill and diligence to be expected of a properly qualified and competent professional adviser who has held himself out as competent and experienced in rendering such services for projects of a similar size, nature, scope and complexity to the Project; and
- 3.4.2 in accordance with all applicable Law.
- 3.5 All instructions to the Independent Tester must be signed and given jointly by the Authority's Representative and D&B Co's Representative or such other person appointed pursuant to Clause 8 (*Representatives*) of the D&B Agreement and, for the avoidance of doubt, the Independent Tester shall not act in accordance with any instructions given to him by either the Authority or D&B Co (or any other person) not given in accordance with the provisions of this Clause 3.5 (*Services And Varied Services*).
- 3.6 The Independent Tester shall comply with all reasonable instructions given to it by D&B Co and the Authority pursuant to Clause 3.5 (*Services And Varied Services*) except and to the extent that the Independent Tester reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Agreement or prejudices or might prejudice the exercise by the Independent Tester of its professional judgement in accordance with Clauses 2.2 (*Appointment*) and 3.4 (*Services And Varied Services*) above. The Independent Tester shall promptly confirm in writing to D&B Co and the Authority whether or not it shall comply with any such instruction setting out the grounds upon which the decision is made.
- 3.7 The Authority, D&B Co and the Contractor agree to co-operate with and provide reasonable assistance to the Independent Tester to familiarise the Independent Tester with all necessary aspects of the Project to enable the Independent Tester to carry out its obligations under this Agreement.
- 3.8 The Independent Tester shall be deemed to have full knowledge of the provisions of the D&B Agreement and the Construction Contract, as such as relates to the

Services or Varied Services and shall be deemed to be aware of and to have taken full account of all the undertakings and warranties, both expressed and implied, on the part of D&B Co and the Authority which are set out in the D&B Agreement provided always that true and accurate copies have been delivered to the Independent Tester.

- 3.9 Subject to Clause 3.10 (*Services And Varied Services*), the Independent Tester shall use the following partners, directors or employees: [insert names of individuals] in connection with the performance of the Services and any Varied Services and such persons' services shall be available when necessary and for so long as may be necessary to ensure the proper performance by the Independent Tester of the Services and any Varied Services. Such persons shall have full authority to act on behalf of the Independent Tester for all purposes in connection with the Services and any Varied Services.
- 3.10 The Independent Tester may by written notice to the Authority and D&B Co replace the staff identified in Clause 3.9 (*Services And Varied Services*) taking into account the need for liaison, continuity, level of qualification and availability of personnel in respect of the Project. Such replacement shall be subject to approval in writing by D&B Co and the Authority (not to be unreasonably withheld or delayed).

4. DURATION

- 4.1 The Services shall commence on the date of this Agreement¹²⁷.
- 4.2 The parties hereby agree that this Agreement governs all of the Services (including the Varied Services, if any) provided by the Independent Tester in relation to the Project whether before or after the date hereof.

5. FEE

- 5.1 D&B shall pay to the Independent Tester a fee of [INSERT FEE] for the Services provided under this Agreement. The fee is exclusive of value added tax and inclusive of disbursements. The Independent Tester shall issue an invoice to D&B Co on a monthly basis in accordance with Appendix 2 Section 1 (*Schedule Of Drawdown Fees*) (the "**Application for Payment**"). The date on which the Application for Payment is received by D&B Co shall constitute the due date (the "**Due Date**"). The final date for payment by D&B Co shall be thirty (30) days after the Due Date (the "**Final Date**"). If Varied Services are provided then they shall be paid for in accordance with the agreement between the Independent Tester and the Authority and D&B Co pursuant to Clause 3.1 and 3.2 (*Services And Varied Services*) and paid for in accordance with the provisions of this Clause 5 (*Fee*).
- 5.2 Not later than five (5) days after the Due Date is ascertained in accordance with Clause 5.1 (*Fee*), D&B Co shall give written notice to the Independent Tester stating the amount which D&B Co considers to be or have been due at the Due

¹²⁷ Authorities to amend according to specific requirements.

Date and the basis on which the amount is calculated (the "**Payment Notice**"). It is immaterial that the sum referred to in this notice may be zero. If D&B Co fails to give a Payment Notice in accordance with this Clause 5.2 (*Fee*) and the Independent Tester has given an Application for Payment in accordance with Clause 5.1 (*Fee*), subject to any Pay Less Notice given under Clause 5.3 (*Fee*), the sum to be paid to the Independent Tester shall be the sum specified in the Application for Payment.

- 5.3 Where D&B Co intends to pay less than the sum stated as due pursuant to this Agreement, D&B Co shall, not later than two (2) days before the relevant Final Date, give a written notice to the Independent Tester (a "**Pay Less Notice**"). Such Pay Less Notice shall specify both the sum that D&B Co considers to be due to the Independent Tester at the date the notice is given and the basis on which that sum is calculated. It is immaterial that the sum referred to in this Clause 5.3 (*Fee*) may be zero. Where any Pay Less Notice is given, the payment to be made on or before the relevant Final Date shall be not less than the amount stated as due in such notice.
- 5.4 If D&B Co fails to pay a sum, or any part of it, due to the Independent Tester under this Agreement by the relevant Final Date, D&B Co shall, in addition to any unpaid amount that should properly have been paid, pay the Independent Tester simple interest on that amount from the Final Date until the actual date of payment at the Default Interest Rate.
- 5.5 If D&B Co fails to pay any amount properly due pursuant to this Agreement by the relevant Final Date and the failure continues for twenty-one (21) days after the Independent Tester has given notice to D&B Co of its intention to suspend performance of all or any of the Services or Varied Services and the ground or grounds on which it is intended to suspend performance, the Independent Tester may suspend performance of any or all of its obligations until payment is made in full. [Any period of suspension of the Services or Varied Services in accordance with this Clause 5.5 (*Fee*) shall be disregarded in computing any contractual time limit to complete work directly or indirectly affected by the exercise of the rights conferred by this Clause 5.5 (*Fee*), or as the case may be and the time for completion of such work shall be extended by a period equal to the period of suspension.]¹²⁸

Where the Independent Tester exercises its right of suspension under this Clause 5.5 (*Fee*), it shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by it as a result of the exercise of that right. Any such costs and expenses shall be included in the Independent Tester's next Application for Payment and the Independent Tester shall, with its application, submit such details of the costs and expenses as are reasonably necessary to enable the Independent Tester's entitlement to be ascertained.

- 5.6 Without prejudice to Clause 3.5 (*Services And Varied Services*), neither the Authority nor D&B Co shall issue instructions or do anything which does or is reasonably likely materially to increase the fees payable to the Independent Tester without the prior approval of the other (such approval not to be unreasonably withheld or delayed).

¹²⁸ Authorities to consider whether this or similar drafting is necessary for compliance with the Housing Grants and Construction Act 1996, as amended.

- 5.7 As soon as the Independent Tester becomes aware of the same and before acting on the same the Independent Tester shall inform the Authority and D&B Co of any instructions given to him pursuant to Clause 3.5 (*Services And Varied Services*) which will or could reasonably be expected to increase the fees payable to the Independent Tester under the terms of this Agreement. The Independent Tester shall if requested by either D&B Co or the Authority provide both the Authority and D&B Co with as detailed an estimate as is reasonably practicable of the increase to the fees payable to it if it carries out such instructions. The estimate of increased fees shall be based upon the rates contained in Appendix 2, Section 2 (*Schedule of Daily rates*).

6. LIMITATIONS ON AUTHORITY

- 6.1 The Independent Tester shall not:
- 6.1.1 make or purport to make any alteration or addition to or omission from the design of the Facilities (including, without limitation, the setting of performance standards) or issue any instruction or direction to any contractor or professional consultant employed or engaged in connection with the Project; or
 - 6.1.2 (unless both D&B Co and the Authority consent in writing) consent or agree to any waiver or release of any obligation of D&B Co or the Authority under the D&B Agreement or of any contractor or professional consultant employed or engaged in connection with the Project.
- 6.2 For the avoidance of doubt, the Independent Tester shall not express an opinion on and shall not interfere with or give any advice, opinion or make any representation in relation to any matters which are beyond its role and responsibilities under this Agreement.

7. TERMINATION

- 7.1 D&B Co and the Authority may by joint notice in writing (a "Joint Notice") immediately terminate this Agreement if the Independent Tester:
- 7.1.1 is in breach of any of the terms of this Agreement which, in the case of a breach capable of remedy, shall not have been remedied by the Independent Tester within twenty-one (21) days of receipt by the Independent Tester of a Joint Notice specifying the breach and requiring its remedy;
 - 7.1.2 is incompetent, guilty of gross misconduct and/or any material failure, negligence or delay in the provision of the Services and/or its other duties under this Agreement;

- 7.1.3 fails or refuses after written warning to provide the Services and/or its other duties under this Agreement reasonably and as properly required of him; or
- 7.1.4 is subject to an event analogous to any of the events set out in Clause 33.1.1 (*Insolvency*) of the D&B Agreement.
- 7.2 If the D&B Agreement is rescinded, terminated or repudiated for any reason and, notwithstanding that the validity of such rescission, termination or repudiation may be disputed, this Agreement may be terminated by Joint Notice and with immediate effect.
- 7.3 Following any termination of this Agreement, but subject to any set-off or deductions which D&B Co or the Authority may be entitled properly to make as a result of any breach of this Agreement by the Independent Tester, the Independent Tester shall be entitled to be paid in full and final settlement of any valid claim which the Independent Tester may have in consequence thereof for any fees due under Clause 5 (*Fee*) above in respect of the Services or Varied Services carried out in accordance with this Agreement prior to the date of termination.
- 7.4 Termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including the right of D&B Co and the Authority to recover damages from the Independent Tester).
- 7.5 If this Agreement is terminated in accordance with Clause 7.1 (*Termination*), D&B Co and the Authority shall use reasonable endeavours to engage an alternative Independent Tester within thirty (30) days, subject to Law and public procurement rules. If within such period D&B Co and the Authority are unable to procure the appointment of an alternative Independent Tester on reasonable commercial terms, the Independent Tester shall pay to D&B Co and/or the Authority, as the case may be, any reasonable incremental loss, damage or extra costs suffered by each of them.
- 7.6 If D&B Co fails to make a payment of any undisputed sum to the Independent Tester within [4] Business Days of the expiry of any notice issued pursuant to Clause 5.5 (*Fee*) in respect of such sum, the Independent Tester may issue a further written notice to the Authority and D&B Co specifying that the payment remains outstanding (the "**Second Notice**") and if payment is not made within [44] Business Days of receipt of the Second Notice the Independent Tester may issue a further written notice terminating this Agreement with immediate effect. Failure by D&B Co to pay, following receipt of a Second Notice pursuant to this Clause 7.6 (*Termination*), shall be the Independent Tester's sole ground for terminating this Agreement by reason of breach of this Agreement by the Authority and/or D&B Co.
- 7.7 Termination of this Agreement shall not affect the continuing rights and obligations of D&B Co, the Authority and the Independent Tester under Clauses 6 (*Limitations On Authority*), 8 (*Confidential Information And Copyright*), 9 (*Professional Indemnity Insurance*), 18 (*Dispute Resolution Procedure*) and this Clause or under any other Clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

8. CONFIDENTIAL INFORMATION AND COPYRIGHT

- 8.1 The Independent Tester shall treat as secret and confidential and shall not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of or permit to be made use of any unpublished information relating to D&B Co's or the Authority's or the Contractor's (if appropriate) technology or other know-how business plans or finances or any such information relating to a subsidiary, supplier, customer or client of D&B Co or the Authority or the Contractor (if appropriate) where the information was received during the period of this Agreement except as may be reasonably necessary in the performance of the Services or Varied Services. Upon termination of this Agreement for whatever reasons the Independent Tester shall offer to deliver up to D&B Co or the Authority (as appropriate) all working papers, computer disks and tapes or other material and copies provided to or prepared by him pursuant either to this Agreement or to any previous obligation owed to D&B Co or the Authority provided always that the Independent Tester shall be entitled to retain copies of all such items where such offer is accepted.
- 8.2 The obligation to maintain confidentiality does not apply to any information or material to the extent that the Independent Tester is compelled to disclose any such information or material by law or any regulatory or Government authority.
- 8.3 The copyright in all reports, and other documents produced by the Independent Tester in connection with the Project shall remain vested in the Independent Tester but the Independent Tester grants to D&B Co and Authority and their nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such reports, and other documents and to reproduce the information contained in them for any purpose related to the Project including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Project. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.
- 8.4 The Independent Tester shall not be liable for use by any person of the documents, (including reports, details, plans, specifications, schedules, computer programs, software, consents and any other papers, works, reports and inventions produced by the Independent Tester) for any purpose other than that for which the same were prepared by or on behalf of the Independent Tester.

9. PROFESSIONAL INDEMNITY INSURANCE

- 9.1 Without prejudice to its obligations under this Agreement, or otherwise at law, the Independent Tester shall maintain professional indemnity insurance with a limit of indemnity of not less than [[+] (£[.])] ¹²⁹ for any one (1) claim in respect of any neglect, error or omission on the Independent Tester's part in the performance of its obligations under this Agreement for the period commencing on the date of this Agreement and expiring twelve (12) years after:

9.1.1 the date of final certification of the Works; or

¹²⁹ Authorities to take advice from insurance advisers on appropriate level of PII cover for the scheme. The minimum level is £10 million.

9.1.2 the termination of this Agreement,

whichever is the earlier, provided that such insurance is available in the market place at commercially reasonable rates.

- 9.2 The Independent Tester shall maintain such insurance with reputable insurers carrying on business in the United Kingdom.
- 9.3 Any increased or additional premium required by insurers by reason of the Independent Tester's own claims record or other acts, omissions, matters or things particular to the Independent Tester shall be deemed to be within commercially reasonable rates.
- 9.4 The Independent Tester shall as soon as reasonably practicable inform D&B Co and the Authority if such insurance ceases to be available at commercially reasonable rates in order that the Independent Tester and D&B Co and the Authority can discuss means of best protecting the respective positions of D&B Co and the Authority and the Independent Tester in respect of the Project in the absence of such insurance.
- 9.5 The Independent Tester shall fully co-operate with any measures reasonably required by D&B Co and the Authority including (without limitation) completing any proposals for insurance and associated documents and maintaining such insurance at rates above commercially reasonable rates if D&B Co and the Authority undertake in writing to reimburse the Independent Tester in respect of the net cost of such insurance to the Independent Tester above commercially reasonable rates.
- 9.6 The Independent Tester shall, prior to commencing the provision of the Services and as soon as reasonably practicable following Renewal Dates, produce for inspection by D&B Co and the Authority documentary evidence that such insurance is being properly maintained.
- 9.7 The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of this Agreement for any reason whatsoever, including (without limitation) breach by D&B Co and the Authority.

10. LIMITATION OF LIABILITY

- 10.1 With the exception of liability for death, personal injury and/or any other liability that cannot lawfully be excluded or limited, the Independent Tester's maximum [aggregate] liability to all parties, under or in connection with this Agreement, whether in contract or in tort, or for breach of statutory duty is limited to £[◆]¹³⁰ million.

¹³⁰ Authorities to consider appropriate cap in the context of the specific project and scope of service. The cap should be set out at a minimum level of £10 million.

- 10.2 [Notwithstanding anything to the contrary stated elsewhere in this Agreement, the parties hereby expressly agree that the Independent Tester shall have no liability to any party under or in connection with this Agreement for any claim or claims related to terrorism, asbestos or toxic mould.]¹³¹
- 10.3 No action or proceedings under or in connection with this Agreement shall be commenced against the Independent Tester after the expiry of twelve (12) years from the earlier of: (a) the date of final certification of the Works; and (b) the termination of this Agreement.

11. SUB-CONTRACTOR LOSSES AND NO LOSS AVOIDANCE

- 11.1 Without prejudice to Clause 10 (*Limitation Of Liability*) the Independent Tester hereby acknowledges and accepts (a) that a breach or failure on the part of the Independent Tester could have adverse financial consequences for the Sub-Contractors (or any of them) and (b) any losses, damages, costs and/or other liabilities suffered or incurred by the Sub-Contractors (or any of them) (as the case may be) arising from or in connection with any breach or failure on the part of the Independent Tester under this Agreement shall, for the purposes of this Agreement and notwithstanding the provisions of any Sub-Contract, be deemed to be losses, damages, costs and/or liabilities suffered or incurred by D&B Co arising from or in connection with such breach or failure.
- 11.2 Where the Independent Tester would otherwise be liable to make a payment by way of compensation to D&B Co including amounts which, in turn, comprise compensation to any Sub-Contractor which is payable by D&B Co and/or which would be payable by way of compensation to any Sub-Contractor by D&B Co the Independent Tester shall not be entitled to withhold, reduce or avoid any such payment to D&B Co in reliance (in whole or in part) on the fact that payment of the amount which is or would be due from D&B Co to the Sub-Contractor or the entitlement of the Sub-Contractor to receive payment of such amount (as a result of the circumstances giving rise to the Independent Tester's obligation to pay such compensation) is conditional on receipt by D&B Co of such amount from the Independent Tester.

12. NOTICES

- 12.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service .
- 12.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

12.2.1 if delivered by hand at the time of delivery; or

¹³¹ This may be appropriate where the IT's insurance cover excludes liability for these occurrences. Authorities to check.

- 12.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place; or

- 12.3 Notices given by email shall be deemed to have been received:

12.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses [12.4 to 12.8] (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

12.3.2 by 11am on the next following Business Day, if the email enters the intended recipient's relevant Information System after 4pm, on a Business Day but before 9am on that next following Business Day,

and provided no error message indicating failure has been received by the sender and in the case of a notice issued pursuant to Clause 7 (*Termination*) provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient in accordance with the provisions of this Clause 12 (*Notices*) and where such notice issued pursuant to Clause 7 (*Termination*) is addressed to the Authority, copied to [◆¹³²]

12.4 Any notice to be given to the [Authority] should be marked for the attention of [◆] and delivered to [◆] or emailed to [◆] or such other party or address or email address as notified in writing to the relevant party by the [Authority].

12.5 Any notice to be given to the [D&B Co] should be marked for the attention of [◆] and delivered to [◆] or emailed to [◆] or such other party address or email address as notified in writing to the relevant party by the [D&B Co].

12.6 Any notice to be given to the [Independent Tester] should be marked for the attention of [◆] and delivered to [◆] or emailed to [◆] or such other party address or email address as notified in writing to the relevant party by the [Independent Tester].

12.7 Any notice to be given to the [Contractor] should be marked for the attention of [◆] and delivered to [◆] or emailed to [◆] or such other party address or email address as notified in writing to the relevant party by the [Contractor].

¹³² Insert Welsh Government details.

- 12.8 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

13. ASSIGNMENT

- 13.1 The Independent Tester shall not assign or transfer any of its rights or obligations under this Agreement or sub-contract the whole or any part of the Services or the Varied Services.¹³³
- 13.2 Neither D&B Co nor the Authority shall be entitled to assign or transfer any of their respective rights or obligations under this Agreement save that the parties hereby consent to any such assignment or transfer which is contemporaneous to the assignment or transfer of the D&B Agreement and is made to the same assignee or transferee. In the event that the D&B Agreement is novated to a third party, the term "D&B Agreement" shall include any replacement contract arising from such novation.
- 13.3 The Independent Tester shall not be entitled to contend that any person to whom this Agreement is assigned in accordance with Clause 13.2 (*Assignment*) is precluded from recovering under this Agreement any loss incurred by such assignee resulting from any breach of this Agreement (whenever happening) by reason that such person is an assignee and not a named promisee under this Agreement.

14. CUMULATIVE RIGHTS AND ENFORCEMENT

- 14.1 Any rights and remedies provided for in this Agreement whether in favour of D&B Co or the Authority or the Independent Tester are cumulative and in addition to any further rights or remedies which may otherwise be available to the parties.
- 14.2 The duties and obligations of the Independent Tester arising under or in connection with this Agreement are owed to D&B Co and the Authority both jointly and severally and D&B Co and the Authority may accordingly enforce the provisions hereof and pursue their respective rights hereunder in their own name, whether separately or with each other.
- 14.3 D&B Co and the Authority covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Agreement which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the other without the other's prior written consent, such consent not to be unreasonably withheld or delayed.

¹³³ Where the Independent Tester intends to sub-contract any part of the Services, additional drafting should be included to identify any such sub-contractors and to ensure that the Independent Tester remains liable for the relevant part of the Services. The Authority should consider whether it is appropriate to obtain a warranty from such sub-contractors.

15. WAIVER

The failure of any party at any one time to enforce any provision of this Agreement shall in no way affect its right thereafter to require complete performance by any other party, nor shall the waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

16. SEVERABILITY

In the event that any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, Clause or provision shall, to that extent, be omitted from this Agreement and the rest of this Agreement shall stand, without affecting the remaining Clauses.

17. VARIATION

A variation of this Agreement is valid only if it is in writing and signed by or on behalf of each party.

18. DISPUTE RESOLUTION PROCEDURE

18.1 All disputes shall be resolved in accordance with terms equivalent (*mutatis mutandis*) to the Dispute Resolution Procedure as set out in the D&B Agreement.

18.2 D&B Co, the Authority and the Independent Tester shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Agreement.

19. GOVERNING LAW AND JURISDICTION

Subject to Clause 18 (*Dispute Resolution Procedure*) above, this Agreement shall be governed by and construed in accordance with the laws of England and Wales, and (subject as aforesaid) the parties hereby submit to the non-exclusive jurisdiction of the courts of England and Wales.

20. COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes

21. DELIVERY

This Agreement is delivered on the date written at the start of this Agreement.

22. THIRD PARTY RIGHTS

It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that save as expressly set out herein, no provision of this Agreement is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party against any party to this Agreement.

IN WITNESS WHEREOF the parties have executed this Agreement as a Deed the day and year first above written:

APPENDIX 1 SCOPE OF SERVICES - INDEPENDENT TESTER CONTRACT¹³⁴

The Independent Tester shall perform the role of Independent Tester as referred to in Clauses 17 (Pre-Completion Commissioning and Completion) and 18 (*Post Completion* Commissioning) (including complying with any time limits specified in such Clauses) and Schedule 5 (*Construction Matters*), Schedule 6 (*The Programme*), Schedule 7 (*Review Procedure*) and Schedule 10 (*Outline Commissioning Programme*) of the D&B Agreement¹³⁵, by providing the following scope of Services:

1. MONTHLY REPORT AND COMPLETION CERTIFICATION

The Independent Tester shall:

- 1.1 During [the Works]¹³⁶, attend monthly site progress meetings and provide the Authority and D&B Co with a monthly report on the activities carried out by the Independent Tester and the status of the Project.
- 1.2 Undertake [regular on-site monitoring and inspections (with the aggregate duration of such inspections being [◆] hours a month) (including attendance at the monthly site progress meetings referred to at paragraph 1.1 above)]¹³⁷ during the Works, and in case of completion activities, in accordance with Clauses [17.8 (*Commissioning prior to Completion Date*), 17.10 (*Pre-Completion Inspections*) and 18.4 (Information)] of the D&B Agreement¹³⁸.
- 1.3 Report on the completion status of the Project, identifying any work that is not compliant with the Authority's Construction Requirements, D&B Co's Proposals, the Approved RDD Items ("**Approved RDD**") and/or the Completion Criteria in accordance with Clause 17.11 (*Pre-Completion Matters*) of the D&B Agreement.
- 1.4 Determine whether the [Main] Works [and/or the Post Completion Works] [is/are] finished or complete in accordance with the Completion Criteria and advise D&B Co and the Authority of the need for any re-testing which may be necessary to demonstrate whether the [Main] Works and/or the Post Completion Works] of the Project are finished and complete.
- 1.5 [Certify that the ICT Handover Requirements relating to the [Main] Works have been met and issue an ICT Acceptance Certificate in accordance with [◆] of Schedule 10 (*Outline Commissioning Programme*) of the D&B Agreement.]

¹³⁴ Authorities to ensure that the scope of services is appropriate and includes (where relevant) Post Completion Works.

¹³⁵ Authorities to insert any other relevant references.

¹³⁶ Authorities and their advisers should consider whether the regularity of progress meetings and monitoring ought to differ in the context of the specific Post Completion Works to be undertaken on the Project and adjust the drafting accordingly.

¹³⁷ Develop specifics on a project by project basis. The regularity of inspections should be governed by the capex of the project as follows:

- £5,000,000 - £24,999,999: four (seven hour) days a month (2 visits, monthly meeting, desk study and reporting)
- £25,000,000 - £99,999,999: five (seven hour) days a month (3 visits, monthly meetings, desk study and reporting)
- £100,000,000 upwards: seven (seven hour) days a month (3 visits, monthly meetings, desk study and reporting)

¹³⁸ Insert periods here if not included in Completion Criteria. Consider stages before the works are 'closed up'.

- 1.6 Certify the Actual Completion Date [and Actual Post Completion Works Date] and issue [a] Certificate[s] of Practical Completion in accordance with the D&B Agreement.¹³⁹
- 1.7 On the same day as the date of issue of the ICT Acceptance Certificate or Certificate of Practical Completion (as applicable), issue a Snagging List [or PCW Snagging List (in the case of a Certificate of Practical Completion in respect of Post Completion Works)] specifying any Snagging Items. Monitor and review rectification of such Snagging Items in accordance with Clauses 17.14 to 17.16 (*Snagging Items*) of the D&B Agreement.
- 1.8 Review the Snagging Programme [or PCW Snagging Programme (as appropriate)] for the rectification of all Snagging Items to be carried out and advise D&B Co and the Authority as appropriate. Identify items that have a lead time of more than twenty (20) Business Days and advise on the reasonableness of any such longer lead times (up to a maximum period of three (3) months) in accordance with Clauses 17.14 to 17.16 (*Snagging Items*) of the D&B Agreement.
- 1.9 Monitor and report (weekly) on the completion of Snagging Items against the Snagging Programme [or PCW Snagging Programme (as appropriate)]. On satisfactory completion of the Snagging List [or PCW Snagging List (as appropriate)], issue the Snagging Items Completion Certificate in accordance with Clause 17.17 (*Snagging Items*) of the D&B Agreement.
- 1.10 In order to enable the Independent Tester to discharge these primary functions which are to be performed independently, fairly and impartially to and as between D&B Co and the Authority the Independent Tester shall discharge the further duties described below.
- 1.11 [The Independent Tester shall:
- 1.11.1 In accordance with the [relevant] Final Commissioning Programme and no earlier than the date that falls on the date that is [◆] weeks following the Actual Completion Date, carry out the WiFi Post Completion Tests.
 - 1.11.2 Within five (5) Business Days of any inspection made pursuant to paragraph 1.11.1 above, notify D&B Co and the Authority of any outstanding matters required to be attended to before the WiFi Post Completion Tests can be considered to be completed.
- 1.12 Determine whether the WiFi is finished or complete in accordance with the WiFi PC Criteria and advise D&B Co and the Authority of the need for any re-testing which may be necessary to demonstrate whether the WiFi is finished or complete.

¹³⁹ This will include (amongst other things) testing Energy Efficiency against the levels bid (and incorporated within D&B Co's Proposals). Welsh Government is consulting separately on the subject of Energy generally.

- 1.13 Certify the WiFi Actual Completion Date and issue a Certificate of WiFi Completion.]

2. GENERAL

The Independent Tester shall:

- 2.1 Familiarise itself with the D&B Agreement (including the Design Data, the Design Quality Plan, the Construction Quality Plan¹⁴⁰ and any Variations issued from time to time and any other relevant documentation or information referred to in the D&B Agreement and the Construction Contract to the extent necessary to enable it to provide a report to the Authority and D&B Co on any contradictory requirements contained within the same and to be in a position to carry out the Services in accordance with the terms of the D&B Agreement and this Agreement.
- 2.2 Following notification by D&B Co, pursuant to Clauses 17.8 and 17.10 (*Pre-Completion Inspections*) of the D&B Agreement, inspect and comment as required on the Works [and in respect of the Post Completion Works] as required by Clause 17.11 (*Pre-Completion Matters*) of the D&B Agreement.

3. DESIGN AUDIT REVIEW

The Independent Tester shall:

- 3.1 Monitor and report upon the implementation of the Design Quality Plan for the construction, structural and engineering services design for the Project, [on a monthly basis during the Works].
- 3.2 Through sample audit of [twenty-five percent (25%)] of the detailed working drawings and specifications for a range and type of rooms or such greater number as is in his professional judgment appropriate to be selected by the Independent Tester, monitor and verify that they comply with the Approved RDD as described in the D&B Agreement. If in the professional judgment of the Independent Tester, because of the results of its sample or other circumstances a greater than [twenty-five percent (25%)] sampling percentage is appropriate, he shall provide a detailed report in respect of that and, if so agreed (or determined as between D&B Co and the Authority by the Dispute Resolution Procedure) any increase in the percentage sampling resulting in a change in fees will be borne by D&B Co and the Authority as they shall agree or as determined by the Dispute Resolution Procedure.
- 3.3 [Review the detailed design information for any approved design or specification variations for compliance with the performance and quality standards of the D&B Agreement, [insert reference to Equipment Services Contract and any Equipment performance measures] and quality standards as set out in the [refer to Equipment Service Level Specification] and the Quality Plans.]

¹⁴⁰ Insert reference to any equipment list or other document as appropriate.

4. PROCEDURE REVIEW

The Independent Tester shall:

- 4.1 Monitor and report on the operation of the quality assurance procedures of the Contractor at [monthly] intervals during the execution of the Works.
- 4.2 The Independent Tester shall familiarise itself with the proposed procedures and programmes for the testing and commissioning of the [Mechanical and Electrical engineering services] prior to the Authority's occupation.
- 4.3 Monitor the procedures for the identification, approval and recording of agreed Variations to the Works in accordance with the D&B Agreement.
- 4.4 Review any samples or mock ups as required by Schedule [◆] and check that they have been approved in accordance with D&B Agreement.

5. CONSTRUCTION REVIEW

The Independent Tester shall:

- 5.1 Visit the Site and monitor the Works for their compliance with the Authority's Construction Requirements, D&B Co's Proposals and the Approved RDD.¹⁴¹ The frequency and timing of the Independent Tester's visits are dependent on the progress of construction on [the relevant] Site. The Contractor shall agree a programme with the Independent Tester for the inspection of [Key Construction Processes]¹⁴² and the completed Works [and the Post Completion Works] and shall give the Independent Tester advance notice of these Works being carried out on the Site.
- 5.2 At least [once a month], randomly check that the Works are being undertaken in accordance with the Construction Quality Plan that has been agreed by the Authority and D&B Co and report on findings.
- 5.3 Review the written mechanical and electrical engineering services testing and commissioning procedure pursuant to paragraph 5.2 above and through a sample audit of [fifty percent (50%)] undertake selective witnessing of the mechanical and electrical services final testing and commissioning. The Independent Tester shall review [one hundred] percent [(100%)] of all final test certification and reports. If in the professional judgement of the Independent Tester, because of the results of witnessing (or because of other circumstances) a different sampling percentage is appropriate for final testing and commissioning he shall provide a detailed report in respect of that and any change in the percentage sampling resulting in a change of

¹⁴¹ Authorities to insert any other relevant documents.

¹⁴² To be defined on a project specific basis. This should include stages of the Works that need to be inspected before being covered over by subsequent activity so that the Independent Tester may satisfy himself that these stages have been constructed in accordance with the Quality Plans, without the need for opening up.

fees will be borne by D&B Co, the Authority or the Contractor as they shall agree and failing such agreement, as determined by the Dispute Resolution Procedure.

- 5.4 Inspect rectification works which have previously prevented the Independent Tester from certifying the Project as complete.
- 5.5 Check the delivery of hard copies of the relevant operating manuals, relevant approvals, test results, inspection records, "final issue" construction drawings, "as-built" specification and "as-built" drawings to the Authority [and monitor compliance with required "data drops" of the same, pursuant to the BIM Protocol and the D&B Agreement].

6. **PARTICIPATION IN DISPUTE RESOLUTION**

In accordance with Clause 3 (Services and Varied Services) of the Independent Tester Contract, as and when required by the Authority or D&B Co, the Independent Tester shall participate in the Dispute Resolution Procedure of the D&B Agreement (as such term is defined in the D&B Agreement) to the extent that issues under the D&B Agreement which have been referred to the said Dispute Resolution Procedure relate to the Independent Tester's other obligations and tasks as set out in this Appendix 1 and this Agreement.

APPENDIX 2

SECTION 1
SCHEDULE OF DRAWDOWN FEES

SECTION 2
SCHEDULE OF DAILY RATES

APPENDIX 3 KEY PERSONNEL

SCHEDULE 10¹⁴³
OUTLINE COMMISSIONING PROGRAMME

¹⁴³ To be completed on a project specific basis.

APPENDIX A COMMISSIONING RESPONSIBILITIES

Table A¹⁴⁴:

Item	Pre or Post Completion Activity	Activity	Responsibility	Programme Date

¹⁴⁴ To be completed on a project specific basis.

APPENDIX B COMPLETION CRITERIA¹⁴⁵

¹⁴⁵ To be completed on a project specific basis.

SCHEDULE 11
EQUIPMENT¹⁴⁶

¹⁴⁶ To be completed on a project specific basis.

SCHEDULE 12
INSURANCE REQUIREMENTS¹⁴⁷

SECTION 1

POLICIES TO BE TAKEN OUT BY D&B CO FROM COMMENCEMENT OF THE WORKS AND TO BE MAINTAINED FOR THE PERIODS SPECIFIED IN THIS SCHEDULE 12

Common to each policy in Section 1 (unless stated otherwise):

Insureds:

1. Authority
2. D&B Co
3. Contractor
4. Construction sub-contractors of any tier
5. Consultants - for their site activities only

each for their respective rights and interests in the Project

1. Contractors' 'All Risks' Insurance (CAR)

1.1 Insured Property

The permanent and temporary works, materials [(including but not limited to equipment supplied by the Authority], goods, plant and equipment for incorporation in the Works (other than constructional plant, tools, accommodation and equipment belonging to or the responsibility of the Contractor or the Construction sub-contractors) and all other property used or for use in connection with works associated with the Project (the "**Insured Property**").

¹⁴⁷ Authorities should seek independent advice on the scope and terms of the project Insurances on a project specific basis. In relation to Business Interruption cover the Authority should be named as a co-insured party to the extent it has a demonstrable insurable interest. This will be in connection with any additional cost of working insured against under the terms of the policy, and not with respect to any loss of anticipated revenue.

1.2 Coverage

"All risks" of physical loss or damage to the Insured Property unless otherwise excluded.

1.3 Sum Insured

At all times an amount not less than the full reinstatement or replacement value of the Insured Property, plus provision to include extensions as appropriate.

1.4 Maximum Deductible

£[♦].

1.5 Territorial Limits

United Kingdom including offsite storage and during inland transit.

1.6 Period of Insurance

From the date of this Agreement until the [later of the Actual Completion Date and the Actual Post Completion Works Date] and thereafter in respect of defects liability until expiry of the [final] twelve (12) months Defects Liability Period.

1.7 Cover Features & Extensions

1.7.1 Terrorism

1.7.2 Munitions of war clause

1.7.3 Additional costs of completion clause

1.7.4 Professional fees clause

1.7.5 Debris removal clause

1.7.6 Seventy-two (72) hour clause

1.7.7 European Union local authorities clause

1.7.8 Free issue materials clause

- 1.7.9 Ten per cent (10%) escalation clause
- 1.7.10 Automatic reinstatement of sum insured clause
- 1.7.11 Loss minimisation

1.8 Principal Exclusions

- 1.8.1 War and related perils (UK market agreed wording)
- 1.8.2 Nuclear/radioactive risks (UK market agreed wording)
- 1.8.3 Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds
- 1.8.4 Wear, tear and gradual deterioration
- 1.8.5 Consequential financial losses
- 1.8.6 Cyber risks
- 1.8.7 Inventory losses
- 1.8.8 Fraud and employee dishonesty
- 1.8.9 DE5/DE3 drop down option

2. Construction Third Party Liability Insurance

2.1 Interest

To indemnify the Insured in respect of all sums that they may become legally liable to pay (including claimant's costs and expenses) as damages in respect of accidental:

- 2.1.1 death, or bodily injury, illness, disease contracted by any person;
- 2.1.2 loss or damage to property;

- 2.1.3 interference to property or any easement right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, nuisance, loss of amenities, or any like cause.

happening during the Period of Insurance and arising out of or in connection with the Project.

2.2 Limit of Indemnity

Not less than £[♦]m in respect of any one (1) occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution liability.

2.3 Maximum Deductible

£[♦] for each and every occurrence of property damage. (Personal injury claims will be paid in full).

2.4 Territorial Limits

UK and elsewhere in the world in respect of non manual visits.

2.5 Jurisdiction

Worldwide excluding USA and Canada.

2.6 Period of Insurance

As per the Contractors' 'All Risks' Insurance, including the Defects Liability Period.

2.7 Cover Features & Extensions

- 2.7.1 Munitions of war
- 2.7.2 Cross liability clause
- 2.7.3 Contingent motor
- 2.7.4 Legal defence costs

2.8 Principal Exclusions

- 2.8.1 Liability for death, illness, disease or bodily injury sustained by employees of the Insured.
- 2.8.2 Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles.
- 2.8.3 Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the Insured.
- 2.8.4 Liability in respect of loss or damage to property in the care, custody and control of the Insured but this exclusion is not to apply to all property belonging to the Authority which is in the care, custody and control of another Insured.
- 2.8.5 Events more properly covered under a professional indemnity policy.
- 2.8.6 Liability arising from the ownership, possession or use of any aircraft or marine vessel.
- 2.8.7 Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.
- 2.8.8 Losses indemnified under the CAR policy.

SECTION 2

POLICIES TO BE TAKEN OUT BY THE AUTHORITY PRIOR TO COMMENCEMENT OF THE WORKS AND TO BE MAINTAINED FOR THE PERIODS SPECIFIED IN THIS SCHEDULE 12

Common to all policies in Section 2 (unless stated otherwise):

Insureds

1. Authority
2. D&B Co
3. Contractor
4. Construction sub-contractors of any tier
5. Consultants for their site activities only

each for their respective rights and interests in the Project.

1. Existing Structures Insurance

1.1 Insured Property

Any existing structures owned by the Authority or in respect of which the Authority is responsible and any contents thereof owned by the Authority or for which the Authority is responsible (the "**Insured Property**").

1.2 Coverage

"All risks" of physical loss or damage to the Insured Property unless otherwise excluded.

1.3 Sum Insured

At all times an amount not less than the full reinstatement or replacement value of the Insured Property, plus provision to include as appropriate.

1.4 Maximum Deductible

£[]

1.5 Territorial Limits

United Kingdom including offsite storage and during inland transit.

1.6 Period of Insurance

From the date of this Agreement until [the later of the Actual Completion Date and the Actual Post Completion Works Date] and thereafter in respect of the defects liability until expiry of the [final] [twelve 12] months Defects Liability Period.

1.7 Cover Features & Extensions

1.7.1 Terrorism

1.7.2 Capital additional clause

1.7.3 Professional fees clause

1.7.4 Debris removal clause

1.7.5 Seventy-two (72) hour clause

1.7.6 European Union local authorities clause

1.7.7 10% escalation clause

1.7.8 Automatic reinstatement of sum insured clause

1.7.9 Loss minimisation

1.7.10 Pollution and Contamination to the Insured Property arising from an event itself is not otherwise excluded

1.8 Principal Exclusions

1.8.1 War and related perils (UK market agreed wording)

1.8.2 Nuclear/radioactive risks (UK market agreed wording)

1.8.3 Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds

- 1.8.4 Wear, tear and gradual deterioration
- 1.8.5 Consequential financial losses
- 1.8.6 Cyber risks
- 1.8.7 Inventory losses, fraud and employee dishonesty

SECTION 3
ENDORSEMENTS¹⁴⁸

Unless the context otherwise requires defined terms set out in the following endorsements shall have the meaning set out in this Agreement.

Endorsement 1

Cancellation

1. This policy shall not be cancelled or terminated before the original expiry date is to take effect except in respect of non-payment of premium.
2. The insurer shall by written notice advise the Authority:
 - 2.1 at least thirty (30) days before any such cancellation or termination is to take effect;
 - 2.2 at least thirty (30) days before any reduction in limits or coverage or any increase in deductibles is to take effect; and
 - 2.3 of any act or omission or any event of which the insurer has knowledge and which might invalidate or render unenforceable in whole or in part this policy.

Endorsement 2

Multiple Insured/Non-Vitiation Clause

1. Each of the parties comprising the insured shall for the purpose of this policy be considered a separate co-insured entity, insured on a composite basis, with the words "the insured" applying to each as if they were separately and individually insured provided that the total liability of the insurers under each section of this policy to the insured collectively shall not (unless the policy specifically permits otherwise) exceed the limit of indemnity or amount stated to be insured under that section or policy. Accordingly, the liability of the insurers under this policy to any one insured shall not be conditional upon the due observance and fulfilment by any other insured party of the terms and conditions of this policy or of any duties imposed upon that insured party relating thereto, and shall not be affected by any failure in such observance or fulfilment by any such other insured party.
2. It is understood and agreed that any payment or payments by insurers to any one or more of the insureds shall reduce, to the extent of that payment, insurers' liability to all such parties

¹⁴⁸ The endorsements are recommended drafting. Whilst the parties should endeavour to obtain cover in accordance with this wording, if these endorsements are not in practice available, the parties should obtain the best terms reasonably available in the market at the time.

arising from any one (1) event giving rise to a claim under this policy and (if applicable) in the aggregate.

3. Insurers shall be entitled to avoid liability to or (as may be appropriate) claim damages from any insured party in circumstances of fraud misrepresentation non-disclosure or material breach of warranty or condition of this policy (each referred to in this Clause as a "**Vitiating Act**") committed by that insured party save where such misrepresentation non-disclosure or breach of warranty or condition was committed innocently and in good faith.
4. For the avoidance of doubt it is however agreed that a Vitiating Act committed by one insured party shall not prejudice the right to indemnity of any other insured who has an insurable interest and who has not committed the Vitiating Act.
5. Insurers hereby agree to waive all rights of subrogation and/or recourse which they may have or acquire against any insured party (together with their employees and agents) except where the rights of subrogation or recourse are acquired in consequence of a Vitiating Act in which circumstances insurers may enforce such rights against the insured responsible for the Vitiating Act notwithstanding the continuing or former status of the vitiating party as an insured.
6. Notwithstanding any other provision of this policy or any other document or any act and/or omission by any insured party insurers agree that:
 - 6.1 no party other than the Authority has any authority to make any warranty, disclosure or representation in connection with this policy on behalf of the Authority;
 - 6.2 where any warranty, disclosure or representation is required from the Authority in connection with this policy insurers will contact the Authority in writing (in accordance with Endorsement 3 to the Contract) and set out expressly the warranty, disclosure and/or representation required within a reasonable period of time from the Authority (regarding itself); and
 - 6.3 save as set out in a request from insurers to the Authority in accordance with (paragraph 2) above, the Authority shall have no duty to disclose any fact or matter to insurers in connection with this policy save to the extent that for the Authority not to disclose a fact or matter would constitute fraudulent misrepresentation and/or fraudulent non-disclosure.

Endorsement 3

Communications

1. All notices or other communications under or in connection with this policy shall be given to each insured (and the Authority) in writing or by email. Any such notice will be deemed to be given [♦].¹⁴⁹
2. The address of the Authority for all notices under or in connection with this policy are those notified from time to time by the Authority for this purpose to D&B Co at the relevant time. The initial address of the Authority is as follows:

The Authority: [♦]

Address: [♦]

Email: [♦]

Attention: The Chief Executive from time to time of the Authority

3. It is further agreed that a notice of claim given by the Authority or any other insured shall in the absence of any manifest error be accepted by the insurer as a valid notification of a claim on behalf of all insureds.

Endorsement 4

Loss Payee (applicable only to the Physical Damage Policies)

All proceeds of this policy shall be payable without deduction or set-off to the Insurance Proceeds Account.

Endorsement 5

Primary Insurance

It is expressly understood and agreed that this policy provides primary cover for the insured parties and that in the event of loss destruction damage or liability covered by this policy which is covered either in whole or in part under any other policy or policies of insurance effected by or on behalf of any of the insured parties the insurers will indemnify the insured parties as if such other policy or policies of insurance were not in force and the insurers waive their rights of recourse if any against the insurers of such other policy or policies of insurance.

¹⁴⁹ To be completed.

Endorsement 6

Ringfencing

The level of any indemnity available to an insured party under this policy in relation to any claim(s) concerning the Project shall not be affected and/or reduced by any claim(s) unrelated to the Project.

SECTION 4

BROKER'S LETTER OF UNDERTAKING¹⁵⁰

To: The Authority

Dear Sirs

Agreement dated [♦] entered into between [♦] Limited ("D&B Co") and [♦] (the "Authority") (the "Agreement")

1. We refer to the Agreement. Unless the context otherwise requires, terms defined in the Agreement shall have the same meaning in this letter.
2. We act as insurance broker to D&B Co in respect of the Insurances and in that capacity we confirm that the Insurances which are required to be procured pursuant to Clause 41 (*Insurance*) and Schedule 12 (*Insurance Requirements*) of the Agreement:
 - 2.1 where appropriate name you and such other persons as are required to be named pursuant to the Agreement for their respective interests;
 - 2.2 are, in our reasonable opinion as insurance brokers, as at today's date, in full force and effect in respect of all the matters specified in the Agreement; and
 - 2.3 that all premiums due to date in respect of the Insurances are paid and the Insurances are, to the best of our knowledge and belief, placed with insurers which, as at the time of placement, are reputable and financially sound. We do not, however, make any representations regarding such insurers' current or future solvency or ability to pay claims; and that
 - 2.4 the endorsements set out in Section 3 (*Endorsements*) of Schedule 12 (*Insurance Requirements*) of the Agreement are as at today's date in full force and effect in respect of the Insurances.

¹⁵⁰ This is recommended drafting. If agreement to this wording is not in practice achievable, then the parties should agree the best terms reasonably available in the market at the time. D&B Co's broker may wish to limit its liability and include additional liability wording in the Broker's Letter of Undertaking. Whilst this is in principle acceptable, the Authority will need to check that (i) the scope of such additional wording is appropriate (e.g. does not extend to a limitation of liability for fraudulent acts), and (ii) the capped amount is set at a sufficiently high level.

3. We further confirm that the attached cover notes confirm this position.
4. Pursuant to instructions received from D&B Co and in consideration of your approving our appointment [or continuing appointment] as brokers in connection with the Insurances, we hereby undertake in respect of the interests of the Authority in relation to the Insurances:

4.1 Notification Obligations

- 4.1.1 to notify you at least thirty (30) days prior to the expiry of any of the Insurances if we have not received instructions from D&B Co to negotiate renewal and in the event of our receiving instructions to renew, to advise you promptly of the details thereof; and
- 4.1.2 to notify you at least thirty (30) days prior to ceasing to act as brokers to D&B Co unless, due to circumstances beyond our control, we are unable to do so in which case we shall notify you as soon as practicable.

4.2 Advisory Obligations

- 4.2.1 to notify you promptly of any default in the payment of any premium for any of the Insurances;
- 4.2.2 to notify you if any insurer cancels or gives notification of cancellation of any of the Insurances, at least thirty (30) days before such cancellation is to take effect or as soon as reasonably practicable in the event that notification of cancellation takes place less than thirty (30) days before it is to take effect;
- 4.2.3 to notify you of any act or omission, breach or default of which we have knowledge which in our reasonable opinion may either invalidate or render unenforceable in whole or in part any of the Insurances or which may otherwise materially impact on the extent of cover provided under the Insurances; and
- 4.2.4 to advise D&B Co of its duties of disclosure to insurers and to specifically advise upon:
 - (a) the facts, circumstances and beliefs that should generally be disclosed to insurers; and
 - (b) the obligation not to misrepresent any facts, matters or beliefs to insurers.

4.3 Disclosure Obligations

- 4.3.1 to disclose to insurers all information made available to us from any source and any fact, change of circumstances or occurrence made known to us from any source which in our reasonable opinion is material to the risks insured against under the Insurances and which properly should be disclosed to insurers as soon as practicable after we become aware of such information, fact, change of circumstance or occurrence whether prior to inception or renewal or otherwise; and
- 4.3.2 to treat as confidential all information so marked or otherwise stated to be confidential and supplied to us by or on behalf of D&B Co or the Authority and not to disclose such information, without the prior written consent of the supplier, to any third party other than those persons who, in our reasonable opinion have a need to have access to such information from time to time, and for the purpose of disclosure to the insurers or their agents in respect of the Insurances in discharge of our obligation set out at Clause 4.3.1 of this letter. Our obligations of confidentiality shall not conflict with our duties owed to D&B Co and shall not apply to disclosure required by an order of a court of competent jurisdiction, or pursuant to any applicable law, governmental or regulatory authority having the force of law or to information which is in the public domain.

4.4 Administrative Obligations

- 4.4.1 to hold copies of all documents relating to or evidencing the Insurances, including but without prejudice to the generality of the foregoing, insurance slips, contracts, policies, endorsements and copies of all documents evidencing renewal of the Insurances, payment of premiums and presentation and receipt of claims;
- 4.4.2 to supply to the Authority and/or its insurance advisers (or the Authority's or its insurance advisers' authorised representatives) promptly on written request copies of the documents set out in Clause 4.4.1 of this letter, and to the extent available, to make available to such persons promptly upon the Authority's request the originals of such documents;
- 4.4.3 to administer the payment of premiums due pursuant to the Insurances such that, in so far as we hold appropriate funds, all such premiums shall be paid to insurers in accordance with the terms of the Insurances;
- 4.4.4 to administer the payment of claims from insurers in respect of the Insurances (the "Insurance Claims") including:
 - (a) negotiating settlement of Insurance Claims presented in respect of the Insurances;

- (b) collating and presenting all information required by insurers in relation to Insurance Claims presented in respect of the Insurances; and
- (c) insofar as it is relevant and practicable, liaising with and reporting to each Authority throughout the settlement, payment and administration of such Insurance Claims.

4.4.5 to advise the Authority promptly upon receipt of notice of any material changes which we are instructed to make in the terms of the Insurances and which, if effected, in our opinion as Insurance Brokers would result in any material reduction in limits or coverage or in any increase in deductibles, exclusions or exceptions;

4.4.6 to advise the Authority in advance of any change to the terms of, or any lapse, non-renewal and/or cancellation of any policy maintained in respect of the Insurances; and

4.4.7 to use our reasonable endeavours to have endorsed on each and every policy evidencing the Insurances (when the same is issued) endorsements substantially in the form set out in Section 3 (*Endorsements*) to Schedule 12 (*Insurance Requirements*) of the Agreement.

5. **Notification Details**

5.1 Our obligations at paragraph 4 of this letter to notify or inform you shall be discharged by providing the requisite information in hard copy to the Authority.

5.2 We shall supply further letters substantially in this form on renewal of each of the Insurances and shall supply copies of such letters to those parties identified to us by the Authority for such purposes.

6. This letter shall be governed by and construed in accordance with the laws of England and Wales.

Yours faithfully

For and on behalf of [D&B Co's broker]

SCHEDULE 13

VARIATION PROCEDURE

SECTION 1

INTERPRETATION

For the purposes of this Agreement, and in particular this Schedule 13 (*Variation Procedure*), unless the context requires otherwise:

- "Authority Works Variation"** means a variation to the Works initiated by the Authority in accordance with this Schedule 13 (*Variation Procedure*);
- "Authority Works Variation Enquiry"** means a Variation Enquiry issued by the Authority pursuant to paragraph 2.1 of Section 2 of Schedule 13 (*Variation Procedure*);
- "Qualifying Variation"** means a Variation for which a Variation Confirmation has been issued and the supplementary agreement referred to in paragraph 4.4 of Section 2 of Schedule 13 (*Variation Procedure*) has become unconditional in all respects;
- "Variation"** means an Authority Works Variation;
- "Variation Confirmation"** has the meaning given in paragraph 4.4 of Section 2 of Schedule 13 (*Variation Procedure*); and
- "Variation Enquiry"** has the meaning given in paragraph 2.1 of Section 2 of Schedule 13 (*Variation Procedure*).

SECTION 2
VARIATIONS

1. General

Subject to receiving the Variation Confirmation issued in accordance with the terms of this Schedule 13 (*Variation Procedure*) and to any Consent which must be obtained or modified being so obtained or modified and subject to the other provisions of this Schedule 13 (*Variation Procedure*), D&B Co shall be under a duty to implement a Variation. D&B Co will not be entitled to any payment or compensation for or in respect of a Variation save as provided in accordance with this Schedule 13 (*Variation Procedure*).

2. Variation Enquiries

2.1 A Variation Enquiry shall be a document issued by the Authority's Representative which:

2.1.1 states on its face that it is a Variation Enquiry; and

2.1.2 specifies the nature of the Authority Works Variation and which of the provisions of the Authority's Construction Requirements and/or D&B Co's Proposals are required to be amended to accommodate the relevant Authority Works Variation.¹⁵¹

2.2 The Authority's Representative may not issue a Variation Enquiry other than in accordance with the provisions of this Section 2.

3. D&B Co Response to Variation Enquiry

Preliminary Indicative Information

3.1 Prior to giving a notice referred to in paragraph 3.2 of this Section 2:

3.1.1 D&B Co may at its option within ten (10) Business Days of receipt of a Variation Enquiry:

(a) give to the Authority in good faith a preliminary non-binding indication of the estimated cost of implementing the Variation and provide such other information about the Variation as is available to D&B Co and which it believes is useful to the Authority; and

¹⁵¹ The reference to D&B Co's Proposals has been included to give Authorities flexibility in circumstances where it is not possible to outline the change required solely by reference to the Authority's output specifications. This option should be used on a limited basis (so that, wherever possible, the Authority's output specifications alone are used for this purpose) taking account of risk transfer implications if D&B Co's Proposals are amended by the Authority.

- (b) such information shall include in particular D&B Co's estimated effect on the date when the Actual Completion Date [and/or Actual Post Completion Works Date] will occur;

3.1.2 if D&B Co provides an indication referred to in paragraph 3.1.1(a), the Authority shall within a further five (5) Business Days of its receipt confirm whether or not it wishes D&B Co to proceed to respond to the Variation Enquiry in accordance with provisions of paragraph 3.2.

D&B Co Response

3.2 Within [one (1) month] of receipt of a Variation Enquiry or (if the provisions of paragraph 3.1.2 apply) within [one (1) month] of the Authority confirming that it wishes D&B Co to proceed with responding to the Variation Enquiry or in either case such longer period as may be agreed by the parties or determined in accordance with Schedule 15 (*Dispute Resolution Procedure*) as reasonable given the nature of the Variation Enquiry and all other relevant considerations, D&B Co shall either:

3.2.1 give notice to the Authority's Representative that it objects to the Variation Enquiry stating the grounds of the objection. D&B Co may only object to a Variation Enquiry on one or more of the following grounds:

(a) that implementation of the Variation would materially and adversely affect the health and safety of any person; or

(b) that implementation of the Variation would:

(i) infringe any Law; or

(ii) cause any existing Consent (which is not reasonably likely, on a balance of probabilities, to be capable of modification) to be revoked; or

(iii) require a new Consent which will not (using all reasonable endeavours) be obtainable; or

(iv) have a material and adverse effect on the carrying out of the Works (except those Works which have been specified as requiring to be amended in the Variation Enquiry) in a manner not compensated pursuant to this Schedule 13 (*Variation Procedure*); or

(v) be a departure from Good Industry Practice; or

- (c) that the Authority does not have the legal power or capacity to require the Variation to be implemented or to do anything envisaged by this Schedule 13 (*Variation Procedure*) in respect of, or in connection with, the Variation; or
- (d) that the Variation would, if implemented, result in a change in the essential nature of the Facilities; or
- (e) that the Variation Enquiry does not comply with paragraph 2 of this Section 2; or
- (f) that the information contained in the Variation Enquiry is inadequate to enable D&B Co to respond in accordance with paragraph 3.2.2 below (on the assumption, whether or not the case, that it has no objection under paragraphs (a) to (e));

or

3.2.2 give notice to the Authority's Representative stating:

- (a) the steps which D&B Co proposes to take to implement the Variation giving such level of detail as is reasonable and appropriate in all the circumstances D&B Co's estimated increase or decrease in the Development Amount calculated in accordance with paragraph 1 of Section 3 of this Schedule 13 (*Variation Procedure*) in respect of the Variation having regard to all relevant facts and matters, including any costs (by line item) incurred or to be incurred under paragraph 5 of this Section 2.
- (b) whether, in the view of D&B Co, implementing the Authority Works Variation Enquiry would be likely to prevent the Actual Completion Date from occurring at the Completion Date [or the Actual Post Completion Works Date from occurring at the Post Completion Works Date] (prior to any adjustment being made to the Completion Date [or Post Completion Works Date, as appropriate,] by reason of the implementation or proposed implementation of the Authority Works Variation) and, if so, giving an estimate of the extension of time likely to be required (subject to any further time required to obtain or amend any Consent);
- (c) any Consent which must be obtained or amended for the Variation to be implemented and the latest date by which D&B Co must receive a Variation Confirmation and any such Consent must be obtained or modified for the matters set out in paragraph 3.2.1(b)(i) to paragraph 3.2.1(b)(v) inclusive above to remain valid, such date being a reasonable period of time after service of the notice by D&B Co under this paragraph 3.2.2 to enable the Authority's Representative to consider any matter under paragraph 4.1.3 below; and

- (d) such amendments to the provisions of this Agreement which are necessary as a consequence of the Variation, the objective of such amendments being to ensure that (save for the obligation of the Authority to make payments or altered payments in respect of the Variation or any other adverse consequences for the Authority arising from the Variation itself) the parties are in no better and no worse position in relation to the Project than they would have been in if such Variation had not been implemented.

4. Resolution of Disputes and Variation Confirmation

4.1 Within ten (10) Business Days of receipt of the notice referred to in paragraph 3.2 of this Section 2:

4.1.1 if D&B Co has served a notice under paragraph 3.2.1 but the Authority's Representative does not accept that D&B Co is entitled to object to the Variation Enquiry, the matter may be referred for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*) and if the Dispute is resolved in favour of the Authority then D&B Co shall forthwith give the notice referred to in paragraph 3.1.2;

4.1.2 if the contents of the notice under paragraph 3.1.2 shall be to the satisfaction of the Authority's Representative he shall so inform D&B Co and the parties shall proceed to agree or determine all the matters referred to in paragraph 4.3 of this Section 2; or

4.1.3 if he wishes to consider further any matter, the Authority's Representative may give notice to that effect to D&B Co provided that if no response is given under paragraph 4.1.2 of this paragraph 4.1 prior to the date referred to in paragraph 3.2, the Variation Enquiry shall be deemed to have been withdrawn; or

4.1.4 if any aspect of a notice under paragraph 3.2.2 shall not be to the Authority's Representative's satisfaction he shall so notify D&B Co and shall specify the alterations to the notice which he would require in order to be so satisfied.

4.2 If the Authority's Representative has given a notice referred to in paragraph 4.1.4 of this Section 2 then, unless agreement has been reached with D&B Co within a further ten (10) Business Days from the date of issue of that notice (in which case the Authority's Representative shall proceed pursuant to paragraph 4.1.2 of this Section 2) or the Authority's Representative withdraws the Variation Enquiry, the outstanding Dispute shall be referred for resolution in accordance with Schedule 15(*Dispute Resolution Procedure*) to be determined (if the Authority's Representative so requires it) concurrently with any matter referred to in paragraph 4.3 of this Section 2. In seeking to reach agreement and/or in so determining a Dispute pursuant to this paragraph or to paragraph 4.3, the criterion to be applied to resolve any such Dispute (except where another criterion or other criteria are expressly or by implication stated in this Schedule 13 (*Variation Procedure*)) shall be that D&B Co shall be in no worse position in relation to the

Project and the Works after the Variation is implemented than it would have been in had the Variation not been implemented.

4.3 The parties shall meet and seek to agree the matters referred to in paragraphs 4.3.1 and 4.3.2 in relation to the Variation, failing which agreement being reached in a reasonable period of time, either party may refer any matter for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*). The matters to be agreed or determined are:

4.3.1 in relation to the terms of the Variation:

- (a) any alteration to the Completion Date [or Post Completion Works Date];
- (b) the increase or decrease in the Development Amount calculated in accordance with paragraph 1 of Section 3 of this Schedule 13 (*Variation Procedure*);
- (c) any amendment to the provisions of this Agreement which is referred to in paragraph 3.2.2(d)

in each case occasioned by the Variation; and

4.3.2 the terms of a supplementary agreement under which:

- (a) as required to give effect to the Variation in each case, the Authority's Construction Requirements and/or D&B Co's Proposals are amended; and/or provision is made for the amendment of the as-built drawings and specifications, including room data sheets and other records, drawings, operating and maintenance manuals, the asset register, the health and safety file; and
- (b) the matters referred to in paragraph 4.3 of this Section 2 are fully recorded and given effect as amendments to and/or other variations to the provisions of this Agreement and/or such other documentation as is necessary.

4.4 Upon the agreement or determination of all the matters referred to in paragraph 4.3, and upon any Consent having been modified or obtained, in accordance with paragraph 5 in terms reasonably satisfactory to D&B Co and the Authority, the Authority's Representative shall, by notice (a "**Variation Confirmation**") confirm the Variation. Upon the issue of the Variation Confirmation, the parties shall enter into the supplementary agreement referred to in paragraph 4.3.

4.5 Upon the Variation Confirmation being issued and the supplementary agreement referred to in paragraph 4.4 becoming unconditional in all respects:

4.5.1 the relevant Variation shall be a Qualifying Variation; and

4.5.2 the rights and liabilities of the parties under this Agreement shall be construed accordingly.

5. Consent and Variations

5.1 If it shall be necessary to obtain or amend any Consent¹⁵² in respect of any Variation then D&B Co shall use all reasonable endeavours to obtain and, where the co-operation and involvement of both parties is required, the Authority shall use all reasonable endeavours to assist and co-operate in obtaining, such Consent. The provisions of Clause 11 (*Consents & Planning Approval*) shall apply in relation to Planning Permissions, save that the time taken to obtain such Consent shall be taken into account for the purposes of determining any extension of time and any other amounts payable by the Authority to D&B Co under this Schedule 13 (*Variation Procedure*).

5.2 If it shall not be possible to obtain any such Consent as is referred to in paragraph 5.1 above by the latest date when a Variation Confirmation could be given with regard to the Variation in question in accordance with the notice by D&B Co pursuant to paragraph 3.2.2 of this Section 2 of Schedule 13 (*Variation Procedure*), the Variation Enquiry shall be deemed to be withdrawn and the provisions of paragraph 6 of this Section 2 of Schedule 13 (*Variation Procedure*) shall apply accordingly.

6. Withdrawal

The Authority's Representative may withdraw a Variation Enquiry at any time prior to the issue of a Variation Confirmation, or, in the case of a Variation which requires the obtaining of, or an amendment to any Consent, the date when the last such Consent is granted, whichever shall be later. In the case of a withdrawal or deemed withdrawal the Authority shall pay D&B Co all out of pocket expenses reasonably and properly incurred by D&B Co in connection with the Variation.

¹⁵² Care must be taken to consider whether there will be Consents which, in principle, ought to be obtained by the Authority.

SECTION 3

PAYMENT IN RESPECT OF VARIATIONS

Adjustment to Contract Sum

1. The increase or reduction in the Development Amount arising out of a Qualifying Variation shall be calculated on the basis of a fair and reasonable valuation of the aggregate of any increased design and construction costs (including insurance costs and costs that arise as a consequence of the effect on the regular progress of the Works) less the aggregate of any reduction in design and construction costs which result directly from the Qualifying Variation.
2. Where the effect of a Qualifying Variation is an increase in the Development Amount, then as part of the matters to be agreed pursuant to paragraph 4.3 of Section 2:

2.1 the Authority and D&B Co shall agree:

2.1.1 a payment schedule in respect of the payment of such increase reflecting the amount and timing of the costs to be incurred by the Contractor in carrying out the Qualifying Variation to the extent borne by D&B Co; and

2.1.2 where payment for part of the Qualifying Variation reflects the carrying out of, or specific progress towards, an element within the Qualifying Variation, an objective means of providing evidence confirming that the part of the Qualifying Variation corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,

(such payment schedule and evidence to be determined in accordance with Schedule 15 (*Dispute Resolution Procedure*) in the event of the Authority and D&B Co failing to agree as to its terms) provided that where all or any part of the Qualifying Variation is being carried out by a third party under a contract with D&B Co, subject to the terms of any contract between the D&B Co and that third party in relation to the implementation of the Qualifying Variation having been approved by the Authority (such approval not to be unreasonably withheld), the process under Schedule 15 (*Dispute Resolution Procedure*) shall not determine a payment schedule or evidence which would not enable D&B Co to be funded by the Authority in time to make payments to that third party in accordance with its contract with the Authority; and

2.2 the relevant amendments to this Agreement shall reflect that the Authority shall make payment to D&B Co in accordance with the procedures for payment of interim payments in accordance with Clause 29 (*Payment*).

SCHEDULE 14

RECORD PROVISIONS¹⁵³

SECTION 1

GENERAL REQUIREMENTS

1. D&B Co shall retain and maintain all the records (including superseded records) referred to in Section 2 of this Schedule 14 (*Record Provisions*) in accordance with this Section 1 of this Schedule 14 (*Record Provisions*), the requirements of Good Industry Practice, in chronological order, in a form that is capable of audit and at its own expense. D&B Co shall make such records available for inspection to the Authority where it has reasonable cause for requiring such records, on giving reasonable notice shall provide such facilities as the Authority may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Schedule 14 (*Record Provisions*).
2. Wherever practical, original records shall be retained and maintained in hard copy form. True copies of the original records may be kept by D&B Co where it is not practicable to retain original records.
3. Those records relating to the Project Operations (including the design, construction and development of the Facilities) shall be retained for the duration of this Agreement.
4. Financial and other records (including without limitation all information provided in support of any Variation) shall be retained and maintained by D&B Co for a period of at least six (6) years after the Actual Completion Date in sufficient detail, in appropriate categories and generally in such a manner to enable D&B Co to comply with its obligations under Clause 50 (*Information and Audit Access*).
5. Where D&B Co wishes to dispose of any records maintained as provided in this Part of this Schedule which are more than fifteen (15) years old, or in respect of which the required period for their retention has expired, then D&B Co shall notify the Authority and if, within forty (40) Business Days of such notice, the Authority elects to receive certain of those records, then D&B Co shall deliver up such records to the Authority in the manner and at the location as the Authority shall reasonably specify, and the costs of retaining those records in safe storage and delivering up the same shall be borne by D&B Co.
6. Subject to paragraph 5, for a period of not more than six (6) years following the termination for whatever reason of this Agreement, D&B Co shall retain in safe storage all such records as are referred to in Section 2 of this Schedule 14 (*Record Provisions*) which were in existence at the date of termination of this Agreement. On the expiry of such period or at the earlier request of the Authority, D&B Co shall deliver up all those records (or where those records are required by statute to remain with D&B Co or a Contracting Associate of D&B Co, copies thereof) to the Authority in the manner and at the location as the Authority shall reasonably specify. The Authority shall make available to D&B Co all the records D&B Co delivers up pursuant to this paragraph subject to reasonable notice. The costs of retaining those records in safe storage and delivering up the same shall be borne:

¹⁵³ Section 1 has been included for the purpose of providing a general framework and should be amended to reflect project specifics. The records to be kept by D&B Co are to be determined on a project specific basis, but should as a minimum include those items listed in Section 2.

- 6.1 by D&B Co where the termination arises as a result of a D&B Co Event of Default;
and
- 6.2 by the Authority where the termination arises for any other cause.
7. Any drawings required to be made or supplied pursuant to this Agreement shall be of a size appropriate to show the detail to be depicted clearly without magnifying aids and shall conform to British Standards 1192 or 308 or equivalent as appropriate. Where by prior agreement the Authority has agreed to accept microfilm, microfiche or other storage media (which must include secure back up facilities), drawings and other documents shall be made or supplied in such form as has been agreed.
8. D&B Co shall use all reasonable endeavours to assist the Authority in its preparation of any report and/or return required pursuant to regulations, directions or guidance applicable to the Authority (in each case as amended, replaced or consolidated from time to time) or as required by external agencies including without limitation, reports and returns regarding the physical condition of the Facilities, health and safety, under the Regulatory Reform (Fire Safety) Order 2005, relating to environmental health or required by the Welsh Ministers, from time to time.

SECTION 2

RECORDS TO BE KEPT

1. This Agreement and the Project Documents including all amendments to such agreements.
2. D&B Co shall at all times maintain a full and easily searchable record of particulars of the costs of performing the Project Operations. This shall require D&B Co to keep (and where appropriate to procure that the sub-contractors shall keep) books of account in accordance with best accountancy practice with respect to this Agreement showing in detail:
 - 2.1 administrative overheads;
 - 2.2 payments to the Sub-Contractors and to sub-contractors;
 - 2.3 capital and revenue expenditure;
 - 2.4 such other items as the Authority may reasonably require to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of Clause 37 (*Consequences of Termination*) or Schedule 13 (*Variation Procedure*)

and D&B Co shall have (and procure that the Sub-contractors shall have) the books of account evidencing the items listed in paragraphs 2.1 to 2.4 available for inspection by the Authority (and any expert) upon reasonable notice, and shall present a report of these to the Authority as and when requested.

3. All other documents, software or other information expressly referred to in this Agreement.
4. Records relating to the appointment and supersession of the Authority's Representative and D&B Co's Representative.
5. Project Data.
6. Documents, drawings, Design Data or submissions raised in accordance with Schedule 7 (*Review Procedure*).
7. Documents relating to planning applications, Consents, refusals and appeals.
8. Records relating to any specialist or statutory inspections of the Facilities, including any roadways.
9. Notices, reports, results and certificates relating to completion of the Works and completion of the commissioning activities (including all documents related to the building warrant).

10. Documents relating to events of Force Majeure, Delay Events and Relief Events and the consequences of the same.
11. Documents submitted in accordance with Schedule 13 (*Variation Procedure*) and all documents provided in support.
12. Documents related to referrals to the Dispute Resolution Procedure.
13. Tax invoices and records related to Value Added Tax.
14. Records required by Law (including in relation to Health and Safety matters and health and safety files prepared pursuant to CDM Regulations) and all Consents.
15. Documents relating to insurance and insurance claims.
16. All other records, notices or certificates required to be produced and/or maintained by D&B Co pursuant to this Agreement or any Project Document.
17. [Documents related to change in ownership or any interest in any or all of the shares of D&B Co.]
18. [Financial Records, including audited and unaudited accounts of D&B Co and related records.]
19. For the avoidance of doubt, all items listed above should be stored in a secure but easily searchable and retrievable format.

SCHEDULE 15

DISPUTE RESOLUTION PROCEDURE

1. The procedure set out in this Schedule 15 (*Dispute Resolution Procedure*) shall apply to any dispute, claim or difference arising out of or relating to this Agreement ("**Dispute**") except where it has been excluded from this procedure by an express term of this Agreement.
2. This Dispute Resolution Procedure shall not impose any pre-condition on either party or otherwise prevent or delay either party from commencing proceedings in any court of competent jurisdiction in relation to any Dispute in which that party requires either:
 - 2.1 an order (whether interlocutory or final) restraining the other party from doing any act or compelling the other party to do any act; or
 - 2.2 a [judgement/decreed] for a liquidated sum to which there is no [arguable/stateable] defence.
3. **Mediation**
 - 3.1 Without prejudice to paragraph 4 below, if the parties have been unable between themselves to resolve the Dispute within twenty (20) Business Days of the Dispute arising, they may (if both parties so agree) refer the Dispute to mediation on such conditions as may be agreed between the parties. 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 final and binding to the extent set out in such agreement unless otherwise agreed by the parties.
 - 3.2 For the avoidance of doubt, mediation shall not be a precondition to the commencement of adjudication or court proceedings.
4. **Adjudication**
 - 4.1 Either party may at any time (notwithstanding that other Dispute Resolution Procedures are running concurrently) give the other party to the Dispute notice of its intention to refer the Dispute to adjudication (the "**Notice of Adjudication**"). The Party giving notice (the "**Referring Party**") shall by the same means of communication send a copy of the Notice of Adjudication to an Adjudicator selected in accordance with paragraph 4.2 below (the "**Adjudicator**").
 - 4.2 The Adjudicator nominated to consider a Dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of adjudicators appointed in accordance with the following:
 - 4.2.1 there shall be a panel of adjudicators in respect of construction matters (the "**Adjudication Panel**"). All the Adjudicators on the

panel shall be wholly independent of D&B Co, the Authority, any relevant Sub-Contractor and any of the major competitors of D&B Co or relevant Sub-Contractor;

- 4.2.2 the Adjudication Panel shall be comprised of three (3) adjudicators [as identified in paragraph 7 (*Panel Members*)] [who shall be selected jointly by D&B Co and the Authority. Such selections shall take place within twenty-eight (28) days of the date of this Agreement];
 - 4.2.3 if any member of the panel resigns or is otherwise no longer available to act as an adjudicator during the term of the Agreement, a replacement adjudicator shall be appointed by D&B Co and the Authority as soon as practicable provided that no such appointment may be made under this paragraph 4.2.3 unless and until the Authority confirms in writing that the replacement Adjudicator identified by the parties has been appointed pursuant to this Schedule 15 (*Dispute Resolution Procedure*);
 - 4.2.4 if D&B Co and the Authority are unable to agree on the identity of [the Adjudicators to be selected for the panel or] any replacement adjudicator, the Chairman (or Vice Chairman) for the time being of the Chartered Institute of Arbitrators Wales Branch shall appoint such adjudicator(s) within seven (7) days of any application for such appointment by either party;
 - 4.2.5 in the event that the first panel member is unable or unwilling to confirm acceptance of his appointment as Adjudicator or where he fails to respond within two (2) days of the date of the Notice of Adjudication, then the Referring Party shall invite the person next in line to act as Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator or where he fails to respond within four (4) days of the date of the Notice of Adjudication then the Referring Party may apply to the Chairman for the time being of the Chartered Institute of Arbitrators Wales Branch who shall within seven (7) days of the Notice of Adjudication, nominate an Adjudicator (who shall also within the same period, confirm acceptance of his appointment as Adjudicator) to determine the Dispute described in the Notice of Adjudication.
- 4.3 The Referring Party shall, within seven (7) days of the date of the Notice of Adjudication, serve its statement of case (the "**Referral Notice**") on the Adjudicator (appointed pursuant to paragraph 4.2) and the other party to the Dispute (the "**Responding Party**"). The Referral Notice shall set out each element of the Referring Party's claim and the relief or remedy sought in sufficient detail so as to enable the Responding Party to understand and, where appropriate, respond to the claim and the Referral Notice shall be accompanied by copies of, or relevant extracts from, this Agreement and such other documents as the Referring Party intends to reply upon. The date of the referral of the Dispute (the "**Referral**") shall be the date of the Referral Notice.
- 4.4 Within seven (7) days of appointment in relation to a particular Dispute, the Adjudicator shall establish the procedure and timetable for the adjudication. The

Adjudicator shall (subject to comply with paragraph 4.8] in his absolute discretion consider whether a hearing is necessary in order to resolve the Dispute. He shall establish the procedure and timetable subject to any limitation within this Agreement. The parties shall comply with any request or direction of the Adjudicator in relation to the Adjudication.

- 4.5 The Adjudicator shall reach a decision on the Dispute within twenty-eight (28) days of the date of the Referral (or such other period as the parties may agree). The Adjudicator may extend the period of twenty-eight (28) days by up to fourteen (14) days with the consent of the Referring Party. Unless the parties otherwise agree, the Adjudicator shall give reasons for his decision. Unless and until the Dispute is finally determined by court proceedings or by an agreement in writing between the parties pursuant to paragraph 5 of this Schedule 15 (*Dispute Resolution Procedure*), the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.
- 4.6 Subject to paragraph 4.4, the Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the parties. Each party shall bear its own costs arising out of the adjudication, including legal costs and the costs and expenses of any witnesses.
- 4.7 The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an adjudicator and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.
- 4.8 The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the Law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement.
- 4.9 All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 48 (*Confidentiality*), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Adjudicator's work.
- 4.10 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.
- 4.11 The Adjudicator may on his own initiative or on the request of the Referring Party or Responding Party correct his decision so as to remove a clerical or typographical error arising by accident or omission.
- 4.12 Any correction of a decision shall be made within five (5) days of the date upon which the Adjudicator's decision was delivered to the parties.

- 4.13 Any correction of a decision shall form part of the decision.
- 4.14 If any Dispute raises issues which, in the opinion of D&B Co, is substantially the same as or connected with issues raised in a Dispute or difference arising out of or relating to any other agreement (all such agreements being referred to as the "Related Agreements") between:

4.14.1 D&B Co and the Contractor;

which was or has been referred to adjudication (the "**Related Adjudication**") and an adjudicator has already been appointed (the "**Related Adjudicator**") then D&B Co may request that the Dispute be referred to the Related Adjudicator and paragraphs 4.15 to 4.17 shall apply.

- 4.15 Subject to paragraphs 4.16 and 4.17 below, in the event that a Related Adjudicator orders that a Dispute under this Agreement be consolidated with a Related Adjudication with which he is dealing under the Related Agreement, then:

4.15.1 with effect from the time of such order, the Dispute which shall be determined by the Related Adjudicator, who shall become the Adjudicator; and

4.15.2 such order shall be binding on D&B Co and the Authority and both of them shall acknowledge the appointment of the Related Adjudicator as the Adjudicator of the Dispute, with D&B Co or the Authority (as the case may be) using its best endeavours to procure that the third party who is a party to the Related Agreement shall with effect from the time of such order comply with the requirements of the Related Agreement (including if applicable any requirement or direction of the Related Adjudicator appointed under such Related Agreement) as to the future conduct of the determination of the Dispute and the Related Adjudication; and

4.15.3 notwithstanding paragraph 4.6, D&B Co and the Authority shall be jointly responsible with the third party who is a party to the Related Agreement for the Related Adjudicator's fees and expenses including those of any specialist consultant appointed under the adjudication procedure in the Related Agreement, in respect of the period in which the Dispute is consolidated with the Related Adjudication pursuant to an order of the Related Adjudicator ("**Consolidated Adjudication Costs**"). D&B Co and the Authority agree that the Related Adjudicator shall have the discretion to make directions to require D&B Co, the Authority and the third party who is a party to the Related Agreement to pay or make contribution to the Consolidated Adjudication Costs in different proportions. If no such directions are made, D&B Co, the Authority and the third party who is a party to the Related Agreement shall bear the Consolidated Adjudication Costs in equal shares, and if D&B Co, the Authority or the third party has paid more than such equal share, that party or third party shall be entitled to a contribution from the other party, parties or third party, as the case may be.

- 4.16 Notwithstanding anything to the contrary a Dispute under this Agreement may only be consolidated with a Related Adjudication, if the Related Adjudicator receives particulars of the Dispute within ten (10) days of the referral of the Related Adjudication to the Related Adjudicator under the Related Agreement.
- 4.17 Where D&B Co requests that a Dispute under this Agreement be consolidated (in terms of paragraph 4.14) with a Related Adjudication and heard by the Related Adjudicator, the Dispute may only be consolidated where the Authority has previously consented in writing to the identity of the Related Adjudicator appointed in respect of the Related Adjudication. The Authority's consent to such request shall not be unreasonably withheld and if the Authority refuses to consent, it must give reasons in writing for its refusal. Should the Authority fail to respond within two (2) days of receipt of such a request it shall be deemed to have consented to the appointment of the Related Adjudicator. Where the Related Adjudicator is on the Adjudication Panel at the time of the Referral then the Authority shall be deemed to have consented to the appointment of the Related Adjudicator.

5. Court Proceedings

Subject to paragraph 4 (*Adjudication*) Disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing provisions of this Schedule 15 (*Dispute Resolution Procedure*), shall be referred to the Courts of England and Wales.

6. Submissions in Relation to Adjudication

6.1 If any Dispute raises issues which relate to:

- 6.1.1 any dispute between D&B Co and the Contractor arising under the Construction Contract or otherwise affects the relationship or rights of D&B Co and/or the Contractor under the Construction Contract (the "**Construction Contract Dispute**")

then D&B Co may include as part of its submissions made to the Adjudicator submissions made by the Contractor.

6.2 Any submissions made by the Contractor shall:

- 6.2.1 be made within the time limits applicable to the delivery of submissions by D&B Co to the Adjudicator; and

- 6.2.2 concern only those matters which relate to the Dispute between the Authority and D&B Co arising out of this Agreement or in connection therewith.

6.3 Where the Contractor makes submissions in any reference before the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third by the Authority and two-thirds by D&B Co.

6.4 The Authority shall have no liability to the Contractor arising out of or in connection with any decision of the Adjudicator or in respect of the costs of the Contractor in participating in the resolution of any Dispute under this Agreement.

6.5 D&B Co shall not allow the Contractor access to any Confidential Information relevant to the issues in dispute between the Authority and D&B Co save where:

6.5.1 the Confidential Information is relevant also to the issues relating to the Construction Contract Dispute; and

6.5.2 D&B Co has first delivered to the Authority a written undertaking from the Contractor addressed to the Authority that they shall not use any such Confidential Information otherwise than for the purpose of the dispute resolution proceedings under this Agreement and that they shall not disclose such Confidential Information to any third party other than the Adjudicator or the courts or any professional adviser engaged by the Contractor to advise in connection with the Dispute.

7. Panel Members

The panel members referred to in paragraph 4 are as follows:

Adjudication Panel [♦]

or any replacements or substitutes to be agreed between the parties.

8. No Loss

Where the Authority would otherwise be expressly liable to make payment to D&B Co of sums which include amounts payable in turn by D&B Co to any Sub-Contractor, the Authority shall not be entitled to withhold, reduce or avoid any such payment to D&B Co in reliance only on the fact that the amount which is due from D&B Co to the Sub-Contractor or the entitlement of the Sub-Contractor to payment of such amount as a result of the circumstances giving rise to the Authority's obligation to pay, is conditional on the entitlement of, or receipt of payment by D&B Co from the Authority.

9. Continuing Obligations

Unless this Agreement has already been repudiated or terminated, the parties shall, (notwithstanding that any Dispute is subject to the Dispute Resolution Procedure set out in this Schedule 15 (*Dispute Resolution Procedure*)), continue to carry out their obligations in accordance with this Agreement.

SCHEDULE 16
CERTIFICATES

ICT Handover Acceptance Certificate

Issued by: **Independent Tester – [INSERT NAME]**

Address: [INSERT ADDRESS]

Issued to:

D&B Co: **[INSERT NAME]**

Address: [INSERT ADDRESS]

Authority: **[INSERT NAME]**

Address: [INSERT ADDRESS]

Issue date:

Design and Build Development Agreement between [*insert name of the Authority*] and [*insert name of D&B Co*] dated:

Independent Tester Contract among [*insert name of the Authority*], [*insert name of D&B Co*] and [*insert name of Contractor*] dated:

Under the terms of the above-mentioned Design and Build Development Agreement and Independent Tester Contract, *I/we certify that the ICT Handover Requirements in respect of [*insert name of Facility*] have been met.

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design and Build Development Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed..... Date

[INSERT NAME OF INDEPENDENT TESTER]

Receipt of this Certificate must be acknowledged by D&B Co's Representative.

Signed..... Date

Name:

Receipt of this Certificate must be acknowledged by Authority's Representative.

Signed..... Date

Name:

*[*delete as appropriate]*

Certificate of Practical Completion

Issued by: Independent Tester – **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issued to:

D&B Co: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Authority: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**.

Issue date:

[*Main Works/ Post Completion Works] relating to the Facility named below

Situated at: *[insert name of Facility]*

Design and Build Development Agreement between *[insert name of the Authority]* and *[insert name of D&B Co]* dated:

Independent Tester Contract among *[insert name of the Authority]*, *[insert name of D&B Co]* and *[insert name of Contractor]* dated:

Under the terms of the above-mentioned Design and Build Development Agreement and Independent Tester Contract, *I/we certify that the [*Actual Completion Date of the *[Main] Works was achieved on [♦]/ [the Actual Post Completion Works Date in respect of the Post Completion Works was achieved on [♦]] and that [building warrant/temporary occupation] approval was achieved on [♦], reference [♦], in respect of *[insert name of Facility]*.

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design and Build Development Agreement (except where they are defined specifically in this Certificate).

To be signed by or for the issuer named above.

Signed.....

[INSERT NAME OF INDEPENDENT TESTER]

**delete as appropriate*

Commissioning Completion Certificate

Issued by: Independent Tester – **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issued to:

D&B Co: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Authority: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issue date:

***[[Main] Works]/ [Post Completion Works]** relating to the Facility named below

Situated at: *[insert name of Facility]*

Design and Build Development Agreement between *[insert name of the Authority]* and *[insert name of D&B Co]* dated:

Independent Tester Contract among *[insert name of the Authority]*, *[insert name of D&B Co]* and *[insert name of Contractor]* dated:

Under the terms of the above-mentioned Design and Build Development Agreement and Independent Tester Contract, **I/we* certify that the Actual Commissioning End Date in respect of the [** Main Works/ Post Completion Works*] at *[insert name of Facility]* was achieved on [*♦*].

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design and Build Development Agreement (except where they are defined specifically in this Certificate).

To be signed by or for the issuer named above.

Signed.....

[INSERT NAME OF INDEPENDENT TESTER]

**delete as appropriate*

Snagging Items Completion Certificate

Issued by: Independent Tester – **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issued to:

D&B Co: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Authority: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issue date:

***[[Main] Works]/ [Post Completion Works]** relating to the Facility named below Situated at: *[insert name of Facility]*

Design and Build Development Agreement between *[insert name of the Authority]* and *[insert name of D&B Co]* dated:

Independent Tester Contract among *[insert name of the Authority]*, *[insert name of D&B Co]* and *[insert name of Contractor]* dated:

Under the terms of the above-mentioned Design and Build Development Agreement and Independent Tester Contract, *I/we certify that the Snagging Items included on *[Snagging List]/[PCW Snagging List] [Insert List Number.....] have been completed and that the Snagging Completion Date in respect of the Snagging Items identified on issue of the *[Certificate of Practical Completion] [for the *Main Works] [Certificate of Practical Completion for the Post Completion Works] [ICT Handover Acceptance Certificate] was achieved on [♦].

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design and Build Development Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed..... Date

[INSERT NAME OF INDEPENDENT TESTER]

Receipt of this Certificate must to be acknowledged by D&B Co's Representative.

Signed..... Date

Name:

Receipt of this Certificate must be acknowledged by the Authority's Representative.

Signed..... Date

Name:

**delete as appropriate*

Certificate of Making Good Defects

Issued by: Independent Tester – **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issued to:

D&B Co: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Authority: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issue date:

[*Main Works/ Post Completion Works]

Design and Build Development Agreement between [*insert name of the Authority*] and [*insert name of D&B Co*] dated:

Independent Tester Contract among [*insert name of the Authority*], [*insert name of D&B Co*] and [*insert name of Contractor*] dated:

Under the terms of the above-mentioned Design and Build Development Agreement and Independent Tester Contract, *I/we certify that all Defects in the Schedule of Defects in respect of the [*Main Works/ Post Completion Works] have been made good.

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design and Build Development Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed..... Date

[INSERT NAME OF INDEPENDENT TESTER]

Receipt of this Certificate must to be acknowledged by D&B Co's Representative.

Signed..... Date

Name:

Receipt of this Certificate must be acknowledged by the Authority's Representative.

Signed..... Date

Name:

**delete as appropriate*

[Certificate of WiFi Completion

Issued by: Independent Tester – **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issued to:

Project Co: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Authority: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issue date:

Situated at: *[insert name of Facility]*

Design and Build Development Agreement between *[insert name of the Authority]* and *[insert name of D&B Co]* dated:

Independent Tester Contract among *[insert name of the Authority]*, *[insert name of D&B Co]* and *[insert name of Contractor]* dated:

Under the terms of the above-mentioned Design and Build Development Agreement and Independent Tester Contract, *I/we certify that the WiFi Actual Completion Date for *[insert name of Facility]* was achieved on [♦].

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design and Build Development Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed..... Date

[INSERT NAME OF INDEPENDENT TESTER]

**delete as appropriate]*

SCHEDULE 17

COMMERCIALLY SENSITIVE INFORMATION

SECTION 1

COMMERCIALLY SENSITIVE CONTRACTUAL PROVISIONS

Column 1 Commercially Sensitive Contractual Provisions	Column 2 For period ending on the date below
Any terms of or figures set out within this Agreement but only insofar as such terms or figures relate to the build up of pricing of the Works, including the prices of the Consultants and any sub-contractors of the Contractor.	From the Commencement Date until the date falling 2 years after the Actual Completion Date

SECTION 2

COMMERCIALLY SENSITIVE MATERIAL

Column 1 Commercially Sensitive Material	Column 2 For period ending on the date below
Information about D&B Co's processes, methodologies, working methods and information relating to the development of new processes and methodologies which amounts to a trade secret or which, if disclosed, could reasonably be considered to provide a commercial advantage to D&B Co's competitors.	From the Commencement Date until the date falling 2 years after the Actual Completion Date

SCHEDULE 18

DEVELOPMENT AMOUNT ANALYSIS

[Insert breakdown of the Development Amount which will dictate the drawdown by D&B Co of the Development Amount over the period of the project]

SCHEDULE 19
PROJECT BANK ACCOUNT

SECTION 1
DEED OF TRUST

SECTION 2

APPLICATION SCHEDULE

Relevant Month	Application Date
[◆]	[◆]
[◆]	[◆]
[◆]	[◆]

SCHEDULE 20
COMMUNITY BENEFITS¹⁵⁴

¹⁵⁴ Welsh Government have published a separate engagement paper on Community Benefits.

SCHEDULE 21

JOINT OPERATING PROTOCOL

SECTION 1

GENERAL

1. Definitions

In this Schedule (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following terms shall have the meanings given to them below:

D&B Co ICT Handover Period Activities has the meaning given in paragraph 6.1 of Section 2 (*Construction Phase Access Protocol*) of this Schedule 21 (*Joint Operating Protocol*)

Damage means the loss or theft of or damage to any ICT Assets;

Deployed means in respect of a Fixed ICT Asset that its installation and all associated installation tasks have been completed, and “Deployment” shall be construed accordingly;

Deployment Protocol means the table set out in the Appendix to Section 2 (*Construction Phase Access Protocol*) of this Schedule 21 (*Joint Operating Protocol*)

Fixed ICT Assets those types of ICT Assets indicated as “Fixed” in column 2 of the Deployment Protocol;

ICT Asset Log has the meaning given to it in paragraph 5.2 of Section 2 (*Construction Phase Access Protocol*) of this Schedule 21 (*Joint Operating Protocol*);

Portable ICT Assets those types of ICT Assets indicated as “Portable” in column 2 of the table set out at the Deployment Protocol;

Secure Room [a secure room (or rooms) provided by D&B Co at the Facility [of approximately 100m² (two classrooms) in Secondary Schools and 50m² (one classroom) in Primary Schools] for the storage of the ICT Assets;]

2. Compliance with the Joint Operating Protocol

2.1 Both parties acknowledge that the purpose of the Joint Operating Protocol is to establish a structure and ongoing process that facilitates joint working and co-

operation, pursuant to Clause 5.8 of the Agreement. In particular, in relation to certain specific Project Operations that involve a high level of interface between the Authority and D&B Co in the carrying out of such Project Operations alongside Authority Commissioning, Authority Post Completion Commissioning and the provision of Authority Services at the Facilities.

- 2.2 The parties agree that if there is any specific conflict, ambiguity, inconsistency or uncertainty in respect of the rights and/or obligations contained in the Joint Operating Protocol with those contained in any other provisions of the Agreement, such rights and obligations shall be additional to and not in substitution for those contained elsewhere in the Agreement and those contained in the Agreement shall, as far as necessary, prevail over those contained in the Joint Operating Protocol.

3. Monitoring Arrangements

The parties acknowledge and agree that the functions of the Liaison Committee set out in Schedule 22 (*Liaison Procedure*) shall include discussion on the effectiveness of the Joint Operating Protocol and any variations proposed by either party.

4. Dispute Resolution

Any disagreement relating to each party's rights or obligations under the Joint Operating Protocol shall be referred for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*).

SECTION 2

CONSTRUCTION PHASE ACCESS PROTOCOL

1. Construction Phase Access

- 1.1 The Authority acknowledges and agrees that D&B Co's Ancillary Rights allow for a degree of exclusive possession of the Site by D&B Co and D&B Co Parties for the period from the Commencement Date until the Actual Completion Date [in respect of the Main Works] [and/or from the Actual Completion Date until the Actual Post Completion Works Date, in respect of the Post Completion Works Areas]. Both parties acknowledge that these rights are subject to the Beneficial Access rights outlined in paragraph [◆] of Appendix B of Schedule 10 (*Outline Commissioning Programme*), to facilitate Authority Commissioning in the areas described in [◆] prior to the Actual Completion Date [and the areas described in [◆] prior to the Actual Post Completion Works Date].
- 1.2 The parties agree that further arrangements set out in paragraphs 2 to 6 below shall apply in respect of the ICT Handover Period, including the installation, testing and integration of ICT Assets.
- 1.3 [The Authority agrees that in exercising its rights under this paragraph 1, the Authority and Authority Parties shall comply with all relevant health and safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and reasonable directions with regard to site safety, traffic management and security intimated by the Contractor's Site Manager from time to time. The parties shall ensure the activities each is responsible for carrying out during the ICT Handover Period are co-ordinated in light of this obligation, through the development of the Final Commissioning Programme.]

2. Hours of Access

- 2.1 During the ICT Handover Period, the ICT Service Provider and/or the Authority and/or any other Authority Party responsible for the installation and commissioning of ICT Assets (the "**ICT Installer**") may commission and install ICT Assets between 8am and 5pm on any Business Day. Without prejudice to Clause 17.1 (*Pre-Completion Commissioning and Completion*), if the ICT Installer requires additional access to the Site beyond these hours on any given Business Day then the Authority shall provide not less than 24 hours' notice of such request to D&B Co, specifying the nature of the access required and the activities proposed to be undertaken by the ICT Installer, and the Authority shall reimburse to D&B Co all additional costs it reasonably and properly incurs as a direct result of providing such additional access. D&B Co shall take all reasonable steps not to impede the ICT Installer(s) in the carrying out of such activities (having regard always to the interactive nature of the activities of the parties and the detailed terms of the Final Commissioning Programme), provided that D&B Co shall be deemed not to be in breach of this paragraph unless it has received notice from the ICT Installer that it is so impeding, and has failed to cease impeding the ICT Installer within one (1) hour of receiving such notice.
- 2.2 The Authority shall and shall ensure that Authority Parties (including the ICT Installer) shall during the ICT Handover Period comply with their obligations under

this Section 2 (*Construction Phase Access Protocol*) of Schedule 21 (*Joint Operating Protocol*). D&B Co shall, and shall ensure that D&B Co Parties shall during the ICT Handover Period, comply with their obligations under this Section 2 (*Construction Phase Access Protocol*) of Schedule 21 (*Joint Operating Protocol*).

3. Access, Installation, Testing and Integration of the ICT Assets

- 3.1 The ICT Installers shall not be entitled to bring ICT Assets into the Facilities at any time during the ICT Handover Period. All ICT Assets will be brought on to the Site by D&B Co in accordance with the provisions of [paragraph [♦] of Section 4 (*Decant Protocol*) of Schedule 11 (*Equipment*)] and the Final Commissioning Programme. For the avoidance of doubt, any new ICT Assets to be procured by the Authority shall be delivered to the Existing Facility and not the Facilities and will be decanted in accordance with [Section 4 (*Decant Protocol*) of Schedule 11 (*Equipment*)].
- 3.2 The ICT Installers shall be permitted to use D&B Co's onsite trolleys (or equivalent) where available and where required to install, test and/or integrate the ICT Assets.
- 3.3 The Authority shall keep D&B Co informed of any Site security risks (or thefts or other similar incidents) and/or damage to the ICT Assets of which the Authority becomes aware.

4. Control of ICT Assets

- 4.1 In respect of an ICT Asset at the Site, such ICT Assets shall be deemed to be within the Authority's control in the following circumstances (the "**Authority Control Period**"):
- 4.1.1 at any time prior to D&B Co commencing the decant of the ICT Asset from the Existing School;
- 4.1.2 at any time after an ICT Asset is signed out of the Secure Room by the ICT Installer, until it has been recorded in the ICT Asset Log as having been either:
- (a) placed back in the Secure Room; or
- (b) in the case of a Fixed ICT Asset, Deployed,
- and such placing back or Deployment has occurred;
- 4.1.3 at any other time when an ICT Asset is removed from the Secure Room by the ICT Installer; and

- 4.1.4 at any time after the Actual Completion Date for the Facility in question.
- 4.1.5 The parties agree the following approach to ICT Assets Deployed at the Site:
- (a) Fixed ICT Assets - the ICT Installer may leave such ICT Assets in situ once Deployed (for the avoidance of doubt, the Authority shall procure that the ICT Installer shall return all Fixed ICT Assets that are not Deployed to the Secure Room at the end of each day);
 - (b) Portable ICT Assets - the Authority shall procure that the ICT Installer shall return all Portable ICT Assets to the Secure Room at the end of each day.
- 4.1.6 The Authority shall be responsible for Damage to any ICT Assets when such ICT Assets are in an Authority Control Period, save where and to the extent that the Damage is caused or contributed to by D&B Co or a D&B Co Party in which case D&B Co shall be responsible for such Damage.

5. Deployment

- 5.1 D&B Co shall ensure that when ICT Assets are decanted to the Site they are stored in a Secure Room.
- 5.2 D&B Co shall provide and maintain a log recording and documenting the delivery of ICT Assets to the Site and into the Secure Rooms so that at all times during the ICT Handover Period an accurate and up-to-date record of the contents of the Secure Room and ICT Asset location is maintained (the "**ICT Asset Log**"), provided the Authority shall, or shall procure that the ICT Installer shall, report to D&B Co the ICT Assets being signed in and out of the Secure Room pursuant to paragraphs 4 and 5.3 of this Section 2 of Schedule 21 (*Construction Phase Access Protocol*) on such deposit/removal. The ICT Asset Log shall be made available to the Authority promptly on reasonable request.
- 5.3 D&B Co shall ensure that the ICT Asset Log incorporates:
- 5.3.1 a method of signing in and signing out each of the ICT Assets as such ICT Assets are placed in, removed from and/or returned to the Secure Room; and
 - 5.3.2 the actual date/time of sign-off by D&B Co or the ICT Installer (as applicable) of the completion of the installation or Deployment of the relevant ICT Asset into the relevant location.

- 5.4 Subject to paragraph 5.3 above, where an ICT Asset is shown in the ICT Asset Log as Deployed it shall for the purposes of this Agreement be taken to be "Deployed".
- 5.5 Nothing in paragraph 5.4 above, shall prevent it being agreed by the parties or determined in accordance with the Dispute Resolution Procedure, following receipt of an ICT Asset Log, that an ICT Asset which was shown in the ICT Asset Log as being Deployed was not in fact Deployed. Where such agreement or determination is made, for the purposes of this Schedule 21 (*Joint Operating Protocol*) the ICT Asset in question shall be treated as having been Deployed from the point at which it was actually Deployed rather than from the point that the ICT Asset Log in question was received.

6. Non Interference by the ICT Installer

- 6.1 The Authority acknowledges that whilst it, or any other party being an ICT Installer, is taking delivery of and installing ICT Assets during the ICT Handover Period D&B Co shall also be at the Site for the purpose of:
- 6.1.1 undertaking Snagging Items and/or remedying Defects;
 - 6.1.2 [carrying out its obligations pursuant to the Decant Protocol, including the installation and recommissioning of Initial ICT Equipment;]
 - 6.1.3 carrying out any other D&B Co Pre-Completion Commissioning activities set out in the Final Commissioning Programme, including (where applicable) carrying out training and handover 'sparkle' cleans; and
 - 6.1.4 carrying out the balancing, testing and/or commissioning of the mechanical and electrical installations at the Facility,

(together the "**D&B Co ICT Handover Period Activities**").

- 6.2 The Authority shall (and shall procure the relevant ICT Installer shall) take all reasonable steps not to impede D&B Co or any D&B Co Party from undertaking D&B Co ICT Handover Period Activities (having regard always to the interactive nature of the activities of the parties and the detailed terms of the [relevant] Final Commissioning Programme).

APPENDIX
DEPLOYMENT PROTOCOL¹⁵⁵

The types of ICT Assets relevant to this Section 2 (*Construction Phase Access Protocol*) of this Schedule 21 (*Joint Operating Protocol*) are classified as set out in the table below.

ICT Asset	Fixed or Portable
Learner Laptop	Portable
Learner Station	Fixed
Learner Station Monitor	Fixed
Learner Netbook	Portable
Apple iMac	Fixed
Teacher Laptop	Portable
Teaching Assistant Laptop	Portable
Tablet computers (Inc. Ipod devices) – Learner	Portable
Tablet computers (Inc. Ipod devices)- Staff	Portable
Display Station PC	Fixed
Admin Station	Fixed
Admin Station Monitor	Fixed
Visualiser	Portable
Digital Cameras (still and video)	Portable
Projector + mount + security	Fixed
Whole-Class Teaching Wall Speakers	Fixed
Interactive Whiteboard	Fixed
Integrated Whole Class Teaching system	Fixed
Laptop Trolley (e.g. Notebus 16+)	Portable
Teaching LED/LCD/Plasma display screen, speakers and bracket	Fixed
LED/LCD/Plasma Display for Streaming Media Set Top Box (e.g. OneLan NTB600)	Fixed
Desktop Printer	Fixed
MFD Printer	Fixed
Voting System	Portable
USB Headset	Portable
Rack Mounted Server	Fixed
Video Server	Fixed
Rack Mounted Keyboard/Video/Monitor Switch	Fixed
Disk to Disk to Tape Backup System	Fixed

¹⁵⁵ To be reviewed and considered on a project specific basis.

SECTION 3

ACCESS TO WORK PROTOCOL¹⁵⁶

1. [Definitions]

In this Section 3 (*Access to Work Protocol*) of Schedule 21 (*Joint Operating Protocol*) (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following terms shall have the meanings given to them below:

[♦]

2. Preamble

- 2.1 This Access to Work Protocol governs the arrangements which allow D&B Co or any D&B Co Party to gain access to the Facilities to make good Snagging or Defects or carry out other DProject Operations at the Facilities following the Actual Completion Date.

3. Access After the Actual Completion Date

- 3.1 The Authority acknowledges and agrees that D&B Co's Ancillary Rights allow for a non-exclusive licence to remain upon those parts of the Site that D&B Co and/or any D&B Co Party requires access to in order to carry out the Project Operations described at Clause 9.2. Both parties acknowledge that these rights are subject to this Section 3 (*Access to Work Protocol*) of Schedule 21 (*Joint Operating Protocol*).
- 3.2 D&B Co shall schedule the carrying out of Project Operations following the Actual Completion Date outside of the [Core Day]¹⁵⁷, wherever reasonably possible.

4. [Process for the Issue of an Access to Work Permit and Safeguarding]

- 4.1 [[♦]].
- 4.2 D&B Co (to the extent permitted by Law) shall procure that all potential staff or persons performing any of the Project Operations following the Actual Completion Date and who may reasonably be expected in the course of their employment or engagement to have access to children[, the elderly] and/or vulnerable adults:

4.2.1 are questioned concerning their Convictions; and

¹⁵⁶ Protocol to developed on a project specific basis.

¹⁵⁷ To be defined on a project specific basis.

- 4.2.2 D&B Co obtains a check of the most extensive available kind made with the Disclosure and Barring Service.
- 4.3 D&B Co shall procure that no person who discloses any Convictions, or who appears on a Barred List following the results of a Disclosure and Barring Service check, in either case of which D&B Co is aware or ought to be aware is employed or engaged in the provision of the Project Operations following the Actual Completion Date without the Authority's prior written consent (such consent not to be unreasonably withheld or delayed).
- 4.4 D&B Co shall procure that the Authority is kept advised at all times of any person employed or engaged by D&B Co in the provision of the Project Operations following the Actual Completion Date who, subsequent to his/her commencement of such employment or engagement, receives a Conviction of which D&B Co becomes aware or whose previous Convictions become known to D&B Co.
- 4.5 The parties agree and acknowledge that [the School Entity/ Authority (through the relevant appointed personnel)] shall be responsible for the issue of Access to Work Permits to D&B Co or a D&B Co Party in respect of access to the Facility in accordance with this Access to Work Protocol.

SCHEDULE 22
LIAISON PROCEDURE

SCHEDULE 23

PLANNING RESPONSIBILITIES MATRIX