

with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the Freedom of Information Act 2000 (the "**FOIA Code**"), be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning the Operator or the Services:

57.2.7.1 in certain circumstances without consulting with the Operator; or

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

provided always that where clause 57.2.7.1 (*Freedom of information*) applies, the Authority shall, in accordance with the recommendations of the FOIA Code, draw this to the attention of the Operator prior to any disclosure.

58. Publicity and branding

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

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

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

58.1.3 exhibit or attach to any part of the Sites any notice or advertisement;

without the prior written approval of the Authority.

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

PART 10 – GENERAL

59. TUPE and employees

59.1 Relevant Transfers

59.1.1 The parties agree that the following events:

59.1.1.1 the commencement by the Operator of the PFP Services on the PFP Service Transfer Date;

59.1.1.2 the commencement by the Operator of the SCT Services on the SCT Service Transfer Date; and

59.1.1.3 the commencement of services, following the expiry, earlier termination or partial termination (as the case may be), which are equivalent to the Services or any of them,

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who are the subject of a Relevant Transfer shall have effect (subject to regulation 4(7) of TUPE) thereafter as if originally made between those employees or workers and the new provider.

59.1.2 Notwithstanding the agreement in clause 59.1.1 above, and in recognition of the possibility that the transactions contemplated by this Agreement may be determined not to be Relevant Transfers by a court or tribunal, the Operator shall with effect from the PFP Service Transfer Date, offer employment to or shall procure that the relevant Sub-Contractor offers employment to each Authority PFP Existing Employee on like terms to the terms on which they would have become employed or engaged on the PFP Service Transfer Date had there been a Relevant Transfer. Also, notwithstanding the agreement in clause 59.1.1 above, and in recognition of the possibility that the transactions contemplated by this Agreement may be determined not to be Relevant Transfers by a court or tribunal, the Operator shall with effect from the SCT Service Transfer Date, offer employment to or shall procure that the relevant Sub-Contractor offers employment to each Authority SCT Existing Employee on like terms to the terms on which they would have become employed or engaged on the SCT Service Transfer Date had there been a Relevant Transfer.

59.1.3 Any reference in this clause 59 to an Authority Related Party includes (without limitation) SCT and PFP and is also a reference to any sub-contractor (of any tier) of an Authority Related Party.

59.2 **Emoluments and Outgoings**

59.2.1 The Authority shall be responsible for all Employment Costs in respect of such of the Relevant Employees as are Authority SCT Existing Employees and which are attributable to the period up to the SCT Service Transfer Date. The Authority also shall be responsible for all Employment Costs in respect of such of the Relevant Employees as are Authority PFP Existing Employees and which are attributable to the period up to the PFP Service Transfer Date.

59.2.2 The Operator shall be responsible for or shall procure that any relevant Sub-Contractor is responsible for all Employment Costs in respect of each Relevant Employee and which are not attributable to any period when that Relevant Employee was employed or engaged by the Authority or by any Authority Related Party.

59.3 **Employee List**

The Authority has supplied to the Operator the information, as at the Commencement Date, which is contained in parts 1 and 2 of schedule 9 (the **"Employee List"**) affecting:

59.3.1 each of those employees or workers of SCT who it is expected, if they remain in the employment or engagement of SCT until immediately before the SCT Service Transfer Date, would become Relevant Employees on the SCT Service Transfer Date; and

59.3.2 each of those employees or workers of PFP who it is expected, if they remain in the employment or engagement of PFP until immediately before the PFP Service Transfer Date, would become Relevant Employees on the PFP Service Transfer Date,

but, in each case, the Authority gives no warranty as to the accuracy or completeness of this information.

59.4 **Proposed Workforce Information**

59.4.1 The Operator has provided to the Authority, and the Authority has agreed, the details set out in part 4 of schedule 9 which show, in respect of each of the Services, the information detailed in clauses 59.4.2 (*Proposed Workforce Information*) to 59.4.4 (*Proposed Workforce Information*) below.

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

59.4.3 The monthly costs of employing or engaging the Relevant Employees who are expected to be employed or engaged by the Operator and/or any Sub-Contractor in the provision of the Services. These costs (the **"Remuneration Costs"**) have been calculated on the basis of (amongst other things) the information contained in the Employee List.

59.4.4 The costs, including any lump sum payments, which have been agreed between the parties for the purposes of any reorganisation which may be required to establish the Proposed Workforce or a workforce which is as close as reasonably practicable to the Proposed Workforce. These costs (the **"Reorganisation Costs"**) have been calculated by the Operator and the Sub-Contractors on the basis of (amongst other things) the information contained in the Employee List.

59.5 **Price Adjustment Mechanism**

59.5.1 No later than one month after the SCT Service Transfer Date the Operator shall provide to the Authority in writing details of any inaccuracies in or omissions from the Employee List that was supplied prior to the SCT Service Transfer Date clearly identifying which information was inaccurate; what is the correct information; and the impact of the correct information on the Remuneration Costs and/or the Reorganisation Costs (the **"SCT Revised Employment Information"**).

- 59.5.2 The Operator shall produce such evidence relating to the accuracy of the SCT Revised Employment Information as the Authority may reasonably require and in any event no later than 21 days following the receipt of such a request.
- 59.5.3 The Operator warrants that the SCT Revised Employee Information will be a fair and accurate representation and interpretation of the position in respect of the relevant employment and related costs as at the SCT Service Transfer Date.
- 59.5.4 Where following the SCT Service Transfer Date the Operator provides reasonable evidence to the Authority that the SCT Revised Employee Information is accurate and that any differences between the information in the Employee List and the position on the SCT Service Transfer Date as reflected in the SCT Revised Employee Information results in reasonable additional costs to the Operator then a reasonable adjustment to the Annual Payment shall be made to meet such reasonable additional costs that the Operator incurs as a result of such differences provided that such differences are not as a result of an act or omission of the Operator or of any Sub-Contractor and provided that the Operator and any relevant Sub-Contractor shall take all reasonable steps to mitigate any such additional costs and any adjustment to the Annual Payment shall be calculated as if they had done so.
- 59.5.5 Where, following the SCT Service Transfer Date, the Authority provides reasonable evidence to the Operator that any differences between the information in the Employee List and the position on the SCT Service Transfer Date as reflected in the SCT Revised Employment Information results in a reasonable reduction in costs to the Operator then a reasonable adjustment to the Annual Payment to reflect any reasonable reduction in costs that the Operator incurs as a result of such differences shall be made.
- 59.5.6 No later than one month after the PFP Service Transfer Date the Operator shall provide to the Authority in writing details of any inaccuracies in or omissions from the Employee List that was supplied prior to the PFP Service Transfer Date clearly identifying which information was inaccurate; what is the correct information; and the impact of the correct information on the Remuneration Costs and/or the Reorganisation Costs (the **"PFP Revised Employment Information"**).
- 59.5.7 The Operator shall produce such evidence relating to the accuracy of the PFP Revised Employment Information as the Authority may reasonably require and in any event no later than 21 days following the receipt of such a request.
- 59.5.8 The Operator warrants that the PFP Revised Employee Information will be a fair and accurate representation and interpretation of the position in respect of the relevant employment and related costs as at the PFP Service Transfer Date.
- 59.5.9 Where following the PFP Service Transfer Date the Operator provides reasonable evidence to the Authority that the PFP Revised Employee

Information is accurate and that any differences between the information in the Employee List and the position on the PFP Service Transfer Date as reflected in the PFP Revised Employee Information results in reasonable additional costs to the Operator then a reasonable adjustment to the Annual Payment shall be made to meet such reasonable additional costs that the Operator incurs as a result of such differences provided that such differences are not as a result of an act or omission of the Operator or of any Sub-Contractor and provided that the Operator and any relevant Sub-Contractor shall take all reasonable steps to mitigate any such additional costs and any adjustment to the Annual Payment shall be calculated as if they had done so.

59.5.10 Where, following the PFP Service Transfer Date, the Authority provides reasonable evidence to the Operator that any differences between the information in the Employee List and the position on the PFP Service Transfer Date as reflected in the PFP Revised Employment Information results in a reasonable reduction in costs to the Operator then a reasonable adjustment to the Annual Payment to reflect any reasonable reduction in costs that the Operator incurs as a result of such differences shall be made.

59.5.11 To avoid double counting, no account shall be taken of any change to the Remuneration Costs or the Reorganisation Costs to the extent that the Operator has been or will be compensated as a result of any Indexation of the Annual Payment under this Agreement or if any indemnity given by the Authority under any other provision of this Agreement would apply.

59.6 Union Recognition

59.6.1 The Authority shall procure if it has the contractual or legal powers to do so and shall otherwise use all reasonable endeavours to procure that SCT shall supply to the Operator no later than five Business Days prior to the SCT Service Transfer Date true written copies of SCT's union recognition agreement(s) (in so far as they relate to employees or workers of SCT who are wholly or mainly engaged in the provision of the SCT Services) and the Operator shall and shall procure that each and every Sub-Contractor shall in accordance with TUPE recognise the trade unions representing Relevant Employees to the same extent as they were recognised by SCT before the SCT Service Transfer Date.

59.6.2 The Authority shall procure if it has the contractual or legal powers to do so and shall otherwise use all reasonable endeavours to procure that PFP shall supply to the Operator no later than five Business Days prior to the PFP Service Transfer Date true written copies of PFP's union recognition agreement(s) (in so far as they relate to employees or workers of PFP who are wholly or mainly engaged in the provision of the PFP Services) and the Operator shall and shall procure that each and every Sub-Contractor shall in accordance with TUPE recognise the trade unions representing Relevant Employees to the same extent as they were recognised by PFP before the PFP Service Transfer Date.

59.6.3 The Operator shall procure that, on each occasion on which the identity of a Sub-Contractor changes, in the event that there is a Relevant Transfer, the new Sub-Contractor shall in accordance with TUPE recognise the trade unions representing the employees or workers whose contracts of employment or engagement transfer to the new Sub-Contractor to the same extent as they were recognised before the change of identity of the Sub-Contractor in respect of those employees or workers.

59.7 Information and Consultation

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

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

59.8 Authority Indemnity

To the extent not dealt with under clause 59.5, the Authority shall indemnify the Operator both for itself and any Sub-Contractor against Employment Liabilities incurred by the Operator and/or any Sub-Contractor in connection with or as a result of the following:

59.8.1 any act, fault or omission (arising directly or indirectly) of the Authority or SCT in respect of any Relevant Employee in the period on and before the SCT Service Transfer Date, save, in each case, to the extent such act, fault or omission arises from the failure of the Operator and/or any Sub-Contractor to comply with its or their duties under regulation 13 of TUPE;

59.8.2 any act, fault or omission (arising directly or indirectly) of the Authority or PFP in respect of any Relevant Employee in the period on and before the PFP Service Transfer Date, save, in each case, to the extent such act, fault or omission arises from the failure of the Operator and/or any Sub-Contractor to comply with its or their duties under regulation 13 of TUPE;

59.8.3 any failure by the Authority (and/or SCT or PFP as applicable) to comply with its obligations under regulations 13 and 14 of TUPE, or any award of compensation under regulation 15 of TUPE arising from any such failure by the Authority, SCT or PFP, save, in each case, to the extent such failure arises from the failure of the Operator and/or any Sub-Contractor to comply with its or their duties under regulation 13 of TUPE; and,

59.8.4 any claim (including any individual employee entitlement under or consequent on such a claim) by any trade union or other body or person representing the Relevant Employees arising from or connected with any failure by the Authority

or SCT or PFP to comply with any legal obligation to such trade union, body or person, save, in each case, to the extent such failure arises from the failure of the Operator and/or any Sub-Contractor to comply with its or their duties under regulation 13 of TUPE.

59.9 **Operator Indemnity**

The Operator shall indemnify the Authority and any Authority Related Party against all Employment Liabilities incurred by the Authority and/or any Authority Related Party in connection with or as a result of the following:

- 59.9.1 any failure by the Operator or any Sub-Contractor to comply with its obligations under clause 61 (*Pensions*) in respect of the Relevant Employees;
- 59.9.2 any act, fault or omission (arising directly or indirectly) of the Operator or any Sub-Contractor in respect of any Relevant Employee on or after the SCT Service Transfer Date;
- 59.9.3 any act, fault or omission (arising directly or indirectly) of the Operator or any Sub-Contractor in respect of any Relevant Employee on or after the PFP Service Transfer Date;
- 59.9.4 any failure by the Operator or any Sub-Contractor to comply with its obligations under regulation 13 of TUPE;
- 59.9.5 any claim (including any individual entitlement of a Relevant Employee under or consequent on such claim) by any trade union or other body or person representing any of the Relevant Employees and arising from or connected with any failure by the Operator or any Sub-Contractor to comply with any legal obligation to such trade union, body or person;
- 59.9.6 any change or proposed change in the terms and conditions of employment or engagement or working conditions of any employee or worker of any Authority Related Party to take place on or after their transfer to the Operator or any Sub-Contractor on the SCT Service Transfer Date;
- 59.9.7 any change or proposed change in the terms and conditions of employment or engagement or working conditions of any employee or worker of any Authority Related Party to take place on or after their transfer to the Operator or any Sub-Contractor on the PFP Service Transfer Date;
- 59.9.8 any change of identity of employer occurring by virtue of TUPE and/or this Agreement and being significant and detrimental to any of the Relevant Employees, or to any person who would have been a Relevant Employee but for their resignation (or decision to treat their employment or engagement as terminated under Regulation 4(9) of TUPE) on or before the SCT Service Transfer Date as a result of the change in employer;
- 59.9.9 any change of identity of employer occurring by virtue of TUPE and/or this Agreement and being significant and detrimental to any of the Relevant

Employees, or to any person who would have been a Relevant Employee but for their resignation (or decision to treat their employment or engagement as terminated under Regulation 4(9) of TUPE) on or before the PFP Service Transfer Date as a result of the change in employer;

59.9.10 any proposal by the Operator and/or a Sub-Contractor to change the terms and conditions of employment or engagement or working conditions or place of work of any of the Relevant Employees on or after the SCT Service Transfer Date, or to change the terms and conditions of employment or engagement or working conditions or place of work of any person who would have been a Relevant Employee but for their resignation (or decision to treat their employment or engagement as terminated under Regulation 4(9) of TUPE) on or before the SCT Service Transfer Date as a result of any such proposed changes;

59.9.11 any proposal by the Operator and/or a Sub-Contractor to change the terms and conditions of employment or engagement or working conditions or place of work of any of the Relevant Employees on or after the PFP Service Transfer Date, or to change the terms and conditions of employment or engagement or working conditions or place of work of any person who would have been a Relevant Employee but for their resignation (or decision to treat their employment or engagement as terminated under Regulation 4(9) of TUPE) on or before the PFP Service Transfer Date as a result of any such proposed changes;

59.9.12 subject to clause 59.13, any proposal by the Operator and/or a Sub-Contractor to make redundant any Relevant Employee on or after the SCT Service Transfer Date or to make redundant any person who would have been a Relevant Employee but for their resignation (or decision to treat their employment or engagement as terminated under Regulation 4(9) of TUPE) on or before the SCT Service Transfer Date as a result of any such proposed redundancy; and

59.9.13 subject to clause 59.13, any proposal by the Operator and/or a Sub-Contractor to make redundant any Relevant Employee on or after the PFP Service Transfer Date or to make redundant any person who would have been a Relevant Employee but for their resignation (or decision to treat their employment or engagement as terminated under Regulation 4(9) of TUPE) on or before the PFP Service Transfer Date as a result of any such proposed redundancy,

save, in each case, to the extent such act, fault or omission arises from an act, fault or omission of the Authority or an Authority Related Party.

59.10 Retendering

59.10.1 Without prejudice to the express provisions of clauses 51.7 and 55.5, the Operator shall (and shall procure that any Sub-Contractor shall) within the period of 18 months immediately preceding the Expiry Date and/or following

the Authority notifying the Operator of its intention to retender the provision of the Services (or any of them) and/or whenever otherwise reasonably requested by the Authority:

59.10.1.1 provide the Authority in respect of any person engaged or employed by the Operator or any Sub-Contractor and working wholly or mainly (to whatever extent) in the provision of the Services (the **"Assigned Employees"**) full and accurate details regarding their identity, number, age, sex, length of service, job title, grade and terms and conditions of employment or engagement and such other matters affecting each or any of those Assigned Employees who it is expected, if they remain in the employment of the Operator or of any Sub-Contractor as the case may be until immediately before the Termination Date or Expiry Date (as appropriate), would be Returning Employees (the **"Retendering Information"**);

59.10.1.2 provide the Retendering Information promptly (and at no cost) to the Authority;

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

and the Authority may pass on the Retendering Information (and any updated version of the same) to and/or require the same to be provided directly to any actual or potential Future Operator.

59.10.2 Without prejudice to clause 59.10.1 (*Retendering*) the Operator shall (and shall procure that any Sub-Contractor shall) provide the Employee Liability Information (as defined in TUPE) (the **"Employee Liability Information"**) to the Authority and to any Future Operator at such time or times as are required by TUPE, and warrant to the Authority and to any Future Operator at the time of providing the Employee Liability Information, that such information will be updated by the Operator (or any relevant Sub-Contractor) to take account of any changes to such information as is required by TUPE.

59.10.3 The Operator shall indemnify (and shall keep indemnified) in full the Authority and any Future Operator against all Direct Losses arising from any failure by the Operator or any Sub-Contractor to comply with the requirements of this clauses 59.10 and/or 51.7 or to provide or promptly to provide the Authority and/or any Future Operator with any Retendering Information and/or Employee Liability Information or to provide or promptly to provide to the Authority and/or any Future Operator full Retendering Information and/or Employee Liability Information or as a result of any material inaccuracy in or omission from the Retendering Information and/or Employee Liability Information.

59.11 Termination of Agreement

59.11.1 Upon all or part of the Services ceasing to be provided by the Operator or any Sub-Contractor for any reason (such date(s) being termed "**Return Date**" or "**Return Dates**"), the parties agree that it is their intention that TUPE shall apply in respect of the provision thereafter of any service equivalent to all or part of a Service but the position shall be determined in accordance with Legislation. Clauses 59.11.2 to 59.11.5 (inclusive) shall apply, however, irrespective of any such determination.

59.11.2 Upon the Return Date(s), the provisions of clauses 59.11.3 to 59.11.5 (inclusive) will apply.

59.11.3 The Operator shall (or shall procure) that all Employment Costs of the Returning Employees (and of all other employees or workers or former employees or workers of the Operator and/or any Sub-Contractor who have been engaged at any time and to whatever extent in the provision of the Services or any of them) in respect of any time up to and including the Return Date(s) are promptly paid by the Operator or any Sub-Contractor.

59.11.4 Without prejudice to clause 59.11.3 *Termination of Agreement*, the Operator shall:

59.11.4.1 (save where expressly provided to the contrary in this clause 59), remain (and procure that each Sub-Contractor shall remain) (as relevant) responsible for all of the Operator's (and/or the Sub-Contractor's) employees and workers (other than the Returning Employees) on or after the Return Date(s) and shall indemnify the Authority and any Future Operator against all Losses incurred by the Authority or any Future Operator resulting from any claim whatsoever, whether arising before on or after the Return Date(s), by or on behalf of any of the Operator's or any Sub-Contractor's current or former employees or workers who do not constitute the Returning Employees; and

59.11.4.2 in respect of the Returning Employees, the Operator shall indemnify the Authority and any Future Operator against all Direct Losses incurred by the Authority or any Future Operator resulting from any claim whatsoever by or on behalf of any of the Returning Employees in respect of the period on or before the Return Date(s) (whether any such claim, attributable to the period up to and on the Return Date(s), arises before, on or after the Return Date(s)) including but not limited to any failure by the Operator or any Sub-Contractor to comply with its or their obligations under regulations 13 and 14 of TUPE and any award of compensation under regulation 15 of TUPE and/or Article 6 of the Directive as if such Legislation applied, even if it does not in fact apply, save to

the extent that any such failure to comply arises as a result of an act or omission of the Authority or any Future Operator.

59.11.5 The Authority shall be entitled to assign the benefit of the indemnities in this clause 59 to any Future Operator.

59.12 Offer of Employment on Expiry or Termination

59.12.1 If TUPE does not apply on the expiry or earlier termination of this Agreement, the Authority shall ensure that each relevant Future Operator (including where applicable where the Authority is the Future Operator) shall offer employment to the persons employed by the Operator or a Sub-Contractor and who are wholly or mainly engaged in the provision of the relevant Services immediately before the Return Date(s), save for any person who is so employed or engaged by the Operator or a Sub-Contractor in breach of clause 59.10.1 and/or clause 51.7.

59.12.2 If an offer of employment is made in accordance with clause 59.12.1, the employment shall be on the same terms and conditions (except for entitlement to membership of an occupational pension scheme, which shall be dealt with in accordance with clause 61 (*Pensions*)) as applied to the relevant person immediately before the expiry or earlier termination of this Agreement, except that the Authority or Future Operator may at its absolute discretion not offer such terms and conditions if there has been any change to the terms and conditions of the persons concerned in breach of clause 59.10.1 and/or clause 51.7.

59.12.3 Where any such offer as referred to in clause 59.12.1 is accepted, the Operator shall indemnify and keep indemnified in full the Authority and/or any Future Operator on the same terms and conditions as those set out in clause 59.11 as if there had been a Relevant Transfer in respect of each and every employee who has accepted any such offer and for the purposes of this clause 59.12.3 each and every such employee shall be treated as if they were a Returning Employee.

59.12.4 For the avoidance of doubt, where any such offer as referred to in clause 59.12.1 *Offer of Employment on Expiry or Termination* is not accepted (and TUPE does not apply in respect of the relevant employee), the employee shall remain an employee of the Operator or Sub-Contractor as appropriate.

59.13 Redundancy on Expiry or Termination

59.13.1 If, on the expiry or earlier termination of this Agreement, all or any of the Services cease to be required by the Authority such that any person employed by the Operator or a Sub-Contractor and who is wholly or mainly assigned to such Services immediately prior to the Return Date is redundant (as defined in the Employment Rights Act 1996), the Authority will bear the Redundancy Costs associated with such person's redundancy, subject to the Operator or Sub-Contractor complying with the obligations described in clause 59.13.2.

59.13.2 The Operator shall, and shall procure that any Sub-Contractor shall, use all reasonable endeavours to redeploy any person who is redundant in circumstances described in clause 59.13.1 and shall do so prior to terminating that person's employment.

59.14 Sub-Contractors

The Operator shall impose (or procure the imposition of) obligations on all Sub-Contractors in the same terms as those imposed on it pursuant to this clause 59 and *TUPE and employees* clause 61 (*Pensions*) and shall procure that each Sub-Contractor complies with such terms. The Operator shall indemnify and keep indemnified the Authority and any Future Operator in full against all Direct Losses incurred by the Authority or any Future Operator as a result of or in connection with any failure on the part of the Operator to comply with this clause 59.14 *Sub-Contractors* and/or any Sub-Contractor's failure to comply with such terms.

60. Employees - General

60.1 Disclosure and Barring

60.1.1 The Operator shall procure that in respect of all potential staff or persons performing any of the Services (other than Relevant Employees/ Assigned Employees) (each a **"Named Employee"**) before a Named Employee begins to attend the Sites to perform any of the Services and only to the extent required under the Home Office Guidance:

60.1.1.1 each Named Employee is questioned as to whether he or she has any Convictions or ASBOS;

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

60.1.1.3 if so requested by the Authority, and subject to appropriate arrangements between the parties being agreed for handling such data, a copy of the results of such checks as are referred to in clause 60.1.1.2 (Disclosure and Barring) are notified to the Authority.

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

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

60.1.2.2 it shall and shall procure that all Sub-Contractors shall comply with all reporting requirements to the Disclosure and Barring Service.

60.1.3 The Operator shall procure that no person who discloses any Convictions or ASBOs, or who is found to have any Convictions or ASBOs following the

results of a Disclosure and Barring Service check, is employed or engaged without the Authority's prior written consent (such consent not to be unreasonably withheld or delayed).

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

60.1.4.1 receives a Conviction or ASBO which becomes known to the Operator or any Sub-Contractors or whose previous Convictions or ASBOs become known to the Operator or any Sub-Contractors;

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

60.1.4.3 who is placed on a Barred List pursuant to the Disclosure and Barring Scheme.

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

60.1.6 Save to the extent prescribed otherwise pursuant to the Disclosure and Barring Scheme, this clause 60.1 (*Employees - General*) shall not apply to those individuals who shall be required by the Operator or any Sub-Contractor to attend on any of the Sites to provide emergency reactive services. In the case of such individuals, the Operator shall or shall procure that any Sub-Contractor shall ensure that such individuals are accompanied at all times while on each Site by a member of the Operator or any Sub-Contractor's staff who has been properly employed or engaged in accordance with clauses 60.1 to 60.1.5 (*Employees - General*).

60.2 **Conduct of Staff**

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

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

60.2.2 where the Authority has reasonable grounds for considering that the presence or conduct of an employee at any location relevant to the performance of the

Services is undesirable, require the exclusion of the relevant employee from the relevant location(s).

60.3 Admission to the Sites

60.3.1 Subject to the remainder of this clause 60.3 (*Admission to the Sites*), the Operator shall if requested in writing, and subject to appropriate arrangements between the parties being agreed for handling any data, provide the Authority with a written list of the names and addresses of all employees or other persons who it expects may require admission to each Site in connection with the provision of the Services, specifying the capacities in which those employees or other persons are concerned with the Services and giving such other particulars as the Authority may require. The decision of the Authority on whether any person is to be refused admission to a Site shall be final and conclusive and the Authority shall not be obliged to give reasons for its decision.

60.3.2 Where the Operator is unable (acting reasonably) to provide a list on request in compliance with clause 60.3.1 (*Admission to the Sites*) then the Operator shall comply with its obligations under that clause as soon as reasonably practicable. Until such time as the Operator has complied with its obligations in respect of that individual, he or she shall at all times be accompanied on any Site by a member of the Operator or Sub-Contractor's staff who has been properly notified to the Authority in accordance with clause 60.3.1 (*Admission to the Sites*).

60.3.3 This clause 60.3 (*Admission to the Sites*) shall not apply to those individuals who shall be required by the Operator or any Sub-Contractor to attend on Site to provide emergency reactive services. In the case of such individuals, the Operator shall or shall procure that any Sub-Contractor shall ensure that such individuals are accompanied at all times while on each Site by a member of the Operator or Sub-Contractor's staff who has been properly notified to the Authority in accordance with the terms of this clause 60.3.1 (*Admission to the Sites*).

60.4 Refusal of Admission

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

60.5 Decision to Refuse Admission

The decision of the Authority as to whether any person is to be refused admission to the Sites pursuant to clause 60.4 (*Refusal of Admission*) shall be final and conclusive. If the Authority declines to give reasons and/or where reasons are given but are found to be unreasonable for exercising its rights under clauses 60.3 (*Admission to the Sites*) and 60.4 (*Refusal of Admission*) and 60.6 (*Removal from Sites*), the Authority shall

60.6 Removal from Sites

60.7 Resources and Training

60.8 Personnel Policies and Procedures

61. Pensions

[REDACTED]
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 [REDACTED]
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[REDACTED]

[REDACTED] [REDACTED]
[REDACTED],

63. Assignment and subcontracting

63.1 Restrictions on Authority

The rights and obligations of the Authority under this Agreement shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) to any person other than to any public body (being a single entity) acquiring the whole of the Agreement and having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Agreement being:

63.1.1 a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975;

63.1.2 any Local Authority which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Agreement; or

63.1.3 any other public body whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the Operator) by the Authority or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Agreement.

63.2 Restrictions on Operator

63.2.1 Subject to clause 63.2.2 and 63.2.3, the Operator shall not subcontract, assign, novate or otherwise dispose of or create any trust in relation to any or all of its rights, obligations or liabilities under this Agreement in whole or in part except with the prior written consent of the Authority.

63.2.2 Nothing in this Agreement shall prohibit the Operator from providing or procuring the provision of the Services from a Sub-Contractor having the legal capacity, power and authority to become a party to and perform the obligations of the relevant Sub Contract and employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it which are sufficient to enable it to perform the obligations of the Sub-Contractor under the relevant Sub-Contract provided that:

63.2.2.1 such Sub-Contractor's identity has been notified to the Authority and the Authority has approved it in writing;

63.2.2.2 such Sub-Contractor's terms of Sub-Contract have been notified to the Authority by the Operator and the Authority has approved them in writing;

63.2.2.3 the Operator has complied with its obligations under clause 3.2 where applicable;

63.2.2.4 the Operator provides the Authority with a certified copy of the Sub-Contract within 10 Business Days of the Sub-Contract being completed;

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

63.2.2.6 the Operator shall remain primarily and directly liable for the Operator's obligations under this Agreement.

63.2.3 By entering into this Agreement, the Authority approves the appointment of the Fitness and Health Operator, the Food and Beverage Operator and Leisure Operator under the Fitness and Health Contract, the Food and Beverage Contract and the Leisure Contract in the Agreed Form, provided that the Operator complies with its obligations under clause 3 (Ancillary Documents and Guarantee) and the Operator shall remain primarily and directly liable for the Operator's obligations under this Agreement.

63.3 **Operator's Obligations**

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

63.4 **Sub-Contractors**

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

64. **Change in ownership**

64.1 **Restricted Share Transfer**

A Change in Ownership may only occur to a Suitable Third Party who is able to:

64.1.1 pass the financial requirements as included within the qualitative selection of the original procurement; or

64.1.2 is able to provide a Parent Company Guarantee and/or a bond (if required) to the Authority in relation to this Agreement.

64.2 **Notification**

64.2.1 The Operator shall provide the Authority with at least 10 Business Days' prior written notice of any Change in Ownership contemplated by clause 64.1 (*Restricted Share Transfer*).

64.2.2 The Authority shall confirm if the Suitable Third Party meets the Authority's financial requirements as soon as possible after receiving notification from the Operator of a proposed Change in Ownership under clause 64.2.1 (*Notification*). The Operator shall then arrange for the Suitable Third Party to provide a Parent Company Guarantee and/or a bond (if required) to the

Authority in relation to this Agreement if required pursuant to clause 64.1 (*Restricted Share Transfer*).

64.2.3 The Authority may, not more than twice in any Contract Year, or at any time when an Operator Default is outstanding, request that the Operator inform it as soon as reasonably practicable and in any event within 20 Business Days of receipt of the Authority's request for details of any Change in Ownership.

64.2.4 The Operator's obligation under clause 64.2.1 (*Notification*) shall, except where a legal transfer of shares is proposed, be limited to the extent of the Operator's awareness.

64.2.5 The Operator's obligation under clause 64.2.3 (*Notification*) shall, except where a legal transfer of shares has occurred, be limited to the extent of the Operator's awareness having made all reasonable enquiry.

64.2.6 For the purposes of this clause 64 (*Change in ownership*) any change in legal or beneficial ownership of any shares that are listed on a recognised investment exchange (as defined in section 285 of the Financial Services and Markets Act 2000) shall be disregarded.

65. Waiver and cumulative remedies

65.1 The rights and remedies under this Agreement may be waived only by notice and in a manner that expressly states that a waiver is intended. A failure or delay by a party in ascertaining or exercising a right or remedy provided under this Agreement or by law shall not constitute a waiver of that right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

65.2 Unless otherwise provided in this Agreement, rights and remedies under this Agreement are cumulative and do not exclude any rights or remedies provided by law, in equity or otherwise.

66. Relationship of the parties

Except as expressly provided otherwise in this Agreement, nothing in this Agreement, nor any actions taken by the parties pursuant to this Agreement, shall create a partnership, joint venture or relationship of employer and employee or principal and agent between the parties, or authorise either party to make representations or enter into any commitments for or on behalf of any other party.

67. Deemed Knowledge

Without limitation to its actual knowledge, the Operator 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 Operator Related Party.

68. **Severance**

- 68.1 If any provision of this Agreement (or part of any provision) is held to be void or otherwise unenforceable by any court of competent jurisdiction, such provision (or part) shall to the extent necessary to ensure that the remaining provisions of this Agreement are not void or unenforceable be deemed to be deleted and the validity and/or enforceability of the remaining provisions of this Agreement shall not be affected.
- 68.2 In the event of a holding of invalidity so fundamental as to prevent the accomplishment of the purpose of this Agreement, the parties shall immediately commence negotiations in good faith to remedy this invalidity.

69. **Further assurances**

- 69.1 Each party undertakes at the request of the other, and at the cost of the requesting party to do all acts and execute all documents which may be reasonably necessary to give effect to the meaning of this Agreement.
- 69.2 Each party agrees to co-operate, at its own expense (but without being compelled to incur material expenditure), with the other party in the fulfilment of the purposes and intent of this Agreement. Neither party shall be under any obligation to perform any of the other's obligations under this Agreement.

70. **Entire agreement**

- 70.1 This Agreement constitutes the entire agreement between the parties in respect of its subject matter and supersedes and extinguishes all prior negotiations, arrangements, understanding, course of dealings or agreements made between the parties in relation to its subject matter, whether written or oral.
- 70.2 Neither Party has been given, nor entered into this Agreement in reliance on, any warranty, statement, promise or representation (whether negligent or innocent) 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) other than those expressly set out in this Agreement.
- 70.3 Nothing in this clause 70 (*Entire agreement*) shall exclude any liability in respect of misrepresentations made fraudulently.

71. **Third party rights**

No term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement.

72. **Notices**

72.1 **Form of Notice**

Save as provided for in clauses 72.2 and 72.3.4, any demand, notice or other communication given in connection with or required by this Agreement shall be provided or submitted by email to the recipient, in the case of:

72.1.1 the Operator, to [REDACTED] (or such other email address as may be notified in writing from time to time); and

72.1.2 the Authority, to [REDACTED] (or such other email address as may be notified in writing from time to time),

and unless otherwise expressly stated in this Agreement marked for the attention of [REDACTED] in the case of the Authority, and [REDACTED] in the case of the Operator.

72.2 Provision of Information to Representatives

72.2.1 Subject to clause 72.3.4, where any information or documentation is to be provided or submitted to the Authority's Representative or the Operator's Representative it shall be provided or submitted by email to the recipient, in the case of:

72.2.1.1 the Operator, to [REDACTED] at [REDACTED] (or such other email address as may be notified in writing from time to time); and

72.2.1.2 the Authority, to [REDACTED] at [REDACTED] (or such other email address as may be notified in writing from time to time),

and unless otherwise expressly stated in this Agreement marked for the attention of [REDACTED] in the case of the Authority, and [REDACTED] in the case of the Operator.

72.2.2 The Authority shall not be responsible for and the Operator shall not be entitled to rely on and shall not do so or claim relief, additional time, losses, expenses, damages, costs or other liabilities should the Operator act on or fail to act on any notice, communication or other purported instruction given by a person alleging to act for and on behalf of the Authority unless such person was the Authority's Representative.

72.3 Service

72.3.1 Subject to clauses 72.3.2 and 72.3.3, any such demand, notice, communication, information or documentation shall be deemed to have been duly served on the day of transmission of the email provided that a read receipt is duly requested and/or other evidence is received and a confirmatory copy is provided on the same day that the email is transmitted, provided in each case that if the time of such deemed service is either after 4:00pm on a Business Day or on a day other than a Business Day, service shall be deemed to occur instead at 10:00am on the following Business Day.

72.3.2 In the event that:

72.3.2.1 an automatic electronic notification is received by the sender within 24 hours after sending the email informing the sender that:

- (a) the email has not been delivered to the recipient; or
- (b) that the recipient is out of the office; or

72.3.2.2 no read receipt or other evidence of receipt has been duly received,

that email shall be deemed not to have been served by email and shall instead only be deemed served two Business Days after being sent in accordance with clause 72.3.

72.3.3 Clause 72.3 shall not apply to the service of any notices served pursuant to clause 19 (*Authority step-in*) nor to the service of any notices served pursuant to clause 31.5 (*Notice to Continue*) or clauses 39 (*Voluntary termination by the Authority*) to 43 (*Termination on Authority Default*) nor to the service of any proceedings or other documents in a legal action to which the Civil Procedure Rules apply.

72.3.4 The provisions of this clause 72 shall not apply to operational activity and/or operational communications that occur by virtue of interoperability between the Operator's and the Authority's electronic communication systems.

72.4 **Change of Details**

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

73. **Dispute resolution**

73.1 **Disputes**

Any dispute arising in relation to any aspect of this Agreement or its performance, validity or enforceability ("**Dispute**") shall be resolved in accordance with this clause 73 (*Dispute resolution*).

73.2 **Consultation**

If a Dispute arises:

73.2.1 either party shall give to the other written notice of the Dispute, setting out its nature and full particulars ("**Dispute notice**"), together with relevant supporting documents. On service of the Dispute notice, the Director of Parks, Leisure and Libraries of the Authority and Regional Director of the Operator shall attempt in good faith to resolve the Dispute;

73.2.2 if the Director of Parks, Leisure and Libraries of the Authority and Regional Director of the Operator are for any reason unable to resolve the Dispute within 10 Working Days of service of the Dispute notice, the Dispute shall be referred to the Finance Director of the Authority and Managing Director of the Operator who shall attempt in good faith to resolve it within 10 Working Days of it being referred to them.

73.3 **Mediation**

Subject to clause 73.4 (*Adjudication*), if the Dispute cannot be resolved by the parties pursuant to clause 73.2 (*Consultation*), either party may escalate the Dispute to mediation in accordance with the Centre for Effective Dispute Resolution ("**CEDR**") Model Mediation Procedure ("**Mediation Procedure**") as amended, or any equivalent replacement procedure from time to time, on the following terms:

- 73.3.1 a party must give notice in writing ("**Mediation Notice**") to the other party requesting a mediation;
- 73.3.2 within 10 Working Days of receiving the Mediation Notice, the other party shall respond stating whether or not it agrees that the Dispute should be referred to mediation. If it does not agree that the Dispute should be referred to mediation, no mediation shall take place;
- 73.3.3 upon the consent of both parties to the mediation, a copy of the Mediation Notice shall promptly be sent to CEDR by the party giving it;
- 73.3.4 the procedure in the Mediation Procedure will be amended to take account of any additional agreement which the parties may enter into in relation to the conduct of the mediation;
- 73.3.5 if within 10 Working Days of the Mediation Notice being issued, the parties are unable to agree on the identity of the mediator, these matters shall be determined by CEDR on the application of either party;
- 73.3.6 the appointed mediator shall have full discretion to issue a timetable for the exchange of written position statements together with any other documents relevant to the issue or issues in Dispute, and the parties will endeavour to agree the contents of a core bundle;
- 73.3.7 no party may commence any court proceedings in relation to the whole or part of the Dispute until it has attempted to settle the Dispute by mediation and either the mediation has terminated, or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay; and
- 73.3.8 if for any reason the Dispute is not resolved within 20 Working Days of commencement of the mediation, the Dispute shall be referred to and finally resolved by the courts of England and Wales in accordance with clause 79 (*Governing law and jurisdiction*).

73.4 **Adjudication**

Without prejudice to clause 73.2 (*Consultation*), either party may give the other notice of its intention to refer the Dispute to adjudication (the "**Notice of Adjudication**") in circumstances where referral of the Dispute to adjudication is required under Legislation. The Notice of Adjudication shall include a brief statement of the issue to be referred and the redress sought. The party giving the Notice of Adjudication (the

"Referring Party") shall on the same day and by the same means of communication send a copy of the Notice of Adjudication to an adjudicator selected in accordance with clause 73.4.173.4.1 (*Identity of Adjudicator*) (**"Adjudicator"**).

73.4.1 Identity of Adjudicator

The Adjudicator nominated to consider a Dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of experts selected in accordance with the following:

- 73.4.1.1 there shall be a panel of experts in respect of operational and maintenance matters. All the experts on the panel shall be wholly independent of the Operator, the Authority, the relevant Sub-Contractor and any of the major competitors of the Operator or relevant Sub-Contractor;
- 73.4.1.2 the panel shall be comprised of three experts who shall be selected jointly by the Operator and the Authority. Such selection shall take place within 20 Business Days of the Commencement Date or otherwise as agreed between the parties;
- 73.4.1.3 if any member of a panel resigns during the Contract Period, a replacement expert shall be selected by the Operator and the Authority as soon as practicable;
- 73.4.1.4 in the event that the nominated Adjudicator is unable or unwilling to confirm acceptance of his appointment as Adjudicator within two Business Days of receipt of the Notice of Adjudication, then the Referring Party shall invite the person next in line to act as the Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within two days or if the parties disagree as to the relevant panel of experts to be used then the Referring Party may apply to the President for the time being of the Chartered Institute of Arbitrators who shall within three Business Days of any such application nominate an Adjudicator to determine the issue set out in the Notice of Adjudication; and
- 73.4.1.5 if the Authority and the Operator are unable to agree on the identity of the experts to be selected to the panels, the President for the time being of the Chartered Institute of Arbitrators shall appoint such expert(s) within 30 days of any application for such appointment by either party.

73.4.2 Referral of the Dispute

Within seven days of the service of the Notice of Adjudication, or as soon thereafter as the Adjudicator is appointed, the Referring Party shall serve its statement of case (the **"Referral Notice"**) on the Adjudicator and the other party (the **"Responding Party"**). The Referral Notice shall include a copy of

this Agreement, details of the circumstances giving rise to the Dispute as set out in the Notice of Adjudication, the reasons why the Referring Party is entitled to the redress sought, and the evidence upon which it relies.

73.4.3 Response to the Referral

The Responding Party shall serve its statement of case (the "**Response**") on the Adjudicator and the Referring Party within a period of time to be directed by the Adjudicator. The Response shall include any arguments in response to the Referral Notice of the Dispute set out in the Notice of Adjudication and any additional evidence on which the Responding Party relies.

73.4.4 Procedure

The Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Agreement. The parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.

73.4.5 Adjudicator's Decision

In any event, the Adjudicator shall provide to both parties his written decision on the Dispute, within 28 days after the date of receipt of the Referral Notice (or such other period as the parties may agree). The Adjudicator shall be entitled to extend the said period of 28 days by up to 14 days with the consent of the Referring Party. The Adjudicator shall state any reasons for his decision. Unless and until revised, cancelled or varied by the English courts, the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.

73.4.6 Adjudicator's Costs

The Adjudicator's costs of any referral shall be borne as the Adjudicator shall specify or, in default, equally by the parties. Each party shall bear its own costs arising out of the referral, including legal costs and the costs and expenses of any witnesses.

73.4.7 Adjudicator as Expert

The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an expert, and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.

73.4.8 Adjudicator's Powers

The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement.

73.4.9 Confidentiality

All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by clause 56 (*Confidentiality*), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Adjudicator's work.

73.4.10 Liability of Adjudicator

The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.

73.4.11 Reference to the Courts

Either party may (within 90 calendar days of receipt of the Adjudicator's decision or where the Adjudicator fails to give a decision pursuant to clause 73.4.5 (*Adjudicator's Decision*)) give notice to the other party of its intention to refer the Dispute to the courts of England and Wales for final determination.

73.5 Parties' Obligations

The parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the Dispute and notwithstanding the referral of the Dispute for resolution under this clause 73 (*Dispute resolution*) and shall give effect forthwith to every decision of the Adjudicator and the courts delivered under this clause 73 (*Dispute resolution*).

74. Sole remedy

74.1 Common Law Rights for the Operator

74.1.1 Without prejudice to any entitlement of the Operator:

74.1.1.1 to specific performance of any obligation under this Agreement; or

74.1.1.2 to injunctive relief,

the Operator's sole remedy in relation to matters for which an express right or remedy is stated in this Agreement shall be that right or remedy and the Operator shall have no additional right or remedy arising by common law, in equity, by statute or otherwise.

74.1.2 Subject to clause 43 (*Termination on Authority Default*), the Operator's sole remedy in relation to any Compensation Event shall be the operation of clause 29 (*Compensation events*).

74.2 Common Law Rights of the Authority

74.2.1 Subject to:

74.2.1.1 any other express right of the Authority pursuant to this Agreement; and

74.2.1.2 the Authority's right to claim, on or after termination of this Agreement, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Agreement by the Operator, save to the extent that the same has already been recovered by the Authority pursuant to this Agreement or has been taken into account to calculate any compensation payable pursuant to Part 8 (*Compensation on Termination*),

the sole remedy of the Authority in respect of a failure to provide the Services in accordance with this Agreement shall be the operation of schedule 5 (*Payment and Performance Monitoring System*).

74.2.2 Nothing in clause 74.3 (*No Breach*) shall prevent or restrict the right of the Authority to seek injunctive relief or a decree of specific performance or other discretionary remedies of the court.

74.3 No Breach

The Operator shall not be held to be failing to comply with its obligations under this Agreement to the extent that such failure to comply is a result of the Authority's breach of its obligations hereunder.

74.4 Indirect Losses

Save where stated to the contrary, the indemnities under this Agreement shall not apply and (without prejudice to the Authority's rights under the Payment and Performance Monitoring System) there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever, to the extent that any loss claimed by either party is for Indirect Losses. The Authority agrees that, notwithstanding the foregoing, any Losses of the Operator arising under the Sub-Contracts as originally executed (or as amended in accordance with the terms of this Agreement) which are not of themselves Indirect Losses, shall not be excluded from such a claim solely by reason of this clause 74 (*Sole remedy*).

75. No double recovery

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

76. Counterparts

This Agreement may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

77. Capacity

Save as otherwise expressly provided, the obligations of the Authority under this Agreement are obligations of the Authority in its capacity as a contracting counterparty and nothing in this Agreement shall operate as an obligation upon, or in any other way fetter or constrain the Authority in any other statutory capacity as a Relevant Authority, nor shall the exercise by the Authority of its duties and powers in any other statutory capacity as a Relevant Authority lead to any liability under this Agreement (howsoever arising) on the part of the Authority to the Operator.

78. Interest on late payment

Save where otherwise specifically provided, where any payment or sum of money due from the Operator to the Authority or from the Authority to the Operator under any provision of this Agreement is not paid on the due date, it shall bear interest thereon at the Prescribed Rate from the due date (whether before or after any judgement) until actual payment and it is agreed between the parties that the Prescribed Rate and the provisions of this Agreement relating to the payment of compensation on termination of this Agreement following the occurrence of an Authority Default provide the Operator with a substantial remedy pursuant to sections 8 and 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

79. Governing law and jurisdiction

The Agreement shall be governed by and construed in all respects in accordance with the laws of England and Wales. Subject to clause 73 (*Dispute resolution*), the English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement.

This document is executed as a deed and delivered on the date stated at the beginning of this Deed.