

DATED

2022

(1) WELSH MINISTERS

- and -

(2) [LEAD REGIONAL TRANSPORT AUTHORITY]

- and -

(3) [OPERATOR]

AGREEMENT

relating to
Bus Emergency Scheme 3 in respect of the
areas of the following [*insert all Local
Authorities in the Region*]

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BETWEEN:

- (1) **WELSH MINISTERS** (“**Welsh Government**”);
 - (2) [**LEAD REGIONAL TRANSPORT AUTHORITY**] of [*address*] acting for and on behalf of [*List names of Constituent Local Authorities*] (“**Lead Authority**”); and
 - (3) [**OPERATOR**] of [*address*] registered in England and Wales with company number [*number*] (“**Operator**”),
- (together the “**Parties**”).

BACKGROUND:

- A Welsh Government has been taking action to help bus operators in Wales, including the Operator, get through the inevitable uncertainty of the COVID-19 affected operating conditions, and that such action has enabled the Operator to continue provision of services which could not have been provided by the Operator without this financial support since March 2020. The Operator further acknowledges that the provision of this support has enabled the Operator to retain customers and a network of services which may otherwise have been lost or reduced significantly, and that this will support the Operator’s business in recovering following relaxation of rules on social distancing and other factors which affect bus travel at the date of this Agreement.
- B Funding has been provided by the Welsh Government to bus operators in Wales pursuant to the Bus Hardship Funding letter dated 2 April 2020, the Bus Emergency Scheme 1 letter (“**BES 1**”), Bus Emergency Scheme 1.5 letter (“**BES 1.5**”) and Bus Emergency Scheme 2 agreements (“**BES 2**”) which provided money to bus operators (including the Operator) through the Lead Authority on behalf of its Constituent Local Authorities. Those letters and agreement set out conditions to the Operator receiving such funding (together the “**Previous BES Funding Arrangements**”).
- C The challenges facing the bus industry have changed during the period of BES 2. Whilst the industry has started to recover from, and manage, the impacts of COVID-19 they now face further challenges to their ability to operate the required network of services on a commercial basis. In particular:
- (i) There has been an increase in driver costs of approximately 15% due to on-going driver shortages across the industry, with the shortage in drivers meaning that some operators are relying upon agency staff materially increasing the cost of operation. There is currently a shortfall of 20% in the number of drivers required to drive local bus services across Wales,
 - (ii) There has been a significant increase in fuel costs, as a result of the uncertainty of global fuel markets due to the crisis in Ukraine, leading to an increase in fuel costs of approximately 30% in some parts of Wales since February 2022.
- D These matters (together the “**Driver and Fuel Cost Impacts**”) were not foreseeable at the time that the BES2 agreement was entered into, and are unlikely to reduce in the short term. The funding provided under BES2 currently protects against the impact of these cost increases on the industry, but it is expected that on expiry of that agreement (which cannot be legally further extended) that there is an immediate risk of disruption to services, with operators likely to de-

register services with a material loss of the current network and the benefits that it provides to passengers. Loss of these services may also be difficult to replace if it leads to failure of SME operators across Wales, and could lead to significantly reduced bus networks in the long term, and also impact on associated sectors such as school transport.

- E In providing Bus Emergency Scheme funding under this agreement, Welsh Government wish to ensure that a stable network is maintained and developed, to enable the continued reshaping of Wales' local bus services, to meet the needs of passengers.
- F It is intended that funding provided under this new BES 3 agreement (“**Agreement**”) will ensure that support provided to bus operators is aligned with the provision of bus services that meet with the aim of supporting the management and interaction across transport modes including smart ticketing, unified routing, integrated timetabling and will do this both through specifying public service obligations in respect of the services provided by the operators (including both supported and formerly commercial services) and providing a framework for long term partnership which will continue to cover both supported and commercial bus services into the future.
- G Welsh Government have agreed to: (i) consult with bus operators before making policy changes which affect or are impacted by local bus services and give full consideration to the views expressed, consistent with their duties under the Well-being of Future Generations (Wales) Act 2015; (ii) ensure funding arrangements are clear, communicated and executed in a timely fashion; (iii) recognise and take account, wherever possible, in designing policy for bus regulation of the real costs of operating services, bus provision and employee matters; and (iv) ensure requests for information to bus operators are targeted, minimise unnecessary burdens on operators and involve no more work than is required to achieve the relevant purposes.
- H Welsh Government and TfW shall engage fully and openly with bus operators in the development of the National Transport Delivery Plan, including policies for the delivery of zero carbon bus fleets and for the development of interventions to improve bus journey times through tackling congestion; and (ii) the Constituent Local Authorities shall take action to enhance highways infrastructure, bus facilities and service information, subject to the availability of funding. The Parties acknowledge that the contribution of government to delivering more reliable and predictable services through traffic and congestion reduction and the introduction and improvement of bus priority is crucial to the successful delivery of bus services.
- I As a result this Agreement includes specific requirements in respect of the continued funding and provision of services to support Welsh Government's wider objectives.
- J It is acknowledged that this Agreement is not intended to amend the basis of payments of BSSG and Concessionary Travel Scheme which shall continue to be paid in accordance with their terms subject to, any future reform of such payments with Welsh Government may undertake.

IT IS AGREED:

1. DEFINITIONS AND INTERPRETATION

In this Agreement:

1.1 Unless the context otherwise requires, the following expressions shall have the meanings set out below:

"ADR Notice"	has the meaning given to it in clause 25.2;
"Agreement"	has the meaning given to it in Recital F;
"Alternate Lead Authority"	means Flintshire, Monmouthshire, Swansea, Ceredigion, Powys which has been appointed to assist with disputes in accordance with clause 6.6;
"BES 1"	has the meaning given to it in Recital B;
"BES 1.5"	has the meaning given to it in Recital B;
"BES 2"	has the meaning given to it in Recital B;
"BES 3 Funding"	means funding provided by the Welsh Government to the operators in Wales pursuant to the terms of this Agreement;
"BES Funding Period"	means the period of the BES Previous Funding and the BES 3 Funding;
"BES Previous Funding"	means funding provided by the Welsh Government to operators in Wales pursuant to the Previous BES Funding Arrangements;
"Breach of Requirements"	has the meaning given to it in clause 4.2;
"BSSG"	means Bus Services Support Grant awarded to a Lead Authority by Welsh Government to support and maintain the core strategic bus network, improve connectivity and quality, provide certain bus and other local transport services, and develop close and effective partnership working;
"CMA"	means the Competition and Markets Authority of Victoria House, Southampton Row, London WC1B 4AD;
"Commercially Sensitive"	means in relation to a Disclosing Party that the disclosure of such information is either a trade secret or if disclosed would prejudice the commercial interests of that Party, and shall include any Operator Information identified as Commercially Sensitive in Part 4 of Schedule 4;
"Commercial Service"	means a Local Service which a bus operator provides on a commercial basis and not pursuant to any Existing Supported Services Contract or New Supported Services Contract;
"Confidential Information"	means, in relation to a Disclosing Party: (a) information of whatever nature concerning the business, assets, liabilities, dealings, transactions, policies or affairs of the Disclosing Party including all trade secrets, financial, marketing and technical

information, ideas, concepts, technology, processes, knowledge and know-how, together with all details of a Disclosing Party's, customers, suppliers, prices, discounts, margins, information relating to research and development, current trading performance and future policy or business strategy and all other information of a like nature; and

- (b) any information which is expressly indicated to be confidential or commercially sensitive or which, due to the nature and circumstances of its disclosure or its content might reasonably be considered to be confidential (whether or not marked as such),

in each case in whatever form or medium (including written, electronic, visual and oral) such information is recorded or kept and whether or not created for the purpose of entering into this Agreement or otherwise, and shall include, for the avoidance of doubt, any Operator Data identified as Confidential Information in Part 4 of Schedule 4;

"Constituent Local Authorities"

means a group of local authorities in Wales who are working together and are represented by the Lead Authority (and **"Constituent Local Authority"** shall be interpreted accordingly);

"COVID-19"

means the virus identified and named "COVID-19 virus" by the World Health Organisation which was characterised as a pandemic by the World Health Organisation on 11 March 2020;

"Data Protection Laws"

means GDPR (to the extent applicable), the UK GDPR and the Data Protection Act 2018, and any other applicable laws relating to the processing of Personal Data including the Privacy and Electronic Communication (EC Directive) Regulations 2003 (as amended) and all codes of practice issued by the Information Commissioner;

"Defaulting Party"

means a Party who commits a material breach of its obligations under this Agreement;

"de minimis contracts"

means Local Services contracts entered into pursuant to section 63 of the Transport Act 1985 which have been procured on a direct award basis to secure the provision of such public transport services as are considered appropriate to meet any public transport requirements which would not otherwise be met, pursuant to the exceptions allowed under section 91 Transport Act 1985 by the Service Subsidy Agreements (Tendering) Regulations 1985 as amended;

"Disclosing Party"

means a Party that discloses Confidential Information to one or more Receiving Parties under this Agreement;

"Dispute"	means a dispute or difference arising out of or in connection with this Agreement or any such matter which a Party deems (acting reasonably) to constitute a dispute;
"Driver and Fuel Cost Impacts"	has the meaning given to it in Recital D;
"Economic Contract"	has the meaning given to it in the Welsh Government "Prosperity for All - Economic Action Plan";
"Effective Date"	means 1 August 2022;
"EIR"	means the Environmental Information Regulations 2004;
"Existing Supported Services"	means any Local Services operated pursuant to the terms of an Existing Supported Services Contract;
"Existing Supported Services Contracts"	means contracts for the provision of Local Services in Wales by the Operator that were entered into before the Effective Date pursuant to: <ul style="list-style-type: none"> a) terms let by or on behalf of the Welsh Government pursuant to section 7 of the Transport (Wales) Act 2000; b) contract terms let by one or more local transport authority pursuant to section 63 of the Transport Act 1985 (including, for the avoidance of doubt, any de minimis contracts); or c) any other contract let by one or more local transport authorities in accordance with sections 89 – 92 of the Transport Act 1985;
"Expiry Date"	means 31 March 2023, or such later date as may be specified by Welsh Government pursuant to clause 3.1;
"FOIA"	means the Freedom of Information Act 2000;
"Force Majeure Event"	means any event or occurrence (including fire, flood, violent storm, pestilence, explosion, malicious damage, act of terrorism, epidemic, pandemic, any industrial action by the workforce of an affected Party or by the workforce of a critical or key supplier, armed conflict, acts of terrorism, nuclear, biological or chemical warfare, or any other disaster, natural or man-made) which: <ul style="list-style-type: none"> a) without prejudice to the operation of clause Error! Reference source not found., the affected Party could not reasonably have provided against before entering into this Agreement;

- b) materially adversely affects the ability of a Party to perform its obligations (in whole or in part) under this Agreement;
- c) which is outside the reasonable control of an affected Party;
- d) having arisen, could not reasonably be avoided or overcome by the affected Party;
- e) occurs in the United Kingdom; and
- f) is not attributable to any act or failure to take reasonable preventative action by an affected Party;

“Former Commercial Services”	has the meaning given to it in clause 15.1;
“Funding Review(s)”	means the review carried out in accordance with Schedule 5;
"GDPR"	means Regulation (EU) 2016/679 (General Data Protection Regulation);
“Good and Efficient Operator”	has the meaning given to it in Section 1 to Schedule 3;
“Gross Cost Contract”	means a contract whereby the procuring authority retains the right to receipt of passenger revenue and therefore carries the financial risk in respect of the level of passenger revenue received in respect of services provided under such contract;
"Initial Reference Network"	has the meaning given to it in clause 8.1;
"Intellectual Property Rights"	means patents, rights to inventions, copyright and related rights, trademarks and service marks, business names and domain names, rights in get-up and trade dress, goodwill and the right to sue for passing off or unfair competition, rights in designs, rights in computer software, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how and trade secrets) and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world;
"Interim Reference Network"	has the meaning given to it in clause 8.3;

"Lead Authority"	means a local authority in Wales acting as the Lead Regional Transport Authority for one or more of its Constituent Local Authorities;
"Legislation"	means any Act of Parliament or subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, any Welsh law within the meaning given to it in section 1(3) of the Legislation (Wales) Act 2019, any exercise of the Royal Prerogative, and any enforceable EU right within the meaning of Section 2 of the European Communities Act 1972 (as amended), in each case in the United Kingdom;
"Local Service"	has the meaning given to it in the section 2 of the Transport Act 1985 and for the avoidance of doubt, this shall not include: (i) services materially supported by a private sector party; or (ii) rail replacement services;
"Net Cost Contract"	means a contract whereby the operator retains all passenger revenue and takes the risk in respect of the level of passenger revenue received in respect of services provided under such contract;
"New Supported Services"	means any Local Service operated pursuant to the terms of a New Supported Services Contract;
"New Supported Services Contract"	means contracts for the provision of Local Services in Wales by the Operator that were entered into after the Effective Date pursuant to: <ul style="list-style-type: none"> a) terms let by or on behalf of the Welsh Government pursuant to section 7 of the Transport (Wales) Act 2000; b) contract terms let by one or more local transport authority pursuant to section 63 of the Transport Act 1985 (including, for the avoidance of doubt, any de minimis contracts); or c) any other contract let by one or more local transport authorities in accordance with sections 89 – 92 of the Transport Act 1985;
"New Supported Services Contract Tendering Assumptions"	has the meaning given to it in clause 17.6;
"Operator Data"	means Operator data required to be provided under this Agreement which are confidential or commercially sensitive to the Operator as identified in Part 4 of Schedule 4;
"Operator Companies"	Group means the Operator and any subsidiary, holding company or subsidiary of any holding company of the Operator and "Operator" shall be construed accordingly;

"Part 2 Competition Test"	means the test for certain agreements, decisions and practices as set out in Schedule 10, Part 2 to the Transport Act 2000 as modified;
"Permitted Use"	means the use of data for any purpose specified in Part 3 of Schedule 4;
"Previous BES Funding Arrangements"	has the meaning given to is in Recital B;
"Priorities"	has the meaning given to it in clause 6.2;
"Procurement Programme"	has the meaning given to it in clause 17.2;
"Public Sector Party"	has the meaning given to it in clause 23.1;
"Quality Partnership Schemes" or "QPS"	means a quality partnership scheme as specified in section 114(1) Transport Act 2000;
"Receiving Party"	means a Party which receives Confidential Information from a Disclosing Party;
"Reconciliation Payment"	has the meaning given to it in clause 9.5;
"Reference Network"	means as appropriate, the Initial Reference Network, Interim Reference Network or Revised Reference Network for the Region as developed in accordance with clause 8;
"Region"	means the geographical area for which the Lead Authority and its Constituent Local Authorities are responsible;
"Regulation 1370/2007"	means Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road as amended, including, but not limited to, by the Regulation (EC) No 1370/2007 (Public Service Obligations in Transport) (Amendment) (EU Exit) Regulations 2020;
"Requests for Information"	shall have the meaning set out in the FOIA or any apparent request for information under the FOIA;
"Revised Reference Network"	has the meaning given to it in clause Error! Reference source not found. ;
"Services"	has the meaning given to it in clause 2.1;
"Service Payment"	has the meaning given to it in clause 9.1;
"Service Specification"	has the meaning given to it in clause 6.1;

“Service Standards”	means the service standards to which the Operator agrees to provide Local Services as determined in accordance with clause Error! Reference source not found. , including but not limited to, compliance with the requirements of Schedule 1;
"Subsidy Control and Procurement Constraints"	has the meaning given to it in clause 19.2;
“Subsidised Network”	means those services within the Reference Network which require subsidy to operate from Welsh Government or any Constituent Local Authority;
"Term"	has the meaning given to it in clause 0;
"TfW"	means Transport for Wales Limited, a wholly owned subsidiary of Welsh Government with registered number 09476013 of Llys Cadwyn, Pontypridd, CF37 4TH;
"UK GDPR"	means the GDPR as transposed into United Kingdom national law by operation of section 3 of the European Union (Withdrawal) Act 2018 and as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019;
"Voluntary Welsh Bus Quality Standards"	means the core requirements which eligible local bus services must achieve and maintain in order to attract payments available through BSSG;
“Wales Transport Strategy”	means the draft strategy for the future of transport in Wales, setting out Welsh Government’s ambitions for the next 20 years and their priorities for the next 5 years in the form of the consultation document published here: https://gov.wales/llwybr-newydd ;
“Welsh Bus Open Data Agreement”	means the agreement entered into between (1) TfW and (2) the Operator in relation to the Operator providing certain data to TfW which will enable TfW to build a consistent data set for all services in Wales to improve services for passengers; and
"Working Days"	means any day of the week other than a Saturday, Sunday or Bank Holiday.

1.2 the Schedule(s) form part of this Agreement and will have the same force and effect as if set out in the body of this Agreement and any reference to this Agreement shall include the Schedule(s);

1.3 references to clauses or paragraphs appearing in the main body of this Agreement are, except where expressly stated to the contrary, references to clauses and paragraphs of this Agreement;

1.4 references to any part or paragraph appearing within a Schedule are, except where expressly stated to the contrary, references to such part or paragraph of that Schedule;

- 1.5 references to this Agreement are references to this Agreement as varied, assigned and/or novated in accordance with the provisions of this Agreement from time to time;
- 1.6 references to any other agreement or document are to such agreement or document as varied, assigned or novated from time to time; and
- 1.7 any reference to any Legislation will include any subordinate legislation made under it and will be construed as a reference to such Legislation as modified, amended, extended, consolidated, re-enacted and/or replaced and in force from time to time.

2. SCOPE OF AGREEMENT

- 2.1 This Agreement shall apply in respect of all Local Services provided by the Operator in the Region which are within the Reference Network, including:
 - 2.1.1 Existing Supported Services; and
 - 2.1.2 Former Commercial Services;
 - 2.1.3 Commercial Services; and
 - 2.1.4 New Supported Services,(together the “**Services**”).
- 2.2 Where and to the extent any Existing Supported Services are provided by the Operator pursuant to an Existing Supported Services Contract which is a Gross Cost Contract, clause 12 shall apply.
- 2.3 Where and to the extent any Existing Supported Services are provided by the Operator pursuant to an Existing Supported Services Contract which is a Net Cost Contract, clause 13 shall apply.
- 2.4 Where and to the extent any Local Service provided by the Operator is a Former Commercial Service the provisions of clause 15 shall apply in respect of Former Commercial Services.
- 2.5 Where and to the extent any Local Service provided by the Operator is a Commercial Service, clause 16 shall apply to the Operator in respect of the provision of those services.
- 2.6 Where and to the extent any Local Service provided by the Operator is provided pursuant to a New Supported Services Contract let by a Lead Authority or one of its Constituent Local Authorities after the date of this Agreement the provisions of clause 17 shall apply.
- 2.7 Where any provision of this Agreement is specified as being carried out by one Public Sector Party pursuant to this Agreement, the Public Sector Parties may agree that a representative of another Public Sector shall be able to exercise such rights or may be required to carry out such function or obligation, provided that prior to such exercise, the Public Sector Parties shall jointly notify the Operator of such change of responsibility, and the party originally subject to such obligation shall notify the Operator of the basis upon which the new Public Sector Party is entitled to exercise the relevant powers. To the extent that this clause relates to the discharge of a statutory duty, the performance of such duty shall not be carried out by another Public Sector Party pursuant to this clause 2.7, save to the extent expressly agreed by such Public Sector Parties or in the event where TfW is performing such duties on behalf on the Welsh Government.

- 2.8 It is acknowledged that the Operator and Operator Group Companies may choose to change the way that they provide Local Services. Notwithstanding this, it is acknowledged by the Operator that this Agreement is entered into in respect of all Local Services provided by the Operator in the Region, and the Operator shall procure that, where there is any change in the operation of such services, that any alternative Operator Group Company providing such Local Services shall enter into an agreement on equivalent terms with the Public Sector Parties, and where and to the extent that they do not the Operator shall indemnify the Public Sector Parties against all costs, losses, expenses and claims arising from the Local Services (including Commercial Services) being provided by an Operator Group Company not subject to the provisions of this Agreement or an agreement on equivalent terms.

3. TERM

Subject to clause 3.1, this Agreement shall commence on the Effective Date and shall continue in force until the Expiry Date unless terminated earlier in accordance with the terms of this Agreement ("**Term**").

- 3.1 Welsh Government shall be entitled to extend the Expiry Date to a date later than the Initial Expiry Date, by providing all other Parties at least 90 days' notice of the proposed new Expiry Date, provided that the Expiry Date may never be extended such that the Term exceeds two (2) years.

4. WELSH GOVERNMENT REQUIREMENTS

- 4.1 As a condition of receipt of BES 2 Funding, the Operator shall comply with Welsh Government's requirements as specified in Schedule 1.

- 4.2 Where the Operator is in material breach of any condition contained in Schedule 1 and such breach is not as the direct result of a breach of this Agreement by any Public Sector Party and the Operator fails to remedy such Breach of Requirement (such remedy to include taking all reasonable steps to ensure that such breach is not repeated) within ten (10) days of notification (or such other period of time as is reasonable given the nature of the breach and the steps required to remedy such breach), then the Lead Authority shall be entitled to take such breach ("**Breach of Requirements**") into account in calculating the Service Payments and/or Reconciliation Payments in respect of each period during which such Breach of Requirements is not rectified. To be a valid notification for the purposes of this clause 4.2, the notification shall be provided in writing by the Lead Authority clearly stating "**Breach of Requirement – BES3**" on the notification, and specifying the details of the breach in the notification (and provided that a single notification may relate to more than one breach).

- 4.3 The Operator shall maintain adequate insurances to cover against the risks which may be expected to arise in connection with any activity undertaken in the delivery of their obligations under this Agreement, including, but not limited to, insuring all property required to perform such obligations. The Operator shall provide Welsh Government with proof of such insurances promptly upon request.

5. PARTNERSHIP

- 5.1 The Parties acknowledge and agrees that to minimise the adverse impacts of the Driver and Fuel Cost Impacts on the bus industry in Wales, including the Services, and to maximise the benefits derived from the stability that BES Funding has provided to the bus industry during a period of significant uncertainty for the bus industry, it is necessary that the Parties work in partnership, and the Parties each undertake to co-operate with each other in the development of future partnership arrangements for the bus industry in Wales both within the Region and across

Wales, including, but not limited to, progressing, where appropriate matters detailed in Schedule 2.

6. SERVICE SPECIFICATION

6.1 From the Effective Date, the Operator shall operate its Local Services as it did under the terms of the BES 2 (“**Service Specification**”).

6.2 The Operator shall consult and agree with the Lead Authority and each Constituent Local Authority in whose area a Local Service operates within 30 days of the Effective Date, the specification of the services (including routes, frequencies and hours of operation) that the Operator shall provide. In determining the specification of the services the Parties shall have regard to:

6.2.1 supporting learners’ journeys to school or college on registered local bus services;

6.2.2 increasing frequencies where demand exceeds capacity;

6.2.3 improving accessibility to jobs and services across our regions and communities;

6.2.4 supporting economic recovery; and

6.2.5 ensuring social inclusion,

(together the “**Priorities**”),

provided that the services shall be affordable within the BES 3 Funding allocated to the Operator in accordance with the terms of this Agreement.

6.3 The Operator shall act in good faith to discuss and agree with the Lead Authority and the relevant Constituent Local Authorities any changes in the Local Services required at regular intervals as agreed by the Parties, to ensure that the Local Services continue to meet local needs.

6.4 The Operator shall take all reasonable steps to respond and comply promptly with reasonable requests from the Lead Authority to amend the Local Services operated including:

6.4.1 the routes used by those services;

6.4.2 the hours of operation;

6.4.3 the vehicles used or levels of provision; and

6.4.4 the timetables of such services.

6.5 If, in exceptional circumstances, the Operator cannot reach agreement with the Lead Authority any Constituent Local Authority on the Local Services to be operated in accordance with clause 6.3, then the Operator shall seek to agree the reasonable level of services to be provided with the Lead Authority who shall act reasonably to determine an appropriate service requirement in the context of the BES 3 Funding available and the requirements of the Lead Authority and the relevant Constituent Local Authority, and where such agreement is reached, these service requirements shall apply.

6.6 Where following discussion with the Lead Authority in accordance with clause 6.5, agreement can still not be reached with the Operator then where the Lead Authority has a reasonable belief

that the Operator has not engaged in good faith with any Constituent Local Authority covered by their operations, the Operator and the Lead Authority shall comply with the following process:

- 6.6.1 the Lead Authority shall notify an Alternate Lead Authority (whose identity is to be agreed between the Operator and the Lead Authority or where they cannot agree the identity of the Lead Authority as determined by Welsh Government) in writing, asking for input. Such notice shall provide background information on the issue and reasons why the Lead Authority believes the Operator has not engaged in good faith;
- 6.6.2 upon receipt of such notice, the Alternate Lead Authority shall consider the information provided in the notice and shall promptly request any additional information from the Operator that may be required to consider the dispute;
- 6.6.3 upon receipt of such additional information from the Operator, the Alternate Lead Authority shall consider all responses within fifteen (15) Working Days. The Alternate Lead Authority shall notify both the Operator and the Lead Authority of its decision; and
- 6.6.4 in the event that the Alternate Lead Authority agrees that the Operator has not engaged in good faith, then the Lead Authority may suspend or reduce BES 2 Funding paid to the Operator in respect of the disputed service or services or treat such failure as a Breach of Requirements for the purposes of calculating the Service Payments and Reconciliation Payments under Schedule 3, provided that where the payment in respect of a specific service or services has been suspended or reduced, such failure shall not also be treated as a Breach of Requirements; and
- 6.6.5 in the event that the Alternate Lead Authority agrees that the Operator has engaged in good faith, the BES 3 Funding paid to the Operator shall continue.

7. DATA PROVISION

- 7.1 The Operator shall provide:
 - 7.1.1 the data specified in Part 1 of Schedule 4, in accordance with Part 3 of Schedule 3; and
 - 7.1.2 the data specified in Part 2 of Schedule 4, in accordance with Part 3 of Schedule 3.
- 7.2 The data provided pursuant to this Agreement (including, but not limited to that provided pursuant to clause 7.1) may be used by the Welsh Government, TfW, the Lead Authority and Constituent Local Authorities in the Region solely for the Permitted Uses specified in Part 3 (Permitted Uses) of Schedule 4 to the extent that each Public Sector Party is entitled to access such data as specified in Part 4 of Schedule 4.
- 7.3 Where any Public Sector Party wishes to use any data provided pursuant to this Agreement for any use which is not a Permitted Use, or to use any data which they are not entitled to access pursuant to Part 4 of Schedule 4 they shall only do so having obtained the consent of the Operator, such consent not to be unreasonably withheld.
- 7.4 Where any data is identified as being Commercially Sensitive pursuant to Part 4 of Schedule 4 then each Public Sector Party shall ensure that, even where such data is being utilised in accordance with the Permitted Use that such data is only disclosed in accordance with clauses

21 to 23, and that where the output from the use of such data is disclosed in any manner which could be accessed by any other operator or prospective operator of Local Services which compete with the Local Services, that such data or outputs are aggregated such that no Commercially Sensitive information is published.

7.5 The Parties acknowledge and agree that the data provided pursuant to this clause **Error! Reference source not found.** shall not be used by any Party for:

7.5.1 the purposes of monitoring and/or reporting to the Traffic Commissioner or the DVSA in respect of the Operator's service performance in respect of reliability and timekeeping for any local services operated by that Operator; or

7.5.2 any purpose relating to the potential introduction of a Quality Contract Scheme pursuant to the Transport Act 2000 by any Local Authority or the introduction by any Local Authority of any similar form of franchising arrangement under subsequent legislation,

without the Operator's prior written consent, such consent not to be unreasonably withheld.

7.6 Where any Public Sector Party analyses Operator Data for a Permitted Use with the intention to use that analysis for policy or decision making processes which may materially affect the Operator, such Public Sector Party shall use reasonable endeavours to engage with the Operator prior to use, to allow the Operator to inform such analysis. The Operator acknowledges that compliance with this obligation may not always be practicable, and in particular that a Public Sector Party shall not be obliged to comply with this obligation to the extent that it would breach clause 7.4.

7.7 The Operator shall keep and maintain full and accurate records and accounts on everything to do with this Agreement throughout and for seven (7) years after the date of expiry or termination of this Agreement.

7.8 Where a Public Sector Party is required to audit any information provided by the Operator pursuant to this Agreement, including where Welsh Government has reasonable grounds to believe that any information provided is materially incorrect, then they may appoint an auditor. The Operator shall allow such appointed auditor access to their premises, upon reasonable notice, to verify all accounts and records of everything to do with this Agreement (which is relevant to the issue identified) and provide copies for the audit upon request.

7.9 The Operator shall provide information to the auditor and reasonable co-operation at their request.

7.10 Where any auditor identifies that any information provided by the Operator to any Public Sector Party is materially false or incomplete the relevant Public Sector Party shall be entitled to assess the impact of such false or incomplete information and where this has led to an under-payment to any Public Sector Party or over-payment from any Public Sector Party of the Service Payment, such Party shall be entitled to recover the difference between the amount originally calculated and the amount calculated following correction of the information found to be false or incomplete, and such amount shall be immediately payable by the Operator to such Public Sector Party.

7.11 Where the Operator is not a party to the Welsh Bus Open Data Agreement, the Operator agrees to enter into the Welsh Bus Open Data Agreement within three (3) months of signing this Agreement. In the event of a conflict between the terms of the Welsh Bus Open Data Agreement and this Agreement, the Parties agree that this Agreement shall take priority during the Term

of this Agreement and upon termination or expiry of this Agreement, the Welsh Bus Open Data Agreement shall take priority.

- 7.12 The Parties acknowledge that TfW use third party suppliers to extract/receive and process data. Welsh Government shall therefore procure that TfW shall use reasonable endeavours to hold such third party suppliers to the same requirements specified in this clause 7, as apply to the Parties to this Agreement.

8. REFERENCE NETWORK

- 8.1 The Parties agree that the initial Reference Network ("**Initial Reference Network**") reflects the routes, frequencies and hours of operation of local bus services in Wales prior to COVID-19, specifically as at 29 February 2020 modified by:

8.1.1 any key seasonal variations as demonstrated in the preceding year e.g. a summer tourist timetable;

8.1.2 any changes to services implemented by agreement with a Local Authority or the Lead Authority prior to the inception of BES 3; and

8.1.3 any changes to services authorised by the Lead Authority in accordance with BES1, BES 1.5 or BES 2.

- 8.2 The Parties agree that for the purposes of continued improvement in the provision of local bus services in Wales, it will be necessary to revise the Initial Reference Network to develop a revised Reference Network ("**Revised Reference Network**") which sets out the target requirements for routes and services to be provided across Wales. The Revised Reference Network shall be developed in accordance with this Agreement, including the provision of services in accordance with clauses 12 to 17 below, as well as any changes to services agreed pursuant to Schedule 1. The Parties agree that the Revised Reference Network shall be developed in respect of each Region in line with the local and regional rankings of the Priorities and in support of a coherent Wales wide Revised Reference Network. The Parties shall carry out an interactive process as part of developing the Revised Reference Network, using historical and current passenger demand data to objectively identify the appropriate service provision.

- 8.3 The Parties, together with other operators in the Region, shall work together to develop an updated Reference Network ("**Interim Reference Network**") which shall reflect the network that the Lead Authority, following consultation with the Operator, other operators of Local Services in the Region, Constituent Local Authorities, proposes is operated in the Region, taking into account the current operating environment at 1 August 2022, any temporary reductions in services resulting from the Driver and Fuel Cost Impacts which have been agreed by the Lead Authority, as well as any schools services or seasonal services which are not operating on 1 August 2022 but which are proposed to be operated at the relevant times of the year.

- 8.4 Welsh Government acknowledges that proposed revisions to BSSG funding may materially affect the viability of Local Services within the Interim Reference Network and Revised Reference Network and shall therefore consult where appropriate with operators in respect of such proposals and use reasonable endeavours to provide the Parties with details of any proposed revisions to BSSG funding as soon as practicable within the term of this Agreement to allow such proposals to be taken into account in developing a viable Reference Network for the period following the end of BES Funding.

- 8.5 The development of the Interim Reference Network and Revised Reference Network shall include:
- 8.5.1 use of data provided by all parties with an interest in provision of bus services within the Region, including operators, Lead Authorities or one of its Constituent Local Authorities, TfW and Welsh Government;
 - 8.5.2 consideration of regional strategic Priorities for the provision of Local Services;
 - 8.5.3 consideration of the effects of any Welsh Government proposals for revisions to BSSG funding that may affect the viability of any part of the Interim Reference Network or Revised Reference Network;
 - 8.5.4 examination of existing routes;
 - 8.5.5 exploration of options for new routes;
 - 8.5.6 resource availability, including Driver and Fuel Cost Impacts; and
 - 8.5.7 consideration of investment or other measures that may be required to support any Interim Reference Network or Revised Reference Networks;
 - 8.5.8 consideration of the effect of expiry or termination of this Agreement, and the withdrawal of BES Funding.
- 8.6 The Lead Authority shall manage compliance with the Interim Reference Network and Revised Reference Network in accordance with the requirements set out in Schedule 1.

9. PAYMENTS AND RECONCILIATION PROCESSES

- 9.1 The Lead Authority shall pay the Operator a service payment calculated in accordance with Part 2 of Schedule 3 (“**Service Payment**”) in relation to the Services provided pursuant to and in accordance with this Agreement. If the Operator disputes the amount of the Service Payment then such dispute shall be resolved in accordance with clause 25.
- 9.2 For the avoidance of doubt, the Operator shall not be entitled to recover more than once in respect of the same amount, including that the Operator shall not be entitled to recover any amount payable pursuant to the Previous BES Funding Arrangements pursuant to this Agreement.
- 9.3 In the event that the Operator is successful in obtaining any other governmental support or support from any Lead Authority or one of its Constituent Local Authorities or other such body that is offered in relation to the same impacts and/or the same costs, this shall be taken into account in relation to the relevant Service Payment such that the Operator does not benefit from double recovery or double counting.
- 9.4 The Operator shall comply with the reconciliation process detailed in Part 3 of Schedule 3. The Parties acknowledge that Schedule 3 assesses the basis on which the Operator is paid, and includes provisions to ensure that such payments, following reconciliation, do not lead to over-compensation or illegal subsidy. Notwithstanding any other remedies that the Lead Authority, Welsh Government may have pursuant to this Agreement or otherwise for provision by the Operator of false or misleading information, it shall be a material breach of this Agreement for the Operator to fail to accurately provide the information specified in Schedule 3. For the avoidance of doubt, it will be necessary to provide information in respect of all Local Services

provided by the Operator, including any Commercial Services to ensure transparency of costs and revenues.

- 9.5 Where following any reconciliation process carried out pursuant to Part 3 of Schedule 3, the Lead Authority identifies that an overpayment or an underpayment has been made, the Lead Authority shall be entitled to require either clawback of such amount or pay such amount (“**Reconciliation Payment**”), calculated in accordance with Part 3 of Schedule 3. The Lead Authority shall provide the Operator with detailed calculations confirming the Reconciliation Payment to be returned to the Lead Authority or paid to the Operator.
- 9.6 The Parties acknowledge and agree that Welsh Government may carry out Funding Reviews in accordance with the provisions of Schedule 5 and the Parties shall agree, acting reasonably, such amendments to this Agreement, as may be reasonably required to reflect the outcomes of each Funding Review.

10. POST BES 3

- 10.1 The Parties agree and acknowledge that by no later than the Expiry Date it is all Parties’ intention that all of the Operator’s Local Services which operate in Wales shall either be:
- 10.1.1 operated as a Commercial Service; or
- 10.1.2 operated pursuant to a New Supported Services Contract or the original terms and conditions of an Existing Supported Services Contract (including in each case any such contract which is let as a *de minimis* contract).
- 10.2 Where all Local Services operated by the Operator in Wales are operated in accordance with clause 10.1 then no further payments shall be made pursuant to this Agreement and the Operator shall be entitled to terminate this Agreement by agreement with the Lead Authority and Welsh Government, such consent not to be unreasonably withheld.

11. TERMINATION

- 11.1 This Agreement, or a Party's participation in this Agreement, may be terminated in accordance with the provisions of this clause 11.

Defaulting Party Material Breach

- 11.2 In the event of a material or persistent breach of this Agreement by a Defaulting Party, the non-Defaulting Party may give four (4) weeks’ written notice of their intention to terminate this Agreement, setting out in sufficient detail the acts or omission of the relevant Defaulting Party giving rise to such breach or breaches. If the Defaulting Party does not, to the reasonable satisfaction of the non-Defaulting Party, remedy the breach or breaches and the consequences of such breach within such notice period, the non-Defaulting Party may terminate this Agreement. .

Insolvency

- 11.3 Any non-Defaulting Party may by written notice terminate its participation in this Agreement where another Party ("**Insolvent Party**"):
- 11.3.1 passes a resolution for its winding up or summons a meeting to pass any such resolution (other than for the purpose of and followed by a solvent reconstruction or amalgamation);

- 11.3.2 has a petition for a winding-up order presented against it (other than for the purpose of and followed by a solvent reconstruction or amalgamation);
- 11.3.3 has an application made to court, or an order made, for the appointment of an administrator or any step is taken to appoint an administrator in respect of the Insolvent Party;
- 11.3.4 has a receiver, administrative receiver, receiver and manager or similar officer appointed by any person of all or any part of the Insolvent Party's property, assets or undertaking;
- 11.3.5 makes a proposal for a voluntary arrangement as defined in Section 1 of the Insolvency Act 1986;
- 11.3.6 enters into any other arrangement with its creditors or any of them;
- 11.3.7 takes or suffers any other action in consequence of debt including, without limitation, giving notice to its creditors or any of them that it has suspended or is about to suspend payment; or
- 11.3.8 has a proposal or threat to do any of the above acts or things made; or an event analogous to the aforesaid occurs in whatever jurisdiction.

Continuing Force Majeure

- 11.4 No Party shall be liable to any other Party for any delay in, or failure to perform its obligations under this Agreement arising (in whole or in part) from any Force Majeure Event, provided that the affected Party shall:
 - 11.4.1 as soon as reasonably practicable, send to the other Parties a written notice setting out the circumstances of the event and its anticipated effect; and
 - 11.4.2 use all reasonable endeavours to minimise the effect of any such circumstances.
- 11.5 If the affected Party's ability to perform its obligations under this Agreement is materially adversely affected (in whole or in part) due to a Force Majeure Event continuing for a period of six (6) months or more, any Party may terminate the affected Party's participation in this Agreement with immediate effect by serving written notice to the other Parties, provided that no such notice shall be served until the Parties have met in good faith to discuss and seek to agree whether this Agreement should continue in modified form (agreement to such not to be unreasonably withheld).

Termination by agreement of the Parties

- 11.6 This Agreement may be terminated in respect of all Parties or in respect of any one party at any time with immediate effect by written consent of all Parties that it be so terminated.
- 11.7 This Agreement shall be terminated in respect of any Party, subject to the agreement of the other Parties (all acting reasonably), that disposes of its business in accordance with clause 28.2.

Funding Reviews

- 11.8 This Agreement may be terminated on notice provided by Welsh Government to the Operator, in accordance with paragraph 1.3.3 of Schedule 5 following a Funding Review.

Operator withdrawal

- 11.9 This Agreement may be terminated on notice 13 weeks' notice from the Operator to the other Parties, in the event where the Operator intends to withdraw from the Welsh bus market.

Effect of Termination

- 11.10 The termination of this Agreement for any reason:
- 11.10.1 shall be without prejudice to any rights or obligations which shall have accrued or become due prior to the date of termination;
 - 11.10.2 shall not prejudice the rights or remedies which any Party may have in respect of any breach of the terms of this Agreement prior to the date of termination; and
 - 11.10.3 shall not impact upon any clawback of BES 3 Funding which is to be made (including any clawback of BES 3 Funding still to be calculated) in accordance with Schedule 3.
- 11.11 Where the Operator intends to withdraw from the Welsh bus market and terminates this Agreement in accordance with clause 11.9, the Operator shall provide 28 days' written notice to Welsh Government where it intends to dispose of any of the assets of its business in the Welsh market, and the Operator shall provide Welsh Government with a reasonable opportunity to purchase those assets on fair terms.

12. EXISTING SUPPORTED SERVICES: GROSS COST

- 12.1 The Parties acknowledge that the Operator operates Existing Supported Services on the date of this Agreement which are contracted in whole, or in part, pursuant to Existing Supported Services Contracts.
- 12.2 Where an Existing Supported Services Contract is let as a Gross Cost Contract:
- 12.2.1 the Operator acknowledges that the relevant Constituent Local Authority (or Welsh Government where the Existing Supported Services Contract is let pursuant to section 7 Transport (Wales) Act 2006) remains at risk for passenger revenue, and that any payments made to the Operator in respect of such Local Services pursuant to this Agreement shall relate solely to additional costs incurred by the Operator in providing services in accordance with the terms of such Gross Cost Contract, as a result of the impact of the Driver and Fuel Cost Impacts on the operation of that Existing Supported Services;
 - 12.2.2 the Operator (and the Lead Authority on behalf of the relevant Constituent Local Authority) agree that each Existing Supported Services Contract shall be varied to:
 - 12.2.2.1 allow such additional payments to be made by the Lead Authority on behalf of the Constituent Local Authority to the Operator in accordance with the terms of this Agreement; and

12.2.2.2 revise the services provided in agreement with the Constituent Local Authority and the Lead Authority and align payment with the revised services.

It is acknowledged that the variation in such payments shall be limited to those which are required to deal with the Driver and Fuel Cost Impacts, and that the modifications are not substantial within the meaning of Regulation 88 (1)(f) Utilities Contracts Regulations 2016 or Regulation 72(1)(f) Public Contract Regulations 2015, as the case may be;

12.2.3 the Operator agrees that more than one amendment may be made pursuant to clause 12.2.2, during the term of this Agreement, provided that those changes shall be made solely for the purposes of reflecting required changes to local bus services to reflect the Driver and Fuel Cost Impacts, and that such changes shall not change the economic balance of the contract in favour of the bus operator nor alter the overall nature of the Existing Supported Services Contract;

12.2.4 the Operator and the Lead Authority acknowledge that the payments made pursuant to this Agreement in respect of such Gross Cost Contracts are made pursuant to a valid variation to the Existing Supported Services Contracts between the Constituent Local Authority and the Operator. The Operator agrees to execute such other documents, as may be required to effect such variation, and the Lead Authority undertakes to obtain any variation documents executed by the Constituent Local Authority as may be required to effect such variation; and

12.2.5 on a continuing basis, the Lead Authority may carry out a further review of each Existing Supported Services Contract to assess whether any further variation is needed or determinate whether the service remains necessary to be supported in accordance with the review process under clause 6.3.

13. EXISTING SUPPORTED SERVICES: NET COST

13.1 The Parties acknowledge that the Operator operates Existing Supported Services on the date of this Agreement which are contracted in whole, or in part, pursuant to Existing Supported Services Contracts.

13.2 Where such Existing Supported Services Contract is a Net Cost Contract:

13.2.1 the Parties acknowledge that the Operator is at risk for passenger revenue under the terms of the Net Cost Contract with the relevant Lead Authority or one of its Constituent Local Authorities (or Welsh Government where the Existing Supported Services Contract is let pursuant to section 7 Transport (Wales) Act 2006), and that any payments made to the Operator in respect of such Local Services pursuant to this Agreement shall relate solely to:

13.2.1.1 additional costs incurred by the Operator in providing services in accordance with the terms of such Net Cost Contract, as a result of the impact of Driver and Fuel Cost Impacts on the operation of that Existing Supported Services; and

13.2.1.2 the impact on passenger revenue beyond that which was foreseeable by the Operator and/or the Lead Authority or one of its Constituent Local Authorities at the time that such Existing Supported Services Contract was let,

- 13.2.2 the Operator (and the Lead Authority on behalf of the relevant Constituent Local Authority) agree that each Existing Supported Services Contract shall be varied to:
- 13.2.2.1 allow such additional payments to be made by the Lead Authority on behalf of the Constituent Local Authority to the Operator in accordance with the terms of this Agreement; and
 - 13.2.2.2 revise the services provided in agreement with the Constituent Local Authority and the Lead Authority.

It is acknowledged that the variation in such payments shall be limited to those which are required to deal with Driver and Fuel Cost Impacts, and that the modifications in respect of any changes to service provision are not substantial within the meaning of Regulation 88 (1)(f) Utilities Contracts Regulations 2016 or Regulation 72(1)(f) Public Contract Regulations 2015, as the case may be, and that the payments in respect of loss of passenger revenue are made due to the immediate and continuing risk of disruption of passenger services as a result of the loss of that passenger revenue,

- 13.2.3 the Operator agrees that more than one amendment may be made pursuant to clause 13.2.2.2, during the term of this Agreement, provided that those changes shall be made solely for the purposes of reflecting required changes to local bus services to reflect Driver and Fuel Cost Impacts, and that such changes shall not change the economic balance of the contract in favour of the operator nor alter the overall nature of the Existing Supported Services Contract;
- 13.2.4 the Operator agrees that, where payments made relate to the effect of Driver and Fuel Cost Impacts on passenger numbers, the extent to which those payments relate to costs which would have been funded from passenger revenue, save for the effect of Driver and Fuel Cost Impacts, that the Lead Authority shall be entitled to limit the payments made in respect of such costs for the period that the risk associated with passenger revenue loss is materially greater than that which was reasonably foreseeable at the date of the relevant agreement;
- 13.2.5 payments made by the Lead Authority to the Operator pursuant to this Agreement in respect of Existing Supported Services pursuant to a Net Cost Contract shall be only made for the period, and to the extent that, the provision of services under the relevant Net Cost Contract are affected by Driver and Fuel Cost Impacts;
- 13.2.6 the Operator and the Lead Authority acknowledge that the payments made pursuant to this Agreement in respect of such Net Cost Contracts are made pursuant to a valid variation to the Supported Services Existing Contract between the relevant Constituent Local Authority and the Operator; and
- 13.2.7 on a continuing basis, the Lead Authority may carry out a further review of each Existing Supported Services Contract to assess whether any further variation is needed or determinate whether the service remains necessary to be supported in accordance with the review process under clause 6.2.

14. REVERTING TO ORIGINAL CONTRACT TERMS FOR EXISTING SUPPORTED SERVICES

- 14.1 The Parties acknowledge that any Existing Supported Services Contract varied in accordance with clause 12 and 13, shall revert to the terms specified immediately prior to such variation

(subject to any other variation to such contract agreed by the Parties to that contract) when the following criteria are achieved:

- 14.1.1 the service operating to a specification materially the same as that at 29 February 2020, subject to any other variation of such contract; and
- 14.1.2 the Operator electing to return to the terms of the original Existing Supported Services Contract,

and the Operator acknowledges that in such circumstances they shall cease to receive BES 3 Funding in accordance with clause 10.

15. SUPPORTED SERVICES CONTRACTS FOR FORMER COMMERCIAL SERVICES

15.1 The Parties acknowledge that the Operator has historically operated Commercial Services, but due to:

- 15.1.1 the effects of COVID-19, those Commercial Services were no longer commercially viable; and
- 15.1.2 the Driver and Fuel Cost Impacts, those Commercial Services are currently not commercially viable; and

support for the continuation of the services was and is required from Welsh Government. Such support was received prior to the date of this Agreement through BES Funding provided pursuant to the Previous BES Funding Arrangements. The Parties further acknowledge that the Previous BES Funding Arrangements were implemented on the basis of payments being made under the following powers:

- 15.1.3 use of grant aid under section 154 Transport Act 2000; or
- 15.1.4 payments made pursuant to section 7 of the Transport (Wales) Act 2006,

(“**Former Commercial Services**”).

15.2 The Operator acknowledges that in the absence of Service Payments made pursuant to this Agreement the Operator would not be able to continue to operate the relevant Former Commercial Service or would not be able to operate the Former Commercial Services to the Service Standards.

15.3 The Lead Authority acknowledges that it would not have funded such Former Commercial Services to the Service Standards unless provided with financial support by Welsh Government.

15.4 The Lead Authority agrees to support the Former Commercial Services pursuant to the terms of this Agreement through the payment of Service Payments in accordance with Schedule 3, provided that the Operator in operating the Former Commercial Services, shall at all times comply with the prevailing Service Specification.

16. COMMERCIAL SERVICES

16.1 Where the Operator registers a Commercial Service which has not been discussed and agreed by the Lead Authority or one of its Constituent Local Authorities or which does not otherwise comply with the applicable Service Standards, then save where the specification of such

Commercial Service has been agreed in accordance with clause 16.2.2, the Operator acknowledges and agrees that:

16.1.1 Welsh Government or any Local Authority in the area in which such service is operated may determine that notwithstanding the operation of the Commercial Service, that the service in question is not being provided to the applicable Service Standard required, in accordance with section 7(4) Transport (Wales) Act 2006 or section 63(5) Transport Act 1985 and that Welsh Government or the relevant Local Authority may determine that a service that meets the applicable Service Standard may be let in accordance with clause 17.

16.1.2 such Commercial Service shall not be taken into account for the purposes of calculation of the Service Payment, and to the extent that any costs are incurred in respect of such Commercial Service such costs shall be Inadmissible Costs for the purposes of this Agreement.

16.2 Where the Operator registers a Commercial Service which will operate:

16.2.1 in accordance with the applicable Service Standards; or

16.2.2 in accordance with a variation to the Service Standards as agreed by the Operator, Lead Authority and Welsh Government on the grounds that, for example, the specified standard for the hours of operation or frequency of the service are not financially viable or required,

then the Parties acknowledge that such service shall be operated as a Commercial Service for the purposes of this Agreement, but shall or the avoidance of doubt, remain subject to the terms of this Agreement.

17. SERVICES TENDERED AFTER THE DATE OF THIS AGREEMENT

17.1 The Parties agree that the Lead Authority or one of its Constituent Local Authorities or Welsh Government may let New Supported Services Contracts including where:

17.1.1 an Existing Supported Service Contract expires or terminates;

17.1.2 the Operator chooses to cease operation of a Former Commercial Service; or

17.1.3 a new route is identified as part of the Reference Network which is not operated as a Commercial Service or any Commercial Service does not comply with clause 16.2,

in each case where the relevant Local Authority or Welsh Government determine that the provision of such service is appropriate for meeting public transport requirements in the relevant area.

17.2 Welsh Government acknowledge that in order to allow the Operator to determine the services it will be able to deliver following the Expiry Date ("**Post BES Services**") and the extent to which they will reflect the Revised Reference Network any proposals for reforms to BSSG funding and any funding support that it may be proposed to provide to Constituent Local Authorities to support New Supported Service Contracts will be discussed so far as practicable during development with the Parties and should be notified to the Operator and the Lead Authority as soon as practical following their development.

- 17.3 The Operator shall no later than six (6) months prior to the Expiry Date, notify the Lead Authority of the local services which it expects to operate immediately following the Expiry Date, specifying the extent to which in the Operator's opinion, acting reasonably, this may be affected by BSSG funding levels and the extent of funding provided for New Supported Service Contracts (whether let to the Operator on a *de minimis* basis or whether procured) and the extent to which this may affect the ability of the Operator to provide services within the Interim Reference Network or Revised Reference Networks either commercially or as part of the Subsidised Network ("**Post BES Service Proposals**"). The Operator, Lead Authority and Welsh Government shall discuss the Post BES Service Proposals in the context of any proposals to reform BSSG Funding and the proposed funding for New Supported Service Contract to inform the funding that may be provided by Welsh Government and the Constituent Authorities to support bus services in Wales from the Expiry Date, and where Welsh Government or the Lead Authority provide details of revisions to the proposed funding support, the Operator shall use reasonable endeavours to promptly revise their Post BES Service Proposals to inform such revisions. Welsh Government and the Lead Authority acknowledge that the Operator has obligations to inform employees who may be affected by service variation or cancellation and notify the traffic commissioner of the same prior to any such variation or cancellation and that they shall therefore use reasonable endeavours to provide the operator with certainty on such proposals in sufficient time to allow for any required consultation and variations or cancellations. Welsh Government acknowledge that in order to allow the Operator to determine the likely Post BES Services any proposals for reforms to BSSG funding should be notified to the Operator as soon as practical following their development.
- 17.4 The Operator shall continue to update Welsh Government and the Lead Authority on any material changes to its Post BES Services which it expects to make as a result of any changes in the operating environment (including Driver and Fuel Cost Impacts), BSSG Funding, funding for New Supported Service Contracts or other revenue streams that may support services in the Interim Reference Network or Revised Reference Network, including notifying the Lead Authority of any service registrations, variations or cancellations which it may notify to the traffic commissioner.
- 17.5 Based upon its understanding of the Post BES Service proposals of each operator (including the Operator) in its Region, the Lead Authority and the relevant Constituent Local Authority shall no later than four (4) months prior to the Expiry Date set out a programme to tender key services that are otherwise at risk of not meeting the requirements of clause 10.1 prior to 1 April 2023 when this contract shall terminate ("**Procurement Programme**"). The Procurement Programme shall be developed in consultation with the Operator and other operators and plans to tender New Supported Service Contracts within the Procurement Programme shall be prioritised to take account of:
- 17.5.1 the prevailing bus market conditions including any continued Driver and Fuel Cost Impacts on the performance of the bus market;
 - 17.5.2 the estimated time frame for meeting the requirements of clause 10.1; and
 - 17.5.3 the extent to which each service is required for the purposes of operating the Reference Network and delivering its intended benefits.

The Procurement Programme shall be reviewed by the Lead Authority every month and revised as necessary in consultation with the Operator, other operators and stakeholders to take account of changes which affect the priorities detailed in clauses 17.5.1 to 17.5.3, including taking into account any service registrations, cancellations or variations that the Operator may notify to the traffic commissioner which affect its Post BES Services

- 17.6 Where a Lead Authority, one of its Constituent Local Authorities or Welsh Government tenders a New Supported Services Contract following the date of this Agreement, the tender for such New Supported Services Contract shall specify the assumptions that are to be made by all bidders regarding payments (if any), to be made pursuant to this Agreement to the operator of services under that New Supported Services Contract, and the relevant Public Sector Party shall ensure that the same assumptions are provided to all tenderers for such Contract (“**New Supported Services Contract Tendering Assumptions**”); or
- 17.7 the Parties acknowledge, that where any Public Sector Party, specifies in advance to the requirements for any New Supported Services Contract (including the New Supported Services Contract Tendering Assumptions) and the Operator enters into such New Supported Services Contract, the Lead Authority shall make payments under this Agreement in respect of such New Supported Services Contract in accordance with the New Supported Services Contract Tendering Assumptions, provided that the Operator provides such services in accordance with the Service Standards.
- 17.8 The Parties acknowledge that any information provided by the Operator pursuant to this Clause 17 shall be Confidential Information for the purposes of this Agreement, and may be used by Welsh Government, the Lead Authority and other Public Sector Parties solely for the purposes of this Agreement, which shall include, for the avoidance of doubt, the development for proposals relating to BSSG, other funding of bus services in Wales and the Subsidised Network.

18. SURVIVAL

- 18.1 This clause 18 and the following provisions (and any clauses/Schedules referred to in them/and or necessary in order to give effect to them) shall survive termination of this Agreement:
- 18.1.1 clauses 1 (*Definitions and Interpretation*);
 - 18.1.2 clause 20 (*Intellectual Property*),
 - 18.1.3 clause 21 (*Confidentiality*),
 - 18.1.4 clause 22 (*Data Protection*),
 - 18.1.5 clause 23 (*Freedom of Information*),
 - 18.1.6 clause 25 (*Dispute Resolution*);
 - 18.1.7 clause 36 (*Governing Law and Jurisdiction*); and
 - 18.1.8 Schedule 3 (*Compensation*) to the extent required for the purposes of any reconciliation of payments following the date of termination,

which shall continue in force after such termination.

19. FUNDING AND CONSTRAINTS

- 19.1 Each Party shall be responsible for funding their own obligations under this Agreement, save where the funding of any obligation is expressly specified in this Agreement, and otherwise in accordance with this clause 19.
- 19.2 It is acknowledged that funding from (or provisions of works, services or supplies which have been funded by) the Welsh Government is subject to constraints on public spending, including

the application of UK rules in respect of subsidy control and procurement ("**Subsidy Control and Procurement Constraints**"). It is acknowledged that Welsh Government, TfW and the Lead Authority shall not be required to fund or deliver anything pursuant to this Agreement which would be in breach of such requirements.

- 19.3 Where any Party is unable to perform an obligation under this Agreement due to Subsidy Control and Procurement Constraints the Parties agree to work together in good faith to determine those changes required to this Agreement whilst not breaching such requirements. It is acknowledged that this may include the Parties working together to identify exemptions which may be applicable and where necessary engaging with third parties including the CMA in order to implement the terms of this Agreement.

20. INTELLECTUAL PROPERTY RIGHTS

- 20.1 To the extent that any Intellectual Property Rights are generated pursuant to the terms of this Agreement, the Parties agree that:

20.1.1 such Intellectual Property Rights shall remain the absolute property of the Party which generated such rights; and

20.1.2 such Party shall hereby grant to the other Party a perpetual, irrevocable, non-exclusive, fully paid up and royalty free licence (with the right to sub-licence) to use such Intellectual Property Rights for any purpose relating to this Agreement or any successor agreement.

21. CONFIDENTIALITY

General

- 21.1 The Parties agree that the provisions of this Agreement shall not be treated as Confidential Information and may be disclosed without restriction.

- 21.2 Each Receiving Party shall:

21.2.1 keep the Disclosing Party's Confidential Information confidential;

21.2.2 use the Confidential Information (or any part thereof) only in connection with performing its obligations under the Agreement; and

21.2.3 subject to clause 21.4 and 23, not disclose the Confidential Information to anyone without the prior written consent of the Disclosing Party.

- 21.3 Data provided by the Operator pursuant to clause **Error! Reference source not found.** or otherwise pursuant to the terms of this Agreement shall be deemed to be Confidential Information where it is identified as such in the table at Part 4 of Schedule 4.

Exceptions

- 21.4 The consent referred to in clause 21.2.3 shall not be required for the disclosure by a Receiving Party of any Confidential Information which:

21.4.1 is disclosed to:

21.4.1.1 the CMA; or

- 21.4.1.2 the Department for Transport,
- 21.4.2 at any time comes into the public domain otherwise than as a result of breach of this Agreement by the Receiving Party;
- 21.4.3 is disclosed to the Receiving Party's officers, contractors or agents, in each case to the extent required to enable the Receiving Party to carry out its obligations under this Agreement provided that the Receiving Party makes such person aware of the Receiving Party's obligations under this Agreement and the Receiving Party requires such person to observe the same restrictions on the use of the relevant information as are contained in clause 21.2;
- 21.4.4 is disclosed to the Receiving Party's professional advisers who are bound to such Receiving Party by a duty of confidence which applies to any information disclosed;
- 21.4.5 is received from a third party who is not in breach of any relevant duty of confidence whether express or implied;
- 21.4.6 is independently developed without access to the Confidential Information; or
- 21.4.7 is required to be disclosed by any applicable law or regulatory requirement to which the Receiving Party is subject or pursuant to any order of the court or other competent regulatory authority or tribunal.
- 21.5 These restrictions and prohibition on use, exploitation, communication and disclosure set out in this clause 21 shall continue to apply after the expiration or termination of the Agreement in respect of any Confidential Information for such period of time as such information remains Confidential Information..

Required Disclosure

- 21.6 If the Receiving Party becomes required, in circumstances contemplated by clause 21.4.7 to disclose any Confidential Information, the Receiving Party shall (save to the extent prohibited by law) give to the Disclosing Party such notice as is practical in the circumstances of such disclosure and shall co-operate with the Disclosing Party, having due regard to the Disclosing Parties' views, and take such steps as the Disclosing Party may reasonably require in order to enable it to mitigate the effects of, or avoid the requirements for, any such disclosure.

Remedy

- 21.7 The Public Sector Parties acknowledge and agree that money damages may not be an adequate remedy for any breach or threatened breach of this clause 21 and that a breach by any Public Sector Partner of this clause 21 may result in immediate and irreparable competitive injury. The Public Sector Parties therefore agree that in addition to any other remedies that may be available, by law or otherwise, the Operator shall be entitled to seek injunctive relief against any breach or threatened breach of this clause 21 by the Public Sector Parties.

22. DATA PROTECTION

- 22.1 In this clause 22, the expressions "**Process/Processing**", "**Controller**", "**Processor**" "**Data Subject**", "**Personal Data Breach**" and "**Supervisory Authority**" shall have the same meaning as in the Data Protection Laws.

- 22.2 Each Party shall Process Personal Data under this Agreement as a separate Controller, and shall comply at all times with its respective obligations under Data Protection Laws.
- 22.3 In respect of any disclosures of Personal Data by one Party ("**Personal Data Disclosing Party**") to another Party ("**Personal Data Receiving Party**"), the Personal Data Receiving Party shall:
- 22.3.1 only Process the disclosed Personal Data where reasonably necessary for the purposes of performing its obligations, or exercising its rights, under this Agreement (including in respect of any onward disclosures to third parties);
 - 22.3.2 not transfer Personal Data outside the UK and EEA without the prior written consent of the Personal Data Disclosing Party; and
 - 22.3.3 notify the Personal Data Disclosing Party without undue delay upon becoming aware of any Personal Data Breach involving the Personal Data.
- 22.4 Each Party shall co-operate with the other, to the extent reasonably requested, in relation to:
- 22.4.1 any requests from Data Subjects to exercise rights under the Data Protection Laws;
 - 22.4.2 any other communication from a Data Subject concerning the Processing of their Personal Data; and
 - 22.4.3 any communication from a Supervisory Authority concerning the Processing of Personal Data, or compliance with the Data Protection Laws.

23. FREEDOM OF INFORMATION

- 23.1 The Operator shall cooperate to facilitate Welsh Government, Tfw and each Lead Authority acting for its Constituent Local Authorities (together the "**Public Sector Parties**" and each a "**Public Sector Party**") in complying with their respective obligations under the FOIA and the EIR, together with any guidance and/or codes of practice issued from time to time by the Information Commissioner or the Secretary of State, in the manner provided for in this clause 23, which shall apply whenever any Public Sector Party receives a Request for Information which in that Public Sector Party's reasonable opinion is likely to involve the disclosure of Confidential Information.
- 23.2 Where the relevant Public Sector Party receives a Request for Information in relation to Operator Confidential Information it shall notify the Operator in writing of the Request for Information as soon as practicable after receipt and in any event within five (5) Working Days of receiving a Request for Information and shall consult in good faith with the Operator to ascertain whether disclosure of the requested information would be likely to prejudice the commercial interests of the Operator for the purposes of section 43(2) of FOIA or regulation 12(5)(e) of EIR.
- 23.3 Where the relevant Public Sector Party receives a Request for Information relating Operator Confidential Information, the relevant Public Sector Party shall keep the Operator fully informed and the Operator shall provide all necessary assistance reasonably requested by the relevant Public Sector Party to enable the Welsh Government or Tfw to respond to a Request for Information in accordance with Section 1 and Section 10 of the FOIA or regulation 5 of the EIR.

- 23.4 The relevant Public Sector Party agrees that (and shall procure that the Constituent Local Authorities agree that) Operator Data shall, for the purposes of the FOIA, constitute:
- 23.4.1 exempt information pursuant to Part 2 of the FOIA which is provided to the Welsh Government and TFW in confidence and that disclosure of the Operator Data would constitute a breach of confidence actionable by the Operator; and/or
 - 23.4.2 exempt information pursuant to Part 2 of the FOIA in that it constitutes either a trade secret of the Operator and/or information which if disclosed to the public would prejudice the commercial interests of the Operator and the Welsh Government and TFW will therefore treat all Operator Data as exempt for the purposes of the FOIA.
- 23.5 In the event that notwithstanding the provisions of clause 23.4, any Public Sector Party is bound by the FOIA to disclose any Operator Data to the public, the relevant Public Sector Party shall nonetheless provide the Operator with a minimum of 24 hours written notice prior to the disclosure of any such data.

24. COMPETITION AND PROCUREMENT LAW

- 24.1 The Parties have considered the application of competition law to this Agreement, and are satisfied that this Agreement complies with competition law at the date of this Agreement.
- 24.2 The Parties have considered the application of procurement law to this Agreement, and are satisfied that:
- 24.2.1 this Agreement does not breach the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016 or Regulation 1370/2007;
 - 24.2.2 that payments in respect of, and the provision of, services by the Operator pursuant to the terms of this Agreement are consistent with the requirements of article 5 of Regulation 1370/2007.
- 24.3 Notwithstanding clause 24.1 to 24.2, if:
- 24.3.1 statements by, advice from, or decisions by competent authorities (including, but not limited to, the CMA) provides additional detail or guidance in relation to the applicability of competition law to this Agreement which may impact on the position of this Agreement;
 - 24.3.2 statements by, advice form, or decisions by competent authorities impact on the position of this Agreement under procurement law,
- the Parties agree to:
- 24.3.3 meet in good faith and review the impact of such change or other developments on this Agreement; and
 - 24.3.4 make any amendment necessary to ensure that this Agreement complies with applicable competition law or procurement law then in force in the light of such development, whilst taking account of the Parties' commercial intentions as expressed in this Agreement.

24.4 In the event that the Parties are unable to agree as to the extent and nature of such amendments within one month, any party shall be entitled to refer the decision to the Dispute process in accordance with clause 25.

25. DISPUTE RESOLUTION

25.1 Where any Dispute arises between the Parties in connection with this Agreement, the Parties shall attempt to resolve the Dispute in good faith. During the period of the Dispute, the Parties shall continue to comply with their respective obligations under this Agreement.

25.2 Where the Parties are unable to resolve the Dispute in good faith, the dispute may be escalated to the relevant Parties' senior representatives (being a senior executive of the relevant Party with sufficient authority to bind the relevant Party in any agreement reached in respect of the Dispute) in order to try and resolve the Dispute. If the Parties' senior representatives are unable to resolve the Dispute within fifteen (15) Working Days of referral, the Dispute shall be referred to mediation in accordance with clause 25.2.

25.3 If the Parties are unable to resolve a Dispute within two (2) months, the Parties shall attempt to settle the Dispute by mediation in accordance with the CEDR Model Mediation Procedure. Within ten (10) Working Days of service of referral to mediation, the mediator shall be nominated by CEDR. To initiate the mediation, one Party must serve notice in writing ("**ADR Notice**") to the other Party(s) requesting mediation. A copy of the ADR Notice should be sent to CEDR. Unless otherwise agreed between the Parties, the mediation shall start no later than ten (10) Working Days after the date of the ADR Notice.

25.4 If the Dispute is not resolved within ten (10) Working Days after service of the ADR Notice, any Party fails to participate or ceases to participate in the mediation before the expiry of that ten (10) Working Day period, or the mediation terminates before the expiry of that ten (10) Working Day period, the Dispute shall be finally resolved by the courts of England and Wales.

25.5 The Parties may by written agreement, agree to vary the time periods set out in this clause 25 to resolve a Dispute.

25.6 Any decision, judgement or settlement resulting from a Dispute determined in accordance with clause 25.1 shall be recorded in writing, signed by all the Parties involved, and shall be binding on the Parties. Where the Parties have submitted the Dispute to the Courts of England and Wales, the decision of the Courts of England and Wales shall be binding on the Parties.

26. CHANGE PROCEDURE

26.1 The Parties acknowledge and agree that from time to time during the Term, any Party may request a change to this Agreement. A Party may present its proposal for change to the other Parties who shall consider and discuss the proposal.

26.2 Where the Parties agree to amend the Agreement to reflect the proposal, they shall as soon as reasonably practicable (and in any event within 20 Working Days), evaluate the proposal to determine whether it remains in accordance with the Wales Transport Strategy and propose and agree the amendments required to the Agreement.

26.3 The Parties shall take all reasonable steps to implement those amendments to the Agreement as soon as reasonably practicable. The Parties acknowledge that any changes agreed pursuant to this clause, are not subject to the general amendment clause at clause 29.

27. LIMITATION OF LIABILITY

- 27.1 References to liability in this clause 27 include every kind of liability arising under or in connection with this Agreement including but not limited to liability in contract, tort (including negligence), misrepresentation, restitution or otherwise. No Party may benefit from the limitations and exclusions set out in this clause in respect of any liability arising from its deliberate default.
- 27.2 Nothing in this Agreement limits any liability which cannot legally be limited, including but not limited to liability for:
- 27.2.1 death or personal injury caused by negligence; or
 - 27.2.2 fraud or fraudulent misrepresentation.
- 27.3 Subject to clause 27.1 and 27.2:
- 27.3.1 the Public Sector Parties' total liability under and in connection to this Agreement shall in no event exceed an amount equal to the total amounts payable to the Operator up to the date that this Agreement is terminated; and
 - 27.3.2 the Operator's total liability under and in connection to this Agreement shall in no event exceed an amount equal to the total amounts payable to the Operator under the terms of this Agreement.

28. ASSIGNMENT

- 28.1 This Agreement is personal to the Parties and may not be assigned (whether absolutely or by way of security and whether in whole or in part), sub-contracted, transferred, mortgaged, charged, declared in trust for a third party, or otherwise disposed of in any manner whatsoever to any third party without the prior written consent of the other Parties and any such purported dealing in contravention of this clause shall be ineffective.
- 28.2 In the event that the Operator disposes of its business, the Operator shall:
- 28.2.1 novate its rights and obligations under this Agreement to the party to which its business is transferred (including any agreement entered into to further the intent of this Agreement); and
 - 28.2.2 terminate its participation under this Agreement in accordance with clause 11.7.

29. AMENDMENT

- 29.1 This Agreement may only be amended, modified, varied or supplemented in writing signed by or on behalf of all of the Parties to this Agreement.
- 29.2 The Parties shall, as soon as reasonably practicable following the coming into force of any legislation, regulations or statutory instruments (or any amendments to existing legislation, regulations or statutory instruments) which impacts the terms of this Agreement, review and, if necessary, amend the terms of this Agreement to account for such changes.

30. WAIVER

The rights and remedies of the Parties shall not be affected by any failure to exercise or delay in exercising any right or remedy or by the giving of any indulgence by any other Party or by anything whatsoever except a specific waiver or release in writing and any such waiver or release shall not prejudice or affect any other rights or remedies of the Parties. No single or partial exercise of any right or remedy shall prevent any further or other exercise thereof or the exercise of any other right or remedy.

31. NOTICES

31.1 Any notice (including any approval, consent or other communication) in connection with this Agreement shall be given in writing and shall either be personally left at the address of the addressee or sent by pre-paid first class post or be sent by electronic mail. The address for service of a Party shall be its address as stated in clause 31.2 or any other address or electronic mail address notified to the other Parties in accordance with this clause 31.1.

31.2 The addresses for service of notices are:

The Operator

- a) Address: [ADDRESS]
- b) For the attention of: [POSITION OF CONTACT]
- c) Email address: [EMAIL ADDRESS]

Welsh Ministers

- a) Address: [ADDRESS]
- b) For the attention of: [POSITION OF CONTACT]
- c) Email address: [EMAIL ADDRESS]

Lead Authority

- a) Address: [ADDRESS]
- b) For the attention of: [POSITION OF CONTACT]
- c) Email address: [EMAIL ADDRESS]

31.3 In the absence of evidence of earlier receipt, any notice shall take effect from the time that it is deemed to be received in accordance with clause 31.4.

31.4 A notice is deemed to be received:

31.4.1 in the case of a notice personally left at the address of the addressee during normal working hours, upon delivery at that address or if not during normal working hours the next Working Day; or

31.4.2 in the case of a first class posted letter (within the United Kingdom), on the third Working Day after posting; or

31.4.3 in the case of an email, in the absence of a delivery error message, at the time of sending to the relevant addressee,

and for the purpose of deemed receipt under this clause 31.4, it shall be sufficient to prove that personal delivery was made or that the envelope containing the posted notice was properly addressed or the email contained the correct email address.

32. SEVERABILITY

If any term of this Agreement is found by any court or body or authority of competent jurisdiction to be illegal, unlawful, void or unenforceable, such term will be deemed to be severed from this Agreement and this will not affect the remainder of this Agreement which will continue in full force and effect.

33. THIRD PARTY RIGHTS

33.1 Save as otherwise expressly provided for in this Agreement, a person who is not a party to this Agreement shall have no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement. This does not affect any right or remedy of a third party which exists, or is available, apart from that Act.

33.2 Where a Lead Authority and/or Constituent Local Authority is stated as having a right pursuant to this Agreement the Lead Authority and/or Constituent Local Authority shall be entitled to exercise that right pursuant to the terms of this Agreement, notwithstanding that it is a third party.

33.3 Where Tfw is stated as having a right pursuant to this Agreement, Tfw shall be entitled to exercise that right pursuant to the terms of this Agreement, notwithstanding that it is a third party.

33.4 The rights of the Parties to terminate, rescind or agree any variation to this Agreement are not subject to the consent of any other person.

34. ENTIRE AGREEMENT

34.1 Subject to clause 34.2, with the Previous BES Funding Arrangements, this Agreement constitutes the entire agreement between the Parties and supersedes any prior agreement or arrangement in respect of its subject matter and:

34.1.1 no Party has entered into this Agreement in reliance upon, and will have no remedy in respect of, any misrepresentation, representation or statement (whether made by any other Party or any other person and whether made to the first Party or any other person) which is not expressly set out in this Agreement; and

34.1.2 the only remedies available for any misrepresentation or breach of any representation or statement which was made prior to entry into this Agreement and which is expressly set out in this Agreement will be for breach of contract.

34.2 Nothing in this clause 34 shall be taken to affect the terms of any Existing Supported Services Contract or New Supported Services Contract between any of the parties to this Agreement, including any amendments to such contracts effected by the terms of this Agreement.

34.3 For the avoidance of doubt, nothing in this clause 34 will be interpreted or construed as limiting or excluding the liability of any person for fraud or fraudulent misrepresentation.

35. COUNTERPARTS

This Agreement may be executed in any number of counterparts, and by the Parties as separate counterparts but will not be effective until each Party has executed at least one counterpart. Each counterpart shall constitute an original of this Agreement, but all the counterparts shall together constitute one and the same Agreement.

36. GOVERNING LAW AND JURISDICTION

36.1 This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with Welsh law.

36.2 Subject to the Dispute Resolution Procedure, the courts of England and Wales have exclusive jurisdiction to determine any dispute arising out of or in connection with this Agreement including (without limitation) in relation to any non-contractual obligations.

This Agreement has been entered into on the date stated at the beginning of this Agreement.

Signed for and on behalf of **WELSH**))
MINISTERS by:

Signature

Name (block capitals)

**Director/authorised
signatory**

Signed for and on behalf of [**LEAD**))
AUTHORITY] by:

Signature

Name (block capitals)

**Director/authorised
signatory**

Signed for and on behalf of [**OPERATOR**))
by:

Signature

Name (block capitals)

**Director/authorised
signatory**

SCHEDULE 1: WELSH GOVERNMENT REQUIREMENTS

The Parties acknowledge and agree that in consideration of the Welsh Government providing the BES 3 Funding and other payments pursuant to this Agreement, the Operator shall comply with the following obligations. Failure to comply with these obligations will constitute a material breach under the terms of this Agreement:

1. Reforming Service Delivery

- 1.1 The Operator shall, in good faith, engage with Welsh Government and the Lead Authorities on behalf of their Constituent Local Authorities in respect of any proposals for reform of funding mechanisms such as BSSG and the Concessionary Travel Scheme to improve the quality and viability of the local services available to passengers in Wales, and in particular where such proposals may affect (positively or negatively) the delivery of the Reference Network.
- 1.2 The Operator shall seek to identify and implement measures that will increase patronage on their services, and mitigate costs on a basis consistent with commercial operation of services. This shall include identifying reasonable measures to mitigate the impact of the Driver and Fuel Cost Impacts on provision of Services.
- 1.3 Welsh Government is in the process of updating the requirements for the Economic Contract Plan with which all bus operators in receipt of Government funding will be required to sign up to. Once the updated guidance has been published, the Operator shall produce an Economic Contract for approval by TfW, acting reasonably and on behalf of Welsh Government, within (6) six months of publication of the guidance.
- 1.4 Following the issue of the updated requirements for the Economic Contract Plan, pursuant to paragraph 1.2, Welsh Government shall ensure that TfW shall set out a timetable and process for the development, review, approval and monitoring of the Operator's Economic Contract.
- 1.5 The Parties acknowledge that, at the time of signing this Agreement, the Operator will not have had sight of the requirements for the Economic Contract Plan. Welsh Government shall, and shall ensure that TfW shall, work with the Operator and representatives of the bus industry to reach agreement on sustainable options for implementing such requirements.
- 1.6 In advance of the development of the new requirements for the Economic Contract Plan, the Operator shall commit to complying with the principles of the current Economic Contract (found here), specifically with respect to:
 - 1.6.1 growth potential;
 - 1.6.2 fair work;
 - 1.6.3 promotion of health, including a special emphasis on mental health, skills and learning in the workplace; and
 - 1.6.4 progress in reducing carbon footprint.
- 1.7 The Operator acknowledges that Welsh Government intends that the Operator's Economic Contract and delivery against the same may form a key part of:
 - 1.7.1 the evidence for the scoring of future competitions for grant funding or other contracts which make use of Welsh Government funding; and
 - 1.7.2 the conditions for other statutory and non-statutory schemes relating to the funding of the bus industry in Wales which Welsh Government may introduce in the future.

2. **Improving the Passenger Experience**

- 2.1.1 The Operator shall use reasonable endeavours to work with the Lead Authority and Welsh Government to increase patronage and social inclusion on bus services and the wider public transport network in Wales.
- 2.1.2 The Operator shall comply with the Voluntary Welsh Bus Quality Standards (and it is acknowledged that compliance with such standards is also a requirement for BSSG funding).
- 2.1.3 The Operator shall participate in the Welcome Ticket scheme to provide free journeys for all refugees in Wales during the period of this Agreement. The Operator shall ensure that all staff are instructed to comply with the terms of this scheme, shall monitor compliance to ensure that free journeys are provided to eligible persons. Welsh Government shall work with the Operator and other operators to review the scheme to ensure that it is not open to abuse.
- 2.1.4 The Operator shall work with other operators of Local Services, and the Public Sector Parties to work to agree the terms of a common passenger charter that will apply to journeys on all Local Services in Wales, and where the terms of such passenger charter have been agreed by operators of Local Services and the Public Sector Parties, implement such a charter on the Services or amend any existing passenger charter to include as a minimum the provisions of such passenger charter.
- 2.1.5 The Operator shall provide accurate bus service timetable information to the public in accordance with the requirements specified or agreed by the Constituent Local Authorities in accordance with sections 139 and 140 Transport Act 2000. The Operator shall ensure that the information provided remains up-to-date and accurate and is provided in any format reasonably specified by the relevant local transport authorities. Such information provision may include, but not be limited to the on-line provision of information by operators, the provision of that information to on-line sources including Traveline Cymru and Constituent Local Authorities, and the provision of accurate timetable information at bus stops and roadside displays, in each case in accordance with the specified requirements of the relevant local transport authority. For the avoidance of doubt, depending upon the approach agreed or determined by each local transport authority under sections 139 to 140 Transport Act 2000, compliance with this obligation may include provisions of information to the relevant local transport authority, provision of the information directly by the operator and/or funding of provision of information by the Operator.
- 2.1.6 The Operator shall seek to improve service availability, frequencies and overall coverage by running no less than 70% of its Commercial Service mileage in the Region as at 29 February 2020 (or such other level as the Lead Authority may agree with the Operator acting reasonably and taking into account the nature of the Operator's network, and any particular impacts on the operation of their network since 29 February 2020 arising from either COVID-19 or the Driver and Fuel Cost Impacts) ("Mileage Target"). Where the Operator fails to meet the Mileage Target for the relevant period used to calculate a Reconciliation Payment they shall provide the Lead Authority with an explanation of why they have failed to meet the Mileage Target and the Lead Authority may only determine that there has been a Breach of Requirements where the Operator has not provided good reasons for such failure and demonstrated how they are seeking to rectify such failure.

2.2 **Routes**

2.2.1 The Lead Authority shall work with the Operator and the Constituent Local Authorities to determine what changes may be required to the network of services provided by the Operator in response to changing passenger demand and patterns of travel, and taking into account the availability of resource to meet those requirements, including Fuel and Driver Cost Impacts, and the Lead Authority shall authorise such changes, including the use of alternative delivery modes, in line with the Reference Network. Such changes may include adjustments to the Operator's timetables and routes, where these are necessary to integrate the Operator's services, other bus services and modes of transport to provide passengers with improved journey times and a better experience of public transport for example by better aligning timetables of services to provide new or better connections and provided that such changes do not materially adversely affect the viability of the Operator's services.

2.2.2 Where the Operator proposes to amend a timetable (including any new registration, variation to a registration or cancellation of a Local Service) the Operator shall provide each Constituent Local Authorities in the area of such Local Service (copied to Bus Users Cymru) with notice of such proposals as soon as reasonably practicable, and shall use all reasonable endeavours to provide such notification in advance of submission of the application for registration, variation or cancellation. The Operator shall consider any submissions by the relevant Constituent Local Authorities and Bus Users Cymru in determining the details of such registration, variation or cancellation. I

2.3 **Fares and Ticketing**

2.3.1 The Parties shall work together to discuss, develop and implement where appropriate multi-operator ticketing schemes (including integrated ticketing schemes) where such schemes provide benefits for passengers and can be implemented on a basis which does not materially adversely affect the financial viability of the Operator, other operators of Local Services or the Reference Network. Such schemes may be developed on a statutory or non-statutory basis subject in all cases to compliance with competition law.

2.3.2 Subject to paragraph 2.3.3, the Operator may increase its fares by no more than the level of CPI in any 12 month period during the term of this Agreement (taking into account any increases in fares during the term of BES 2).

2.3.3 Where the Operator can demonstrate that it has incurred increases in costs during the period of this Agreement which means that the fare increases allowed by paragraph 2.3.2 are insufficient to reflect those cost increases, then the Operator may provide evidence of such disproportionate cost increases to the Lead Authority, and the Lead Authority may, acting reasonably but considering the impacts on passengers as well as the Operator, agree to a fare increase in excess of that allowed pursuant to paragraph 2.3.2.

3. **Negative Conditions**

For the Term of this Agreement the Operator shall not:

3.1 act in a way which is primarily intended or expected to make cost effective delivery of the Reference Network more difficult;

- 3.2 carry out their business in a manner which can be shown to, overall, have the intent or expectation of reducing passenger benefits from the bus network in Wales; and
- 3.3 register Local Services which have the primary effect of undermining the value for money of the Subsidised Network (provided that nothing in this paragraph 3 shall prohibit the Operator from replacing an Existing Supported Service or New Supported Service with a Commercial Service which provides the same or better service throughout the day).

SCHEDULE 2: PARTNERSHIP THEMES

Compliance with clause 5.1 may include (but not be limited to) the Operator working with the Public Sector Parties to develop and, where appropriate, implement proposals for matters such as:

1. registering routes and timetables that support improved journey times and interchange opportunities ;
2. consolidating core routes, including determining how passengers can benefit from services on core routes irrespective of bus operator, to the extent enabled by competition law;
3. de-duplicating and harmonising route numbering;
4. identifying unserved markets and routes that could serve those markets;
5. developing and implement a code of practice on employment terms and driver standards to offer a safe and high quality service to passengers;
6. facilitating the introduction of demand responsive or other approaches to service delivery, e.g. by deregistering the existing Local Services, where it is identified that routes may be more effectively served by other means;
7. aligning new routes within the Reference Network where appropriate whilst allowing the Operator innovation in respect of new routes and bus services;
8. improving value and/or convenience for passengers. This shall, to the extent enabled by competition law, include working with TfW and the Constituent Local Authorities on the introduction of ticketing schemes (whether statutory or voluntary) which may:
 - 8.1 introduce pay as you go capped fares;
 - 8.2 rationalise fares; and/or
 - 8.3 introduce day and/or weekly tickets,
9. establishing, where appropriate, multi-operator ticketing schemes;
10. providing information to support passengers, including the prompt communication of changes to bus timetables; and
11. investing in bus services alongside the Welsh Government's and Constituent Local Authorities' investment in infrastructure with the aim of improving customer experience.

SCHEDULE 3: COMPENSATION, PAYMENT AND RECONCILIATION

Part 1: General and information provision

The Operator shall provide such information to the Lead Authority and Welsh Government as they may reasonably require in order to calculate support payments, reconciliation payments and compensation to be paid pursuant to this Schedule 3.

Part 2: Payment

1. The Service Payment (SP) shall be calculated as follows:

$$\underline{SP = FC + AM - FR}$$

Where:

- 1.1 Service Payment (SP): shall be calculated monthly and in accordance with the following:
 - 1.1.1 the Operator shall provide the Lead Authority on a monthly basis by no later than the fifteenth day of the preceding month the information contained in paragraph 1 of the Forecast Template.
 - 1.1.2 The Lead Authority shall review the information provided pursuant to paragraph 1.1.1 and shall, notify the Operator of the proposed Service Payment no later than 10 working days from receipt of the Forecast Template, providing reasonable detail as to how it has been calculated in accordance with this Schedule;
 - 1.1.3 the Lead Authority shall pay the proposed Service Payment specified in the notice issued pursuant to paragraph 1.1.2 to the Operator within 10 Working Days of issue of such notice in respect of provision of services for that month; and
 - 1.1.4 where this Agreement terminates or expires, other than at the end of a month, the Lead Authority shall, acting reasonably, determine the date and calculation of payment to ensure that the Operator is paid for provision of Services throughout the term of this Agreement.
- 1.2 Forecasted Costs (FC): shall be the value calculated by the Operator in accordance with paragraph 1 of Section 1 to this Schedule, as reviewed by the Lead Authority and notified in accordance with paragraph 1.1.2, provided that Inadmissible Costs, as set out in Section 2 to this Schedule, shall not be included in the calculation of FC;
- 1.3 Assumed Margin (AM): shall be the assumed margin payable to the Operator for provision of the Services and shall be a percentage applied to these elements of the Forecasted Costs (FC) for the relevant period i.e. direct costs, variable costs and overhead costs. The AM shall be calculated as follows:

$$AM = \text{Initial AM} \times FC$$

Where:

Initial AM shall be:

- 1.3.1 prior to the date of calculation of the first Reconciliation Payment:

- where the Operator has certified to the Lead Authority that it is in compliance with the provisions of Schedule 1 (such certificate to be provided by a person authorised to bind the Operator, including the Operator's traffic manager or a company director) 5%; or
 - otherwise, 2%; and
- 1.3.2 following the date of calculation of the first Reconciliation Payment, the lesser of:
- 5%; and
 - the value of RM last determined in accordance with Part 3 of this Schedule;
- 1.4 Forecasted Revenue (FR): shall be all revenue received by the Operator in respect of the relevant period in accordance with paragraph 1 of Section 1 to this Schedule 3 and should include for the period and be not limited to;
- 1.4.1 All revenue from farebox (including both on and off bus revenue, including pre-purchased tickets and revenue received by operator in respect of their proportion of any multi-operator ticket revenues);
- 1.4.2 Mandatory Concessionary Fare reimbursement;
- 1.4.3 My Travel Pass reimbursement;
- 1.4.4 any other concessionary travel reimbursement;
- 1.4.5 Bus Service Support Grant payments;
- 1.4.6 payments under Existing Supported Service Contracts and New Supported Service Contracts (including de minimis contracts);
- 1.4.7 Scholars Season Ticket payments (whether made privately or received from a Local Authority);
- 1.5 The Operator acknowledges and agrees that where it fails to provide information in accordance with Section 1 of this Schedule 3, the Lead Authority shall be entitled to reduce the Service Payment to:
- 1.5.1 50% in the month following the failure to provide such information; and
- 1.5.2 no payment in each and every month following the 50% reduction,
- provided that the Lead Authority shall pay the balance of such Service Payments to the Operator following provision of such information, and provided that no other information is outstanding under this Agreement, and further provided that the Lead Authority shall be entitled to deduct any costs reasonably and properly incurred as a result of such delay in information provision and/or retention of Service Payments.
- Part 3: Reconciliation Payment**
1. The Reconciliation Payment (RP) shall be calculated as follows, using information provided or identified pursuant to the reconciliation process set out in paragraph 3 below:

$$\text{RP} = (\text{AC} + \text{RM}) - (\text{AR} + \text{SP})$$

Where:

- 1.1 Actual Costs (**AC**): shall be the actual costs of the Operator in the relevant period as calculated in accordance with paragraph 2 of Section 1 of this Schedule, provided that Inadmissible Costs, as set out in Section 2 to this Schedule, shall not be included in the calculation of AC.
- 1.2 Reconciliation Margin (**RM**): which shall be the assumed margin payable to the Operator for provision of the Services which shall be determined by the Lead Authority, acting reasonably and having regard to all information provided pursuant to this Agreement, as follows:
 - 1.2.1 Where the Operator is in compliance with the terms of this Agreement in all material respects and no Breach of Requirements are outstanding: 7%
 - 1.2.2 Where no Breach of Requirements are outstanding but there have been minor failures to comply with the terms of this Agreement which are not a result of any breach of this Agreement by a Public Sector Party, and in particular clause 5 or Schedule 1: 5%
 - 1.2.3 Where one or more Breach of Requirements is outstanding, but the the Operator is seeking to rectify such Breach of Requirements in accordance with clause 4: 4%
 - 1.2.4 Where one or more Breach of Requirements is outstanding and the Operator does not have a deliverable plan to rectify such Breach of Requirements in accordance with clause 4: 2%

Where an event occurs part way through the relevant period, which means that the Reconciliation Margin calculated above changes during that relevant period, then the Reconciliation Margin for the relevant period shall be calculated on a pro-rated basis based on the number of days in the relevant period that each value of Reconciliation Margin applied. For example, where the relevant period is 90 days, and the Reconciliation Margin on the first day of the period was 7%, but a Breach of Requirements applies from the 10th day such that the Reconciliation Margin is 4% for the remainder of the relevant period, then the Reconciliation Margin for that period would be $[7\% \times 9/90] + [4\% \times 81/90] = 4.3\%$

- 1.3 Actual Revenue (**AR**): shall be all revenue received by the Operator in respect of the relevant period in accordance with paragraph 2 of Section 1 to this Schedule and should include for the period and be not limited to;
 - 1.3.1 All revenue from farebox (including both on and off bus revenue, including pre-purchased tickets and revenue received by operator in respect of their proportion of any multi-operator ticket revenues);
 - 1.3.2 Mandatory Concessionary Fare reimbursement;
 - 1.3.3 My Travel Pass reimbursement;
 - 1.3.4 any other concessionary travel reimbursement;
 - 1.3.5 Bus Service Support Grant payments;

- 1.3.6 payments under Existing Supported Service Contracts and New Supported Service Contracts (including de minimis contracts);
- 1.3.7 Scholars Season Ticket payments (whether made privately or received from a Local Authority);
- 1.4 Service Payment (**SP**): shall be the sum total of Service Payments made for the relevant Reconciliation Period in accordance with Part 2 of this Schedule.
- 2. Where:
 - 2.1 RP is a positive figure then this amount shall be paid by the Lead Authority to the Operator; and
 - 2.2 RP is a negative figure then this amount shall be paid to the Lead Authority by the Operator, in each case in accordance with clause 9 and this Schedule.
- 3. The Operator shall participate in an open book reconciliation exercise with the Lead Authority in accordance with paragraph 2 of Section 1 to this Schedule 3 to enable them to assess compliance by the Operator with the terms of this Agreement and ensure that the Operator has not been over-compensated or under-compensated for provision of services pursuant to the terms of this Agreement. The Operator acknowledges that the support provided to the Operator pursuant to the terms of this Agreement cannot lead to:
 - 3.1 over-compensation of the Operator, and that where it is determined that the Operator has been over-compensated for provision of any Local Service that the Lead Authority shall be entitled, on behalf of Welsh Government, to recover the amount of any over-compensation, in accordance with this Part 3 of Schedule 3; or
 - 3.2 under-compensation of the Operator, and that where it is determined that the Operator has been under-compensated for provision of any Local Service that the Lead Authority shall be entitled, on behalf of Welsh Government, to add the amount of any under-compensation to the next Service Payment.
- 4. Welsh Government may determine materiality thresholds for the carrying out of the reconciliation process, and determine that it would be disproportionate to carry out a reconciliation process in respect of the Operator. Such decision shall be solely at Welsh Government's discretion, and where Welsh Government makes any such decision, the Operator acknowledges that this shall be without prejudice to any future requirement to examine payments made to the Operator, including where this is required for the purposes of subsidy control, procurement or competition assessment. It is acknowledged that Welsh Government may determine materiality thresholds by reference to level of payments made to the Operator, or such other criteria as Welsh Government may determine are appropriate.
- 5. The Operator shall provide any information reasonably required by Welsh Government or the Lead Authority for the purposes of the reconciliation process on an open book basis, including, but not limited to, information specified in Part 1 to Schedule 4.
- 6. Information provided for this purpose may be shared with TFW and contractors that are engaged by Welsh Government to undertake any reconciliation exercise or other analysis of the BES Funding, including BES 3 Funding.

Section 1: INFORMATION TO BE PROVIDED BY THE OPERATOR

Definitions

“Good and Efficient Operator” means in the context of all other relevant provisions of this Agreement a notional bus operator, having the same commercial, regulatory and operational arrangements as the Operator and being subject to the same operational circumstances (which, for the avoidance of doubt, shall recognise the Driver and Fuel Cost Impacts and the existence of this Agreement) as other bus operators, which complies with its legal obligations, including pursuant to this Agreement and in a timely, efficient and economical manner and with the degree of skill, diligence, prudence and foresight which can be expected from a skilled and experienced bus operator so that in this context costs and revenues are optimised in combination to the greatest extent reasonably practicable;

“Forecast Template” means the Excel spreadsheet issued by the Lead Authority, as updated from time to time, to capture forecast revenue and costs for the purpose of calculating the Service Payment;

“Inadmissible Costs” means those costs which are listed in Section 2 to Schedule 3;

“Management Accounts” means the periodic management accounts which cover the relevant Quarter;

“Month” means a calendar month;

“Operator Specific Reporting Period” means a four-weekly, five weekly, monthly or similar cycle on which the Operator posts its accounts;

“Quarter” means a period of 3 months (April to June, July to September, October to December and January to March), or such other 3 month period as the Lead Authority may reasonably specify;

“Reconciliation Period” means the closest multiple of the Operator Specific Reporting Period to the Quarter, to be agreed with the Operator; and

“Reconciliation Template” means the Excel spreadsheet issued by the Lead Authority, as updated from time to time, to capture the actual revenue and income generated and costs incurred by the Operator for the relevant Quarter.

1. Information to be provided Monthly

1.1 In order for FC and FR to be calculated in accordance with paragraph 1 of Part 2 of Schedule 3, for each Month, the Operator shall complete the Forecast Template which provides high level details on the forecast revenue and costs for that Month;

1.2 The Lead Authority will provide the Forecast Template for the Operator to complete and return to the Lead Authority within 14 days of the Operator issuing an invoicing following receipt of the notice from the Lead Authority notifying the Operator in reasonable detail of the proposed Service Payment or on such other date as may be agreed with Welsh Government.

1.3 The Operator shall be required to populate the following items in the Forecast Template in respect of all Local Services that they provide, including Commercial Services, Existing Supported Services, Former Commercial Services and New Supported Services:

1.3.1 Forecast farebox revenue: based on the current month’s predicted outturn (including both on-bus and off-bus revenue) plus adjustment for seasonal factors, including, but not limited to Christmas, Easter and school holidays;

1.3.2 Forecast funding: This shall reflect all funding received by the Operator, including but not limited to BSSG, Mandatory Concessionary Fare reimbursement, Young

Persons Travel payments, payments under Existing Supported Service Contracts and New Supported Service Contracts (including de minimis contracts), Scholars Season Ticket payments (private and Local Authority), CJRS, Job Retention Bonus and Job Support Scheme (as amended or replaced from time to time);

- 1.3.3 Other income: This shall reflect all other income received by the Operator arising from the provision of Local Services, including but not limited to income received from advertising, maintenance and sales; and
- 1.3.4 Forecast Cost: These shall be broken down by headings, e.g. Staff Costs, Fuel/Maintenance Costs, Overhead Costs, Interest, Depreciation etc.
- 1.4 The Forecast Template will use the information provided in line with paragraph 1.3 to calculate the value of the Service Payment in accordance with the principles set out in paragraph 1 of Part 2 of Schedule 3.
- 2. Information to be provided for each Reconciliation Period**
- 2.1 In order for RP to be calculated in accordance with paragraph 1 of Part 3 of Schedule 3, at the end of each Reconciliation Period the Operator shall complete the Reconciliation Template which provides details on the actual revenue and income generated and costs incurred in the relevant Reconciliation Period.
- 2.2 The Lead Authority will provide the Reconciliation Template for the Operator to complete and return to the Lead Authority within fifteen (15) Working Days of the end of the relevant Reconciliation Period.
- 2.3 The Operator shall be required to populate the Reconciliation Template, which Welsh Government may reasonably update from time to time, in respect of all Local Services that they provide, including Commercial Services, Existing Supported Services, Former Commercial Services and New Supported Services. Such information to be provided for each Month in the Reconciliation Period in question plus the figures for the same three (3) Months in the prior year.
- 2.4 In the event where any of the Operator's Local Services operate across the Welsh border, the Operator shall assist with any further examination and analysis of the information provided in paragraph 2.3 above to ensure that the BES 2 Funding it receives, does not relate to the section of such Local Service which is outside of Wales.
- 2.5 Once the Operator has submitted the Reconciliation Template, this shall be evaluated by the Lead Authority to ascertain whether a Reconciliation Payment adjustment will be made to the next Service Payment following the completion of the reconciliation process in this Schedule 3.
- 2.6 In determining the level of Reconciliation Payment, the Lead Authority may request further information or evidence from the Operator as it reasonably requires, such as, but not limited to Management Accounts or receipts relating to certain transactions.
- 2.7 The Lead Authority shall use the Reconciliation Template and additional information to check whether any costs included in the template are Inadmissible Costs and may amend the Reconciliation Template to adjust the Reconciliation Payment accordingly where any costs are Inadmissible Costs.

- 2.8 Where Inadmissible Costs are identified and the Actual Costs (as defined in Part 3 of this Schedule) are re-calculated, the reconciliation exercise shall include consequential adjustments and reconciliation of the Assumed Margin to reflect the change in Actual Costs.

Section 2: INADMISSIBLE COSTS

The following costs shall be Inadmissible Costs for the purposes of this Agreement:

1. The Operator agrees and acknowledges that: (i) only reasonable costs incurred and evidenced as ongoing and repeat transactions shall be taken into account; and (ii) it shall operate efficiently during the Term.
2. The Operator shall seek approval from the Lead Authority prior to incurring any material costs which are not ongoing and repeat transactions and agree the basis upon which such transactions will be considered for the purposes of this Schedule 3. Material costs may include investment in vehicles, information technology, costs of depot purchase or refurbishment or major items of plant and equipment. The Lead Authority shall take the following considerations into account when determining the eligibility for BES 3 Funding such costs:
 - 2.1 evidence from the Operator to confirm that such expenditure was in their business plans and/or is required in respect of Driver and Fuel Cost Impacts and cannot be deferred until the effect of Driver and Fuel Cost Impacts has ended;
 - 2.2 confirmation from the Operator that they have explored all other routes for grants and funding such expenditure;
 - 2.3 a forecast of the net impact of the additional expense on their claims under this Agreement; and
 - 2.4 confirmation from the Operator that they will be able to sustain any ongoing payments for this following the cessation of the BES 3 Funding.
3. For the avoidance of doubt, the reconciliation process will not take into account any capital expenditure, exceptional (non-operating) payments or dividend payments in determining whether the Operator has generated a profit before tax, or a loss at the end of each Reconciliation Period. The Lead Authority shall determine whether any capital expenditure will be reimbursed in accordance with paragraph 2 above and will be paid in addition to the Service Payment as calculated pursuant to paragraph 1.1, of Part 2 of Schedule 3.
4. Any costs that were incurred otherwise than in accordance with those expected to be incurred by a Good and Efficient Operator including but not limited to:
 - 4.1 staff, director or officer costs in excess of that set out in the Forecast Template (except where evidenced by the Operator as appropriate to the satisfaction of the Lead Authority);
 - 4.2 staff costs which reflect use of agency staff or materially enhanced pay rates for staff where the Operator cannot evidence that payment of such rates was reasonably necessary in order to have staff available to the extent necessary to be able to deliver the Services, or where the Operator is unable to demonstrate that it has a strategy in place to mitigate such costs;
 - 4.3 costs that do not reflect the contracted position under Existing Supported Services Contracts unless such change has been agreed by the Lead Authority;
 - 4.4 new contracts entered in to by the Operator which have not been procured in compliance with the Operator's usual procurement procedures; and

- 4.5 variations to existing contracts which have not been made in accordance with the Operator's usual procurement procedures or practice.
5. Any bonuses, rewards or discretionary benefits paid to any staff, directors or officers under any schemes which have not previously been approved by the Welsh Government (in their absolute discretion) in writing.
 6. Any expenses, disbursements or equivalent costs (to which the Operator's expenses policy would apply) which are incurred other than in compliance with the Operator's expenses policy.
 7. Any cost that the Operator may incur as a result of it failing to comply with any applicable laws, to the extent this gives rise to a criminal liability.
 8. Any payments, costs or other liabilities owed to affiliates save in respect of such payments costs or other liabilities which have been incurred by the Operator acting as a Good and Efficient Operator.
 9. Costs of developing and protecting any Intellectual Property Rights which are not owned by the Operator or are so owned, but where the costs are not ancillary to an activity included in the Forecast Template.
 10. Marketing or advertising costs incurred substantially to the benefit of wider group products or group brand recognition and which are not primarily for the benefit of bus services.
 11. Fines from government or regulatory bodies.
 12. Any costs (including any legal costs and expenses) incurred by the Operator in pursuing any claim against or defending any claim from Welsh Government in respect of or in connection with the grant offer letter or otherwise.
 13. Any costs incurred in relation to the period prior to the BES Funding Period which a Good and Efficient Operator would usually have discharged in the period prior to the BES Funding Period.
 14. Any costs incurred in relation to the period prior to the expiry of the term of the BES Funding Period which a Good and Efficient Operator would usually have discharged in the period following the expiry of the BES Funding Period.
 15. Interest paid on payable on any loan from any lender which is not a fixed term loan.
 16. Except with the prior agreement of the Lead Authority or Welsh Government (not to be unreasonably withheld), any costs, charges, penalties, compensation or similar payments that the Operator may incur as a result of the termination of any contract or other arrangement.
 17. Except with the prior agreement of the Lead Authority or Welsh Government, losses on disposals of fixed or non-current assets.
 18. Maintenance costs where the maintenance activity was previously scheduled to be undertaken prior to or after the term of the BES Funding Period or where (and to the extent that) it would have been reasonable and/or prudent for the maintenance to have been carried out prior to or after the BES Funding Period.
 19. Depreciation or Capital Expenditure to the extent that the capital cost of acquisition of the relevant assets was to be funded by third party.

20. Costs of complying with any audit by Welsh Government or its agents pursuant to any grant offer letter or this Agreement.
21. Reasonable costs for external assistance to complete this proforma up to £1,500 are not Inadmissible Costs. Any amount in excess of £1,500 plus legal, accountancy and other costs and expenses incurred in connection with the preparation and implementation of this Agreement are Inadmissible Costs.
22. Legal, accountancy and other costs and expenses incurred in connection with any future arrangements between the Lead Authority or Welsh Government and the Operator following the BES Funding Period.
23. Travel costs (including flight travel) of the Operator primarily relating to the business of their group, noting that Welsh Government would expect the group to cover the cost of any such travel.
 - 23.1 Any costs which relate to that part of a Local Service which operates outside of Wales which shall be calculated on a pro rata basis to the length of the Local Service or as otherwise more accurately evidenced by the Operator.
 - 23.2 Any costs to the extent that they relate to a Commercial Service operated other than in accordance with the Service Standards, as more expressly set out in clause 16.1.

SCHEDULE 4: DATA REQUIREMENTS

Part 1: Financial Data Requirements

The Operator shall provide the following data in accordance with templates provided by TfW and updated from time to time, in respect of Commercial Services, Former Commercial Services and Local Services provided pursuant to Existing Supported Services Contracts and New Supported Services Contracts:

1. Operational costs and revenue from the period covered by BES (including this Agreement, BES 2 BES 1.5), the Bus Hardship Fund and the 20 March Letter scheme as well as costs and revenues covering a similar period prior to the commencement of the BES, the Bus Hardship Fund and the 20 March Letter schemes. Where intra-group costs are shown, you must be able to show evidence that these are properly incurred costs of providing the services. These figures shall be disaggregated to show major cost and revenue sources, and shall include any payments received from local authorities and central Government such as:
 - 1.1 payments made under the Coronavirus Jobs Retention Scheme, Job Retention Bonus, Job Support Scheme and any replacement schemes;
 - 1.2 payments (and any reconciliation payments) made under BES including Service Payments received;
 - 1.3 payments pursuant to the terms of any Existing Supported Services Contract or New Supported Services Contract;
 - 1.4 payments under existing bus support arrangements including BSSG, Mandatory Concessionary Fare reimbursement and Young Persons travel payments and shall include any costs associated with the operation of such Local Services, including:
 - 1.4.1 direct costs, such as the costs of drivers, parts and fuel (fuel costs shall include the amounts payable or receivable on fuel related financial derivatives in respect of the relevant period, but exclude any "mark to market" gains or losses on financial derivatives);
 - 1.4.2 semi-direct costs, including but not limited to: the costs of engineering, maintenance, traffic pay, vehicle related costs and marketing;
 - 1.4.3 costs of additional holidays accrued by employees in the relevant claim period;
 - 1.4.4 overhead costs, including but not limited to: the costs of administration, pensions, fixed operating costs, insurance and claims;
 - 1.4.5 pensions expenses on the basis of the ongoing contributions payable for the relevant period, without adjustment to comply with accounting standards;
 - 1.4.6 operating lease costs on the basis of the lease rentals payable during the Term;
 - 1.4.7 depreciation and amortisation of property, plant, equipment, software and other applicable assets on a basis consistent with the Term; and
 - 1.4.8 reasonable PPE and safe operating costs.

2. Revenue sources to also include farebox revenue generated and all other income received by the Operator, including but not limited to income received from advertising, maintenance and sales.
3. Commercial service kilometres covered by the operator's services per 4-week period during the period covered by BES (including this Agreement, BES2 and BES 1.5), the Bus Hardship Fund and the 20 March Letter Scheme and that for a similar period prior to the commencement of the BES, the Bus Hardship Fund and the 20 March Letter Scheme.
4. Commercial services run and patronage data per 4 week period for the period covered by BES (including this Agreement, BES2 and BES 1.5), the Bus Hardship Fund and the 20 March Letter Scheme and that for a similar period prior to the commencement of the BES, the Bus Hardship Fund and the 20 March Letter Scheme.
5. Evidence of the process that the Operator has undertaken with Constituent Local Authorities to agree services, including pursuant to the terms of this Agreement and that service changes have been properly communicated to the general public.
6. Evidence of the cost implications of any requirement to make use of agency staff or enhanced pay rates for staff in order to be able to provide the Services, including any measures put in place to mitigate these costs.
7. The same information as above for the equivalent period in the previous financial year.
8. Additional information (e.g. management accounts) to corroborate any submissions.

Part 2: Operational Data Requirements

Where the data is available to the Operator or from its Electronic Ticket Machines, the following data shall be provided by it to support the prioritisation, co-ordination and design of services and to support the provision of information to passengers. The data may be provided direct from the Operator's Electronic Ticket Machine supplier with its permission, not to be unreasonably withheld, or direct from the Operator. The data shall be provided to TfW (or its nominated agent which may be Traveline Cymru or a local authority):

Data	Format	Source	Scope
Timetable	TransXchange 2.4 to include all stop level detail and full geographic routing information	Scheduling software or entry into an online portal for conversion to TransXchange 2.4	Current timetable and any updates
Patronage Data	Report from ETMs	Direct from ETM/Operator	Historic and current to support prioritisation of routes
Passenger Counting/Capacity	SIRI VM feed as amended to include occupancy and bus capacity information or report from ETMs	Direct from ETM/Operator	Historic and current to support passenger information and prioritisation of routes
Origin and Destination Data	Report from ETMs	Direct from ETM/Operator	Historic and current to support prioritisation and design of routes
Fares	Spreadsheet Files for Adult and child fares, zone or rider tickets, m-tickets and multi operator tickets. Move to NeTEx format from January 2021	Direct from ETM/Operator	Historic and current to support passenger information and development of ticketing schemes
Real Time Information	SIRI SM (where currently available)	Direct from ETM/Operator	Every 5-30 seconds
	SIRI VM	Direct from ETM/Operator	Every 5-30 seconds
	TransXchange 2.1 (as a minimum standard) to include Service number, journey code and crew/duty number information for each track/leg for each service Note that this will move to TransXChange 2.4 once the Department for Transport profile is finalised and adopted	Scheduling software or entry into an online portal for conversion to TransXchange 2.4	5 days where systems permit

Part 3: Permitted Use

1. Permitted Uses of the Operator Data shall be the following purposes:
 - 1.1 calculation of payments to be made in accordance with Part 2 of Schedule 3;
 - 1.2 periodic reconciliation in accordance with Part 3 of Schedule 3;
 - 1.3 calculation of any additional payments to be made in respect of provision of any additional services to be provided pursuant to clauses 12 (Existing Supported Services: Gross Cost), 13 (Existing Supported Services: Net Cost) or 15 (Supported Services Contracts for Former Commercial Services).
 - 1.4 to support the calculation and payment of BSSG, Mandatory Concessionary Fare Reimbursement or My Travel Pass reimbursement;
 - 1.5 identification of any anomalous Operator costs and for the purposes of any audit of operator data or otherwise pursuant to clauses 7.7 to 7.10 of this Agreement;
 - 1.6 the assessment the viability of routes to support return to commerciality and determine the scope of the Subsidised Network in accordance with clause 8;
 - 1.7 to allow review of the BES 3 Funding mechanism specified in this Agreement by Welsh Government and Transport for Wales, including, but not limited to, pursuant to Schedule 5;
 - 1.8 to inform the reform of funding mechanisms (including BSSG and Mandatory Concessionary Fares) by Welsh Government and Transport for Wales including assessing the impact (or potential impact) of such funding mechanisms (and changes to such funding mechanisms) on the operators of local services in the Welsh bus market;
 - 1.9 to support the management of contracts (including Existing Supported Service Contracts as varied in accordance with the terms of this Agreement) that are being managed under this Agreement including in respect of the delivery of local services in accordance with the Service Specification or to the Service Standards;
 - 1.10 development of the Reference Network in accordance with clause 8;
 - 1.11 provide of public information about the Operator's Local Services and other Local Services operated in Wales;
 - 1.12 provision of a support service to the Traffic Commissioner, including a registration service (subject always to clause 7.5.1);
 - 1.13 inform investment decisions by Welsh Government, TfW and Local Authorities (including the Lead Authority); and
 - 1.14 inform Welsh Government response to Driver and Fuel Cost Impacts.

Part 4: Public Sector Data Access and Confidentiality

Note: a table is to be developed on the following basis specifying for each data element that is provided pursuant to this Schedule 4 which Public Sector Party shall have access to that data and any specific restrictions on use.

Data provided	Public Sector Party with access to the Data				Confidential or Commercially Sensitive
	Welsh Government	TfW	Lead Authority	Local Authority	
[Note: to be completed with reference to each Operator Data element]	[Note, for each party state: <ul style="list-style-type: none"> • No access • Full access • Any access restrictions] 				[Note: For each data to be identified where Confidential or Commercially Sensitive and for what timescale]

SCHEDULE 5: FUNDING REVIEW

1. Funding Review

- 1.1 Welsh Government shall review the implementation of BES Funding on a periodic basis (“**Funding Review**”), at frequencies to be determined by Welsh Ministers at their sole discretion.
- 1.2 It is acknowledged that BES Funding has been provided on a discretionary basis by Welsh Government and that Welsh Government shall therefore be entitled to apply its own criteria to determine whether to continue the provision of BES 3 Funding, but such criteria may include:
 - 1.2.1 Performance of the Bus Emergency Scheme (including this Agreement) against the available Funding in meeting the Priorities; and
 - 1.2.2 The levels of Funding available.
- 1.3 The outcome of any Funding Review may include, but not be limited to, the following:
 - 1.3.1 continuation of the BES 3 Funding on its existing terms;
 - 1.3.2 changes to the BES 3 Funding terms, in which case the Agreement shall be varied in accordance with clause 29 to reflect the requirements of such change.

The Parties agree and acknowledge that the Operator may propose a reduced Service Standard to take account of any reduction in BES 3 Funding, save for where

Welsh Government provide an alternative grant or funding scheme in place of BES 3 Funding which is designed to provide continuity of service; or
 - 1.3.3 ending the BES 3 Funding, in which case the Welsh Government shall use reasonable endeavours to provide the Lead Authority and the Operator with notice of such change (which at a minimum shall be one (1) months’ notice) prior to ending the BES 3 Funding.
- 1.4 Where BES 3 Funding is terminated pursuant to paragraph 1.3 above, no further payments shall be made pursuant to this Agreement, following such notice period, provided that nothing in this Schedule 5 shall be taken to remove the right of Welsh Government to recover monies paid to the Operator or the entitlement of the Operator to any additional payments calculated, in each case, pursuant to the reconciliation and compensation process specified in Schedule 3.
- 1.5 The Parties agree and acknowledge that as part of a Funding Review, Welsh Government may review the level of AM (as set out in Schedule 3) and make such adjustments as are reasonable and necessary to ensure the continued viability of services.