



Llywodraeth Cymru
Welsh Government

Welsh Government's Mutual Investment Model (MIM)

Standard Form Project Agreements User Guide

March 2017 (Version 1)

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Chapter 1: Introduction

Background

The Welsh Government has produced two forms of Project Agreement for use on Mutual Investment Model ("MIM") schemes. These are:

- a MIM Standard Form Project Agreement (Accommodation Version), which is designed to be used for the design, build, financing and maintenance of accommodation projects, such as individual or grouped schools, colleges and health facilities; and
- a MIM Standard Form Project Agreement (Roads Version), which is designed to be used for the design, build, financing and maintenance of roads projects.

The two forms are deliberately designed to maximise efficiency and minimise costs of procurement for public and private sector users and to facilitate joined-up contract management across sectors in the future. As a result, drafting is aligned between the two forms of Project Agreement to the extent possible.

This User Guide for the MIM Standard Form Project Agreements has been developed for contracting authorities undertaking a MIM scheme, in order to assist them with the development of their contractual approach. It is also being made available to the market and its advisers in order to facilitate efficient procurements and a good understanding of the MIM approach. Please note this User Guide assumes a reasonable working knowledge of revenue based schemes and structures.

Capitalised terms in this User Guide shall have the meaning given to them in Schedule 1 of the relevant MIM Standard Form Project Agreement, unless otherwise defined herein. References to the "Authority" mean the authority responsible for procuring the relevant MIM project.

General approach

The MIM Standard Form Project Agreements have been developed against a background of revenue funded accommodation and road investment plans, at a time when public funds for infrastructure investment, whether capital or revenue, are severely curtailed. They maintain the basic principles that:

- the private sector will provide the Authority with serviced accommodation/roads;
- payment will only commence once the accommodation/road is complete and ready for use; and
- the Authority will pay for available facilities/roads and deductions will be made from the Annual Service Payment if the facilities/roads are not available, or the Services are otherwise not provided in accordance with the Authority's requirements.

In the case of accommodation projects, differences in operation between revenue funded facilities and facilities procured using conventional capital funding have been minimised as far as possible on the basis that an Authority should be free to operate its revenue funded facilities in the same way as facilities provided using conventional capital funding and that good estate management practices should not depend on the financing route that was used to make the investment in the facilities. As such, a relatively narrow scope of hard facilities management services has been proposed for the MIM Standard Form Project Agreement (Accommodation Version), under which the private sector will provide planned maintenance (including lifecycle replacement), reactive maintenance to the buildings

and hard landscaping. In turn, this should produce a simplified Service Level Specification and associated performance monitoring and contract management arrangements for Authorities.

The approach has been:

- to promote maximum value for money through commercially reasonable risk transfer consistent with the principles outlined above and in line with statistical classification requirements;
- to adhere to the MIM principles approved by the Welsh Government;
- to simplify the documents as far as possible consistent with a robust commercial structure and 'bankability'; and
- to minimise transaction costs with a standard that should be reasonably acceptable to contractors, investors and funders as well as procuring authorities.

Approach to Standardisation

The key principles embodied in the MIM Standard Form Project Agreements will be familiar to those who operate in the UK 'PPP' market. The MIM Standard Form Project Agreements are based on various UK precedent and standard project agreements, updated in order to accommodate the specific needs of the Welsh Government's infrastructure programme and Welsh Government policy. Account has also been taken of Council Regulation (EC) 549/13 on the European system of national and regional accounts in the European Union, together with the Manual on Government Deficit and Debt, published in March 2016, and EPEC/EUROSTAT's Guide to the Statistical Treatment of PPPs, published on 29 September 2016 ("**EPEC/EUROSTAT's Guide**"). In brief, key defining features of the MIM Standard Form Project Agreements include:

- no controls or vetoes on the operations of Project Co;
- no sharing of rewards for the procuring Authority;
- a move to traditional "Project Co Event of Default" compensation on termination for Corrupt Gifts;
- provisions to ensure Welsh Language Standards are complied with;
- provisions to reflect BIM, ethical employment standards and requirement for genuine Community Benefits;
- more detailed provisions to deal with the treatment of equipment, snagging, completion requirements and certification of Works; and
- amendments required to reflect legal jurisdiction.

In addition, the MIM Standard Form Shareholders' Agreement introduces Welsh Government Shareholder investment as another key feature of the Welsh Mutual Investment Model.

Contact

Should you have any questions on the MIM Standard Form Project Agreements please contact: MIMMailbox@Wales.gsi.gov.uk

**This Version 1 of the User Guide is accurate at the time of publication in March 2017.
Further updates will be published from time to time.**

Chapter 2: General Comments

Using the MIM Standard Form Project Agreements

Use of the MIM Standard Form Project Agreements is not a substitute for project specific advice and Authorities must take appropriate legal, financial and technical advice when using them.

Neither this User Guide nor the footnotes in the MIM Standard Form Project Agreements represent an exhaustive list of project specific matters that need to be considered by each Authority and its advisors, who must analyse and review them in detail to ensure they are tailored to the requirements of the specific project and their terms (and their impact) are clearly understood by the Authority.

The MIM Standard Form Project Agreements should be used in conjunction with any further guidance issued/adopted by the Welsh Government from time to time. They should also be read in conjunction with the accompanying MIM Standard Form Shareholders' Agreement.

This User Guide accompanies the MIM Standard Form Project Agreement (Accommodation Version) and MIM Standard Form Project Agreement (Roads Version). Chapter 4 contains generic (non-sector specific) guidance that should be read together with the applicable sector specific guidance contained in Chapter 5 (Health), Chapter 6 (Education) or Chapter 7 (Roads), as applicable.

Changes to the MIM Standard Form Project Agreements

All changes to the MIM Standard Form Project Agreements require the prior approval of Welsh Ministers, acting through the relevant officials.

For the avoidance of doubt, this includes completion of all 'technical' Schedules, such as the Service Level Specification and Payment Mechanism.

It should be noted derogations to the MIM Standard Form Project Agreements are strongly discouraged and it is expected Welsh Government approval will be strictly limited to changes that represent value for money and are required for project specific reasons, or to reflect changing Welsh Government guidance or demonstrable changing market circumstances. Further, in the case of matters which may adversely affect an 'off-balance sheet' statistical classification by ONS/EUROSTAT, project teams are advised to read EPEC/EUROSTAT's Guide before contacting Welsh Government for approval. For ease, attention has been drawn to certain key aspects of EPEC/EUROSTAT's Guide within this User Guide but it is not intended to be a substitute for reading EPEC/EUROSTAT's Guide in its entirety.

Prior to submission of the Outline Business Case, Authorities must propose a detailed timetable indicating when requests for derogations to any MIM Standard Form Project Agreement (or Shareholders' Agreement) will be presented to the Welsh Government, and such programme shall then be updated in discussion with Welsh Government as required. An Authority/the project team must give Welsh Government no less than one (1) month notice of when it intends to submit a request for derogations and the dates should generally tie in with Commercial Approval Point ("CAP") dates intimated by the Welsh Government to the Authority. The Welsh Government will endeavour to respond to a request for approval to derogations within two (2) weeks of receipt. In requesting derogations the Authority must provide its amended version of the relevant MIM Standard Form Project Agreement (including the Schedules) and provide explanations for the proposed amendments by way of accompanying commentary. The Welsh Government will do a comparison of the document submitted against its master version of the MIM Standard Form Project Agreement. It

will then decide whether to approve each derogation, or whether to decline to do so, and in each case will inform the Authority and the relevant project team of its decision in writing.

This User Guide and the MIM Standard Form Project Agreements contain optional/required drafting to deal with matters that are specific to different sectors and particular circumstances that are commonly encountered. Use of such drafting must nevertheless be reported to the Welsh Government and approval obtained. Explanatory footnotes also appear in some parts of the body and/or Schedules to the MIM Standard Form Project Agreements. These should all be used/implemented/deleted as appropriate before the document is issued for a specific project. For ease of future contract management, Welsh Government does not expect to see the MIM Standard Form Project Agreements amended to any individual law firm's house style. Clause and paragraph numbering should be preserved through the use of lettered additions and "not used" deletions. Automatic numbering and hyperlinked cross references should be maintained.

Chapter 3: Key Features of MIM Projects

The Welsh Mutual Investment Model is characterised by the following key policy features:

- the opportunity for Welsh Government to take a minority equity stake (up to a maximum of 20% of issued share capital) in Hold Co;
- the ability to provide for "third party equity" funding competitions for a specified portion of equity in Hold Co at preferred bidder stage;
- enhanced stakeholder involvement through the right of the Welsh Government to appoint a director to the Board of Project Co and Hold Co and the option for the Authority to appoint an observer to the Board of Project Co and Hold Co;
- no 'Soft' Services on Accommodation projects;
- the ability of the Authority to carry out low value changes and adoption of a rigorous change procedure;
- proper and ongoing scrutiny of the construction and operations carried out by Project Co, together with stringent performance monitoring; and
- Community Benefits.

In order to embed key policies within the structure of MIM projects, successful participants will be required to enter into the MIM Standard Form Shareholders' Agreement, in addition to the MIM Standard Form Project Agreement (Accommodation Version) or the MIM Standard Form Project Agreement (Roads Version). The MIM Standard Form Shareholders' Agreement should be tailored to suit the successful participants own equity solutions, in accordance with the guidance contained in the footnotes therein.

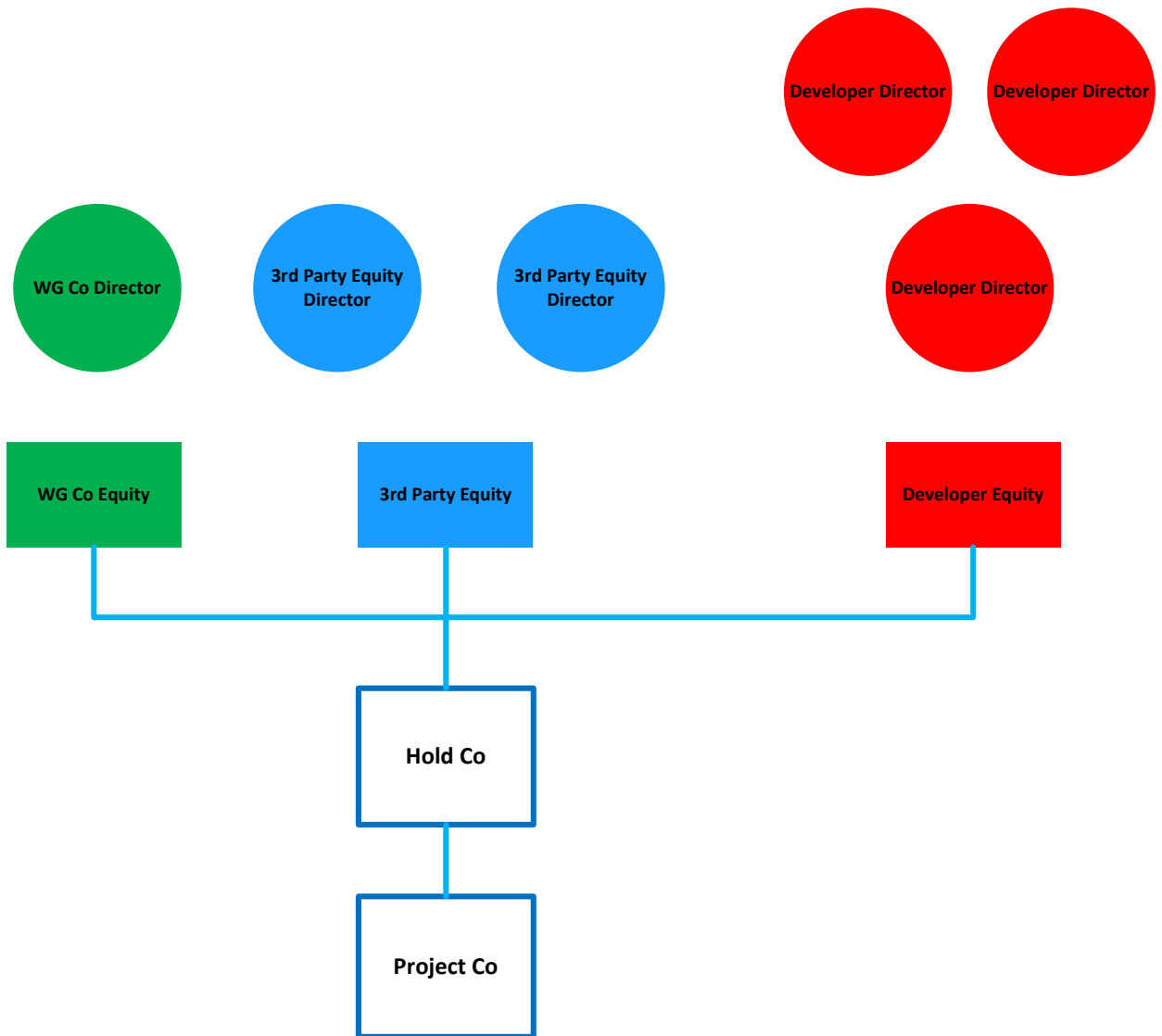
The MIM Standard Form Shareholders' Agreement regulates matters as between the equity investors, Hold Co and Project Co. Project Co is wholly owned by Hold Co, as is usual for PPP-type projects, and investment in Hold Co will be determined on a project by project basis. Diagram 1 below illustrates the base structure adopted under the MIM Standard Form Shareholders' Agreement.

The terms of the MIM Standard Form Shareholders' Agreement assume the creation of a wholly owned Welsh Government investment entity, referred to as 'WGCo', however in the event that a corporate vehicle is not used, Welsh Government (or another such body as it may determine) may assume the role of WGCo.

The private sector equity investors within the successful participant are represented as 'Developer Equity'.

Welsh Government may also elect that an equity competition is held in respect of a portion of 'Third Party Equity', post successful participant appointment. Third Party Equity is distinct from Developer Equity and is a tranche of equity that will be invested by parties unrelated to the sponsoring project parties. This approach is intended to encourage long-term investors to invest at the outset of a project, thereby limiting the potential for excessive profits and, consequently, the potential for windfall gains on secondary market sales.

Diagram 1



In order to determine the precise structure of each specific MIM project, the Authority should engage with Welsh Government early in the pre-procurement process and seek confirmation of (a) the level of issued share capital Welsh Government shall have a right to subscribe for in Hold Co; and (b) whether a third party equity funding competition will be required (and if so the portion of equity to be classified as third party equity together with any required adjustment to the traditional gearing ratios), on a project by project basis. This information will be referred to in the Contract Notice.

Welsh Government may issue further guidance on these issues from time to time.

Chapter 4: General Guidance

The following guidance relates to generic Clauses, applicable across sectors. The generic guidance should be read in conjunction with the relevant sector specific guidance in Chapters 5 to 7, as applicable. All references to the MIM Standard Form Project Agreements in this Chapter 4 refer to both the MIM Standard Form Project Agreement (Accommodation Version) and the MIM Standard Form Project Agreement (Roads Version).

| Clause (Roads ref if different) | Comment |
|---------------------------------|---|
| 2 | The MIM Project Agreements assume contract execution and delivery will occur simultaneously with Financial Close. If there are project specific reasons why a condition or event cannot be satisfied until after contract execution and delivery, then the Agreement will need to be amended accordingly. In those circumstances, any conditions precedent (" CPs ") should be limited as far as possible to items of real significance that cannot be satisfied prior to signature. This approach is necessary to minimise the risk of a party terminating the Agreement for failure to satisfy a trivial or insignificant CP. If Financial Close does not occur simultaneously with contract execution and delivery, owing to the existence of any unsatisfied CPs, the parties will need to agree how risks relating to interest rate fluctuations between the date of the contract and Financial Close are to be allocated. Consideration will also need to be given as to whether the definition of Project Term should be amended, so as to commence on Financial Close rather than the date of the Agreement. |
| 4.1 | The Independent Tester Contract is dealt with in Clause 15 (<i>Independent Tester</i>) and Schedule 13 (<i>Independent Tester Contract</i>). The MIM Standard Form Project Agreements envisage the independent tester will have obligations jointly to the Authority and Project Co. If, in exceptional cases, these obligations are owed to Project Co alone, the definition of Ancillary Documents should be extended to cover the Independent Tester Contract and Authority assurance measures would need to be discussed with Welsh Government. |
| 4.3.1 | The Authority's consent should not be given unless the Additional Permitted Borrowing Limit has been reached. |
| 4.7 | The term "Funding Default" should be defined by reference to the borrower defaults under the Senior Funding Agreements (and applies whether or not the Senior Funders choose to accelerate their loan). Please note this obligation is additional to the obligation of the Agent under paragraph 9.4 of Schedule 4 (<i>Funders' Direct Agreement</i>). |
| 4.8 | The Authority should insert a definition of Interim Project Report that sets out the broad headings and issues which it requires to cover. The Interim Project Report ought to include any information Project Co is required to provide to the Senior Funders under the Senior Funding Agreements in the circumstances described in Clauses 4.7 and 4.8. A template form of report should be inserted by the Authority as a schedule to the Agreement and should outline the required detail, so as to avoid ambiguity. |

| Clause (Roads ref if different) | Comment |
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| 8.10 - 8.14 | <p>These provisions should be read in conjunction with Clause 5.6 (<i>Observers at Board Meetings</i>) of the MIM Standard Form Shareholders' Agreement. It may be appropriate to appoint an Authority Observer where the Welsh Ministers are not the procuring authority, or they are the procuring authority but are no longer Shareholders in Hold Co. The Authority will need to ensure that the right for the Welsh Ministers to appoint an Authority Observer is reflected in the Articles of Association (with a similar approach being taken to that in Clause 5.6 (<i>Observers at Board Meetings</i>) of the Shareholders Agreement). The relevant rights in respect of the Authority Observer will thereby continue under the Articles of Association notwithstanding termination of the Shareholders Agreement (which may arise for example, where the Authority is no longer a Shareholder in Hold Co).</p> |
| 9 | <p>The MIM Standard Form Project Agreements are drafted on the basis that the Site has been selected by the Authority and the Authority retains title risk. If the Site is to be selected by Project Co then these provisions will need to be reviewed.</p> <p>Under Clause 9 the Authority grants licences that are subject only to disclosed Reserved Rights and Title Conditions. Project Co is required to comply with such disclosed Title Conditions and Reserved Rights at its own risk.</p> <p>The Authority must therefore arrange for suitable title due diligence to be carried out by its own or external legal advisors, in advance of OJEU publication in order to determine whether any title matters might reasonably be expected to interfere with the carrying out of the Works and/or Services. Where Project Co would reasonably be expected to be the party best placed to manage any identified issues, these issues should be disclosed as Reserved Matters or Title Conditions in Schedule 5. See further guidance at Schedule 5 below.</p> |
| 9.1.1 | <p>To be reviewed on a project specific basis. Where a project involves phased construction, refurbishment or upgrades, a phased programme of access may be required.</p> |
| 10 | <p>The MIM Standard Form Project Agreements assume the Authority has carried out appropriate Site investigations (which are capable of being relied upon by Project Co) and Project Co is otherwise able to carry out any further investigations it considers necessary to satisfy itself in relation to Site conditions.</p> <p>The Authority should seek technical advice on the scope and type of surveys to be commissioned and paid for by the Authority (outwith the Annual Service Payment), which consultants to appoint and their required level of professional indemnity cover. The surveys should be commissioned in advance of OJEU notice publication and be capable of being relied upon by Project Co. Any redress for any loss or omission shall be between Project Co and the consultant who undertook the survey. The survey reports should be included in the "Site Pack" referred to in Schedule 5 guidance below. However, the Authority should clearly state that it does not warrant the survey information contained in the report (or which should have been revealed if the report had been done properly).</p> |
| 11 | <p>The outline planning consent must be obtained prior to OJEU. The status of planning consents will be reviewed as part of the relevant Commercial Approval Points by the Welsh Government.</p> |

| Clause (Roads ref if different) | Comment |
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| 11.1.1 | <p>Where, on a project specific basis, there are certain Consents which only the Authority can obtain, or Consents which Project Co can obtain only with input from the Authority, appropriate drafting should be included in this Clause 11 (<i>Consents and Planning Approval</i>) and cross referred to in Clause 5.2.1. Acceptance of any such responsibility by the Authority should be narrowly prescribed. A similar approach should be followed where there are legislative requirements in relation to the Facilities/Project Facilities which can only be complied with by, or that require the input or co-operation of the Authority as occupier or user of the Facilities/Project Facilities or any part of them. Again, acceptance of any such responsibility by the Authority should be narrowly prescribed.</p> |
| 11.1.2 | <p>If the detailed planning permission includes conditions with which the Authority (as owner/occupier of the Facilities/Project Facilities) must comply, appropriate drafting should be included at Clause 11.3 and cross-referred to in Clause 5.2.1. Authorities should seek advice on the extent and consequences of any such obligations.</p> |
| 11.4 (11.16 to 11.24) | <p>Set out below is drafting that must be used where Financial Close is reached less than six (6) weeks after detailed planning permission is granted. In line with market practice, this drafting places the risk of judicial review of the planning permission within that six (6) week period with the Authority. Thereafter judicial review risk transfers to Project Co. The risk transferred to the Authority excludes any judicial review or challenge that arises from Project Co's conduct during or compliance with the planning process.</p> <p>11.4 Judicial Proceedings</p> <p>11.4.1 Either party shall notify the other forthwith upon becoming aware of any Judicial Proceedings.</p> <p>11.4.2 If in accordance with Clause 11.4.1 either party serves a notice then:</p> <p>11.4.2.1 the Authority shall be entitled by notice in writing to Project Co (the "Suspension Notice") to require Project Co to suspend the Works (or the relevant part thereof) and Project Co shall forthwith suspend the Works (or the relevant part thereof) upon receipt of the Suspension Notice at the Site which is the subject of any Judicial Proceedings and such suspension shall subsist subject to Clause 11.4.5.1 until such time as (i) such Judicial Proceedings are finally dismissed or withdrawn leaving in place a valid planning permission; or (ii) provided there is no subsisting Judicial Proceedings Action the Authority informs Project Co that the Works (or the relevant part thereof) should be resumed (whichever is the earlier); and/or</p> |

| Clause (Roads ref if different) | Comment |
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| | <p data-bbox="639 315 1396 831">11.4.2.2 Project Co must suspend the Works (or the relevant part thereof) at the Site which is the subject of any Judicial Proceedings Action and forthwith give notice of such suspension in writing to the Authority (the "Project Co Suspension Notice") and such suspension shall subsist subject to Clause 11.4.5.2 until such time as (i) such Judicial Proceedings Action is finally overturned leaving in place a valid planning permission; (ii) this Agreement is varied by means of a Authority Change in order to permit Project Co lawfully to resume the Works (or the relevant part thereof) and/or perform its obligations under this Agreement; or (iii) the parties otherwise agree in writing that the Works (or the relevant part thereof) should be resumed (whichever is the earlier).</p> <p data-bbox="512 864 1396 1323">11.4.3 Save for where Project Co or a Project Co Party (and for the purposes of this Clause 11.4.3 only "Project Co or a Project Co Party" shall exclude an employee or agent of Project Co or of a Project Co Party acting in a personal capacity) has brought or caused to be brought on its behalf Judicial Proceedings, any suspension of the Works (or the relevant part thereof) pursuant to Clause 11.4.2.1 or 11.4.2.2 shall be deemed to be a Compensation Event from the date of the Suspension Notice or Project Co Suspension Notice as appropriate (and for the purposes of the provisions of Clause 65 (<i>Notices</i>) Project Co is deemed to have become aware that there will be or is likely to be a delay in the commencement or completion of the Works on the date of receipt of the Suspension Notice or the date of Project Co Suspension Notice as appropriate).</p> <p data-bbox="512 1357 1396 1749">11.4.4 Where a Project Co Party (and for the purposes of this Clause 11.4.4 only "Project Co Party" shall exclude an employee or agent of Project Co or any Project Co Party acting in a personal capacity) has brought or caused to be brought on its behalf Judicial Proceedings any suspension of the Works (or the relevant part thereof) pursuant to Clause 11.4.2.1 or 11.4.2.2 shall be deemed to be a Relief Event from the date of the Suspension Notice or Project Co Suspension Notice as appropriate and the provisions of Clause 31 (<i>Relief Events</i>) shall apply but solely for the purpose of entitling Project Co to apply for relief from any rights of the Authority to terminate this Agreement for a Project Co Event of Default pursuant to Clauses 40.1.2 and/or 40.1.4.</p> |

| Clause (Roads ref if different) | Comment |
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| | <p>11.4.5 If by the date falling [twelve (12)]¹ months after the date of the:</p> <p>11.4.5.1 Suspension Notice, the Works (or the relevant part thereof) are still suspended pursuant to Clause 11.4.2.1; or</p> <p>11.4.5.2 Project Co Suspension Notice, the Works (or the relevant part thereof) are still suspended pursuant to Clause 11.4.2.2,</p> <p>then unless agreed otherwise in writing between the parties, the Authority shall either (i) issue an Authority Change Notice to remove the affected [Facilities]/[Project Facilities] from the scope of the Project and/or varying the Authority's Construction Requirements to remove those requirements relating to the affected [Facilities]/[Project Facilities] to which the Judicial Proceedings relate; or (ii) serve notice of termination under Clause 42.1 of this Agreement.</p> <p>"Judicial Proceedings" means the grant of permission for an application of judicial review within six (6) weeks of the date of a Planning Approval (and any subsequent application or related process) under Part 54 of the Civil Procedure Rules in respect of a Planning Approval;</p> <p>"Judicial Proceedings Action" means any court order or declaration made by a relevant court (including without limitation the granting of an injunction) arising out of or in connection with any Judicial Proceedings that renders unlawful and/or prevents the performance of all or part of Project Co's obligations under this Agreement;</p> |
| 13 | <p>Authorities are reminded of the duty they ultimately owe to the public to ensure the provision of a safe environment. Authorities should therefore consider what internal resource and/or specialist technical support is needed to perform the role of the 'intelligent client' and carry out the appropriate degree of internal assurance, notwithstanding the services being provided by Independent Tester. Authorities should discuss their intended approach with the Welsh Government.</p> |
| 14.5-14.6 | <p>Provision for notification of early completion has been included to enable the parties (at their discretion) to consider early occupation by the Authority of the Facilities/Project Facilities. The consequential amendments required as a result of agreeing to early completion (e.g. in relation to commissioning, phasing, equipment procurement, service payments, as appropriate) would have to be considered and agreed on a project specific basis at the time and Authorities will be required to seek Welsh Government approval prior to agreeing to early completion. If the Authority is not willing to accept early completion of the Facilities/Project Facilities under any circumstances, this Clause may be deleted.</p> |

¹ The time limit must be realistic and take into account the likely time for the Judicial Proceedings to be heard.

| Clause (Roads ref if different) | Comment |
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| 15.1 | The MIM Standard Form Independent Tester Contract is set out at Schedule 13 and provides that the Independent Tester will be appointed jointly by the parties. |
| 17.13 (16.9) | This Clause makes the certificate of the Independent Tester conclusive as regards the Actual Completion Date/Payment Commencement Date unless there is manifest error (for example a clearly erroneous date), bad faith or fraud. It is in the interests of both parties that there is certainty about when payment commences. Both parties should have remedies under the Independent Tester Contract if he/she wrongly issues or refuses to issue his/her certificate. Damages (claimed from the Independent Tester) should always be a sufficient remedy if payment starts prematurely or is wrongly delayed by reason of fault on the part of the Independent Tester. |
| 17.18 (16.14) | Documentation to be specified on a project by project basis. Documents should, as a minimum include "as-built" drawings and "final issue" construction drawings. Authorities should monitor compliance with this important provision, considering remedies such as Deductions, where Project Co fails to comply. Note the drafting assumes use of BIM. Where this is not the case, the Authority should discuss approach with Welsh Government. |
| 19.6 (17.6) | The discovery of fossils and antiquities is treated as a Relief Event entitling Project Co to an extension of time in accordance with Clause 30 (<i>Delay Events</i>) (Clause 44 for Roads) but leaving the financial risks of such discovery with Project Co. If there is a known problem on the Site the provisions relating to discoveries may need to be reviewed and amended on a project specific basis. |
| 21 (18) | Provisions relating to Information Technology are to be included on a project specific basis, where required. |
| 23 (22) | <p>There are no Deductions during periods when planned preventative maintenance is taking place in accordance with the agreed Schedule of Programmed Maintenance. Authorities must ensure that risk in relation to maintenance and replacement lies with Project Co and, further, will need to:</p> <ul style="list-style-type: none"> • develop their output specifications and Payment Mechanism (in sufficient detail); and • consider the grounds for objection in paragraph 3.9 of the Review Procedure, <p>in the light of this requirement (and the Authority's output requirements).</p> <p>Although Schedule 18 (<i>Handback Procedure</i>) deals with the hand-back of the asset on expiry, the Authority may wish to reserve the right to carry out periodic surveys to ensure that regular maintenance is in fact carried out. The Authority should not get involved in the micromanagement of planned maintenance but should have the ability to ensure that any significant deterioration in the facility is avoided. Alternatively, this may already be achieved via the deductions in the Payment Mechanism.</p> |
| 23.3 (22.3) | Authorities will need to consider this provision in the light of how unplanned maintenance will in fact be carried out by Project Co. For example, if maintenance personnel are to be present full time on the Site, it may be more appropriate not to require advance notification, but to reserve a right to defer or reschedule any work if it is actually carried out at an inconvenient time. |

| Clause (Roads ref if different) | Comment |
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| 25 (24) | Authorities should consider and discuss reporting requirements on a project specific basis. Additional reporting requirements or supplementary detail on the matters to be included within the Biennial Review Report may be included within the Authority's Construction Requirements and/or the Service Level Specification, as appropriate. |
| 26.3 | The warning notice regime is now triggered by the levels of Deductions being made from the Annual Service Payment. The trigger levels in this Clause need to be calibrated and to be consistent with that in Clause 40.1.9 (Clause 44.1.9 for Roads). |
| 27.1 to 27.11 | Clause 27 (<i>Employment Matters</i>) contains drafting for projects that envisage no staff transfers. However, TUPE operates as a matter of law and so in order to protect any inadvertently affected personnel, alternative drafting for projects where staff transfers would or could occur is included at Appendix 1 below and the sector specific sections of this guidance. Clauses 27.1 to 27.11 should be deleted where Staff transfers are envisaged and the alternative drafting in Appendix 1 substituted, together with the sector specific amendments set out in Chapters 5, 6, and 7, as appropriate. |
| 27.9 (no staff transfer) or 27.48 (staff transfer) | Where the Contractor and/or the Service Provider has signed up to the Welsh Government's Code of Practice - Ethical Employment and Supply Chains, compliance with the code shall be mandatory. |
| 28.5 | The MIM Standard Form Project Agreements assume Authority Policies will include any relevant rules, regulations and requirements of the Authority relating to the conduct of staff (including those in respect of security arrangements). |
| 28.8 to 28.10 (28.12 to 28.14) | Each Authority should consider and review Clauses 28.8 to 28.10 in light of its own policies in relation to disclosure checks and disclosure of convictions, and the extent to which these obligations apply during the construction and/or operational periods. The Authority's requirements in this regard should correspond to the relevant sector and the extent to which Project Co's staff are likely to be in contact with children, the elderly or vulnerable persons. |
| 28.8 (28.10) | <p>The following drafting should be inserted after the words "performing any of the Project Operations" where staff transfers are envisaged:</p> <p>"other than Transferring Authority Employees (as confirmed by the Authority whose duties do not thereafter change so that they may reasonably be expected to have access to children, the elderly and/or vulnerable adults in the course of their employment or engagement)"</p> |
| 28.12 (28.17) | Authorities should note the procedures in Clause 28.12 will be governed by Data Protection law. To the extent that the Authority envisages receiving information concerning Project Co employees, the Agreement will need to oblige Project Co to include a relevant Clause in the contract of employment of the relevant employees. |

| Clause (Roads ref if different) | Comment |
|---------------------------------|---|
| 28.16 | <p>The following proviso should be added at the end of Clause 28.16 where staff transfers are envisaged.</p> <p>"provided Project Co shall not be in breach of its obligations under this Clause 28.16 to the extent that such breach is caused or contributed to by the Authority failing to comply with its obligations under Clause 28.17."</p> |
| 28.17 (28.19) | <p>The following Clause should be inserted where staff transfers are envisaged:</p> <p>28.17 The Authority agrees to permit and arrange for any person who in the event that he or she remains in the employment of the Authority as at the Relevant Service Transfer Date will be a Transferring Authority Employee to receive training and to make familiarisation visits to the [Facilities]/[Project Facilities] (all as reasonably requested by Project Co and in such manner as to ensure that there is no material adverse effect on the operations of the Authority as a result of the same).</p> |
| 29 | <p>The drafting places obligations on both parties, recognising that both parties may keep hazardous materials at the Facilities/Project Facilities. The Authority should consider who is best placed to maintain the COSHH register for the Facilities/Project Facilities.</p> |
| 29.4 | <p>Where the Authority considers it appropriate, a carve-out may be provided to cover the case of phased construction and handover for the Site.</p> |
| 29.9-29.14 and Schedule 29 | <p>Investment in MIM presents an opportunity to deliver benefits for local communities and, ultimately, the Welsh economy, which Welsh Government considers to be an integral part of its revenue funded infrastructure model. Local benefits must be required from the bidders for all MIM projects and guidance sought from Welsh Government on the minimum core and non-core requirements applicable at the time. Additionally, Authorities are required to consider on a project-specific basis any wider benefits that could feasibly flow from their projects. At this time, the two primary foci of Community Benefits policy in Wales are (a) workforce initiatives, focussing on employment and training opportunities for disadvantaged people and specific target groups; and (b) supply chain initiatives, designed to maximise opportunities for smaller and more local businesses.</p> <p>As well as referring to any internal community benefits policies that they may have, Authorities should refer to appropriate guidance (e.g. "Community Benefits, Delivering Maximum Value for the Welsh Pound - 2014" or such later guidance on the subject as may be produced by Value Wales or, the Welsh Government more generally).</p> <p>Authorities should encourage innovation from bidders to exceed minimum requirements and reflect this in the evaluation criteria. The evaluation criteria and methodology should be set out in the pre-qualification documents and will be subject to Welsh Government's prior approval. Authorities should refer to further guidance in the Welsh Government's Standard Form Descriptive Document on this subject.</p> |

| Clause (Roads ref if different) | Comment |
|---------------------------------|---|
| 30 (34) | <p>Delay Events give rise to an extension of time for completion of construction. Compensation is payable for all Delay Events (other than Force Majeure or Relief Events) as follows:</p> <ul style="list-style-type: none"> • Authority Changes – Schedule 16 (<i>Change Protocol</i>) • Clauses 30.9 to 30.13 (Clauses 34.9 to 34.13 for Roads) • Relevant Change in Law referred to in Clause 33 (<i>Relevant Changes in Law</i>) (Clause 37.2 for Roads) <p>Delay Events may apply after the original completion date. However, the Authority should be under no obligation to accept early completion where Project Co has completed prior to the revised completion date.</p> |
| 30.3.1 (34.3.1) | <p>The issue of an Authority Change Notice will not, in itself, give rise to a Delay Event as Project Co will be obliged to continue to carry out the Project Operations until such time as the Change is agreed. The Authority may wish to consider whether the Project Operations ought to be suspended whilst the Change process is ongoing e.g. to avoid abortive works and costs being incurred, in which case it would be appropriate to factor the time/cost implications of such suspension in Project Co's claim for a Delay Event and Compensation Event.</p> |
| 31.1 (35.1) | <p>Should particular project specific circumstances warrant, the list of events could be extended to include other similar events with the Welsh Government's approval. However, the Authority should not permit the inclusion of a "catch-all" provision to the extent any event outside the control of the parties should be a Relief Event. Only approved specified events should be listed. Equally, Authorities are free to delete any item from this list if project specific circumstances merit, although examples of this have been, and are expected to remain, extremely rare.</p> |
| 33 (37) | <p>The Authority should review the proposed Service Level Specification to clarify whether Project Co has any responsibility for ensuring the Facilities/Project Facilities are compliant following future Changes in Law. It may be appropriate, if not, to review this Clause 33 (<i>Changes in Law</i>) (Clause 37 for Roads) and Clause 30 (<i>Delay Events</i>) (Clause 34 for Roads). Where Project Co is taking residual value risk, the drafting in Clause 33.4.3(a) (Clause 37.4.3(a) for Roads) should be reviewed on a project specific basis and agreed in conjunction with the Welsh Government.</p> |
| 33.3 (37.3) | <p>Changes in Law relating to the extent of irrecoverable VAT are dealt with in Clause 36 (<i>VAT and Construction Industry Tax Deduction Scheme</i>) (Clause 40 for Roads).</p> |
| 33.4.3 (37.4.3) | <p>The Authority has a say over the manner in which any Changes are implemented in accordance with the provisions of Schedule 16 (<i>Change Protocol</i>) and Project Co's grounds for objections to such changes are limited to the grounds referred to in Clause 33.4.3(a) (Clause 37.4.3.1 for Roads).</p> <p>The financial consequences of such changes in law rest with the Authority (including in relation to the cost of obtaining any necessary Consent). The risks of obtaining the Consents remain with Project Co.</p> |

| Clause (Roads ref if different) | Comment |
|---------------------------------|---|
| 35 (Roads 39) | <p>Authorities are referred to Theme 14 (Financing arrangements) at Chapter 3 of EPEC/EUROSTAT's Guide.</p> <p>Government financing (e.g. capital contributions, loans, equity, grants or financing guarantees) must not exceed 49% of the capital expenditure to be incurred for the construction of the MIM asset. However, all Authority/government financing must be considered in light of statistical treatment under EPEC/EUROSTAT's Guide. Authorities must seek consent from the Welsh Government to all public financing proposals, prior to issue of the contract notice for the project.</p> <p>Where, for example, the Authority is considering a capital contribution to a project, this should be considered as part of the Outline Business Case in both the affordability and value for money assessments. This will be relevant to statistical classification of the financing of the Project and will be considered in conjunction with, for example, equity in Project Co/Hold Co.</p> <p>Other factors to be considered include:</p> <ul style="list-style-type: none"> • ensuring capital is reflected in value already delivered in the project (e.g. achievement of important milestones in the construction schedule); • under the "no-retendering procedure" adjustment should be made in respect of any outstanding capital contribution that has been committed by the Authority but is unpaid at that date; • VAT status (especially if the capital contribution is funded by grant monies from a third party source); and/or • if there is any re-scheduling of Senior Debt drawdown, Authority capital contributions should be withheld until the Authority is satisfied no drawdown of Senior Debt or equity is retired behind those of the Authority and that the ratio of private capital to Authority capital is not adversely affected. <p>If the Authority intends to make a capital contribution, it should use the drafting set out below.</p> <p>Capital Contributions</p> <p>35.8 Subject to Clause 35.9 to 35.11, the Authority hereby agrees to make a capital contribution in the sum of [◆] (£[◆]) (the "Contribution") to Project Co in respect of [capital construction costs to be incurred by Project Co in relation to the Works (but excluding professional and administrative fees and other similar overheads)].²</p> <p>35.9 [The Contribution shall become due and payable by the Authority to Project Co on the later of (a) fifteen (15) Business Days after the Actual Completion Date, or (b) fifteen (15) Business Days after the Authority receives a valid invoice for the Contribution from Project Co.]</p> |

² Consider amendments if contributions are phased (i.e. contributions to be retained in a reserve account subject to withdrawal restrictions).

| Clause (Roads ref if different) | Comment |
|---------------------------------|--|
| | <p>35.10 The ratio of private sector funding (including Senior Debt, [Junior Debt] and share capital) drawn down as compared with the Contribution made shall at all times be that determined from the [Base Case].</p> <p>35.11 For the avoidance of doubt, the Contribution is exclusive of VAT and shall not be Indexed.</p> |
| 35.1 (39.1) | <p>Practical completion of the Works triggers commencement of payment of the Annual Service Payment. Where phased completion is envisaged, the payment mechanism should generally be structured so that payment of a relevant percentage of the Annual Service Payment commences on practical completion, with build-up of the payment being linked to completion of each phase of post completion service commissioning, if any, (so that an increase in payments is triggered by completion of each phase until full payment is reached). The basic principle is that the Authority only pays for what it, in fact, receives. However, it may be appropriate in certain project specific circumstances to take a different approach. See for example the Health Sector Specific Guidance in Chapter 5 relating to Key Clinical Equipment. Where a non-standard approach is adopted, approval to the proposed approach must be sought from Welsh Government.</p> |
| 35.2 (39.3) | <p>The drafting here and in Section 2 of Schedule 14 (<i>Payment Mechanism</i>) assumes the Authority will pay for services delivered in the current Contract Month at the end of the current Contract Month. In order to allow sufficient time for reporting and agreeing performance and any resulting Deductions, monitoring and reporting will work two months behind. Thus, payment for month 3 will be invoiced near the beginning of month 3 and paid before the last working day of month 3 and will be based on service performance in month 1. Month 2 will be spent reporting and agreeing that performance. This is considered to be the optimum timing for value for money consistent with the principle that payment should not be made before services have been delivered. An Authority proposing any alternative payment cycle will have to demonstrate to the Welsh Government the value for money benefit.</p> <p>Clause 35.2.1 (Clause 39.3.1) will need to be reviewed on a project specific basis. The Agreed Form of invoice must be agreed between Project Co and the Authority in advance of Financial Close and in consultation with Welsh Government.</p> |
| 35.2.1(e) (39.3.1(e)) | <p>Add a new limb (e) as follows, where staff transfers are envisaged:</p> <p>"(e) any amounts owed to Project Co to take account of an Equal Pay Adjustment in accordance with Clause 27.26;"</p> <p>And re-order the existing limb (e) as limb (f).</p> |
| 35.3 (39.4) | <p>Project Co to specify the manner of payment.</p> |
| 37 (41) | <p>The Welsh Government considers that parties ought to be able to safeguard their own copies of the base case financial model and any amended versions during the life of the project. The Authority should ensure that it has suitable contract management arrangements in place for obtaining updates of the financial model, as well as arrangements for safeguarding these. The Authority will be required to supply the Welsh Government with a copy of the financial model at Financial Close and whenever it is amended.</p> |
| 40.1.1 (44.1.1) | <p>Delete limb (e) if all relevant parties are incorporated and resident in the jurisdiction of England and Wales.</p> |

| Clause (Roads ref if different) | Comment |
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| 40.1.2 (44.1.2) | If it is critical for project specific reasons to meet the scheduled date for completion, the Authority may need to include an earlier trigger which would enable it to terminate prior to the longstop date if it became clear at a given point in time that the longstop date was incapable of being met. |
| 40.1.5 (44.1.5) | The Authority should note this provision is intended to address the situation where Project Co is responsible for a significant contravention of health and safety law which would (in the Authority's perception) make Project Co's position untenable but might not otherwise be caught by the "material breach" event of default (at Clause 40.1.3(a) (Clause 44.1.3(a) for Roads)) because there may not (arguably) be a material impact on the provision of the Authority Services. |
| 40.1.8 (44.1.8) | To be developed on a project specific basis, when calibrating the specific payment mechanism. |
| 40.1.9 (44.1.9) | This Clause and the triggers in Clause 26.3 (<i>Warning Notices</i>) need to be calibrated and related to the performance measures in Schedule 12 (<i>Service Requirements</i>) and the requirements of Schedule 14 (<i>Payment Mechanism</i>). |
| 42.2 (46.2) | <p>Alternative drafting for Authority break-points is provided below. The Authority should consider carefully whether it requires one of more specific break-points when it can terminate the contract at a pre-agreed cost in terms of compensation. Any Authority wishing to include this drafting must consult the Welsh Government.</p> <p>Termination on an Authority Break Point Date</p> <p>42.2 Without prejudice to its rights under Clause 42.1, the Authority may terminate this Agreement on any of the Authority Break Point Dates by complying with its obligations under Clause 42.2.1 below.</p> <p>42.2.1 If the Authority wishes to terminate this Agreement under this Clause it must give notice to Project Co stating:</p> <ul style="list-style-type: none"> (a) the Authority is terminating this Agreement under this Clause 42.2; and (b) this Agreement will terminate on the specified Authority Break Point Date, which must be a minimum of [thirty (30)] days after the date of receipt of the notice. <p>42.2.2 Provided the notice has been provided in accordance with Clause 42.2.1 above, this Agreement will terminate on the specified Authority Break Point Date.</p> <p>Add the following definition to Schedule 1 (<i>Definitions & Interpretation</i>):</p> <p>"Authority Break Point Dates" means [◆];</p> <p>Add the following to Section 1 of Schedule 17 (<i>Compensation on Termination</i>):</p> |

| Clause (Roads ref if different) | Comment |
|---|--|
| | <p>Compensation on an Authority Break Point Date</p> <p>2. On termination under Clause 42.2.2 the Authority shall pay Project Co, in accordance with Section 4 (<i>General</i>) of this Schedule 17 (<i>Compensation on Termination</i>), an amount equal to the amount payable in accordance with paragraph 1 of this Section 1 (<i>Compensation on Termination for Authority Default and Voluntary Termination [and Termination on an Authority Break Point Date]</i>) of Schedule 17 (<i>Compensation on Termination</i>), save that in calculating such amount, the amount specified in paragraph 1.2.3 of this Section 1 (<i>Compensation on Termination for Authority Default and Voluntary Termination [and Termination on an Authority Break Point Date]</i>) of this Schedule 17 (<i>Compensation on Termination</i>) shall be substituted by:</p> <p>2.1 in the case of termination on the first Authority Break Point Date, £[◆]; or</p> <p>2.2 in the case of termination on the second Authority Break Point Date, £[◆].</p> |
| <p>46.5 to 46.10 (50.5 to 50.11)</p> | <p>The grossing up provisions are drafted on the basis of compensation payments which are calculated by reference to the return the Hold Co shareholders/Subordinated Debt holders would have received but for the termination. If the basis of calculation of the compensation payment differs from this these provisions will need to be considered in the light of such alternative basis of calculation.</p> |
| <p>46.11 (50.12)</p> | <p>The limits on Authority's rights of set-off do not apply to compensation payable on termination for Project Co Events of Default.</p> |
| <p>47.2 (51.2)</p> | <p>The Authority should include project specific provisions (e.g. relating to equipment, IT, planning, land and Authority assets or information etc). The Authority should consider what protection is required to ensure compliance with the handover provisions on a project specific basis (taking into account the nature, importance and value of the assets that the handover provisions will apply to).</p> |
| <p>47.2.1 (51.2.1)</p> | <p>The Authority should add other project specific items.</p> |
| <p>47.2.4 (51.2.4)</p> | <p>The Authority should insert any project specific provisions regarding, for example, Information Technology and Equipment.</p> |
| <p>47.2.9 (51.2.9)</p> | <p>The following drafting should be added after the words "delivered to the Authority", where staff transfers are envisaged:</p> <p>"information equivalent to the information it is required to provide in accordance with Clause 27 (<i>Employment Matters</i>) in relation to the employees employed by Project Co and/or Service Providers and"</p> |
| <p>52 (55)</p> | <p>The list of Excusing Causes needs to be considered on a project specific basis.</p> |
| <p>52.2 (55.2)</p> | <p>On projects which include phased working, it is possible that Delay Events affecting construction work may also have an impact on service delivery. For this reason, it may be necessary to include additional Excusing Causes on a project specific basis, although Authorities should take care not to do so automatically (for example, Relief Events do not give relief from deductions for service failure in any circumstances, even though they are classified as Delay Events).</p> |

| Clause (Roads ref if different) | Comment |
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| 52.2.2 (55.2.2) | Include limb (e) in phased projects, otherwise delete. |
| 53 (56) | <p>Any warranties to be given by the Authority must be justified on a project specific basis (it is expected such circumstances will be limited for example, where the Authority is the only source of the information and Project Co has no means of obtaining or verifying that information itself). Increasingly the private sector has required warranties as to the accuracy of certificates of title however these are not considered to be necessary in transactions such as these if there is no security being granted over the property. To the extent that a problem with title arises then Project Co's remedy is either through a Delay/Compensation Event or an Excusing Cause (on the basis that it will constitute a breach of Clause 9). If a warranty is required then the Authority should consider qualifying it to the best of the Authority's knowledge, belief and information.</p> <p>Authorities should note the Standard Form MIM Project Agreements assume the Authority will not warrant information disclosed to Project Co (referred to as Disclosed Data) and expressly excludes liability in this regard. A breach of warranty should give rise to a claim for damages or a price variation mechanism could be introduced to the Agreement. A breach of a warranty should not give rise to a right for the Project Co to terminate.</p> |
| 54.6.1 (57.6.1) | If insurers are unwilling to waive subrogation rights against unnamed Authority Parties, the Authority should consider including specified named Authority Parties (especially sub-contractors). The Authority should, however, resist a suggestion that third parties should automatically be carved out from this Clause. |
| 54.6.2 (57.6.2) | <p>This Clause may not be amended but an obligation may be put in Schedule 15 (<i>Insurance Requirements</i>) as follows:-</p> <p>"The Insurers hereby waive all rights of subrogation however arising which they may have or acquire against the Authority, Authority Parties and its or their respective parents, affiliates, directors, officers employees and assigns arising out of any occurrence in respect of which any claim is admitted under this Policy except where the rights of subrogation or recourse are acquired in consequence of a Vitiating Act in which circumstance insurers may enforce such rights against the vitiating party notwithstanding the continuing or former status of the vitiating party as an Insured."</p> |
| 54.14.4 (57.14.4) | The MIM Standard Form Project Agreements allow for insurance premiums to be a pass-through cost to the Authority during the Operational Term on the basis this reflects better value for money for the public sector. It should be noted, it is appropriate for the Authority to have the right to trigger the Uninsurability provisions if it considers the premiums have reached such a level that the risk is not generally being insured against. |
| 54.15.4 (57.18) | Given insurance premiums are a pass-through cost to the Authority during the Operational Term, it is appropriate for the Authority to have the right to trigger the Unavailability provisions if it considers the premium for insuring with a particular term or condition has reached such a level that the term or condition is not generally being incorporated in insurance. |
| 54.18 (57.22) | This Clause must refer to only such insurances, the proceeds of which are to be paid into the Insurance Proceeds Account i.e. Physical Damage insurance policies. |

| Clause (Roads ref if different) | Comment |
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| 54.22.1 (57.26.1) | This will not include, for example, third party liability, employers' liability, business interruption or advance loss of profits insurance. |
| 55.1 (58.1) | As a matter of good practice, the Authority should review the relevant subcontracts prior to Financial Close to ensure that they contain mirror provisions excluding the right to claim Indirect Losses. Assurances on the contents of the sub-contracts will be required to be provided to Welsh Government, whether or not equity is being invested by the public sector. |
| 55.3 (58.3) | The Authority should note that the general effect of the sole remedy provisions contained in the MIM Standard Form Project Agreements is that, to the extent the Payment Mechanism does not take account of a particular service failure, the Authority will not be able to recover any loss or damages from Project Co (there are certain specific exceptions which are set out in the Project Agreements). The Senior Funders will be unwilling to accept a general right to sue for breach of contract if a service failure is not caught. Schedule 14 (<i>Payment Mechanism</i>) is designed to be a suitable baseline, but the Authority will need to ensure that this remains the case in the final version of the contract. |
| 56.3.& 56.4 (59.3 & 59.4) | If either party is to be given access to any of the other party's computer systems, as a matter of good practice and also to clarify potential liability for unauthorised access to those systems under the Computer Misuse Act 1990, the scope of each party's authorisation to access each other's computer systems will need to be defined clearly. The terms of such authorisation will be project specific. |
| 58.5 to 58.6 (61.5 & 61.6) | Clauses have been added providing a wipe-clean of Deductions and Warning Notices for the purposes of Clauses 40.1.8 and 40.1.9 (Clauses 44.1.8 and 44.1.9 for Roads) in the event the Service Provider is replaced, on a maximum of two (2) occasions during the life of the project, in order to incentivise Project Co to replace an under-performing service provider and to facilitate it in so doing. |
| 58.8 (61.8) | The inclusion of the words in square brackets should be considered on a project specific basis. |
| 61 (64) | The Authority should review the scope of this provision in the light of project specific data processing requirements. |
| 62 (65) | In line with the general approach taken by the Welsh Audit Commission, these Clauses support a general openness in regard to the project contracts and associated documentation. The Welsh Government considers there is a limited amount of the Project Data that can be properly regarded as falling under any of the exemptions in the freedom of information regime. These have been identified in Schedule 26 (<i>Commercially Sensitive Information</i>) with what are thought to be reasonable periods when the protection of confidentiality may be claimed. The Authority should be wary of attempts to widen the scope or extend the duration of the limited contractual confidentiality arrangements in these Clauses and should consider these Clauses in light of any other guidance with which it is required to comply. |
| 62.1.4 (65.1.4) | This should be the Monthly Service Report or some other form of report that Project Co is required to produce on a regular basis, detailing (a) the Monthly Service Payment Amounts (gross and net of Deductions), (b) a breakdown of Deductions incurred, (c) Warning Notices issued and (d) other payments included within the Monthly Invoices for the quarter (e.g. in respect of changes, compensation, indemnities etc). |

| Clause (Roads ref if different) | Comment |
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| 62.1.6 (65.1.6) | Any other information is to be listed on a project by project basis. |
| 63.2 (66.2) | This should enable the Authority to comply with its obligations under the FOIA. If the Authority wishes to go beyond this, for instance by referring in addition to other information or to information held by first tier subcontractors on behalf of Project Co, then this can be specified but it should be noted this may have cost/value for money implications. |
| 63.4 (66.4) | The Authority should ensure the appropriate policy is in place. |
| 63.7 (66.7) | It is up to the parties to decide whether costs associated with any future change in the Authority's FOIA cost recovery policy should go through Schedule 16 (<i>Change Protocol</i>). If the Environmental Information Regulations are relevant to the project, the parties may include broadly equivalent provisions in the Agreement dealing with costs and based upon the Authority's policy towards reimbursement of such costs under section 10 of the Environmental Information Regulations. |
| 73 (76) | Authorities undertaking a MIM project in any sector must always seek Welsh Government approval of any variations to the Project Agreement, to ensure ongoing compliance with the relevant accounting and statistical classification. |

| Schedule | Comment |
|----------|---|
| 1 | Definitions and Interpretation |
| 1 | 5 Year Maintenance Plan The drafting captures the minimum requirements and may be developed and expanded on a project by project by project basis, as appropriate. |
| 1 | Ancillary Documents The Authority should consider if there are any other project significant documents. See also note above on Clause 4.1. The Authority must carry out due diligence on the key sub-contracts and the management services agreement prior to Financial Close, to satisfy itself of deliverability and pass through of risk. Where risks are not passed through to sub-contractors, the Authority should be satisfied as to how these risks are being managed at Project Co level. |
| 1 | Associated Companies If a fund or limited partnership or "50:50" owned vehicle (which is not a "subsidiary") or similar is in the relevant ownership chain of Project Co, this definition will need to be expanded to cover this instance. If any of the holders of equity in Project Co are limited partnerships or other funds, particular attention will need to be given to Clause 59 (<i>Ownership Information and Changes in Control</i>) during any lock-in period. |

| Schedule | Comment |
|----------|---|
| 1 | <p>Authority Assets</p> <p>This definition (which is only used in the indemnity to the Authority in Clause 49.1.3 (Clause 53.1 in the Roads PA)) is intended to cover those parts of the Authority site that are not the subject of the sole remedy payment mechanism. In practice that means those parts of the Site to which Project Co does not provide any Service or, where Project Co does provide Services to a Facility, in respect of those parts of the Site which Project Co does not take any element of availability risk. The Authority should also consider how equipment is treated – if Project Co is not responsible for maintenance and lifecycle of any items of equipment then such items should be included within the definition.</p> |
| 1 | <p>Authority Policies</p> <p>The relevant policies will vary on a project specific basis.</p> |
| 1 | <p>Collateral Agreements</p> <p>The Authority should specify on a project specific basis which professional team collateral warranties and key subcontractor (i.e. with design responsibility) collateral warranties are required.</p> |
| 1 | <p>Completion Date</p> <p>Insert agreed date on which completion is scheduled to occur.</p> |
| 1 | <p>Confidential Information</p> <p>Any information or classes of information the parties agree should be treated as Commercially Sensitive Information should be included in Schedule 26 (<i>Commercially Sensitive Information</i>). Standard provisions are included in Schedule 26 (<i>Commercially Sensitive Information</i>).</p> |
| 1 | <p>Contract Year</p> <p>This definition is relevant to the timing of annual reviews of Annual Service Payments (see Section 2 (<i>Interpretation</i>) of Schedule 1 (<i>Definitions and Interpretation</i>) paragraph 15). The Authority may prefer to amend the timing of reviews (which are scheduled to occur at the assumed commencement of the Authority's financial year on 1 April).</p> |
| 1 | <p>Contracting Associate</p> <p>This provision should be drafted on a project-specific basis to encompass any principal sub-contractors to Project Co.</p> |
| 1 | <p>Disclosed Data</p> <p>The following drafting should be inserted after the words "data and documents" where staff transfers are envisaged:</p> <p>"(excluding for the avoidance of doubt information contained in the First Employee List or any subsequently updated version of that list)"</p> |
| 1 | <p>Discriminatory Change in Law</p> <p>The definition must be completed on a project specific basis and will vary depending on the nature of the Facilities/Project Facilities.</p> |

| Schedule | Comment |
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| 1 | <p>Funding Default</p> <p>See note on Clause 4.7.</p> |
| 1 | <p>Interim Project Report</p> <p>See note on Clause 4.8.</p> |
| 1 | <p>Initial Funding Agreements</p> <p>List those Funding Agreements which are to be put in place at Financial Close.</p> |
| 1 | <p>Original Senior Commitment</p> <p>Adjust for a bond transaction to refer to (a) the gross bond proceeds to be raised; and (b) the amount committed under the Senior Funding Agreements other than such bond proceeds in each case as at Financial Close (as adjusted to take into account any Qualifying Change).</p> |
| 1 | <p>Permitted Borrowing</p> <p>The "Committed Standby Facility", if used, will be any standby facility that is committed by the Senior Funders at Financial Close for the purposes of funding any unforeseen cost overruns, increased expenses or loss of revenues incurred by Project Co. If there is no such facility limb (c) of the definition of "Permitted Borrowing" will not be required.</p> |
| 1 | <p>Phase, Phase 1, Phase 1 Actual Completion Date etc</p> <p>Cross-refer to description of Phases, if relevant, or delete.</p> |
| 1 | <p>Senior Funding Agreements</p> <p>These are all documents relating to the Senior Debt and may include:</p> <ul style="list-style-type: none"> • a credit agreement; • interest rate hedging agreements; and • security documents. <p>Alternatively, bond documentation may be included, in which case the definition will include the bond trust deed, the terms and conditions of the bond, as well as security documents. A monoline insured deal will also include reference to the monoline's Policy and Endorsement and its insurance and Indemnity Agreement (each of which will be defined in the Agreement). Other financing structures will mean referring to other documents.</p> <p>The Authority should place limits on hedging agreements to allow only those agreements that comply with an agreed hedging policy and details of which have been notified to and acknowledged by the Authority to be included in the definitions of Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount (as appropriate). The hedging policy may, of course, change over time, which will require agreement at the time.</p> |

| Schedule | Comment |
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| | <p>Where referred to in the Agreement, Senior Funding Agreements should mean those agreements as at the date of the Agreement as may be amended with the approval of the Authority pursuant to Clause 4.3. This is particularly important if Senior Debt is paid on early termination of the Agreement. On signature of the Agreement, the Authority has an assumed profile of its termination liabilities (based on the financing structure in place at Financial Close); the Authority should therefore generally have the right to approve any amendments to the financing agreements that would have the effect of changing the Authority's liability profile. If Project Co makes changes to the Senior Funding Agreements which have not been approved by the Authority for the purposes of Clause 4.3 they will be disregarded for the purposes of calculating termination sums unless they qualify as Additional Permitted Borrowing.</p> |
| <p>1 & 14</p> | <p>Indexation</p> <p>The drafting assumes the use of the RPI index as the index for both general "indexation" of amounts pursuant to paragraph 16 of Section 2 of Schedule 1 and for indexation of the Annual Service Payment in Schedule 14 (Payment Mechanism).</p> <p>Authorities should consider and seek advice on the appropriateness of other indices (including potentially a basket of indices) as alternatives to RPI.</p> <p>Welsh Government approval will be required to the approach adopted.</p> |
| <p>1</p> | <p>Section 2, Paragraph 17</p> <p>It has become increasingly common to refer to the form of an Agreed Form document on a retrievable electronic medium. This approach should only be adopted where the data/information is financial or technical in nature and it would be impractical to reproduce in paper format.</p> |
| <p>3</p> | <p>Key Personnel</p> |
| <p>3</p> | <p>Include details required in accordance with Clause 8.9.</p> |
| <p>4</p> | <p>Funders' Direct Agreement</p> |
| <p>4</p> | <p>The purpose of the Funders' Direct Agreement is to provide rights for the Funders to step-in and manage the project where otherwise the right and obligation of Project Co to perform the project would terminate. The Funders require this right because their preferred approach will generally be to keep the project alive and preserve the project's income stream, rather than allowing the Agreement to terminate, as this represents the Funders' best chance of being fully repaid.</p> |
| <p>4</p> | <p>The Funders' Direct Agreement sets out arrangements whereby the effect of any notice of termination issued by the Authority will be suspended and the Funders will have a specified period to put into place alternative contractors to perform the project. Key issues will include the length of the suspensory period and the liability (if any) the Funders will incur while trying to save the project.</p> |
| <p>5</p> | <p>Land Matters</p> |
| <p>5</p> | <p>It is not unusual for land matters to cause delay to procurements so Authorities must have carried out all title due diligence in advance of OJEU notice publication and have collated the following information:</p> |

| Schedule | Comment |
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| | <ul style="list-style-type: none"> • Reserved Rights; • Title Conditions; • Site plan (with illustrative red-line boundary and title boundary); • Site surveys (see guidance relating to Clause 10); and • Planning and development brief, <p>for consideration through the Welsh Government's Commercial Approval Process.</p> <p>This information should be presented in a pack (a "Site Pack") which is distributed to those expressing an interest in the project.</p> |
| 5 | <p>Section 1 - Title Conditions</p> <p>This should include any restrictions on the use of any part of the Site following title due diligence and must be completed prior to OJEU notice publication.</p> <p>Un-disclosed title issues will constitute an Excusing Cause and Compensation Event so the Authority must ensure adequate title diligence and appropriate disclosure through Section 1 of Schedule 5, on a value for money basis. The Authority will also need to be clear that, for any title compensation event proposed by a bidder, (i) the rights subsist (ii) the rights would, if enforced, affect the Works (iii) the bidder could not reasonably have taken account of the problems in designing its solution and (iv) that insurance cover was not appropriate or available.</p> |
| 5 | <p>Section 2 - Reserved Rights</p> <p>This should include any rights over any part of the Site which have been or are being reserved for the Authority and/or any third party e.g. rights of access, wayleaves and must be completed prior to OJEU notice publication.</p> <p>Un-disclosed reserved rights will constitute an Excusing Cause and Compensation Event so the Authority must ensure adequate title diligence and appropriate disclosure through Section 2 of Schedule 5, on a value for money basis. The Authority will also need to be clear that, for any title compensation event proposed by a bidder, (i) the rights subsist (ii) the rights would, if enforced, affect the Works (iii) the bidder could not reasonably have taken account of the problems in designing its solution and (iv) insurance cover was not appropriate or available.</p> |
| 5 | <p>Section 3 - Ancillary Rights</p> <p>This will be project specific. It should include any areas and periods within which the Contractor should have exclusive possession to parts of the Site and should be reviewed and completed following any project specific dialogue with bidders regarding phasing and early access for the Authority's Commissioning.</p> |
| 6 | <p>Construction Matters</p> |
| 6 | <p>Section 3</p> <p>This section will be sector and project specific but may include the following:</p> |

| Schedule | Comment |
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| | <ul style="list-style-type: none"> • Introduction to what is comprised within the Facilities/Project Facilities; • Architectural performance specification; • Civil/Structural performance specification; • Mechanical and Electrical performance specification; • Thermal and energy efficiency requirements; • Area Schedule; and • Drawings. <p>Any design requirements in relation to thermal and energy efficiency should be included here. Authorities should also seek advice from technical advisors on design review, construction monitoring and tests on completion to give a high degree of assurance that the design requirements have been achieved before the services commence. These are all matters Authorities also require to address for capital funded assets and a generally similar approach should be adopted.</p> |
| 6 | <p>Section 4</p> <p>This section will be sector and project specific but may include the following:</p> <ul style="list-style-type: none"> • Introduction; • Architectural proposals; • Civil/Structural engineering proposals; • Mechanical and Electrical engineering proposals; • Thermal and energy efficiency proposals; • Construction Methodology; • Drawings (full design to be developed at least to 1:200 level, with a sample drawing of each key area of the Facility developed to 1:50 level in the case of an Accommodation MIM scheme /detail to be developed for a roads scheme in agreement with Welsh Government); • Management proposals; and • Lifecycle Efficiencies Plan. |
| 6 | <p>Section 8</p> <p>This section should contain Design and Construction Quality Plans. The Authority should carefully review and evaluate Project Co's Design and Construction Quality Plans, e.g. processes to be adopted to allow for inspection of cavity walls before closing up.</p> |
| 8 | <p>Review Procedure</p> |

| Schedule | Comment |
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| 8 | <p>Paragraph 1.2.1</p> <p>The Authority should include any other items which are relevant on a project specific basis.</p> <p>Paragraph 1.4</p> <p>The Authority should refer to any other items which are relevant on a project specific basis.</p> <p>Paragraph 3</p> <p>This drafting has been included as a framework for guidance and should be amended as appropriate on a project specific basis, including, in particular, to take account of how commissioning of the Facilities is to be carried out (where relevant) and any other matters that are to be left to be agreed pursuant to the Review Procedure (such as proposals for self-monitoring systems etc).</p> <p>Paragraph 3.9.3</p> <p>The Authority should consider (as a technical matter) the extent to which the terms of the Service Level Specification are sufficient to ensure that the Facilities/Project Facilities will be maintained sensibly (for example, that material maintenance work is not being back-ended, with items of plant and equipment being made to operate beyond the design/programmed life expectancy).</p> <p>Paragraph 5</p> <p>This paragraph is intended as a framework basis only and should be developed in a project specific basis.</p> |
| 9 | <p>Collateral Agreements</p> |
| 9 | <p>Section 3 - Key Sub-Contractor Collateral Agreements</p> <p>Authorities should require a full description of the proposed scope of design team services, including any proposed role in the inspection of works on site. This, together with the quality of the proposed design team and proposed design, should be important factors in the assessment of tenders.</p> |
| 12 | <p>Service Requirements</p> |
| 12 | <p>The Service Requirements should be developed on a project and sector specific basis with the Authority's technical advisers.</p> <p>The Service Requirements comprise four sections:</p> <ul style="list-style-type: none"> the Authority's Service Level Specification, setting out its service requirements (which will have formed part of the tender documentation). These will adopt the form of an output specification but should include detailed specifications and finishes where appropriate. The Performance Standards should include specific reference to delivery of key construction documentation to the Authority, for example under Clauses 17.18 and 18.5. Any failure to deliver should then give rise to an appropriate level of Deductions with ratchets for persistent failure; |

| Schedule | Comment |
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| | <ul style="list-style-type: none"> • the Method Statements, being Project Co's statement of the methods it will use to satisfy those requirements (which will have been bid); • the Services Quality Plan; and • the Interface Protocol. |
| 12 | <p>Section 2</p> <p>The Method Statements will be project specific. The Authority should ensure the Method Statements capture all the service provision descriptions that were included in the preferred bidder's bid and which formed part of the offer that was evaluated in reaching the decision to select the preferred bidder.</p> |
| 12 | <p>Section 3</p> <p>The Services Quality Plan will be project specific and developed during or out of documents produced by the preferred bidder during the bidding process.</p> |
| 13 | <p>Independent Tester Contract</p> |
| 13 | <p>Tailoring will be required to this contract on a sector specific basis. The Independent Tester Contract must be publicly tendered as soon as possible following selection of the preferred bidder. The evaluation criteria must recognise that all Key Personnel must have a minimum of 10 years' experience of completion testing in the relevant sector.</p> <p>The level of fees should reflect the level of service required and the scope of service should be explicitly set out in Appendix 1. It is anticipated further guidance will be issued by Welsh Government on the scope of services set out at Appendix 1.</p> |
| 14 | <p>Payment Mechanism</p> |
| 14 | <p>Tailoring will be required on a project and sector specific basis. See sector specific guidance below.</p> |
| 15 | <p>Insurance Requirements</p> |
| 15 | <p>Sections 1 and 2</p> <p>Authorities should seek independent advice on the scope and terms of the project insurances.</p> <p>In relation to Business Interruption cover the Authority should be named as a co-insured party to the extent it has a demonstrable insurable interest. This will be in connection with any additional cost of working insured against under the terms of the policy, and not with respect to any loss of anticipated revenue.</p> |
| 15 | <p>Section 3</p> <p>The endorsements are recommended drafting. Whilst the parties should endeavour to obtain cover in accordance with this wording, if these endorsements are not in practice available, the parties should obtain the best terms reasonably available in the market at the time.</p> |

| Schedule | Comment |
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| 15 | <p>Section 4</p> <p>This contains provisions to oblige Project Co to take steps to procure the project insurances on terms that represent best value for money to the Authority. Given the Authority will ultimately bear most insurance costs, it is important that it is given sufficient information on how such costs are being accumulated and managed. There is an Information Breach where Project Co fails to procure that the Authority receives such information.</p> |
| 15 | <p>Section 5</p> <p>This is recommended drafting. If agreement to this wording is not in practice achievable, then the parties should agree the best terms reasonably available in the market at the time. Project Co's broker may wish to limit its liability and include additional liability wording in the Broker's Letter of Undertaking. Whilst this is in principle acceptable, the Authority will need to check that (i) the scope of such additional wording is appropriate (e.g. does not extend to a limitation of liability for fraudulent acts), and (ii) the capped amount is set at a sufficiently high level.</p> |
| 16 | <p>Change Protocol</p> |
| 16 | <p>The Authority must consider whether it wishes to have the right to carry out Derogated Low Value Changes and should delete the defined terms relevant to Derogated Low Value Changes in Section 1 and paragraphs 1.2 and 1.3 in Section 2, if not required.</p> <p>The Authority should consider the suitability of the thresholds between the three categories of Authority Changes (see the individual definitions), but should not propose changes without prior approval from the Welsh Government.</p> <p>The Authority should consider the limit on Senior Funders' due diligence costs (paragraph 12 in Section 3 and paragraph 14 in Section 4) but should not propose changes without prior approval from the Welsh Government.</p> <p>In the case of MIM Accommodation schemes, the Change Protocol envisages that the parties agree a Catalogue that will govern the pricing of low value changes. Including a well-developed Catalogue in the Agreement from day 1 will be in both parties' interests as it will create a clear and practical framework (with greater price certainty) for agreeing day-to-day low value changes.</p> <p>Authorities undertaking a MIM project in any sector must always seek Welsh Government approval to any Changes, other than Derogated Low Value Changes or Low Value Changes, to ensure ongoing compliance with the relevant accounting and statistical classification.</p> |
| 17 | <p>Compensation on Termination</p> |
| 17 | <p>Section 1</p> <p>Paragraph 1.1</p> <p>Consistency of approach to compensation on Authority Default and Authority Voluntary termination avoids any incentive on the part of the Authority to default.</p> <p>Paragraph 1.2.3</p> |

| Schedule | Comment |
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| | <p>This assumes Project Co's share capital and subordinated debt are stapled.</p> <p>Paragraph 2</p> <p>In addition to a general right to terminate at any time, the Authority may consider it would be beneficial to have the option to terminate the Agreement on specified dates ("Authority Break Point Dates") for a specified compensation amount for equity and Subordinated Debt. Any Authority wishing to include this drafting must consult the Welsh Government.</p> |
| 17 | <p>Section 2</p> <p>Paragraph 2.1.2</p> <p>Unless agreed by the parties, a novation to a vehicle controlled by the Senior Funders under the Funders' Direct Agreement should not on its own be sufficient to constitute a Liquid Market.</p> <p>Paragraph 3.8</p> <p>Negative Post Termination Service Amounts will always be taken into account in reducing the Adjusted Highest Compliant Tender Price irrespective of whether or not they have been set off against Positive Termination Service Amount. The effect of setting off is merely to reduce the sums payable by the Authority during the re-tendering period.</p> <p>Paragraph 4.3.3(a)</p> <p>A methodology can be agreed in advance for agreeing what constitutes a reasonable risk assessment.</p> <p>Paragraph 4.3.3(b)</p> <p>This includes both the everyday running costs and the costs of the service and life cycle maintenance costs. Forecasts are determined by agreement or, in the event of disputes, by an expert.</p> <p>Paragraph 4.3.3 (d)</p> <p>Where a capital contribution is to be made by an Authority after Financial Close, the following drafting should be included:</p> <p>"(d) any outstanding part of the Contribution will be deemed to have become payable on the Termination Date;"</p> |
| 17 | <p>Section 3</p> <p>Paragraph 1.2.3</p> <p>This excludes interest accrued but unpaid but the Subordinated Debt documentation should, of course, be checked to ensure this is the way it works. Repayment of principal is caught through the definition of Subordinated Debt.</p> |

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| 17 | <p>Section 4</p> <p>Authorities may wish to use the alternative drafting set out in Appendix 2 below in relation to the arrangements for paying compensation on termination.</p> <p>Paragraph 1.3</p> <p>Where the Authority elects to pay in instalments interest shall be calculated on outstanding amounts at a rate between the gilt rate and the senior debt rate.</p> <p>Paragraph 1.6</p> <p>The Authority should review the tax implications of the payment passing through Authority's' control and grossing up provisions may be required as appropriate.</p> <p>Paragraph 1.9</p> <p>This right is granted to give the Authority a claim as an unsecured creditor of Project Co and is not likely to result in any significant recovery for the Authority.</p> <p>Where the Authority elects to pay in instalments interest shall be calculated on outstanding amounts at a rate between the gilt rate and the senior debt rate.</p> |
| 17 | <p>Section 5</p> <p>Adjusted Estimated Fair Value of the Agreement</p> <p>There will only be any Post Termination Service Amounts available to the extent that the Authority starts the retendering process, but then decides to follow the no-retendering approach. These amounts are not deducted to the extent paragraph (c) of the definition of "New Agreement" is a period from the date of the New Contract to the original Expiry Date (rather than the Termination Date to the original Expiry Date).</p> <p>Adjusted Highest Compliant Tender Price</p> <p>Negative Post Termination Service Amounts ("PTSA") represent an out of pocket cost to the Authority and will therefore need to be deducted from any payment of compensation due to Project Co. Positive PTSA, on the other hand, are regarded as a form of prepayment – the benefit of reduced service costs is also reflected in the tender price, which is likely to be higher. To avoid double counting, any PTSA actually paid to Project Co need to be deducted from the tender price. The effect of set-off of negative PTSA under paragraph 3.8 of Section 2 (<i>Compensation for Project Co Default</i>) of Schedule 17 (<i>Compensation on Termination</i>) simply reduces the amount of any prepayment and is therefore neutral. In reality on the Project Co Default (d) and (e) are likely to be the same amounts.</p> <p>Base Senior Debt Termination Amount</p> |

| Schedule | Comment |
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| | <p>This definition assumes debt finance.</p> <p>In practice the definition is project specific and, in the case of bond finance will need to refer to the principal outstanding amount (indexed or otherwise) and/or the early redemption price mechanism (or break cost provision) by reference to early redemption or acceleration terms and conditions of the bonds, known as the Spens formula. The bond solution will need to be approved by the Welsh Government.</p> <p>The Spens formula will be payable only on Authority Default. In the long-term sterling market, the Spens formula has historically operated such that on an early redemption of the bonds, the bondholders are broadly paid an amount equal to the higher of the outstanding principal on the bond and the foregone coupon (interest and principal) on the bonds, discounted at a rate equal to the gross redemption yield on a Treasury Gilt of comparable weighted average life to the bond. This level of compensation is set to allow the bondholder to attain the same return by reinvesting in risk free gilts.</p> <p>Contingent Funding Liabilities</p> <p>This is intended to be an exhaustive list of all such arrangements put in place at Financial Close</p> <p>Deemed New Agreement</p> <p>The Termination Date here is the relevant date as no new contract is actually being entered into.</p> <p>Liquid Market</p> <p>Unless agreed by the parties, a novation to a vehicle controlled by the Senior Funders under the Funders' Direct Agreement should not on its own be sufficient to constitute a Liquid Market.</p> <p>Maximum Termination Amount</p> <p>In line with MIM principles, this ensures Project Co does not make any windfall gain from compensation on termination for Project Co default.</p> <p>New Agreement</p> <p>This should also include other documents entered into between the parties, where appropriate. In projects in which the Services cease to be required on or shortly after the original expiry Date, then the term of the New Contract will be reduced and so Post Termination Service Amounts will not be deducted (or added back).</p> <p>Post Termination Service Amount</p> <p>This payment is made both to ensure the Authority is incentivised to expedite the tender and any value received by the Authority is reflected post termination. Usage based payments will need to be addressed specifically. It is recommended that their effects are, where possible, stripped out. A positive Post Termination Service Amount will occur where the cost incurred by the Authority in procuring the Service itself (including rectification costs) is less than the Monthly Service Payment. A negative Post Termination Service Amount will arise if the costs incurred in procuring the Service (including rectification costs) are greater than the Annual Service Payment.</p> |

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| | <p>Qualification Criteria</p> <p>If tenderers are not required to bid on the basis of a single capital payment then the Authority would have to fund the delay in payment of the compensation amount which is not recommended.</p> <p>Revised Senior Debt Termination Amount</p> <p>This definition assumes debt finance. In practice the definition is project specific and, in the case of bond finance, will need to refer to the principal outstanding amount (indexed or otherwise) and/or the early redemption price mechanism by reference to the terms and conditions of the bonds and will need to be approved by the Welsh Government. This "Spens" amount will be payable only on Authority Default and Authority Termination, and will be calculated pursuant to the Spens calculation methodology.</p> <p>Senior Debt</p> <p>This definition assumes debt finance. In practice the definition is project specific and, in the case of bond finance will need to refer to the principal outstanding amount (indexed or otherwise) and/or the early redemption price mechanism by reference to the terms and conditions of the bonds and will need to be approved by the Welsh Government.</p> <p>Sub-Contractor Losses</p> <p>The Authority must review sub-contracts to ensure payments due on early termination are not excessive e.g. operational subcontracts in place where the operational phase has not yet started.</p> |
| 18 | Handback Procedure |
| 18 | <p>Paragraph 1</p> <p>The Authority should ensure its handback requirements are clearly set out in the Authority's Construction Requirements, or alternatively in this Schedule 18. In accordance with Chapter 2 of the EPEC/EUROSTAT Guide, the asset must have an economic life that is longer than the duration of the contract.</p> <p>The retention provided for at paragraph 7 may be reviewed on a project specific basis. The Authority should seek advice on suitable standards.</p> |
| 19 | Record Provisions |
| 19 | <p>Section 1 has been included for the purpose of providing a general framework and should be amended to reflect project specifics. The records to be kept by Project Co are to be determined on a project specific basis, but should as a minimum include those items listed in Section 2.</p> |
| 21 | Project Co/Hold Co Information |
| 21 | <p>This has been included as an example only and the Authority should amend as appropriate to its individual project.</p> |
| 23 | Refinancing |

| Schedule | Comment |
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| 23 | <p data-bbox="411 275 571 309">Paragraph 5</p> <p data-bbox="411 342 1390 434">The Authority should take into account UK Accounting Standards in deciding whether to take its share of any Refinancing Gain by way of a reduction to the Annual Service Payment or lump sum payment.</p> <p data-bbox="411 468 675 501">Exempt Refinancing</p> <p data-bbox="411 535 1390 627">The defined terms referred to in limb (c)(vi) should follow those contained in the Senior Funding Agreements –the Initial Availability Period being the construction phase drawdown period. These will need to be checked.</p> <p data-bbox="411 660 699 694">Qualifying Institutions</p> <p data-bbox="411 728 1390 909">If there are particular institutions which, for particular reasons, do not come within the other heads of Qualifying Bank Transaction Project Co may propose to the Authority that such institutions be included as Qualifying Institutions. In the light of the broad drafting of the other provisions in the definition of Qualifying Bank Transaction, the Authority would expect any such proposal to be specific and limited. Broad group definitions will not be entertained.</p> <p data-bbox="411 943 691 976">Threshold Equity IRR</p> <p data-bbox="411 1010 1390 1102">This is the nominal post tax (i.e. post tax with respect to Project Co, pre-tax with respect to the shareholders in Project Co) Equity IRR set out in the Base Case, which excludes the effects of any anticipated refinancing.</p> |

Appendix 1 to Chapter 4

Employee Transfer

- 27.1 The Authority and Project Co agree that the Transfer Regulations shall apply to the transfer on one or more dates agreed by the parties (each a “**Relevant Service Transfer Date**”) to Project Co of responsibility for the provision of (or procuring the provision by Service Providers of) the Services in accordance with this Agreement and that an Employee Transfer shall take place on each Relevant Service Transfer Date (or such date as may be determined by Law). The Relevant Service Transfer Date in respect of the Services is specified in [◆].
- 27.2 As a consequence of Clause 27.1, and in accordance with the Transfer Regulations, the contracts of employment of all Transferring Employees shall (subject to Regulation 4(7) of the Transfer Regulations) have effect after the Relevant Service Transfer Date (or such other date as may be determined by Law) as if originally made between those employees and the relevant Service Provider, except insofar as such contracts relate to an occupational pension scheme.
- 27.3 The Authority and Project Co agree and intend (and shall take all reasonable steps to procure) that there shall be an Employee Transfer on each occasion on which the identity of a Service Provider changes pursuant to this Agreement, and that the contracts of employment of all those employees of the relevant Service Provider wholly or mainly engaged in the provision of the relevant Service or Services immediately before the change of identity of the Service Provider shall have effect (subject to Regulation 4(7) of the Transfer Regulations) thereafter as if originally made between those employees and the relevant Service Provider, except insofar as such contracts relate to an occupational pension scheme. Project Co shall procure that both the former and the relevant Service Provider shall comply with their obligations under the Transfer Regulations.
- 27.4 If Project Co or the relevant Service Provider dismisses by reason of redundancy a Transferring Authority Employee who had he or she been so dismissed before the Relevant Service Transfer Date would have been entitled to a payment pursuant to [section 16 of the Agenda for Change] then Project Co shall provide, or shall procure that the relevant Service Provider shall provide, such employee with a payment or other benefit calculated in the same manner as would have been applied on dismissal by reason of redundancy immediately before the Relevant Service Transfer Date. For these purposes a dismissal by reason of redundancy is one so defined in section 139 of the Employment Rights Act 1996.
- 27.5 The Authority shall comply with its obligations under the Transfer Regulations in respect of each Employee Transfer pursuant to this Agreement and Project Co shall comply, and shall procure that the relevant Service Provider shall comply, with its obligations (including without limitation the obligation under Regulation 13(4) of the Transfer Regulations) in respect of each Employee Transfer pursuant to this Agreement and each of the Authority and Project Co shall indemnify the other against any Direct Losses sustained as a result of any breach of this Clause 27.5 by the party in default.

Offer of Employment

- 27.6 If the Transfer Regulations do not apply to any person who is a Transferring Authority Employee, Project Co shall offer to, or shall procure the offer by the relevant Service Provider to, each and every such employee, a new contract of employment commencing on the Relevant Service Transfer Date under which their terms and conditions (including full continuity of employment) shall not differ from those enjoyed by them immediately prior to the Relevant Service Transfer Date (except insofar as such terms and conditions relate to an occupational pension scheme). This offer of employment shall be in writing, shall be open to acceptance for a period of not less than ten (10) Business Days and shall be made:

- 27.6.1 if it is believed that the Transfer Regulations will not apply to a person, not less than ten (10) Business Days before the Relevant Service Transfer Date; or
- 27.6.2 if it is believed that the Transfer Regulations apply to a person but it is subsequently decided that the Transfer Regulations do not so apply, as soon as is practicable and in any event no later than ten (10) Business Days after that decision is known to Project Co.
- 27.7 Where any such offer as referred to in Clause 27.16 is accepted, the Authority shall indemnify and keep indemnified in full Project Co on the same terms and conditions as those set out in Clauses 27.20, 27.21, 27.22 and 27.25 of this Agreement as if there had been an Employee Transfer in respect of each and every Transferring Authority Employee who has accepted any such offer and the provisions of Clause 27.12 shall apply in the event of any increase or decrease in the [Remuneration Costs and Reorganisation Costs].
- 27.8 Where any such offer as referred to in Clause 27.6 is accepted, Project Co shall act and shall procure that each relevant Service Provider shall act in all respects as if the Transfer Regulations had applied to each and every Transferring Authority Employee who has accepted any such offer and shall comply with Clause [27.49 to 27.68] (*Pensions*) of this Agreement in respect of each and every such employee who was immediately before the Relevant Service Transfer Date an Eligible Employee.

Provision of Information and Employment Costs

- 27.9 The Authority has supplied to Project Co the information, as at the date of this Agreement, which is contained in Section 1 (*Employee Information*) of Schedule 31 (*Employment and Pensions*) (the “**First Employee List**”) regarding the identity, number, age, sex, length of service, job title, grade and terms and conditions of employment of and other matters affecting each of those employees of the Authority and of any sub-contractor of the Authority who it is expected, if they remain in the employment of the Authority or of the sub-contractor of the Authority as the case may be until immediately before the Relevant Service Transfer Date, would be Transferring Employees but the Authority gives no warranty as to the accuracy or completeness of this information.
- 27.10 The Authority shall supply to Project Co an update of the First Employee List at three-monthly intervals from the date of this Agreement and an updated list shall also be provided ten (10) Business Days before each Relevant Service Transfer Date. The Authority shall also supply to Project Co within five (5) Business Days after each Relevant Service Transfer Date information, which was correct as at that Relevant Service Transfer Date, in respect of the Transferring Employees on all the same matters as should be provided in the First Employee List. This list is the “**Final Employee List**” and where there is more than one Relevant Service Transfer Date the “**Final Employee List**” means each list so prepared in respect of the Services and at each Relevant Service Transfer Date. The Authority gives, and shall give, no warranty as to the accuracy or completeness of any information contained in any update of the First Employee List or in the Final Employee List.
- 27.11 Project Co has provided to the Authority, and the Authority has agreed, the details set out in Section 3 (*Proposed Workforce Information*) of Schedule 31 (*Employment and Pensions*) which show, in respect of the Services, the following information:
- 27.11.1 the workforce which Project Co proposes to establish to provide the Services (the “**Proposed Workforce**”) classified by reference to grade, job description, hours worked, shift patterns, pay scales, rates of pay and terms and conditions;
- 27.11.2 the monthly costs of employing the Proposed Workforce. These costs (the “**Remuneration Costs**”) have been calculated on the basis of (amongst other things) the information contained in the First Employee List; and

- 27.11.3 the costs, including any lump sum payments, which Project Co has allowed for the purposes of any reorganisation which may be required to establish the Proposed Workforce or a workforce which is as close as reasonably practicable to the Proposed Workforce (including but not limited to costs associated with dismissal by reason of redundancy or capability and costs of recruitment. These costs (the "**Reorganisation Costs**") have been calculated by Project Co and the Service Providers on the basis of (amongst other things) the information contained in the First Employee List.
- 27.12 If at any time (including, for the avoidance of doubt, after the submission of the Final Employee List) the Remuneration Costs and/or the Reorganisation Costs require to be adjusted on account of any differences between the information contained in the First Employee List and that contained in the Final Employee List, or on account of any inaccuracies in or omissions from the information contained in the First Employee List or the Final Employee List then (subject to Clauses 27.13, 27.14 and 27.15) there shall be a corresponding adjustment to the Annual Service Payments to compensate for any such difference.
- 27.13 If the circumstances described in Clause 27.12 arise:
- 27.22.1 in circumstances where there are more Transferring Employees than shown on the Final Employee List then the parties shall discuss the implications for the provision of the Services, and the implementation of the Authority Policy relating to change; and
- 27.22.2 Project Co and the relevant Service Provider shall take all reasonable steps to mitigate any additional costs and any adjustment to the Annual Service Payment shall be calculated as if they had done so.
- 27.14 In calculating any adjustment which shall be made to the Annual Service Payment pursuant to Clause 27.12:
- 27.14.1 no account shall be taken of a decrease in the [Remuneration Costs or Reorganisation Costs] to the extent that it arises from a reduction in the number of Transferring Employees or their whole time equivalent [such that there are immediately after the Relevant Service Transfer Date, fewer suitably qualified persons available than are required in order to establish the Proposed Workforce];
- 27.14.2 to avoid double counting, no account shall be taken of any change to the [Remuneration Costs or the Reorganisation Costs] to the extent that Project Co has been or will be compensated as a result of any indexation of the Annual Service Payment under this Agreement;
- 27.14.3 to avoid doubt any changes in costs which fall to be dealt with under Clause 27.12 and which arise from a Change in Law shall be dealt with in accordance with the provisions of Clause 27.12 and shall not be taken into account for the purposes of Clause 33 (*Changes in Law*);
- 27.14.4 no adjustments under Clause 27.12 shall be made in respect of overpayments made by Project Co or a Service Provider to Transferring Employees which arise from reliance on the Final Employee List to the extent that Project Co or the Service Provider is unable to correct overpayments in respect of continuing employment having taken reasonable steps to do so; and
- 27.14.5 if there are underpayments by Project Co or a Service Provider to Transferring Employees, whether claimed or established as unlawful deductions from wages or as a breach of contract, which arise from reliance on the Final Employee List, there shall be an immediate increase to the Annual Service Payments in respect of all such liabilities of Project Co or the Service Provider for all such

underpayments which are retrospective (save that any such liabilities which relate to the period prior to the Relevant Service Transfer Date shall be dealt with in accordance with Clauses 27.20 or 27.21) and an appropriate increase in respect of such liabilities of Project Co which represent ongoing costs but this provision shall not apply to any underpayment relating to an Equal Pay Ruling (which underpayment shall be dealt with in accordance with Clause 27.25).

To the extent that it is appropriate to do so, in order to ensure that the parties are treated fairly and reasonably, a lump sum payment may be made in place of some or all of any adjustment referred to above which would otherwise have been required to the Annual Service Payments.

- 27.15 Either party may propose an adjustment to the Annual Service Payment pursuant to Clause 27.12 by giving not less than ten (10) Business Days' notice to the other. Each party will provide or procure the provision to the other on an open book basis access to any information or data which the other party reasonably requires for the purpose of calculating or confirming the calculation of any adjustment pursuant to Clause 27.12.
- 27.16 In relation to all matters described in Clause 27.13, Project Co and the Authority shall, and Project Co shall procure that the relevant Service Provider shall, co-operate with the other or others and take all reasonable steps to mitigate any costs and expenses and any adverse effect on industrial or employee relations.
- 27.17 The Authority shall and Project Co shall, and Project Co shall procure that each and every Service Provider shall, take all reasonable steps, including co-operation with reasonable requests for information, to ensure that each and every Employee Transfer pursuant to this Agreement takes place smoothly with the least possible disruption to the services of the Authority including the Services and to the employees who transfer.
- 27.18 The Authority shall and shall procure if it has the contractual or legal powers to do so and shall otherwise use all reasonable endeavours to procure that every relevant sub-contractor of the Authority shall supply to Project Co no later than five (5) Business Days prior to the Relevant Service Transfer Date true copies of its Recognition Agreement(s) and Project Co shall and shall procure that each and every Service Provider shall in accordance with the Transfer Regulations recognise the trade unions representing Transferring Employees (as relevant to each Service Provider) after the transfer to the same extent as they were recognised by the Authority or the relevant sub-contractor before the Relevant Service Transfer Date.
- 27.19 Project Co shall procure that, on each occasion on which the identity of a Service Provider changes pursuant to this Agreement, in the event that there is an Employee Transfer, the new Service Provider shall in accordance with the Transfer Regulations recognise the trade unions representing the employees whose contracts of employment transfer to the new Service Provider to the same extent as they were recognised before the change of identity of the Service Provider in respect of the provision of the Services at the Authority's premises.

Authority Indemnities

- 27.20 The Authority shall indemnify and keep indemnified in full Project Co (for itself and for the benefit of each relevant Service Provider) against all emoluments and all other contractual or statutory payments due to any Transferring Authority Employee, or former employee of the Authority in respect of his or her employment by the Authority or its termination by the Authority which relate to any period of employment prior to or on the Relevant Service Transfer Date even if the liability to make any such payment does not arise until on or after the Relevant Service Transfer Date (which shall include any backdated pay award by the Authority), and against all income tax and pension and national insurance contributions payable thereon.

- 27.21 Insofar as Clause 27.20 does not apply, the Authority shall indemnify and keep indemnified in full Project Co against all Direct Losses sustained by Project Co in consequence of any liability which transfers to Project Co or a Service Provider in accordance with the Transfer Regulations and/or the Acquired Rights Directive in relation to any Transferring Authority Employee or former employee of the Authority in respect of his or her employment by the Authority or its termination by the Authority which arises as a result of any act or omission by the Authority occurring before or on the Relevant Service Transfer Date. The provisions of this Clause 27.21 and of Clause 27.20 shall not apply in respect of any claim that the terms and conditions of employment relating to Pay of Transferring Authority Employees contravene the Equal Pay Legislation including but not limited to any claim in respect of an Equal Pay Ruling.
- 27.22 Where any liability in relation to any Transferring Authority Employee, or former employee of the Authority in respect of his or her employment by the Authority or its termination which transfers in whole or part in accordance with the Transfer Regulations and/or the Acquired Rights Directive arises partly as a result of any act or omission occurring on or before the Relevant Service Transfer Date and partly as a result of any act or omission occurring after the Relevant Service Transfer Date, the Authority shall indemnify and keep indemnified in full Project Co against only such part of the Direct Losses sustained by Project Co in consequence of the liability as is reasonably attributable to the act or omission occurring before the Relevant Service Transfer Date.
- 27.23 The indemnities contained in Clause 27.20 and Clause 27.21 shall apply as if references in those Clauses to any Transferring Authority Employee also included a reference to any Transferring Private Sector Employee to the extent that the Authority recovers any sum in respect of the subject matter of those indemnities from any sub-contractor of the Authority under any indemnity or other legal entitlement it has against such sub-contractor. The Authority undertakes that it will use all reasonable endeavours to recover any sums under any such entitlement as is mentioned in this Clause 27.23.
- 27.24 To avoid doubt, nothing in Clauses 27.20 or 27.21 shall impose any liability upon the Authority for any part of any statutory or contractual redundancy payment to any Transferring Employee which is payable as a result of any termination of employment of a Transferring Employee occurring after the Relevant Service Transfer Date.
- 27.25 If there is an Equal Pay Ruling relating to any Transferring Authority Employees the Authority shall indemnify Project Co and keep Project Co indemnified (for itself and for the benefit of each relevant Service Provider) against all loss, damages, injury, claims, costs, liabilities and expenses (including legal expenses) arising out of or in connection with the Equal Pay Ruling. Project Co will not be entitled to the benefit of this indemnity in respect of an Equal Pay Adjustment which is dealt with in Clause 27.26 below.
- 27.26 Following each Equal Pay Adjustment the Annual Service Payment shall be adjusted by operation of Clause 35.2.1(e) to reflect the additional cost to Project Co and/or the Service Provider of employment of the Transferring Authority Employee.
- 27.27 To avoid doubt, Clause 49.3 applies to the indemnities under Clauses 27.20, 27.21, 27.22 and 27.25.

Compliance with Law and Authority Policies

- 27.28 Project Co shall comply and shall procure that each Service Provider and all persons employed or engaged by a Service Provider in connection with the provision of any Service shall comply at all times with the Law on health and safety at work and on anti-discrimination and equal opportunities.
- 27.29 Project Co shall procure that each Service Provider takes all reasonable steps to procure that all persons including any employed or engaged by a Service Provider in connection with the provision of any Service shall, so far as applicable, comply with the Authority Policies as regards health and safety at work (including the Authority Policy regarding

smoking) and with those relating to anti-discrimination and equal opportunities (including those relating to harassment). Project Co also shall take and shall procure that every Service Provider shall take all such steps as the Authority may reasonably require, which shall include co-operation with action proposed or taken by the Authority, to ensure that the Authority complies with its duty under section 3(1) Health and Safety at Work Act 1974 regarding the conduct of the undertaking of the Authority.

27.30 Project Co shall or shall procure that it and/or any relevant Service Provider to whom any Transferring Authority Employees transfer under an Employee Transfer shall:

27.30.1 ensure that all individuals (including Transferring Authority Employees) employed or engaged from time to time in the provision of the Services (“**Assigned Employees**”) are engaged on terms and conditions of employment which are no less favourable overall than those applying to the Transferring Authority Employees;

27.30.2 subject to Clause 27.30.1 ensure that the terms and conditions offered to any new employees who are being employed or engaged in the provision of the Services are offered after full consultation with the representatives of any recognised trade union of the Assigned Employees or, in the event that there is no recognised trade union for the Assigned Employees, with other elected representatives of such Assigned Employees;

27.30.3 subject to Clauses 27.30.1 and 27.34, ensure that any changes to the terms and conditions of the Assigned Employees are achieved after full consultation with the representatives of any recognised trade union of such Assigned Employees or, in the event that there is no recognised trade union for such Assigned Employees, with other elected representatives of such Assigned Employees;

27.30.4 use all reasonable endeavours to promote and conduct fair employment practices and best practice in relation to health and safety and equal opportunities and maintain a constructive approach to employee relations, including to the question of trade union recognition;

27.30.5 support any government sponsored review of any guidelines, recommendations or requirements in relation to public private partnerships in England and Wales and that Project Co shall provide (and shall procure that any Service Provider shall provide) the Authority with all such advice, information or other support as it shall require to enable it to assist any such reviews;

27.30.6 provide in writing to the Authority immediately upon a request from the Authority, subject to its obligations relating to data protection and confidentiality, all such information or documentation as the Authority may require acting reasonably to enable it to review and monitor the extent to which Project Co (or any Service Provider) complies with the conditions set out in [◆³] (or any such similar protocol, requirements or guidance issued and with which the Authority, Project Co or any Service Provider may be required to comply) and in this Clause 27.30 throughout the period of this Agreement. Such information may include (but shall not be limited to) information relating to:

- (a) the management arrangements for the Assigned Employees;
- (b) the pay, terms and conditions of the Assigned Employees, including details of the pension arrangements for Assigned Employees;

³ Current guidance to be inserted here.

- (c) the variety of workforce training and development opportunities available to the Assigned Employees;
 - (d) the framework for and conduct of employee relations relating to the Assigned Employees, including the employer's approach to trade union recognition and facilities; and
 - (e) the health and safety, equal opportunities or other employment related procedures relating to the Assigned Employees;
- 25.30.7 provide to the Authority as soon as reasonably practicable any further information or documentation in its possession or under its control (or which it can reasonably obtain) which updates any information or documentation provided in accordance with Clause 27.30.6 above;
- 27.30.8 warrant that the information provided to the Authority in accordance with Clauses 27.30.6 and 27.30.7 above will be full, complete and accurate;
- 27.30.9 indemnify the Authority and keep the Authority indemnified in full against all costs, claims, liabilities or expenses (including legal expenses) suffered or incurred by the Authority which relate to or arise out of any breach by Project Co (or any Service Provider) of any of the provisions of Clauses 27.30.6 and 27.30.7 above; and
- 27.30.10 indemnify the Authority and keep the Authority indemnified in full from and against any cost, claims, liabilities and expenses (including legal expenses) suffered or incurred by the Authority which relate to or arise out of any act or omission by Project Co or any Service Provider or any other event or occurrence in each case on or after the Relevant Service Transfer Date up to but not including the date of expiry or termination of this Agreement (including, without prejudice to the foregoing generality, in relation to negligence claims by any Transferring Authority Employee or third party, unfair dismissal, redundancy, unlawful discrimination, breach of contract, unlawful deduction of wages and, subject to Clauses 27.25 and 27.26, equal pay).

Project Co Indemnities

- 27.31 Project Co shall indemnify and keep indemnified in full the Authority and, at the Authority's request, each and every service provider who has or shall provide any service equivalent to any of the Services against:
- 27.31.1 claims in respect of all emoluments and all other contractual or statutory payments unpaid by Project Co or a Service Provider to any person entitled to such payments from Project Co or a Service Provider who is or has been employed or engaged by Project Co or any Service Provider in connection with the provision of any of the Services which relate to any period of employment or engagement with Project Co or any Service Provider on or after the Relevant Service Transfer Date but on or prior to the date of expiry or termination of this Agreement, and all income tax (or any tax replacing it) and pension and national insurance contributions payable thereon; and
 - 27.31.2 insofar as Clause 27.31.1 does not apply, all Direct Losses incurred by the Authority as a result of any claim against the Authority in respect of any liability to any person who is or has been employed or engaged (whether as a consequence of the Transfer Regulations or of the provisions of this Clause 27 (*Employment Matters*)) by Project Co or any Service Provider in connection with the provision of any of the Services, where such claim arises as a result of any act or omission of Project Co or the Service Provider occurring after the Relevant Service Transfer Date and on or before the expiry or termination of this Agreement;

BUT the indemnities in Clauses 27.31.1 and 27.31.2 shall not apply:

- (a) in respect of any sum for which the Authority is obliged to indemnify Project Co or a relevant Service Provider pursuant to Clause 27.20 or 27.21 or as a result of any adjustment to the Annual Service Payments in accordance with Clause 27.12; or
- (b) to the extent that the claim arises from a wrongful act or omission of the Authority.

27.32 Clause 49.3 (*Conduct of Claims*) of this Agreement shall apply where any claim is made in respect of the indemnities given by Project Co under Clause 27.31.

Position on Expiry or Earlier Termination of this Agreement

27.33 On the expiry or earlier termination of this Agreement, the Authority and Project Co agree that it is their intention that the Transfer Regulations shall apply in respect of the provision thereafter of any service equivalent to a Service but the position shall be determined in accordance with the Law at the date of expiry or termination as the case may be and this Clause is without prejudice to such determination.

27.34 Project Co shall not and shall procure that no Service Provider shall make any material change to the terms and conditions of employment of any person employed in the provision of any Service, transfer any person employed in the provision of any Service to another part of its business, or materially increase or decrease the number of such persons:

25.34.1 within the period of twelve (12) months immediately preceding the expiry of this Agreement; or

25.34.2 within the period of twelve (12) months before the termination of this Agreement or, if shorter, during the period of notice of termination,

without the Authority's consent (which shall not be unreasonably withheld), except if such change is required by Law.

27.35 If the Transfer Regulations do not apply on the expiry or earlier termination of this Agreement, the Authority shall ensure that each new provider of a service equivalent to a Service on or after the expiry or earlier termination of this Agreement (including the Authority) shall offer employment to the persons employed by Project Co or a Service Provider in the provision of the Service immediately before the expiry or earlier termination of this Agreement and shall indemnify Project Co or a Service Provider for Direct Losses any of them may suffer or incur as a result of its failure to do so, and for any costs, claims or liabilities for redundancy payments (whether statutory or contractual).

27.36 If an offer of employment is made in accordance with Clause 27.35 the employment shall be on the same terms and conditions as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the Authority or other new service provider may at its absolute discretion not offer such terms and conditions if there has been any change to the terms and conditions of the persons concerned in breach of Clause 27.34.

Staff Records

27.37 The Authority shall, subject to the requirements of the Law, deliver to Project Co as soon as reasonably practicable after the Relevant Service Transfer Date all those records relating to the Transferring Employees which were in its possession or under its control at the Relevant Service Transfer Date, which shall include all such records relating to competence, qualifications and training.

27.38 The Authority gives no warranty as to the accuracy or completeness of any records referred to in Clause 27.37 except that it warrants that it has maintained all those records relating to

the Transferring Authority Employees as it is required by Law to maintain to the extent which the Law requires.

Compliance with Code Obligations

- 27.39 The Authority and Project Co shall (and Project Co shall procure that any Obligated Party shall) have regard to the Code in interpreting and applying the Code Obligations.
- 27.40 Subject to Clause 27.41 Project Co shall procure that any New Joiners shall be employed on terms and conditions of employment which are:
- 27.40.1 overall fair and reasonable and no less favourable than those of the Transferring Employees [(or, where employees transfer from more than one Authority, the Specified Group of Transferring Employees)] engaged in the provision of the Services who are working alongside and holding the same or a similar position to that of the New Joiners; or
 - 27.40.2 the same as Project Co's existing staff, where those terms and conditions of employment are the subject of national agreement.
- 27.41 Project Co shall, and shall procure that any relevant Obligated Party shall, consult with the recognised trade unions and where there is no recognised trade union any other employee representative body on the terms to be offered to the New Joiners pursuant to Clause 27.39.
- 27.42 In addition to its obligations under Clause 27.41, Project Co shall procure that the New Joiners are offered either:
- 27.42.1 membership of the relevant Legacy Scheme, under the 2013 Fair Deal⁴ or otherwise, the employer has become a participating employer in relation to that Legacy Scheme; or
 - 27.42.2 membership of a pension scheme which meets the auto-enrolment standards under the Pensions Act 2008 (whether or not the Act requires the service provider to offer membership to the New Joiner).
- 27.43 During the term of this Agreement, Project Co shall provide or procure that the Authority is provided with such accurate and complete information as requested by the Authority as soon as reasonably practicable, including the terms and conditions of employment of the Transferring Employees and the New Joiners, where this is required to monitor Project Co's compliance with its Code Obligations.
- 27.44 Project Co shall and shall procure that any relevant Obligated Party shall support the Welsh Government sponsored review and monitoring programme on the impact of the Code⁵ and provide the Authority as requested with such accurate and complete information as soon as reasonably practicable in order to assist the Authority in doing this.
- 27.45 The Authority and Project Co shall in the first instance seek to resolve by discussions between them any complaints from any employee or any recognised trade union in relation to compliance by Project Co and any Obligated Party with its Code Obligations.
- 27.46 Where it appears to the Authority or Project Co that it is not possible to resolve the matter by continuing discussions between them pursuant to Clause 27.45 or where an employee of Project Co or any recognised trade union writes to the Authority to confirm that it has been

⁴ A Fair Deal for Staff Pensions (October 2013) – Appendix to the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector

⁵ The details of the reporting requirements faced by public bodies are included within the Code in Appendix A.

unable to resolve its complaint directly with Project Co or any Obligated Party in relation to the Project Co's or any Obligated Party's Code Obligations:

- 27.46.1 the Authority shall first write to Project Co to seek an explanation for the alleged failure by Project Co to comply with its Code Obligations. Project Co shall or shall procure that the relevant Obligated Party provide such an explanation in writing within five (5) Business Days of receipt of the request from the Authority;
 - 27.46.2 if the response provided by Project Co or any Obligated Party satisfies the Authority that the Code Obligations have been met, then the Authority will inform the complainant of this;
 - 27.46.3 in the event that the Authority is not satisfied with the response provided by Project Co or any Obligated Party the Authority shall write to Project Co to require the Obligated Party to take immediate action to resolve this dispute; and
 - 27.46.4 if, following such a request by the Authority Project Co still appears to the Authority not to be complying with its Code Obligations, the Authority shall seek to enforce the terms of Clause 27.39 to 27.47.
- 27.47 The Authority, Project Co or any Obligated Party) and any recognised trade unions and/or other staff representatives shall have access to the Alternative Dispute Resolution process set out in the Code as a means of resolving any disputes arising from the application of the Code.
- 27.48 Project Co shall:
- 27.48.1 comply with the Ethical Employment Code and any similar applicable schemes or codes of practice which apply to Project Co;
 - 27.48.2 encourage all Sub-Contractors to sign up to the Ethical Employment Code and any similar applicable schemes or codes of practice promoted by the Welsh Ministers; and
 - 27.48.3 ensure that the [Contractor and the Service Provider and] all Sub-Contractors who have signed up to the Ethical Employment Code comply with that code of practice and any similar applicable schemes or codes of practice which apply to that sub-contractor.

Where this alternative drafting is used in Clause 27, the following definitions should be added to Schedule 1:

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| “Acquired Rights Directive” | [means Council Directives 77/187/EEC and 2001/23/EC]; |
| “Assigned Employees” | has the meaning given in Clause 27.30.1; |

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| “Authority Employee” | means in relation to any service equivalent to the Services (or any part thereof), all those persons employed by the Authority under a contract of employment (excluding, to avoid doubt and without limitation, any person engaged by the Authority as an independent contractor or persons employed by any sub-contractor engaged by the Authority) who are wholly or substantially engaged in the provision of that service, as at the Relevant Service Transfer Date; |
| "Code" | means the Code of Practice on Workforce Matters in Public Sector Service Contracts 2014; |
| "Code Obligations" | means the express obligations of Project Co in Clauses 27.39 to 27.47 (Compliance with Code Obligations); |
| “Employee Transfer” | means a relevant transfer of an undertaking in accordance with the Transfer Regulations; |
| “Equal Pay Adjustment” | means in relation to any Transferring Authority Employee any alteration to salaries and pay scales in order to settle, address or compromise threatened or extant claims or grievances under the Equal Pay Legislation (including, for the avoidance of doubt, as a result of an Equal Pay Ruling) which has its origin in any act or omission of the Authority before the Relevant Service Transfer Date and whether such claim relates to the periods before and/or after the Relevant Service Transfer Date against the Authority or Project Co; |
| “Equal Pay Legislation” | means any and all the legislation relating to equality of pay between men and women consisting of the Equal Pay Act 1970, the Sex Discrimination Act 1975, Article 157 of the Treaty on the Functioning of the European Union, the Equal Treatment Directive (Recast) (2006/54/EC), and Chapters 1 and 3 of Part 5 to the Equality Act 2010; |
| “Equal Pay Ruling” | means the determination by an employment tribunal or court of competent jurisdiction or any settlement or compromise to which the Authority has given consent (such consent not to be unreasonably withheld or delayed) in relation to any claim or grievance brought by any Transferring Authority Employee against the Authority or Project Co or a Service Provider under the Equal Pay Legislation which has its origin in any act or omission of the Authority before the Relevant Service Transfer Date and whether such claim relates to the periods before and/or after the Relevant Service Transfer Date, that the terms and conditions of employment relating to the pay of the Transferring Authority |

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| | Employee contravene Equal Pay Legislation; |
| “Final Employee List” | has the meaning given in Clause 27.10; |
| “First Employee List” | has the meaning given in Clause 27.9; |
| "New Joiner" | means all staff of Project Co and/or any Obligated Party, whether they are recruited for the purpose of the public service contract or whether they are existing or future staff of the service provider, who are allocated to work on the public service contract alongside the Transferring Employees; |
| "Legacy Scheme" | means the pension scheme of which the Eligible Employees are members, or are eligible for membership of, or are in a waiting period to become a member of, prior to the Relevant Transfer; |
| "Obligated Party" | means Project Co, any Contractor, sub-contractor or any Service Provider whilst they employ [Fair Deal Employees]; |
| "Pay" | means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the Authority Transferring Employee receives either directly or indirectly in respect of his or her employment, from his/her employer; |
| “Proposed Workforce” | has the meaning given in Clause 27.11.1; |
| "Recognition Agreements" | means [◆]; |
| "Relevant Employees" | means the employees who are the subject of a Relevant Transfer; |
| "Relevant Service Transfer Date" | has the meaning given in Clause 27.1; |
| "Relevant Transfer" | means a Relevant Transfer for the purpose of the Transfer Regulations; |
| “Remuneration Costs” | has the meaning given in Clause 27.11.2; |
| “Reorganisation Costs” | has the meaning given in Clause 27.11.3; |
| [Specified Group of Transferring Employees | the group or category of employees described at [◆] of Schedule 31 to this Agreement;] |
| “Transferring Authority Employee” | means any Authority Employee who transfers under an Employee Transfer in accordance with this Agreement; |
| “Transferring Employees” | means any Transferring Authority Employee and/or any Transferring Private Sector Employee; |
| “Transferring Private Sector | means in relation to a service equivalent to a |

Employee”

Service, any person employed by any sub-contractor engaged by the Authority who is wholly or mainly engaged in the provision of that service as at the Relevant Service Transfer Date and who will become an employee of Project Co or a Service Provider on the Relevant Service Transfer Date in accordance with the provisions of Clause 27 (*Employment Matters*);

A new Schedule 31 (*Employment and Pensions*) should be added where these provisions are used. Schedule 31 should contain two parts; Section 1 (*Employee Information*) and Section 2 (*Proposed Workforce Information*), to be populated on a project-specific basis.

Appendix 2 to Chapter 4

1 PAYMENT AND INTEREST

- 1.1 In respect of the termination payments to be made pursuant to any of Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination [and Termination on an Authority Break Point Date]*) or Section 3 (*Compensation on Termination for Force Majeure*) of this Schedule 17 (*Compensation on Termination*) as soon as practicable after, and in any event within twenty (20) Business Days of, the Termination Date, Project Co shall give to the Authority an invoice for the relevant termination sum and sufficient supporting evidence, reasonably satisfactory to the Authority, justifying the amount of the relevant termination sum including a breakdown of each of the individual elements of such sum.
- 1.2 Subject to paragraph 1.3 below, the Authority shall pay to Project Co:
- 1.2.1 the relevant termination amount within forty (40) Business Days of the Invoice Date; and
- 1.2.2 interest on the relevant termination amount (or any part of such amount that remains outstanding) from the Termination Date until the date of payment:
- (a) at the No Default Interest Rate for the period from (but excluding) the Termination Date to (and including) the date which is forty (40) Business Days after the Invoice Date; and
- (b) thereafter, at the Default Interest Rate.
- 1.3 The Authority shall be entitled to pay the amount payable pursuant to Section 3 or Section 4 (as the case may be) of this Schedule 17 (*Compensation on Termination*) ("**Termination Sum**") in [four (4)] equal instalments by serving notice on Project Co within thirty (30) Business Days of the Invoice Date, in which case the provisions of paragraph 1.4 shall apply.
- 1.4 In the event that the Authority elects to pay the Termination Sum in instalments pursuant to paragraph 1.3 then:
- 1.4.1 the first such instalment (together with interest thereon calculated pursuant to paragraph 1.4.2 below) shall be due on the first Business Day occurring six (6) months after the date of the Authority's notice served pursuant to paragraph 1.3 above and the remaining instalments (together with interest thereon calculated pursuant to paragraph 1.4.2 below) shall be due, respectively, on the first Business Day occurring twelve (12), eighteen (18) and twenty-four (24) months after the date of such notice; and
- 1.4.2 the Authority shall pay interest on the Termination Sum (or any part of such sum that remains outstanding) from the Termination Date until the date of payment at the No Default Interest Rate.

If the Authority fails to make a payment under paragraph 1.4.1 or 1.4.2 above in full within ten (10) Business Days of the due date for payment, the outstanding amount of the Termination Sum shall be immediately due and payable and, thereafter, the Authority shall pay interest on such sum at the Default Interest Rate.

Following Retendering

- 1.5 Subject to paragraphs 1.6 and 1.8, following a retendering exercise under Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*) the Authority shall pay to Project Co an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling twenty (20) Business Days after the later of:
- 1.5.1 the date on which the Authority receives the [Market Value] of the New Agreement from the New Project Co; and
 - 1.5.2 if Project Co has referred a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution pursuant to paragraph 3.11 of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*), the date on which the dispute is finally determined in accordance with Clause 57 (*Dispute Resolution*),
- provided that, to avoid doubt, if the dispute referred by Project Co to dispute resolution (pursuant to paragraph 1.5.2 above) concerns only a proportion of the Adjusted Highest Compliant Tender Price then the Authority shall pay the undisputed proportion of such sum no later than twenty (20) Business Days after the date referred to in paragraph 1.5.1 above (the "**Undisputed Payment Date**") and the Authority shall pay interest to Project Co on any amount of the Adjusted Highest Compliant Tender Price which has been withheld, from the Undisputed Payment Date until the date on which payment is due under paragraph 1.5.2 above at the No Default Interest Rate.
- 1.6 If the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify Project Co of this decision and (if the Adjusted Highest Compliant Tender Price is a positive number) pay to Project Co an amount equal to the Adjusted Highest Compliant Tender Price within [twenty (20)] Business Days of such notification.
- 1.7 If the Authority fails to pay the Adjusted Highest Compliant Tender Price (or any proportion thereof) by the date on which payment is due in accordance with paragraph 1.5 or paragraph 1.6 above, the Authority shall pay to Project Co interest on such unpaid amount, which shall accrue on such amount at the Default Interest Rate from (but not including) the date on which payment is due in accordance with paragraph 1.5 or paragraph 1.6 above until such amount is paid.
- 1.8 If the Adjusted Highest Compliant Tender Price is zero or a negative number then, on entering into the New Agreement with the New Project Co, the Authority shall have no obligation to make any payment to Project Co and (if a negative number) an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by Project Co to the Authority on the date of the New Agreement or (where paragraph 1.6 applies) within [twenty (20)] Business Days of notification from the Authority pursuant to that paragraph.

Following no retendering

- 1.9 If the Authority follows the no retendering procedure set out in paragraph 4 of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*) then, subject to paragraph 1.10, the Authority

shall pay to Project Co an amount equal to the Adjusted Estimated Fair Value of the Agreement no later than the date falling twenty (20) Business Days after the Compensation Date together with interest on such amount calculated in accordance with paragraph 1.2.2 above unless the Authority has paid Post Termination Service Amounts pursuant to paragraph 3.5 of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*).

- 1.10 To the extent that the Adjusted Estimated Fair Value of the Agreement is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Agreement shall be due and payable by Project Co to the Authority on the Compensation Date.

2 Full and Final Settlement

- 2.1 Any and all sums irrevocably paid by the Authority to Project Co under this Schedule 17 (*Compensation on Termination*) will be in full and final settlement of each party's rights and claims against the other for breaches and/or termination of this Agreement and any other Project Document whether under contract, tort, restitution or otherwise but without prejudice to:

2.1.1 any antecedent liability of Project Co to the Authority which the Authority has been unable to set off pursuant to Clause 46.11 of this Agreement;

2.1.2 any antecedent liability of either party to the other that arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining or agreeing the Authority Default Termination Sum, Adjusted Highest Compliant Tender Price, or Adjusted Estimated Fair Value of the Agreement or the Force Majeure Termination Sum as the case may be; and

2.1.3 any liabilities arising in respect of any breach by either party of their obligations under this Agreement which arises or continues after the Termination Date pursuant to Clause 47.6 (*Continuing Obligations*).

- 2.2 If either the Adjusted Highest Compliant Tender Price or (as the case may be) the Adjusted Estimated Fair Value of the Agreement is zero or a negative number the Authority shall be released from all liability to Project Co for breaches and/or termination of this Agreement and any other Project Document whether under contract, tort, restitution or otherwise save for:

2.2.1 any antecedent liability of the Authority which arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining the Adjusted Highest Compliant Tender Price or the Adjusted Estimated Fair Value of the Agreement (as the case may be); and

2.2.2 any liabilities arising in respect of any breach by either party of their obligations under the Agreement which continues after the Termination Date pursuant to Clause 47.6 (*Continuing Obligations*).

3 Costs

The costs and/or expenses to be taken into account in the calculation of all termination sums due pursuant to this Schedule 17 (*Compensation on Termination*) shall only be such costs and/or expenses to the extent that they are reasonable and proper in quantum and shall have been or will be reasonably and properly incurred and shall only be counted once.

4 **Undisputed Amounts**

If the calculation of any termination amount is disputed then any undisputed element of that amount shall be paid in accordance with this Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*) and the disputed element shall be dealt with in accordance with Schedule 20 (*Dispute Resolution Procedure*).

5 **Outstanding Senior Debt Amount**

5.1 The Authority shall be entitled to rely on the certificate of the [Senior Funders' Agent] as conclusive as to the amount of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount (as the case may be) outstanding at any relevant time.

5.2 The receipt by the [Senior Funders' Agent] of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount or elements thereof (as the case may be) and, where appropriate, any accrued interest or breakage costs as certified in accordance with paragraph 5.1 above, shall discharge the Authority's obligations to pay such sums to Project Co.

Where this alternative drafting is used in Section 4 of Schedule 17, the following definitions should be deleted in Section 5 of Schedule 17:

“Credit Agreement” means [◆] as at the date of this Agreement or as amended as permitted pursuant to Clause 4 (*Project Documents*);

“Notice Date” means the later of the Termination Date and (if paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*) applies) the date that the Adjusted Estimated Fair Value of the Agreement has been agreed or determined;

“Outstanding Principal” means the principal amount outstanding at the Termination Date of each borrowing (other than any borrowing under any equity bridge facility) under the [Credit Agreement];

Where this alternative drafting is used in Section 4 of Schedule 17, the following definition should be amended in Section 5 of Schedule 17:

“Termination Sum” has the meaning given in paragraph 1.3 of Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*).

Chapter 5: Health Sector Specific Guidance

Authorities intending to procure a project for the design, build, finance and maintenance of a health facility in Wales should use the MIM Standard Form Project Agreement (Accommodation Version), tailored in accordance with the following guidance. All references to the MIM Standard Form Project Agreement in this Chapter 5 refer to the MIM Standard Form Project Agreement (Accommodation Version).

Authorities should note the MIM Standard Form Project Agreement for Accommodation projects anticipates non-acute healthcare.

Where the facilities deliver acute healthcare and/or require to operate on a 24/7 basis, it may be appropriate to revert to some of the measures in the former Scottish or English Standard Form Health PPP Contracts (in particular the measurement of service performance by sessions rather than days and the commissioning arrangements around handover of the new facilities).

Authorities must liaise, and agree an approach to the production of their specific Project Agreement with Welsh Government, prior to submitting derogations.

| Clause | Comment |
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| 5.2.4 | Insert the following as Clause 5.2.4 and re-number accordingly: 5.2.4 except to the extent expressly stated to the contrary in the Authority's Construction Requirements or the Service Level Specification, in compliance with all applicable NHS Requirements; |
| 5.3.1 | Insert, "NHS Requirements" between the words "Laws" and "and Consents". The Authority should seek technical advice on the appropriateness of the derogation wording at the definition of "NHS Requirements" on a project specific basis. |
| 5.4 | Authorities should consider what joint working arrangements are necessary to provide a practical approach to interface with the soft service provider (which may be the Authority itself) in the completion of the template FM Interface Protocol. |
| 5.5 | Insert the following additional Clause, as Clause 5.5: 5.5 Without prejudice to the generality of Clause 5.4, the parties shall liaise with a view to ensuring that the requirements of the Health and Care Standards and any other NHS requirement relating to customer service and satisfaction which may from time to time supplement or replace the Health and Care Standards are met in respect of the operation of the Facilities. This provision is intended to capture 'customer service' aspects of healthcare provision. |

| Clause | Comment |
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| 6.1 | <p>The MIM Standard Form Project Agreement does not envisage <i>any</i> third party revenue generation activities will form part of the Project. However, some MIM projects may charge for services or activities that are ancillary to the primary use of the asset (e.g. renting retail space in a hospital, private healthcare and training courses).</p> <p>Authorities should note, under Chapter 2 of the EPEC/EUROSTAT Guide, EUROSTAT will not record a project as off balance sheet if, at Financial Close, the revenues that the Authority (and/or government more widely) is forecast to receive from users of the asset over the life of the Project will exceed 50% of the total value of payments that the Authority is forecast to make to Project Co over the life of the contract. Revenues and forecast payments should be reviewed against the thresholds in EPEC/EUROSTAT's Guide and compared on a net present value basis at Financial Close. The amount of revenues forecast should be those specifically related to the MIM asset. Comprehensive details of revenue generation activities related to the MIM asset must be included in the Authority's Outline Business Case and approved by Welsh Government. Authorities must also seek approval from Welsh Government to any anticipated change to such forecast revenues, to allow ongoing review of statistical treatment, and care will be required to be taken in defining the Authority Services to include such activities.</p> <p>Where Project Co undertakes third party revenue schemes, this Clause (and the Agreement generally) will need to be amended, as appropriate. However, as noted above, the amount of third party revenues that the Authority is forecast to receive over the life of the PPP contract (whether through itself charging for the use of the asset or through sharing of revenues Project Co generates) will influence statistical treatment so reference must be made to the thresholds set out at section 5.5 of Chapter 3 the EPEC/EUROSTAT Guide.</p> <p>Where the Authority intends to have a retail unit at the Facilities, for which Project Co is to be responsible and for which Project Co is to be entitled to receive the revenues generated, the following drafting should be substituted in Clause 6.1:</p> <p>6.1 Project Co shall:</p> <p>(a) not engage in any business or activity other than the business or activities related to, and conducted for, the purpose of the Project Operations <u>and the Permitted Project Co Operations</u>; and</p> <p>(b) <u>be entitled to retain the income derived from the Permitted Project Co Operations.</u></p> <p>"Permitted Project Co Operations" means [the operation of a newsagents/convenience store in the Retail Unit, provided the sale of the following shall not be Permitted Project Co Operations:</p> <p>(a) alcohol;</p> <p>(b) aromatherapy, homeopathy or similar products;</p> <p>(c) candles and charcoal;</p> <p>(d) cosmetic products which have been tested on animals;</p> |

| Clause | Comment |
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| | <p>(e) financial products and services;</p> <p>(f) firearms or weapons of whatsoever nature (which shall include razorblades, scissors, knives, pins and needles);</p> <p>(g) fruit drinks for babies;</p> <p>(h) [healthcare products (other than first aid, foot care, holiday health and incontinence products)];</p> <p>(i) optician services and glasses;</p> <p>(j) pets and livestock;</p> <p>(k) pharmaceutical products (by way of prescriptions or over the counter products);</p> <p>(l) pornographic products; and</p> <p>(m) tobacco products, matches and smokers' requisites;]</p> <p>["Retail Unit" means the area [plan to be referenced];]</p> <p>Consideration will also be required to inclusion of appropriate drafting on the following:-</p> <ul style="list-style-type: none"> • Lease/ licence/ Ancillary Rights and property related provisions, to allow the necessary access to and occupation of the relevant retail units solely for the purpose of the Permitted Project Co Operations and provisions on title risk, planning and consents risk will be required, akin to those for the Project Co Operations. • Obligations in respect of Law/ Consents, Health & Safety and other general standards should be aligned to those applying to the Project Co Operations. • Inclusion of indemnity drafting for a breach by Project Co of any of its obligations relating to the conduct of any Permitted Project Co Operations and equivalent indemnity provisions to those applying to Project Co Operations, where relevant. • The Payment Mechanism may need to be amended where there is a Retail Unit at the Facilities. • Other appropriate references to Project Co's right to carry out Permitted Project Co Operations (alongside obligations to carry out Project Co Operations) will be required to ensure necessary risk transfer to Project Co. |

| Clause | Comment |
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| 8.15, Schedule 20 (Dispute Resolution Procedure) and Schedule 24 (Liaison Procedure) | <p>Liaison Procedures</p> <p>Liaison procedures may be adopted where this is considered beneficial to a specific project. The role of the Liaison Committee should only be to make recommendations to the parties, which they may accept or reject in their complete discretion. Neither the Liaison Committee itself, nor the members acting in that capacity, should have the authority to vary any of the provisions of the Project Agreement or make any decision that is binding on the parties.</p> |
| 10.3-10.4 | <p>To the extent it is not practical to investigate areas of the Site (for example, due to Authority occupation of Facilities on Site), the drafting at Clauses 10.3 and 10.4 can be included to provide Project Co with appropriate relief. These Clauses provide that the Authority bears any additional costs arising out of unforeseen conditions in areas which Project Co cannot investigate and which cannot be reasonably identified by Project Co. Areas of the Site to which this carve out applies should be clearly identified in the Project Agreement.</p> <p>It may be appropriate, where additional surveys are recommended by Project Co acting in accordance with good industry practice and in good faith during the bidding process but were not instructed by the Authority or permitted by the Authority to be carried out, that these should be specifically carved out of Clause 10.3.</p> <p>The risk that an Authority assumes in terms of Clauses 10.3 and 10.4 where relevant (i.e. where there are areas of the Site under existing buildings that are not capable of survey) will include the risk of asbestos. The risk of asbestos on other areas of the Site should be considered on a project specific basis. The MIM Standard Form Project Agreement assumes, and it will ordinarily be expected, that Project Co takes this risk (including on projects that involve the demolition of existing buildings where Project Co ought to be in a position, on the basis of its knowledge and expertise, to evaluate the need for asbestos removal and factor this in to its demolition proposals).</p> <p>In exceptional cases (e.g. on refurbishment projects) where the treatment of asbestos will be a particularly sensitive issue it may be appropriate for an Authority to consider risk sharing that involves a process for carrying out asbestos surveys and Project Co pricing asbestos works on the basis of those surveys. If the Authority considers that risk-sharing will offer an appropriate and value for money solution it should use the drafting set out below, where approved by Welsh Government.</p> <p>Asbestos</p> <p>10.6 Subject to Clauses 10.7 to 10.15 below Project Co shall be responsible for and shall hold the Authority harmless from the removal of any Asbestos at the Site(s) and the Authority shall have no liability in respect of the removal of any Asbestos at the Site(s) other than as set out in Clauses 10.7 to 10.14.</p> |

| Clause | Comment |
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| | <p>10.7 ⁶Prior to the commencement of the Works at a Demolition Site, Project Co shall procure:</p> <p>[10.7.1 the appointment of an Asbestos Surveyor in accordance with Clause 10.8 and 10.10; and]</p> <p>10.7.2 the Asbestos Surveyor [appointed in accordance with Clause 10.8 and 10.10] carries out an Asbestos Survey and submits an Asbestos Survey Report in respect of the relevant Demolition Site.</p> <p>10.8 [Project Co shall seek competitive tenders from a minimum of three [(3)] persons competent to carry out Asbestos Surveys on the basis that the successful tenderer shall provide:</p> <p>10.8.1 Asbestos Surveys in respect of all of the Demolition Sites; and</p> <p>10.8.2 for each Demolition Site, as soon as reasonably practicable after the relevant Asbestos Survey has been carried out, an Asbestos Survey Report in a format suitable for pricing by a Licensed Contractor tendering for the Asbestos Works.]</p> <p>10.9 [In parallel with the process referred to in Clause 10.8 above, Project Co shall procure competitive tenders from a minimum of [three (3)] Licensed Contractors, based on the surveys contained in [♦] of Schedule [♦] (<i>Asbestos Surveys</i>), which tenders shall include a schedule of rates to assist in the pricing of the Asbestos Works.]</p> <p>10.10 [As soon as reasonably practicable following receipt of the tenders referred to in Clauses 10.8 and 10.9, Project Co shall submit copies of such tenders to the Authority together with Project Co's recommendation as to which tenders should be accepted. Within five (5) Business Days of having received copies of all of the tenders referred to in Clauses 10.8 and 10.9, the Authority shall notify Project Co which tenders to accept, provided that failing such notification Project Co shall be entitled to accept the tenders it had recommended to the Authority.]</p> <p>10.11 Project Co shall procure that a copy of each Asbestos Survey Report issued by the Asbestos Surveyor is submitted to the Authority within seven (7) Business Days of receipt of the same by Project Co.</p> |

⁶ The drafting assumes that Project Co has not appointed an Asbestos Surveyor and Licensed Contractor before Financial Close. On the basis that the Additional Asbestos is an Authority risk the drafting allows for the Authority to select the Asbestos Surveyor and Licensed Contractor (with an opportunity for Project Co to make its recommendations). Compensation payable to Project Co in relation to the removal of Additional Asbestos will be calculated on the basis of the Licensed Contractor's tender. If an Asbestos Surveyor and Licensed Contractor are appointed before Financial Close the drafting in Clauses 10.6 to 10.10 and 10.12 will need to be revised accordingly and the Licensed Contractor's schedule of rates should be set out in the Schedule to the Project Agreement and used for calculating compensation payable to Project Co under Clauses 10.13 and 10.14).

| Clause | Comment |
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| | <p>10.12 [Following the issue of each Asbestos Survey Report Project Co shall procure that [the Licensed Contractor appointed pursuant to Clause 10.10 provides a revised tender, clearly setting out its assumptions, resources analysis and all costs for carrying out the Asbestos Works at the relevant Demolition Site on the basis of the Asbestos Survey Report to enable robust and transparent verification of all allowances within the tender, and shall procure that] the Asbestos Works are completed by the Licensed Contractor in accordance with the requirements of Clause 6.2.</p> <p>10.13 To the extent that, only as a result of the nature and/or extent and/or location of the Additional Asbestos, the period of time taken to complete the Asbestos Works at a Demolition Site is longer than the relevant Asbestos Works Period (“Additional Asbestos Delay”), Project Co will be entitled to apply for relief from its obligations and/or compensation in accordance with Clause 30 (<i>Delay Events</i>)⁷ provided compensation for any additional direct costs and associated expenditure incurred by Project Co for the removal and disposal of the Additional Asbestos shall be calculated on the basis of the schedule of rates set out in [the Licensed Contractor’s tender] [Schedule [◆]] and paid as provided for in Clause 10.14 below and Clause 30 (<i>Delay Events</i>) shall be construed accordingly.</p> <p>10.14 In respect of any additional direct costs and associated expenditure incurred by Project Co as a result of the nature and/or extent and/or location of the Additional Asbestos at a Demolition Site (whether or not there has been an Additional Asbestos Delay):</p> <p>10.14.1 Project Co shall deliver to the Authority a VAT invoice for such additional direct costs and associated expenditure, calculated on the basis of the schedule of rates set out in [the Licensed Contractor’s tender] [Schedule [◆]], in each month in which they are incurred together with copies of the records maintained by the Contractor and the Licensed Contractor to show the amount of Additional Asbestos removed from the relevant Demolition Site and the associated expenditure during such month and such additional supporting information as the Authority may reasonably request; and</p> <p>10.14.2 the Authority shall pay to Project Co the amount of each such invoice (provided it reflects the records and schedule of rates referred to in Clause 10.14.1 above) within twenty (20) Business Days of receipt of the same.</p> <p>10.15 Unless the exposure arises directly or indirectly as a result of any act or omission of Project Co or any Project Co Party, the Authority accepts full responsibility (including any financial and other consequences which result (whether directly or indirectly) for death and personal injury in respect of exposure to Asbestos on the Site, where the exposure takes place prior to the date on which Project Co is given possession of the Site for the purposes of carrying out the Works.</p> <p>Where Clauses 10.6 to 10.15 are used, the following definitions should be added to Schedule 1:</p> |

⁷ Add Additional Asbestos Delay to the list of Delay Events in Clause 30.3 and Compensation Events in Clause 30.10.

| Clause | Comment |
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| | <p>“Additional Asbestos” means Asbestos discovered at a Demolition Site to the extent only that it differs in nature and/or extent and/or location from the Asbestos identified in the surveys contained in [♦] of Schedule [♦] (<i>Asbestos Surveys</i>);⁸</p> <p>"Additional Asbestos Delay" has the meaning given to it in Clause 10.13;</p> <p>“Asbestos” has the meaning given to it in the Control of Asbestos Regulations 2012;</p> <p>“Asbestos Survey” means a Refurbishment/Demolition Survey as described in Guidance Note HSG264 (<i>Asbestos: The Survey Guide</i>) published by the Health & Safety Executive;</p> <p>“Asbestos Survey Report” means a detailed report prepared by the Asbestos Surveyor on the results of an Asbestos Survey, which report shall include the Asbestos Surveyor’s detailed recommendations as to the nature and scope of the Asbestos Works required at the relevant Demolition Site;</p> <p>“Asbestos Surveyor” means [a licensed asbestos surveyor appointed in accordance with Clauses 10.8 and 10.10];</p> <p>“Asbestos Works” means, in relation to a Demolition Site, the removal and disposal of all Asbestos;</p> <p>“Asbestos Works Period” means, in relation to a Demolition Site, the period of time programmed for the carrying out of Asbestos Works as identified in [♦] of Schedule [♦];</p> <p>“Demolition Site” means [♦];</p> <p>"Licensed Contractor" means a contractor licensed by the Health and Safety Executive to work with Asbestos;</p> |
| 11.1.2 | The costs associated with any planning agreements etc should be for the account of Project Co. |

⁸ Details of Management Surveys to be included.

| Clause | Comment |
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| 12 | <p>If the Authority has specific fuel source requirements in relation to energy, such as biomass or photovoltaic cells, or multi-fuel capability, drafting should be added to ensure that if Project Co fails to provide or maintain the necessary equipment and that results in the Authority incurring increased fuel costs or losses of income, Project Co will be obliged to compensate the Authority whether or not it has incurred Deductions.</p> <p>Further guidance on this subject will be issued in due course.</p> |
| 12.4.3 | <p>Replace Clause 12.4.3 with the following:</p> <p>12.4.3 for the purposes of this Clause 12.4 (<i>Corporate Identity and Signage</i>), the Authority shall be deemed to be acting reasonably where any proposals made by it and/or any approvals exercised by it conform with the Welsh Language Standard(s) and any further relevant guidance, amendments or supplements issued by the Welsh Government from time to time in connection with bilingual use of the Welsh and English language or any proposals made by it and/or any approvals exercised by it conform with any relevant guidance issued to NHS bodies by the Welsh Government in relation to such matters.</p> |
| 12.5 | <p>It is essential the Authority reviews the final version of Project Co's Proposals shortly before contract signature in order to ensure these satisfy the Authority's requirements for Operational Functionality and that it is happy to give sign-off on this limited basis. The Authority must have the right to notify Project Co of its comments/qualifications in relation to Operational Functionality.</p> |
| 12, 17 and schedules 6 and 10 | <p>A Welsh Government representative from the sponsoring department will require to be involved in parallel approval of Reviewable Design Data and the Final Commissioning Programme.</p> <p>The approach to such parallel review will be dealt with through the funding letter from the Welsh Government.</p> |
| 12.6.1, paragraph 1.2 and Appendix 3 of Schedule 8 (Review Procedure) | <p>The Authority should seek advice from its technical advisors on the status of design development and whether Project Co's Proposals are sufficiently and suitably well developed at Financial Close. Consideration should also be given to key risk areas, e.g. detailed design and construction information for cavity walls.</p> <p>Unless there is strong justification for an alternative approach, it will usually be appropriate to include a Reviewable Design Data Programme, to avoid significant volumes of RDD being submitted for review by the Authority without due notice. In such circumstances, the Authority should include the drafting in square brackets at Clause 12.6.1 and paragraph 1.2 of Schedule 8 (<i>Review Procedure</i>) and develop a more detailed process for submission of RDD at Appendix 3 of Schedule 8 (<i>Review Procedure</i>). The Authority must seek approval of the proposed approach from Welsh Government.</p> |

| Clause | Comment |
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| <p>12.10, Schedule 30 (BIM Protocol)</p> | <p>Clause 12.10 should be used where a Building Information Modelling solution is being used. These provisions are intended to ensure that all parties involved in the use, production or delivery of the Model on a Project are required to abide by common principles on use and liability,</p> <p>Schedule 30 (<i>BIM Protocol</i>) should be developed by Project Co (and approved by the Authority and Welsh Government) on a project by project basis. The terms of the protocol must be aligned with the Construction Industry Council's Building Information Modelling Protocol, adjusted to reflect the MIM contract structure and to provide for the Authority's licence to use the Model. The BIM Protocol will include the Information Requirements and associated execution plan (i.e. the level of detail, timing and protocol associated with 'data drops'). The terms of the BIM Protocol should take precedence over specified Clauses in the front end of the Project Agreement, where there is any conflict or inconsistency (for example intellectual property rights). Further guidance on the BIM Protocol will be issued in due course.</p> |
| <p>14.5</p> | <p>If the Authority wishes to place additional constraints on when service commencement may occur (for example in relation to commissioning/ equipment decant) this Clause should be amended as required. Authorities should remember that the more restrictive its requirements the greater the risk that will be priced by bidders.</p> <p>Approach to this provision to be considered by Authorities on a project specific basis.</p> |
| <p>17</p> | <p>The MIM Standard Form Project Agreement for Accommodation schemes assumes the Authority and Project Co will each undertake inspection and commissioning activities both prior to and after completion.</p> <p>Parties need to consider which commissioning activities have to occur before and which after completion (and, in each case, by whom) on a project specific basis. The MIM Standard Form Project Agreement envisages that the Final Commissioning Programme will set out all requirements and obligations in relation to the development, nature, principles and performance of the completion tests to be performed to enable certification of completion to take place.</p> <p>The commissioning process is to be developed and agreed on a project specific basis and the Agreement amended as necessary to reflect project specific arrangements.</p> |
| <p>17.4</p> | <p>The Authority should describe any other core requirements to be complied with in relation to Project Co's commissioning activities.</p> |
| <p>17.7.2</p> | <p>The Authority should consider what the Authority's commissioning activities, if any, will entail. Parties will need to consider when the Authority's commissioning activities (including, for example, installing of its own equipment) will be carried out.</p> |
| <p>17.14</p> | <p>Where clinical commissioning is programmed to take place post construction completion, amendment may be required to Clause 17.14 to ensure the Snagging Programme takes account of the need to implement infection control and the timescales for any resulting necessary deep cleans.</p> |

| Clause | Comment |
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| 18.1 to 18.4 | <p>The Authority should consider what commissioning/services start-up activities will be carried out by Project Co and what commissioning activities will be carried out by the Authority during this period.</p> <p>The Payment Mechanism and Service Level Specification may need to be structured so as to reflect the intention of the parties in relation to services start up during this period. The standard Payment Mechanism does not envisage any structuring of this type and may therefore need to be adjusted in project specific cases. It will depend on the significance of each party's activities during this period and will depend on how step-up of payments during this period are structured. If not relevant these Clauses may be deleted.</p> |
| 18.5 | <p>To be amended on a project specific basis. For example, operational manuals may need to be made available at an earlier date depending on the timing of commissioning activities. Further, it may be possible, for Project Co to provide draft manuals to the Authority for comment prior to finalisation and suitable amendments should be made to the Clause where relevant. It is expected that substantially complete manuals will be available by the Actual Completion Date with final drafts being made available within an agreed time thereafter. The Authority should list any other manuals required.</p> |
| 18.8 | <p>This Clause may be deleted if not relevant.</p> |
| 23.13 | <p>The MIM Standard Form Project Agreement places responsibility for interior decoration of walls and ceilings with the Authority and this will be done on a regular basis. Authorities should consider on a project by project basis whether they also wish to take on responsibility for floor coverings. The drafting allows Project Co to step-in and perform such Authority Maintenance Obligation tasks where the Authority's failure to is likely to have an adverse effect on the Facilities, Services and/or Project Co's obligations.</p> <p>Authorities will need to consider the cost implications of these responsibilities in preparing their business cases for projects. They will also need to consider the interface between these obligations and the design and specification of the Facilities (i.e. the impact that the design and specification will have on the Authority's ongoing internal redecoration responsibilities), as would be the case on any capital-funded project.</p> <p>In scoping the Authority's Maintenance Obligations, careful note needs to be taken of the EPEC/EUROSTAT Guide and examples of services that EUROSTAT considers to be "secondary" (i.e. not influencing statistical treatment).</p> |
| 23.13.2 | <p>Include if the Authority wishes to assume this responsibility and adjust the Services Specification.</p> |
| 23.13.3 | <p>Include if the Authority wishes to assume this responsibility and adjust the Services Specification.</p> |
| 23.13.4 | <p>Delete if the right to carry out Derogated Low Value Changes is not included in Schedule 16 (<i>Change Protocol</i>).</p> |
| 23.14 | <p>Breach of this Clause will be an Excusing Cause by virtue of Clause 52.2.1.</p> |

| Clause | Comment |
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| 23.23 to 23.25 | <p>This drafting has been introduced because of the risk transfer in regard to Utilities. If Project Co makes material use of Utilities to achieve Rectification of Availability Failures it should bear the associated costs. It is suggested that a <i>de minimis</i> level is set to avoid the time and effort required to make relatively trivial claims. It is suggested that this is linked to the average normal daily cost of each utility, but Authorities may prefer to adopt a simpler cash sum in which case it should be index linked.</p> |
| 27.4 | <p>Insert the words "section 45 of the Whitley Agreement or" before the words "section 16 of the Agenda for Change" where the staff transfer drafting is used and define Whitley Agreement.</p> <p>Insert the following at the end of Clause 27.4 where the staff transfer drafting is used:</p> <p>"If the provisions of this Clause 27.4 and the provisions of Clause 27.38A apply (or would apply but for this provision) to the same circumstances, then the provisions of Clause 27.38A shall apply instead of this Clause 27.4."</p> |
| 27.38A | <p>Insert a new Clause 27.38A where the 'staff transfer' drafting is used:</p> <p>27.38A [Notwithstanding the provisions of Clause 27.4, Project Co shall procure that there shall be provided to each Transferring Authority Employee who was employed by the Authority immediately before the Relevant Service Transfer Date rights in respect of employment on or after the Relevant Service Transfer Date equivalent to those to which the employee would have been entitled under the [NHS (Injury Benefit) Regulations 1995] as amended from time to time had he remained in the Authority's employment.]</p> |
| 27.49 to 27.68 | <p>As noted in Chapter 4, the Project Agreements envisage no staff transfers. However, alternative pensions drafting for the NHS Pension Scheme is included below, for use where staff transfer provisions are necessary.</p> <p style="text-align: center;">Direction Order</p> <p>27.49 Project Co undertakes prior to the Services commencing that any Obligated Party shall use their best endeavours to procure a Direction Order in respect of the Fair Deal Employees of the Obligated Party. The Authority shall use its reasonable endeavours to facilitate the procurement. Project Co must supply to the Authority, at least twenty eight (28) days before the Relevant Service Transfer Date, a complete copy of the relevant Direction Order.</p> <p>27.50 Project Co undertakes on behalf of itself and any Obligated Party to comply with the terms of any Direction Order (including any terms which change as a result of changes in legislation) in respect of the Fair Deal Employees of the Obligated Party who are listed in the Direction Order until the day before any Service Transfer or termination of the Agreement so long as they are employed in the provision of the Services.</p> <p>27.51 Where any Employee who is not listed in the Direction Order and who is subsequently found to be a Fair Deal Employee, Project Co will ensure that person is treated as a Fair Deal Employee from the Relevant Service Transfer Date so that their pension and Premature Retirement Rights are not adversely affected.</p> |

| Clause | Comment |
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| | <p>27.52 Project Co undertakes that itself and any Obligated Party will provide all such information which may reasonably be required by the Authority or by the NHSBSA relating to Fair Deal Employees of the Obligated Party and supply the information as expeditiously as possible.</p> <p>27.53 Project Co shall bear its own costs and all costs that the Authority reasonably incurs in connection with the negotiation, preparation and execution of documents to facilitate any Obligated Party's participation in the NHS Scheme.</p> <p>Future Service Benefits</p> <p>27.54 Project Co undertakes to do all such things as may be required so that the Fair Deal Employees so long as they are employed in the provision of the Services, shall be offered continued membership of, or eligibility for the NHS Scheme and Project Co shall procure that the Fair Deal Employees continue to accrue benefits in accordance with the provisions governing the NHS Scheme for pensionable service from (and including) the Relevant Service Transfer Date.</p> <p>Cancellation of any Direction Order(S)</p> <p>27.55 Project Co undertakes that should it or any Obligated Party, as applicable, cease to participate in the NHS Scheme due to events, circumstances or causes that are not beyond their reasonable control at a time when the Obligated Party has Fair Deal Employees, then, subject to Clause 27.56 below it will procure that, at no extra cost to the Authority, Fair Deal Employees continue to enjoy future pension accrual in accordance with New Fair Deal. Where such cessation of participation in the NHS Scheme is due to events, circumstances or causes that are beyond Project Co or the Obligated Party's reasonable control, at a time when the Obligated Party has Fair Deal Employees, then, subject to Clause 27.56 below Project Co will take such steps necessary to ensure that the Fair Deal Employees continue to enjoy future pension accrual in accordance with New Fair Deal and Project Co and the Authority agree to use best endeavours to agree a fair and equitable basis on which any additional costs incurred by Project Co to ensure that the Fair Deal Employees continue to enjoy future pension accrual in accordance with New Fair Deal will be apportioned between the Authority and Project Co having regard to the circumstances or causes that resulted in such cessation of participation in the NHS Scheme.</p> <p>27.56 [If the Authority is entitled to terminate this Agreement under Clause 40 (<i>Project Co Event of Default</i>) of the Agreement, the Authority may in its sole discretion instead of exercising its right under Clause 40 (<i>Project Co Event of Default</i>) of the Agreement, permit Project Co or the Obligated Party, as applicable, to offer a Broadly Comparable Scheme in accordance with Clause 27.55 above.]⁹</p> <p>Premature Retirement Rights</p> |

⁹ Where this Clause is used an additional Project Co Default should be included in Clause 40.1 for failure by Project Co to comply in any material respect with its obligations in respect of the NHS Scheme under Clauses 27.48 to 27.67.

| Clause | Comment |
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| | <p data-bbox="395 277 1385 461">27.57 Whilst an individual remains an Eligible Employee, employed by an Obligated Party, Project Co shall procure that an Obligated Party provides Premature Retirement Rights in respect of the individual that are the same as the benefits they would have received had they remained employees of the Authority in respect of such service and had they remained active members of the NHS Scheme.</p> <p data-bbox="496 495 603 521">Funding</p> <p data-bbox="395 562 1385 685">27.58 Project Co shall procure that any Obligated Party shall pay to the NHS Scheme all such amounts as are due under the relevant Direction Order and shall deduct and pay to the NHS Scheme such employee contributions as are required by the NHS Scheme.</p> <p data-bbox="395 719 1385 902">27.59 If the employer standard contribution rate to the NHS Scheme as defined in the NHS Scheme Regulations (as a percentage of pensionable salaries) is increased or reduced from what it was at the Relevant Service Transfer Date, the Authority shall bear the cost of such increase by way of adjustment to the charges it pays under this Agreement or the Authority will reduce the amount it pays to Project Co under this Agreement.</p> <p data-bbox="395 936 1385 1117">27.60 Project Co undertakes to the Authority to indemnify and keep indemnified the NHS Scheme on demand from and against any loss incurred by the NHS Scheme which relates to the failure of any Obligated Party to account to the NHS Scheme for payments received and the non-payment or the late payment of any sum payable by any Obligated Party to or in respect of the NHS Scheme.</p> <p data-bbox="496 1151 692 1178">Right of Set Off</p> <p data-bbox="395 1218 1385 1464">27.61 If the Authority is notified by NHSBSA of any failure to comply with Clause 27.58 above, the Authority will be entitled to deduct all or part of those arrears from any amount due to be paid by the Authority to Project Co having given five (5) days' notice of its intention to do so, and to pay any sum deducted to NHSBSA in full or partial settlement of such arrears. [This set-off right is in addition to and not instead of the Authority's right to terminate the Agreement under Clause 40 (<i>Project Co Event of Default</i>) of the Agreement]¹⁰</p> <p data-bbox="496 1498 1094 1525">Direct Enforceability by the Eligible Employees</p> <p data-bbox="395 1565 1385 1778">27.62 The provisions of this Clause 27.62 may be directly enforced by a Fair Deal Employee against their employer and the parties agree that the Contracts (Rights of Third Parties) Act 1999 will apply to the extent necessary to ensure that any such Fair Deal Employee will have the right to enforce any obligation owed to him or her by their employer under this Clause 27.62 in his or her own right under section 1 (1) of the Contracts (Rights of Third Parties) Act 1999.¹¹</p> |

¹⁰ Where a Project Co Default is included in respect of Project Co's failure to comply in any material respect with its obligations in relation to the NHS Scheme, this drafting should be included.

¹¹ Note that Clause 69 (*Third Party Rights*) should be made subject to Clause 27.61, where Fair Deal Employees are to have the right to enforce obligations .

| Clause | Comment |
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| | <p style="text-align: center;">Provision of Information</p> <p>27.63 Project Co and the Authority respectively undertake to each other:</p> <p style="padding-left: 40px;">27.63.1 to provide all information which the other party may reasonably request concerning matters (i) referred to in this Clause 27.63 and (ii) set out in the Direction Order, and to supply the information as expeditiously as possible; and</p> <p style="padding-left: 40px;">27.63.2 not to issue any announcements to the Fair Deal Employees prior to the Relevant Service Transfer Date concerning the matters stated in Clause [27.49 to 27.68] without the consent in writing of the other Party (such consent not to be unreasonably withheld or delayed).</p> <p style="text-align: center;">Indemnity</p> <p>27.64 Project Co undertakes to the Authority to indemnify and keep indemnified the Authority on demand from and against all and any Losses whatsoever arising out of or in connection with:</p> <p style="padding-left: 40px;">27.64.1 any liability of any Obligated Party in respect of the Fair Deal Employees arising in respect of service on or after the Relevant Service Transfer Date which arises while they are employed by the Obligated Party in the provision of the Services which relate to the payment (or failure of payment) of pension benefits under a Broadly Comparable Scheme or the NHS Scheme or which relate to the provision of (or failure to provide) Premature Retirement Rights;</p> <p style="padding-left: 40px;">27.64.2 any liability arising as a result of any Obligated Party allowing any Employee who is not a Fair Deal Employee to join and claim membership of the NHS Scheme at any time when providing the Services; and</p> <p style="padding-left: 40px;">27.64.3 any breach of the provisions of this Clause 27.64 or the terms of the Direction Order.</p> <p style="text-align: center;">Employer Obligation</p> <p>27.65 Project Co and any Obligated Party shall comply with the requirements of Part 1 of the Pensions Act 2008 and the Transfer of Employment (Pension Protection) Regulations 2005.</p> <p style="text-align: center;">Subsequent Transfers</p> <p>27.66 In anticipation of the expiry or early termination of the Agreement, Project Co will procure that it or any Obligated Party shall:</p> <p style="padding-left: 40px;">27.66.1 not adversely affect pension rights accrued by any Fair Deal Employee in the period ending on the date of the relevant future transfer;</p> |

| Clause | Comment |
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| | <p>27.66.2 provide all such co-operation and assistance as the NHS Scheme and the replacement employer and/or the Authority may reasonably require to enable the replacement employer to participate in the NHS Scheme in respect of any Fair Deal Employee and to give effect to any transfer of accrued rights from any Broadly Comparable Scheme operated by any Obligated Party in respect of such Fair Deal Employees required as part of participation under New Fair Deal; and</p> <p>27.66.3 for the period either:</p> <p style="padding-left: 40px;">27.66.3.1 after notice (for whatever reason) is given, in accordance with the other provisions of this Agreement, to terminate the Agreement or any part of the Services; or</p> <p style="padding-left: 40px;">27.66.3.2 after the date which is two (2) years prior to the date of expiry of this Agreement,</p> <p>ensure that no change is made to pension, retirement and death benefits provided for or in respect of any person who will transfer to the replacement employer or the Authority, no category of earnings which were not previously pensionable are made pensionable and the contributions (if any) payable by such employees are not reduced without (in any case) the prior approval of the Authority (such approval not to be unreasonably withheld or delayed). Save that this Clause 27.66.3 shall not apply to any change made as a consequence of a term of the Direction Order or change of legislation affecting the NHS Scheme.</p> <p>Interpretation</p> <p>27.67 Where a provision of Clauses 27.49 to 27.68 imposes an obligation on Project Co to provide an indemnity, undertaking or warranty, Project Co shall procure that each of its Service Providers or Sub-contractors shall comply with such obligation and provide such indemnity, undertaking or warranty to the Authority.</p> <p>Compliance</p> <p>27.68 Project Co shall, and shall procure that each of the Obligated Parties shall, comply with the pensions provisions in Clause 27.49 to 27.68.</p> <p>Where the above NHS Pension specific drafting is used, the following definitions should be added to Schedule 1:</p> <p>"Broadly Comparable Scheme" means a registered pension scheme certified by GAD (or any other actuary nominated by the Authority) in accordance with relevant guidance produced by GAD as providing benefits which are broadly comparable to those provided by the relevant sections of the NHS Scheme at the relevant date;</p> |

| Clause | Comment |
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| | <p data-bbox="395 275 647 309">"Eligible Employee"</p> <p data-bbox="906 275 1390 398">means any Fair Deal Employee who at the relevant time is an eligible employee as defined in the NHS Scheme or the Direction Order;</p> <p data-bbox="395 432 616 465">"Direction Order"</p> <p data-bbox="906 432 1390 678">means an order issued by the NHSBSA (on behalf of the Secretary of State) pursuant to section 7(2) of the Superannuation Act (Miscellaneous Provisions Act 1967) to Project Co setting out terms on which Project Co is to be granted access to the NHS Scheme;</p> <p data-bbox="395 712 679 745">"Fair Deal Employees"</p> <p data-bbox="906 712 1390 992">means those Transferring Employees who are on the Relevant Service Transfer Date entitled to the protection of New Fair Deal and remain Eligible Employees, in any questions of doubt the Authority shall decide whether a person is a Fair Deal Employee, and in this Agreement means such employees employed by the Obligated Party;</p> <p data-bbox="395 1014 475 1048">"GAD"</p> <p data-bbox="906 1014 1390 1081">means the Government Actuary's Department;</p> <p data-bbox="395 1104 515 1137">"Losses"</p> <p data-bbox="906 1104 1390 1328">means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses), and charges whether arising under statute, contract or at common law or in connection with judgments, proceedings, internal costs or demands;</p> <p data-bbox="395 1350 595 1384">"New Fair Deal"</p> <p data-bbox="906 1350 1390 1507">means the revised Fair Deal position set out in the HM Treasury guidance: "Fair Deal for staff pensions: staff transfer from central government" issued in October 2013;</p> <p data-bbox="395 1529 531 1563">"NHSBSA"</p> <p data-bbox="906 1529 1390 1664">means the Special Health Authority established under the NHS Business Services Authority (Establishment and Constitution Order) 2005 SI2005/2414;</p> <p data-bbox="395 1686 587 1720">"NHS Scheme"</p> <p data-bbox="906 1686 1390 2000">means the National Health Service Pension Scheme for England and Wales, established under the Superannuation Act 1972, governed by subsequent regulations under that Act including the National Health Service Pension Scheme Regulations 2008 (SI2008/653) and as amended from time to time (the "NHS Scheme Regulations");</p> |

| Clause | Comment |
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| | <p>"Obligated Party" means Project Co, any Service Provider or any Sub Contractor whilst they employ Fair Deal Employees;</p> <p>"Premature Retirement Rights" means rights to which the Fair Deal Employees (had they remained in the employment of the Authority) would have been or are entitled under the NHS Pension Scheme Regulations 2008 (SI2008/653), the NHS Compensation for Premature Retirement Regulations 2002 (SI2002/1311) the NHS Injury Benefits Regulations 1995 (SI1995/866) and clause 16 NHS Terms and Conditions of Service Handbook or any other legislative or contractual provision which replaces, amends, extends or consolidates the same from time to time;</p> <p>"Service Transfer" means any transfer of the Services (or any part of the Services), for whatever reason, from one Obligated Party to another Obligated Party or to another entity;</p> |
| 28.1 | The MIM Project Agreement assumes the Project is a stand-alone development and not part of a larger site and therefore the Authority's rights here apply in relation to the Facilities only. Authorities should refer to any other relevant areas (e.g. existing premises from which the Authority operates) as necessary on a project specific basis. |
| 28.17 to 28.20 | <p>The following Clauses 28.17 to 27.20 should be added for NHS projects (note the consequential Clause numbering will differ for staff transfers):</p> <p>Health Requirements</p> <p>28.17 Project Co shall procure that all potential employees or persons who may otherwise perform any of the Services [(other than Transferring Authority Employees)] undergo pre-employment health screening (including a medical examination if necessary) by a qualified occupational health professional to establish in each case that the relevant person is medically fit for his proposed tasks in the provision of the Services and that he does not pose at that time any danger to the health of other persons (provided that Project Co is not required to procure compliance with an obligation which contravenes the Equality Act 2010) and Project Co shall also procure (to the extent permitted by Law) that all persons employed or engaged in the provision of the Services shall undergo such medical screening examination or treatment and provide such information during the currency of this Agreement when reasonably requested to do so by the Authority as required to ensure that the Authority is able to comply with relevant legal obligations in respect of the health of Authority staff, patients or visitors to Authority premises.</p> |

| Clause | Comment |
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| | <p>28.18 To the extent permitted by Law, records of all screenings, examinations or treatments referred to in this Clause 28 (<i>Site Security and Personnel Issues</i>) shall be held by Project Co on behalf of and as agent for the Authority and produced (subject to requirements under the Law) for inspection upon request by the Authority's Representative provided that no such inspection shall take place unless each staff member has given his or her written consent to such inspection.</p> <p>28.19 Project Co shall (to the extent permitted by Law) procure that the Authority shall be informed upon reasonable request by the Authority of the outcome of each and every medical screening examination or treatment referred to in Clause 28.17 with reference to the purpose of the screening, examination or treatment concerned and shall receive all such other information referred to in Clause 28.17 subject to requirements under the Law.</p> <p>28.20 The Authority's Representative may (acting reasonably) refuse admittance to or order the removal from the Authority's premises of any person employed or engaged in the provision of the Services whose presence poses or is reasonably believed to pose a risk to the health of Authority staff, patients or visitors and such action, which shall forthwith be confirmed in writing by the Authority, shall not relieve Project Co of any of its obligations under this Agreement.</p> |
| 30.3.8 | Include where Clauses 10.3 and 10.4 are used. |
| 30.10.3 | Include where Clauses 10.3 and 10.4 are used. |
| 39.1 | <p>Include the following new Clause and include reference at Clause 39.2.2, in relation to rectification within 60 Business Days:</p> <p>39.1.4 an Adverse Law or a Proposal for an Adverse Law being made.</p> |
| 49.1.1 | This mirrors the indemnity given by the Authority in relation to its employees in Clause 49.2.1. Project Co should manage the risks covered by the indemnity (and the fact that there is no carve out for causation) by putting appropriate insurance cover in place (which it is required by law to do), which contains satisfactory non-vitiation provisions (see Clause 54.6 (<i>Subrogation and Vitiatio</i>)). |
| 49.1.2 | Deliberate acts or omissions do not include acts or omissions which are within the contemplation of the parties or provided for in this Agreement (see paragraph 11 of Section 2 (<i>Interpretation</i>) of Schedule 1 (<i>Definitions and Interpretation</i>)). |
| 49.2 | A general indemnity has not been included in relation to Authority breach. The Project Co has its express rights under the agreement (for example, Delay Event, Compensation Event and Excusing Causes) and its rights to sue for breach of contract in order to recover any additional loss. |
| 49.2.1 | See note on Clause 49.1.1. |
| 49.2.3 | <p>The Authority's indemnities relating to physical damage in Clauses 49.2.3 and 49.2.4 do not cover physical damage caused by negligent acts or omissions. Project Co should insure against that risk. Authorities should not act as insurers of last resort in those circumstances.</p> <p>The indemnity in Clause 49.2.3 also excludes liability for acts of malicious damage, which are dealt with under Clause 50.</p> |

| Clause | Comment |
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| 52.2.8 | <p>Where there are clinical services being provided at the Facilities, insert the following new sub-Clause:</p> <p>52.2.8 the outbreak or the effects of any outbreak of any Medical Contamination unless and to the extent that the effects of such outbreak are caused (or contributed to) by any failure of Project Co or any Project Co Party to comply with procedures (or Authority instructions) relating to control of infection or to take all reasonable steps to mitigate the effect of such Medical Contamination.</p> |
| 58.11 | <p>Include the following at Clause 58.11:</p> <p>58.11 The Authority shall be entitled to assign, transfer or dispose of the whole of this Agreement and/or of any agreement entered into in connection with this Agreement to which the Authority and Project Co are both party to:</p> <p>58.11.1 the Welsh Ministers or a Minister of the Crown;</p> <p>58.11.2 another NHS Authority to whom the Welsh Ministers or Secretary of State exercising their statutory rights would be entitled to transfer such benefits pursuant to section 29 of the National Health Service (Wales) Act 2006; or</p> <p>58.11.3 any other person or body with the prior written consent of Project Co (not to be unreasonably withheld or delayed);</p> <p>provided nothing in this Clause shall restrict the rights of the Welsh Ministers to effect a statutory transfer.</p> |
| 62.7 | Add "patient or" between the words "any" and "Authority Party". |

| Schedule | Comment |
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| 1 | Definitions and Interpretation |
| 1 | <p>Insert the following definition:</p> <p>"Adverse Law" means any Change in Law which would if passed into Law have the following effects, and any administrative act of the Government or any minister of the Crown, department, agency, regulator or other public body or official not amounting to a Change in Law but which has (or would, if made, have) the following effects:</p> <p>(a) remove, transfer to another party or otherwise have a material adverse effect upon the Authority's legal capacity (or obligation) to perform any of its material obligations in relation to the Project which are material to the interests of Project Co and/or its Funders; or</p> <p>(b) amend or repeal (without re-enactment, consolidation or replacement by Law having an equivalent effect) the Protective Legislation;</p> |

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| | <p>provided that in the circumstances referred to in paragraph (a), where a Change in Law would have the effect of transferring the legal capacity or obligation of the Authority in relation to such material obligations to a new entity (an "Authority Substitute"), the relevant Law shall not be an Adverse Law if:</p> <p>(aa) either:</p> <p>(i) the provisions of the Protective Legislation apply to such Authority Substitute in full (as applied to the Authority as at the date of this Agreement); or</p> <p>(ii) the relevant Law has the same effect in relation to the Authority Substitute as the Protective Legislation; and</p> <p>(bb) the relevant Law does not otherwise have any material adverse effect on the legal capacity or obligation of the Authority Substitute which affects (or could reasonably be expected to affect) the Authority Substitute's ability to perform any material obligations owed to Project Co and/or the Funders in relation to the Project which are material to the interests of Project Co and/or its Funders, when compared to the material obligations of the Authority under this Agreement;</p> |
| 1 | <p>Authority Services</p> <p>The Authority should complete this definition on a project specific basis to reflect services (whether public facing or administrative or support services) being provided at the Facilities.</p> |
| 1 | <p>Equipment</p> <p>To be drafted on a project-specific basis linked as appropriate to Clause 16, Schedule 11 (<i>Equipment</i>) and the Service Level Specification.</p> |
| 1 | <p>Insert the following definition:</p> <p>"NHS Authority" means a special body established by the Welsh Ministers to provide goods and services for the purpose of health services, to carry out functions which were transferred to the National Assembly for Wales by the Health Authorities (Transfer of Functions, Staff, Property, Rights and Liabilities and Abolition) (Wales) Order 2003 (SI 2003/813 (W98)) and/ or to exercise any function of the Welsh Ministers related to the health service;</p> |
| 1 | <p>Insert the following definition:</p> <p>"Medical Contamination" means a disease carrying agent which cleaning and prevention of infection or contamination techniques in use in accordance with Good Industry Practice and this Agreement cannot substantially prevent or cannot substantially remove with the result that:</p> <p>(a) it is unsafe to admit patients or staff to the relevant area or to use the area for the purpose for which it is intended; and</p> <p>(b) the area cannot be made safe for the admission of patients or staff;</p> |
| 1 | <p>Insert the following definition;</p> <p>"NHS" means the National Health Service;</p> |

| Schedule | Comment |
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| 1 | <p>Each Authority should take advice at the relevant time, but a definition such as contained in the wording below should be used:</p> <p>"NHS Requirement" means:</p> <ul style="list-style-type: none"> (a) in relation to the Works, Welsh Health Building Notes and Welsh Health Technical Memoranda, and such other requirements as are designated as NHS Requirements [(and are not specifically excluded by virtue of [◆] of the Authority's Construction Requirements)] in the Authority's Construction Requirements; and (b) in relation to the Project Operations (other than the Works), Welsh Health Building Notes, Welsh Health Technical Memoranda, Welsh Health Circulars (previously known as Ministerial Letters), Specialist Estates Services Notifications and any similar official requests, requirements and guidance having similar status for the time being in force in Wales, including any Department of Health documentation that applies in Wales, but only to the extent the same are published and publicly available or the existence and contents of them have been notified to Project Co by the Authority; |
| 1 | <p>Insert the following definition:</p> <p>"Proposal for an Adverse Law" means:</p> <ul style="list-style-type: none"> (a) in the case of a bill passing through the United Kingdom Parliament, the bill being introduced by the Government or receiving the support of the Government at its second reading in the first House of Parliament into which it is introduced or the bill passing a second reading in the first House of Parliament into which it is introduced; (b) [in the case of a bill passing through the National Assembly for Wales, the bill being introduced by the Welsh Government, an Assembly Committee, an individual Member or the Assembly Commission and passing Stage 2 in the National Assembly for Wales]; (c) in the case of subordinate legislation, the proposed statutory instrument or order being laid before the United Kingdom Parliament or the National Assembly for Wales in draft; (d) in the case of a directive, regulation or decision of the European Union, its adoption; (e) in the case of an administrative act as referred to in the definition of Adverse Law, any of the following prior or preparatory to the making of such an act; <ul style="list-style-type: none"> (i) the taking by the Authority, the Government, a minister of the Crown, or a department, agency, regulator or other public body official of any step in a process defined by Law for the making of such administrative acts, other than any early stages of such process (such as, without limitation, consultation or information gathering) following the completion of which further substantive steps remain in such a process before the making of such an administrative act can occur; or |

| Schedule | Comment |
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| | (ii) any communication from the Government, a minister of the Crown, or the department, agency or regulator or other public body or official responsible for making such administrative acts, to the effect that such an administrative act will be made; |
| 1 | <p>Insert the following definition:</p> <p>"Protective Legislation" means each of Section 29 of and [Paragraph 23 of Schedule 3] to the National Health Service (Wales) Act 2006;</p> <p>Note Paragraph 23 of Schedule 3 relates to the power of NHS Trusts to enter into externally financed development agreements. The equivalent Paragraph 16 of Schedule 2 applying to Local Health Boards should be substituted where appropriate.</p> |
| 1 | <p>"Restricted Person" - add the following additional limb (e):</p> <p>(e) any person whose activities are, in the reasonable opinion of the Authority, incompatible with the provision of health services;</p> |
| 6 | Construction Matters |
| 6 | <p>Section 5</p> <p>This section should include the design that is to be developed in accordance with principles set out in the Review Procedure e.g. 1:200 drawings of site plans, 1:50 drawings of room layouts, etc.</p> |
| 6 | <p>Section 6</p> <p>This section should include in the case of health schemes, a room by room design and contents schedule.</p> |
| 6 | <p>Section 7</p> <p>This section should provisions relating to the monitoring (through design and construction) and testing of the Authority's thermal and energy efficiency requirements.</p> |
| 8 | Review Procedure |
| 8 | <p>Paragraph 1.2.3 (Table of Finishes)</p> <p>This is project specific. This table is intended to be for guidance only.</p> |

| Schedule | Comment |
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| 8 | <p>Paragraph 3.3.3 should be amended to read as follows:</p> <p>3.3.3 which comprises a 1:50 scale Room Layout Drawing in respect of which there is no corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by the Authority's Representative in accordance with this Schedule 8 (<i>Review Procedure</i>)), the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 (Effect of Review), on the grounds:</p> <p>(a) the Submitted Item is not in accordance with the Authority's Construction Requirements and/or Project Co's Proposals; or</p> <p>(b) the Submitted Item is inconsistent with the guidance contained in any current NHS Requirement which is applicable to a room of that function provided such guidance has not been superseded by and is not inconsistent with any other provisions of the Authority's Construction Requirements (including any existing Approved RDD Item);</p> |
| 8 | <p>Appendix 2</p> <p>To be completed by the Authority on a project-specific basis.</p> |
| 10 | <p>Outline Commissioning Programme</p> |
| 10 | <p>Schedule 10 will require to be developed on a project specific basis, with input from technical advisers. The approach needs to be considered in parallel with Clauses 17 (<i>Pre-Completion Commissioning</i>) and 18 (<i>Post Completion Commissioning</i>) and the commissioning activities/start-up of services to be carried out pre and post completion. This Schedule should outline who is responsible for what commissioning activities (and when) and set out the principles for all completion tests and inspections.</p> <p>The Completion Criteria should be limited to matters for which the construction sub-contractor will be solely responsible as senior funders will want to be certain that the construction sub-contractor is liable for liquidated damages if the Payment Commencement Date is delayed for any reason other than a Compensation Event.</p> <p>Authorities are reminded that any amendment to the MIM Standard Form Project Agreement will require Welsh Government approval.</p> <p><i>Installation/Commissioning</i></p> <p>In determining allocation of responsibility for commissioning activities, the Authority ought to consider the following matters:</p> <ul style="list-style-type: none"> • There must be a clear limit on the extent of Authority participation pre-completion, as material involvement may lead to the Authority taking back both a risk it is paying Project Co to accept and a management role it is paying Project Co to deliver. |

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| | <ul style="list-style-type: none"> • The Authority will usually always be responsible for the specification of medical equipment. However, where the Authority is also responsible for procurement, installation and commissioning of medical equipment, consideration needs to be given to the scope and timing of activities. Similarly, where responsibility for procurement, installation and/or commissioning is passed to Project Co, consideration will need to be given to the mechanics for Authority input. • Where the nature of activities are such that the Authority can work alongside Project Co to carry out the commissioning activities (for example IM&T activities, staff training and familiarisation), an agreed 'window' of time must be included in the Outline Commissioning Programme for such activities as "Authority Commissioning". Note that the MIM Standard Form Project Agreement ensures no greater or more onerous obligations are imposed on the Authority in the development of the Final Commissioning Programme and any delay to the Authority's Commissioning caused by Project Co should be capable of extending that window by the period of such delay, at Project Co's risk. In such circumstances, the Authority ought to adopt the Beneficial Access drafting included at paragraph 6 of Appendix B below, to ensure for example: <ul style="list-style-type: none"> • the Independent Tester has certified the necessary "Access Conditions" for Authority Commissioning have been met; and • the Access Conditions are maintained for the period of Authority Commissioning. • Whether Authority Commissioning activities will be included within the Completion Tests required to achieve the Actual Completion Date/Payment Commencement Date. For example, staff training/familiarisation will involve co-operation by Project Co and should be included within the Completion Tests. Project Co and the Authority must work together to agree a joint list of commissioning activities in the Outline Commissioning Programme so that each is aware of the other's requirements. • Whether the Works need to be Phased to facilitate Authority Post Completion Commissioning in parallel with completion of the Works or Project Co Pre Completion Commissioning. Completion of the Works (or any Phase of the Works) by Project Co triggers commencement of the Annual Service Payment under the MIM Standard Form Project Agreement. The basic principle is that the Authority only pays for what it, in fact, receives. However, where phased payments are agreed, the Authority must ensure that Project Co remains incentivised through the Payment Mechanism to complete the outstanding works on time. There are essentially two options for the Authority: <ul style="list-style-type: none"> • <u>Option 1</u>: A requirement that all Phases in the scheme achieve the Completion Criteria before payment of the Annual Service Payment commences (thereby incentivising Project Co to complete all Phases as quickly as possible); or |

| Schedule | Comment |
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| | <ul style="list-style-type: none"> • <u>Option 2</u>: Acceptance of Phased completion and step-up of the Annual Service Payment, though reference should be made to Theme 2 in Chapter 3 of the EPEC/EUROSTAT Guide in this case to ensure each Phase is linked to a component of the asset that is genuinely capable of being used independently and that the proportion of the payment is linked to the proportion of the capital cost of the Phase, as against the capital cost of the whole asset. <p>The overall time period between programmed completion of the first Phase and the last Phase is likely to have a significant impact on the relative value for money and commercial viability of option 1. This approach assumes a fairly limited period.</p> <p>In such circumstances, the Authority should adopt the Exclusive Access drafting set out at paragraph 7 of Appendix B below, to ensure the Authority is entitled to exclusive access to carry out its post completion commissioning activities with no interference from Project Co, save as set out in any interface protocols developed to allow delivery of any interim services and/or Project Co commissioning support functions. In addition:</p> <ul style="list-style-type: none"> • risk of damage to areas under the Authority's control will need to be considered; and • insurance responsibilities for areas under the Authority's control will need to be considered. |
| 10 | <p>Appendix A, Table A:</p> <p>Examples of Authority hardware could include essential IM&T infrastructure that will support clinical systems, such as servers.</p> |
| 10 | <p>Appendix B</p> <p>Authorities should refer to Theme 2 of Chapter 3 of the EPEC/EUROSTAT Guide and ensure that the specific criteria for determining whether construction of the asset is complete must be objective, clearly set out and robust.</p> |
| 10 | <p>Appendix B, Paragraph 2.1.25:</p> <p>Examples of specialist systems could include chillers for LINACs, laboratory gases, medical gases, medical and dental vacuum, bedhead services and pneumatic tube systems; this list is not exhaustive.</p> |

| Schedule | Comment |
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| 10 | <p>Appendix B, Paragraph 4.5 (Handover Clean):</p> <p>Insert the following: "Where Clean Rooms or equivalent classified spaces are present, consideration shall be given to Project Co achieving a level of cleanliness as specified within BS EN ISO 14644 'Cleanrooms and associated controlled environments' and BS5295 'Environmental cleanliness in enclosed spaces. General introduction, terms and definitions for clean rooms and clean air devices' and in the case of Pharmacy spaces for MHRA approval, additional levels of cleanliness will be required to be mandated."</p> |
| 10 | <p>Appendix B, Paragraph 5.1 (Documentation):</p> <p>The following should be considered, where relevant, for healthcare facilities (this list is not exhaustive)¹²:</p> <ul style="list-style-type: none"> • Ductwork physical cleaning certification in accordance with [◆]; • Confirmation water systems (heating and domestic water) are commissioned in accordance with [◆]; • Chillers and associated equipment for LINACs; • Staff attack alarm test certificates; • Nurse Call system test certificates; • Medical Gas system test certificates; • Equipment/Patient tracking system test certificates; • Pneumatic tube system test certificates; • [Certification demonstrating compliance with Radiation Protection Officers requirements]; and • Slip resistance test reports for flooring. |
| 10 | <p>Appendix B, Paragraph 6</p> <p>Include the following Clauses 6.1 to 6.9 (<i>Authority Commissioning Access</i>) where the Authority requires access to specific areas of the Facilities to complete Authority Commissioning, prior to construction completion. These provisions should be developed on a project specific basis to ensure they are appropriate in the context of the extent of the areas the Authority will require access to pre-construction completion.</p> <p>Access requirements may range from, for example, data/server rooms or critical clinical areas required to carry out full IM&T commissioning.</p> <p>[6. AUTHORITY COMMISSIONING ACCESS¹³</p> |

¹² Drafting to be confirmed on a project specific basis.

¹³The Independent Tester Contract will require to be amended to accommodate this approach. Responsibility for insurance of the Facility will remain with Project Co but the Authority should seek advice from its insurance advisors in relation to items

| Schedule | Comment |
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| | <p>6.1. Project Co shall provide the Authority and any relevant Authority Party with:</p> <p>6.1.1 Beneficial Access to the IM&T Access Areas on the dates set out in [column 5 of Table A of Appendix A of the Final Commissioning Programme] (the "Beneficial Access Dates") where Beneficial Access is required to install and/or commission [IM&T Equipment]; and</p> <p>6.1.2 Exclusive Access to [◆] on the dates set out in [column 5 of Table A of Appendix A of the Final Commissioning Programme] (the "Exclusive Access Dates") where Exclusive Access is required to (amongst other things) install and/or build [Authority Equipment],</p> <p>provided that in exercising such rights the Authority and Authority Parties shall comply with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.</p> <p>6.2 The Authority will not be obliged to commence or continue Authority Commissioning in an [IM&T Access Area] or [◆], until an Access Certificate has been provided for that [IM&T Access Area] or [◆] and Access Conditions have been met and continue to be met by Project Co for the duration of the Authority Commissioning (which shall include access to the room locations and/or associated plant room if required) (the "Access Period").</p> <p>6.3 The Access Conditions to be met by Project Co for each [IM&T Access Area] and [◆] are:-</p> <p>6.3.1 The Works in that area are complete (including installation, testing and balancing of the air conditioning system save for local air balancing following Authority Commissioning but with the exception of any Works which are required to be carried out after the Authority Commissioning in accordance with the Final Commissioning Programme and the provisions of this Schedule 10 (<i>Outline Commissioning Programme</i>)).</p> <p>6.3.2 The area has received a [Sparkle Clean] as set out at Appendix [◆] immediately prior to the Beneficial Access Date or Exclusive Access Date (as appropriate).</p> <p>6.3.3 Access to the area shall be possible for the transport of any relevant Equipment required for Authority Commissioning, in a manner which is safe, secure and satisfies health and safety requirements.</p> |

of Authority equipment and Schedule 10 (*Outline Commissioning Programme*) and Schedule 15 (*Insurance Requirements*) amended as necessary. Responsibility for locking-up will need to be considered.

| Schedule | Comment |
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| | <p data-bbox="520 271 1385 454">6.3.4 The remaining Works to be completed by Project Co in areas immediately adjacent to the Access Areas will be complete to a level where the Independent Tester considers that trades and activities in those surrounding areas would not ordinarily produce a level of dirt or dust emissions that would adversely impact on the Authority's Commissioning.</p> <p data-bbox="400 488 1385 577">6.4 Following issue of an Access Certificate, Project Co shall ensure the [IM&T Access Areas] and/or [◆] relative thereto shall at all times during the Access Period:-</p> <p data-bbox="520 611 1385 674">6.4.1 comply with all safety and environmental requirements set out in the Completion Criteria;</p> <p data-bbox="520 707 1385 797">6.4.2 meet the equipment supplier's requirements, as notified by the Authority to Project Co (including prior installation of fixings provided by the Authority);</p> <p data-bbox="520 831 1385 893">6.4.3 be provided with service connections that meet the Completion Criteria and provide an uninterrupted supply; and</p> <p data-bbox="520 927 1385 958">6.4.4 be capable of being locked and secured by the Authority.</p> <p data-bbox="400 992 1385 1137">6.5 Project Co and the Authority will meet no later than forty (40) Business Days prior to each Beneficial Access Date and Exclusive Access Date to determine if it will be possible to issue the Access Certificate on the Beneficial Access Date and/or the Exclusive Access Date (as appropriate).</p> <p data-bbox="400 1171 1385 1597">6.6 If pursuant to paragraph 6.5 of Schedule 10 (<i>Outline Commissioning Programme</i>) Project Co and the Authority have determined it will be possible to issue the Access Certificate in respect of an [IM&T Access Area] or [◆] then they will also meet with the Independent Tester no later than five (5) Business Days prior to the Beneficial Access Date and/or Exclusive Access Date (as appropriate) in respect of such area to determine if in the Independent Tester's reasonable opinion it will be possible to issue the Access Certificate on the Beneficial Access Date or Exclusive Access Date (as appropriate). If the Independent Tester does not in his reasonable opinion believe that the Access Certificate should be issued on the Beneficial Access Date or Exclusive Access Date (as appropriate) he must advise Project Co and the Authority of the reasons why not and the procedure in paragraph 6.7.2 of Schedule 10 (<i>Outline Commissioning Programme</i>) shall apply.</p> <p data-bbox="400 1630 1385 1776">6.7 Project Co, the Independent Tester, and the Authority will meet on the Beneficial Access Date in respect of an [IM&T Access Area] or Exclusive Access Date in respect of [◆] and the Independent Tester shall determine whether or not the Access Conditions for the relevant area have been met, and:-</p> <p data-bbox="520 1809 1385 1899">6.7.1 if the Access Conditions have been satisfied the Independent Tester shall issue the Access Certificate in respect of such [IM&T Access Area] or [◆]; or</p> |

| Schedule | Comment |
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| | <p data-bbox="512 271 1386 546">6.7.2 if the Access Conditions have not been met, Project Co shall set a revised Beneficial Access Date or Exclusive Access Date (as appropriate) and shall give the Authority and the Independent Tester at least two (2) Business Days' prior notice of such revised Beneficial Access Date or Exclusive Access Date (as appropriate) and the provisions of this paragraph 6.7 of Schedule 10 (<i>Outline Commissioning Programme</i>) shall be repeated until the issue of the Access Certificate in respect of the relevant area.</p> <p data-bbox="512 577 1386 669">If there is any dispute as to whether or not the Access Conditions in respect of an area have been met, the matter shall be referred to the Dispute Resolution Procedure.</p> <p data-bbox="400 712 1386 862">6.8 In the event Project Co fails to maintain the Access Conditions for the duration of the Access Period, Project Co shall at its own cost restore the Access Conditions and the procedure in paragraph 6.6 of Schedule 10 (<i>Outline Commissioning Programme</i>) above shall be repeated until such time as the Authority has had the benefit of the full Access Period.</p> <p data-bbox="400 898 1386 1688">6.9 In the event Project Co informs the Authority that a Beneficial Access Date or Exclusive Access Date will not be met following the Authority's placing of its order for the relevant item of Equipment as defined within Schedule 11 (<i>Equipment</i>) with an equipment supplier or in the event the Access Conditions are not met by the Beneficial Access Date or Exclusive Access Date or for the duration of the Access Period, the Authority shall use its reasonable endeavours to mitigate any resultant costs or losses and/or reschedule the delivery of the equipment in accordance with the revised Programme. If a Beneficial Access Date or Exclusive Access Date is amended by Project Co (including as a result of the setting of a revised Beneficial Access Date or Exclusive Access Date pursuant to paragraph 6.7.2 of Schedule 10 (<i>Outline Commissioning Programme</i>) following a failure to satisfy the Access Conditions) or in the event Project Co fails to meet the Access Conditions by the Beneficial Access Date or Exclusive Access Date or for the duration of the Access Period in respect of an area, other than as a result of the occurrence of a Delay Event, Project Co shall indemnify the Authority against all Direct Losses suffered or incurred by the Authority (including, but not limited to, Access LADs) as a consequence of the amendment to the Beneficial Access Dates, Exclusive Access Dates or as a result of the Access Conditions not being met for the entirety of the Access Period in respect of the relevant area and further, where the delivery of any item of equipment cannot be rescheduled, Project Co shall provide an area for the storage of any such item of equipment and which area shall be safe, secure and suitable for the storage of the relevant item. The Authority shall ensure the equipment is sufficiently wrapped and protected.]</p> <p data-bbox="400 1722 1299 1753">Insert the following definitions at Schedule 1 (<i>Definitions and Interpretation</i>):</p> |

| Schedule | Comment |
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| | <p>"Access Certificate" means the certificate to be issued by the Independent Tester in accordance with Appendix 1 of the Independent Tester Contract and in the form set out in Schedule 22 (<i>Certificates</i>);¹⁴</p> <p>"Access Conditions" means the access conditions as set out at paragraph 6.3 of Schedule 10 (<i>Outline Commissioning Programme</i>);</p> <p>"Access LADs" means liquidated and associated damages payable to the [Equipment Supplier] in respect of each calendar week (or part thereof) that elapses after the Phase 1 Completion Date up to and including the Phase 1 Actual Completion Date being [◆];</p> <p>"Access Period" has the meaning given at paragraph 6.2 of Schedule 10 (<i>Outline Commissioning Programme</i>);</p> <p>"Beneficial Access" means the obligations of Project Co to provide the Authority with non-exclusive access to the Facilities in accordance with paragraph 6 of Schedule 10 (<i>Outline Commissioning Programme</i>);</p> <p>"Beneficial Access Date" has the meaning given in paragraph 6.1 of Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>);</p> <p>"Exclusive Access" means the obligations of Project Co to provide the Authority with exclusive access to the Facilities in accordance with paragraph 6.1 of Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>);</p> <p>"Exclusive Access Date" has the meaning given to it in paragraph 6.1 of Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>);</p> <p>["IM&T Access Area"] means those parts of the Facility that the Authority shall be entitled to Beneficial Access, identified in the plans set out at Appendix C of this Schedule 10 (<i>Outline Commissioning Programme</i>);</p> |

¹⁴ Schedule 22 of the Project Agreement and Appendix 1 of the Independent Tester Contract to be amended where these provisions are used.

| Schedule | Comment |
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| 10 | <p data-bbox="403 271 724 304">Appendix B, Paragraph 7</p> <p data-bbox="403 360 1385 483">Include the following Clauses 7.1 to 7.5 (<i>Authority Post Completion Commissioning Access</i>) where the Authority requires exclusive access to the Facilities to complete Authority Post Completion Commissioning. These provisions should be refined and/or developed on a project specific basis.</p> <p data-bbox="403 510 1286 544">[7. AUTHORITY POST COMPLETION COMMISSIONING ACCESS¹⁵</p> <p data-bbox="403 577 1385 730">7.1. Project Co shall provide the Authority and any relevant Authority Party with exclusive access to the [Clinical Areas] for the period from the [Phase Actual Completion Date] to the date on which the Authority has completed the Authority's Post Completion Commissioning relative to those areas (the "Authority Post Completion Commissioning Period").</p> <p data-bbox="403 763 1385 853">7.2¹⁶ Project Co shall ensure the [Clinical Areas] shall at all times during the Authority Post Completion Commissioning Period meet the following conditions (the "Commissioning Period Conditions"):-</p> <p data-bbox="491 887 1385 943">7.2.1 [comply with all safety and environmental requirements set out in the Completion Criteria;</p> <p data-bbox="491 976 1385 1032">7.2.2 be lit in accordance with the Completion Criteria and have an uninterrupted (including back-up) power supply;</p> <p data-bbox="491 1066 1385 1155">7.2.3 meet the equipment supplier's requirements, as notified by the Authority to Project Co (including prior installation of fixings provided by the Authority);</p> <p data-bbox="491 1189 1385 1256">7.2.4 be provided with service connections that meet the Completion Criteria and provide an uninterrupted supply; and</p> <p data-bbox="491 1290 1385 1323">7.2.5 be capable of being locked and secured by the Authority].</p> <p data-bbox="403 1357 1385 1503">7.3 The remaining Works to be completed by Project Co in areas adjacent to the [Clinical Areas] will be complete to a level where all trades and activities producing significant dust emissions will have been finished, or, alternatively, the [Clinical Areas] will be protected from dust to the reasonable satisfaction of the Authority or relevant equipment supplier.</p> <p data-bbox="403 1536 1385 1659">7.4 In the event Project Co fails to maintain the Commissioning Period Conditions for the duration of the Authority Post Completion Commissioning Period, Project Co shall at its own cost immediately restore the Commissioning Period Conditions.</p> |

¹⁵ Responsibility for insurance of the Facility will remain with Project Co but the Authority should seek advice from its insurance advisors in relation to items of Authority equipment and Schedule 10 (*Outline Commissioning Programme*) and Schedule 15 (*Insurance Requirements*) amended as necessary. Responsibility for locking-up will need to be considered.

¹⁶ Authorities will also need to consider the extent of Service provision at the Facilities during this period. There should be no double recovery in respect of areas.

| Schedule | Comment |
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| | <p>7.5 In the event Project Co informs the Authority that a [Phase Completion Date] will not be met [following the Authority's placing of its order for the relevant item of Equipment as defined within Schedule 11 (<i>Equipment</i>) with an equipment supplier] or in the event the Commissioning Period Conditions are otherwise not met by the [Phase Completion Date] or maintained for the duration of the Authority Post Completion Commissioning Period for a [Clinical Area], the Authority shall use its reasonable endeavours to mitigate any resultant costs or losses and reschedule the delivery of the equipment in accordance with the revised Programme. In the event Project Co fails to meet the [Phase Actual Completion Date] by the [Phase Completion Date] or to meet the Commissioning Period Conditions for the duration of the Authority Post Completion Commissioning Period in respect of a [Clinical Area] other than as a result of the occurrence of a Delay Event, Project Co shall indemnify the Authority against all Direct Losses suffered or incurred by the Authority (including, but not limited to, Access LADs) as a consequence of the amendment to the [Phase Completion Date] or as a result of the Commissioning Period Conditions not being met for the entirety of the Authority Post Completion Commissioning Period in respect of the relevant [Clinical Area] and, for the avoidance of doubt, where the delivery of any item of equipment cannot be rescheduled, Project Co shall be responsible for the cost of suitable and sufficient storage of any such item of equipment. The Authority shall ensure the equipment is sufficiently wrapped and protected.]</p> |
| 11 | Equipment |
| 11 | <p>The form of Equipment Schedule included at Appendix 1 should be developed on a project specific basis, for consideration and approval through the Welsh Government's Commercial Approval Point process.</p> <p>The Authority will need to consider allocation of responsibility for the specification, selection, procurement, installation, commissioning, maintenance, replacement, decommissioning and disposal of medical equipment. In particular, consideration will need to be given to the allocation of responsibility for the installation and commissioning of large medical equipment such as MRI scanners and/or LINACS, given the potential interface with Project Co prior to or post construction completion.</p> <p>The drafting assumes Project Co support is not required in connection with decant of Authority equipment. Where this is not the case, Authorities should liaise with Welsh Government in connection with required drafting. This will be based on the education equivalent.</p> |
| 12 | Service Requirements |
| 12 | <p>Section 1 - Service Level Specification</p> <p>Specific reference ought to be made to Chapter 2 of the EPEC/EUROSTAT Guide regarding the scope of services to be provided by Project Co on accommodation projects and Theme 4 of Chapter 3 of the EPEC/EUROSTAT Guide in connection with contractual standards.</p> <p>Although not an exhaustive list, Service aspects that have previously often been regarded as part of hard FM services that have been excluded from the MIM model are:</p> |

| Schedule | Comment |
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| | <ul style="list-style-type: none"> • Window cleaning; • Internal decoration (which may also include cleaning and replacement of carpets and other floor coverings); and • Maintenance of soft landscaped areas. <p>More extensive service requirements are not precluded, where they can be shown to demonstrate value for money, but the general expectation is that the Authority will arrange for the provision of these at revenue funded facilities on the same basis as it uses for their existing and capital funded facilities. Consideration will need to be given to practical interface with the Authority and any other soft service providers at the Facilities (e.g. in relation to access arrangements), as set out at Clause 5.4.</p> <p>The Authority will need to consider carefully the interface between the design and specification of the Facilities and the risks the Authority is retaining in relation to the Facilities (e.g. utilities consumption, security, internal redecoration) in the same way it would need to on a capital funded project.</p> <p>Note that the basic helpdesk service is restricted to dealing with Services related events. If an Authority wishes a more broadly based helpdesk that handles a broader scope of service requests, it should consider carefully whether this is best provided under the project or separately. In the latter case, the broad-based helpdesk must be one of the parties able to make reports to the project helpdesk.</p> <p>The Performance and Availability Standards provide for Response Times. The aim is to ensure that irrespective of the Rectification Period, the Authority is told what steps will be taken to rectify the service event and when. In addition, if the nature of the event is such that there are health and safety or security implications Project Co must attend the Facilities and make them safe. The specific requirements in terms of response are project specific according to the nature and location of the Facilities and what it is reasonable and cost effective to require Project Co to achieve.</p> |
| 13 | Independent Tester Contract |
| | Reference to "and NHS Requirements" should be included at the end of Clause 3.4.2. |
| 14 | Payment Mechanism |
| 14 | <p>This will require to be tailored on a project and sector specific basis (including to taking account of phased completion where applicable, ratchet and consequential unavailability mechanisms). The accommodation version includes the following principal features:</p> <ul style="list-style-type: none"> • It operates Deductions on the basis of whole days rather than several sessions within a day. This can be adapted to suit the circumstances. • There are minimum Deductions for Performance Failures and for Availability Failures. |

| Schedule | Comment |
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| | <ul style="list-style-type: none"> • Whole Facility unavailability remains an option for Facilities where loss of key areas or more than a specific percentage of the areas in the facility renders the whole of the Facilities unusable by the Authority. The relevant criteria will be project specific. • The concept of Unavailable but Used is retained where the Authority elects to continue to occupy areas despite them not meeting the Availability Standards and the Deduction will be at 50% of the rate for Unavailability. • Deductions for Performance Failures are fixed monetary amounts at one of three levels according to the severity of the failure. • Repeated failures will incur increased Deductions. • Reporting failures incur Deductions in addition to any Deduction for the original failure. • Operational Insurance premiums, energy, rates and water charges are pass-through costs. • Temporary rectification/making safe is potentially acceptable to rectify Service failures. <p>Authorities must contact the Welsh Government for further guidance on sector specifics and calibration of the Payment Mechanism / Service Level Specification.</p> |
| 14 | <p>Section 1</p> <p>Core Times</p> <p>These should be the times during which the Facilities are generally expected to be in use. It may be different Core Times apply to different Functional Areas within the Facilities (e.g. limited to sports facilities at a school at weekends). See comments below for the implications this will have in relation to the Gross Monthly Availability Deduction and the Service Unit Rate.</p> <p>External Utility Failure</p> <p>No relief for External Utility Failure should be required where Project Co is required to provide back-up arrangements and so this definition may require amendment on a project by project basis.</p> <p>Gross Monthly Availability Deduction</p> <p>The monthly cap on Deductions operates so as to ensure, over the course of a year, the total Deductions will be capped at an amount equal to the Annual Service Payment. In any Contract Month that the monthly cap exceeds the Monthly Service Payment, the drafting provides for the excess to be carried forward and set-off against future Monthly Service Payments (rather than being an amount payable by Project Co to the Authority). If different Core Times apply to different Functional Areas within the Facilities, then the drafting that defines the Gross Monthly Availability Deduction by reference to the “Daily SUF” should be selected.</p> <p>Minimum Availability Deduction</p> |

| Schedule | Comment |
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| | <p>The Minimum Availability Deduction indexes in line with the Annual Service Payment.</p> <p>Logged Rectification Time & Logged Report Time</p> <p>The drafting in these definitions should be aligned with the Service Level Specification requirements for record keeping in the event of Helpdesk system failure.</p> <p>Rectification Period</p> <p>The drafting assumes Service Events reported outside Core Times will be relatively rare and will generally be of a type that requires Project Co to Respond by attending and making safe. Rectification Periods will, therefore, only begin at the start of the next Core Time. If an Authority wishes a higher level of service so that Rectification Periods are the same irrespective of when the Logged Report Time it should evaluate the costs and benefits of that requirement.</p> <p>Service Unit Rate (SUR)</p> <p>If a single set of Core Times applies to the whole of the Facilities, then the Service Unit Rate for a Contract Year is the Annual Service Payment for that Contract Year divided by the product of multiplying the Service Units for the Facilities and the number of Days in the relevant Contract Year. If on some days only some Functional Areas have Core Times (such as R&D facilities which may not be used at weekends) the Service Unit Rate should be calculated using TAGSUF (the aggregate of the Daily Service Units of the Facilities). It must remembered that Service Unit Rate will need to be recalculated if there is a change to Core Times that affects the number of days on which only some Functional Areas have Core Times or the total Gross Service Units of the Functional Areas on such days changes.</p> |
| 14 | <p>Section 2</p> <p>Authorities will need to adjust paragraph 1 to reflect the appropriate approach to staged payments, i.e. to reflect the Phasing of the Works and/or retentions for Snagging Items and/or WiFi completion.</p> <p>Indexation Factor (IF)</p> <p>The indexation factor should reflect the proportion of the Annual Service Payment that represents the indexing of Project Co costs.</p> <p>RPI₀ and RPI_n</p> <p>The default index is RPI but the Authority should consider whether RPI is the most appropriate index to use and Welsh Government will need to approve the selection.</p> <p>Authorities may wish to consider the application of multipliers to Deductions affecting certain Functional Areas at certain times, in which case the standard drafting will be required to be amended.</p> |

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| 14 | <p>Section 6</p> <p>Paragraph 1</p> <p>Delete this paragraph if the Authority procures Energy, water and telecoms services in its own name.</p> <p>Paragraph 2</p> <p>To be decided by the Authority on a project by project basis whether it wants to make Project Co responsible for paying Rates, and reimburse these as a Pass Through Cost or pay the Rates directly itself.</p> |
| 17 | Compensation on Termination |
| Section 4, paragraph 1.4 | <p>Where the alternative drafting in Appendix 2 of Chapter 4 of this User Guide is used, the following wording should be inserted after the words "due date for payment":</p> <p>", or an Adverse Law or a Proposal for an Adverse Law is made"</p> |
| 18 | Handback Procedure |
| 18 | <p>Technical advice should be sought in all cases, but it is envisaged that the following should be considered in the context of project and sector specific drafting required for paragraph [2.2]:</p> <p>For NHS bodies, as well as complying with the residual design life requirement, as a minimum, all components of the Physical Facet (as described in Estatecode (ISBN 0-11-322549-0)) should (subject to the point made below) meet Condition B (i.e. be sound, operationally safe and exhibit only minor deterioration (as is more fully described in Estatecode Section 4 "Facet 1: Physical condition")). Condition B will not be the appropriate standard for some other facets of the Facilities (e.g. components relating to fire protection, health and safety, statutory requirements etc.). The Authority should ensure such requirements are also dealt with. The Authority should ensure that where any component falls short of Condition B, rectification work should be planned to bring such component up to Condition B (or equivalent) within six (6) months of the time at which the component is surveyed in this situation, that Project Co is obliged to carry out such work and that the Authority has adequate remedy where Project Co fails to do this.</p> |
| 19 | Record Provisions |
| 19 | <p>Insert "and to comply with the Health and Care Standards or any document replacing it" after the words "environmental health" at Paragraph 11.</p> |
| 28 | Disaster Plan |
| 28 | <p>The Authority and Project Co should develop and agree a planned course of action in the event of a disaster occurring, which should be set out in Schedule 28. To the extent a responsible and sensible plan can be put in place and then implemented should any disaster occur, it is likely to assist the Authority and Project Co in claiming under any relevant policies of insurance. The Disaster Plan should tie in with the Authority's Major Incident Plan policies and should include the following:</p> <ul style="list-style-type: none"> • Project Co obligation to ensure Service continuity during any incident, such that Authority Services can continue with as little disruption as possible, together with detail of how this will be achieved (e.g. utility failure); |

| Schedule | Comment |
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| | <ul style="list-style-type: none"> • Project Co obligation to ensure co-operation in the maintenance of any temporary accommodation; • Project Co obligation to identify and provide a command room, incident command team and command management structure; • Project Co obligation to participate in emergency planning; • Project Co obligation to participate in training, where required by the Authority; • Project Co obligation to participate in the preparation of Authority emergency planning policies; and • Authority obligation to pay the proper cost incurred by Project Co for any additional/alternative services against Project Co's invoice in respect of each Contract Month during which the additional/alternative services are being provided. • The Authority should consult with its insurance advisers in developing the Disaster Plan. |

Appendix 1 to Chapter 5

SCHEDULE 11

EQUIPMENT

1. DEFINITIONS

1.1 For the purposes of this Schedule 11 (*Equipment*), unless the context otherwise requires:

["Authority Input Item"] means any item of Equipment that is subject to the Equipment Selection Process, in accordance with paragraph 3.1 of this Schedule 11 (*Equipment*);¹⁷

["Authority Input Item Specification"] means in respect of an Authority Input Item, the basic specification provided in:

(a) the column headed "Component Description" in the Equipment lists at Appendices [◆] to [◆] in Schedule 11 (*Equipment*); and

(b) where provided, the draft specification for that Authority Input Item set out in Appendix 1 to this Schedule 11 (*Equipment*);¹⁸

"Committee Chairman" has the meaning given to it in paragraph 6.1 of this Schedule 11 (*Equipment*);

"Equipment Committee" has the meaning given to it in paragraph 6.1 of this Schedule 11 (*Equipment*);

"Equipment Responsibilities Matrix" means the equipment responsibilities matrix contained in Appendix 2 to this Schedule 11 (*Equipment*);

["Equipment Selection Process"] has the meaning given to it in paragraph 3 of this Schedule 11 (*Equipment*);¹⁹

¹⁷ Insert where Clause 3 is applicable.

¹⁸ Insert where Clause 3 is applicable.

¹⁹ Insert where Clause 3 is applicable.

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| ["Final Specification Date"] | means[: (a) in the case of any Authority Input Item that is Key Clinical Equipment, the date set out in the column headed "Final Specification Date" against that item in the Key Clinical Equipment Programme; and (b) in the case of any Authority Input Item that is not Key Clinical Equipment,] ²⁰ thirty (30) Business Days prior to the date on which Project Co intends to place an order for such Authority Input Item;] ²¹ |
| ["Key Clinical Equipment"] | means the items of Equipment listed in the Key Clinical Equipment Programme;] ²² |
| ["Key Clinical Equipment Programme"] | means the programme set out at Appendix 3 to this Schedule 11 (<i>Equipment</i>);] ²³ |
| "Permanent Members" | has the meaning given to it in paragraph 6.1 of this Schedule 11 (<i>Equipment</i>); |
| ["Technical Documentation"] | means, in respect of potential suppliers proposals for the supply of an Authority Input Item, all relevant technical information including the make, model and technical specification, such information to be in writing (whether in the form of a brochure, technical specification or otherwise);] |
| "Terms of Reference" | means the terms of reference set out at paragraph 6.8 of this Schedule 11 (<i>Equipment</i>); |

2. EQUIPMENT RESPONSIBILITIES MATRIX²⁴

- 2.1 The Equipment Responsibilities Matrix sets out the respective responsibilities of the parties in relation to various matters relating to Equipment, namely:
- 2.1.1 the party responsible for developing the initial and refresh specification and selection of items of Equipment (at its own cost), the responsibility for which, subject to paragraph 2.3 of this Schedule 11 (*Equipment*), is set out in the columns headed "Initial specification and selection" and "Refresh specification and selection";
 - 2.1.2 the party responsible for initial procurement of the item of Equipment (at its own cost), the responsibility for which is set out in the column headed "Initial procure";
 - 2.1.3 the party responsible for the initial installation of the item of Equipment (at its own cost), the responsibility for which is set out in the column headed "Initial installation";

²⁰ Insert "Key Clinical Equipment" project specific drafting, where appropriate.

²¹ Insert where Clause 3 is applicable.

²² Insert "Key Clinical Equipment" project specific drafting, where appropriate.

²³ Insert "Key Clinical Equipment" project specific drafting, where appropriate.

²⁴ This assumes all Equipment is new. Transferring Authority Equipment provisions will need to be developed if required, on a project specific basis and must follow Welsh Government guidelines (which are available on request).

- 2.1.4 the party responsible for the subsequent installation of the item of Equipment (at its own cost), the responsibility for which is set out in the column headed "Refresh installation";
 - 2.1.5 the party responsible for the initial commissioning of items of Equipment and staff training where required (at its own cost), the responsibility for which is set out in the column headed "Initial commissioning (and staff training where required)";
 - 2.1.6 the party responsible for the subsequent commissioning of items of Equipment and staff training where required (at its own cost), the responsibility for which is set out in the column headed "Refresh commissioning (and staff training where required)";
 - 2.1.7 the party responsible for the maintenance and repair of the item of Equipment (at its own cost), the responsibility for which is set out in the column headed "Maintenance";
 - 2.1.8 the party responsible for the subsequent refresh/replacement of the item of Equipment (at its own cost), the responsibility for which is set out in the column headed "Refresh/Replacement";
 - 2.1.9 the party responsible for the safe removal of the Equipment at the time of refresh/replacement (at its own cost), the responsibility for which is set out in the column headed "Decommissioning"; and
 - 2.1.10 the party responsible for the safe disposal of the item of Equipment (at its own cost) and adherence to any Law, Consents, regulations and/or guidelines relating to such disposal, the responsibility for which is set out in the column headed "Disposal".
- 2.2 If the Equipment Responsibilities Matrix identifies the Authority as being responsible for a service referred to in paragraph 2.1 of this Schedule 11 (*Equipment*), that shall not be construed as meaning the Authority is under any obligation to Project Co to provide such service (unless expressly stated otherwise in this Schedule 11 (*Equipment*)). Provided the parties agree that if the Authority does not perform any such service which is specified as the Authority's responsibility in the Equipment Responsibilities Matrix, then such failure shall be treated as an Excusing Cause for the purposes of Clause 52 (*Excusing Causes*) only.
- 2.3 In respect of the service referred to in paragraph 2.1.1 of this Schedule 11 (*Equipment*), where the Authority is identified as being responsible in the column headed "Initial Specification and Selection" in the Equipment Responsibilities Matrix, that shall be construed as meaning that Project Co is to be responsible for such service, if the Equipment Selection Process is applicable pursuant to paragraph 3.1.1 of this Schedule 11 (*Equipment*).
- 2.4 In respect of the service referred to at paragraph 2.1.1 of this Schedule 11 (*Equipment*), where Project Co is identified as being responsible in the column headed "Initial Specification and Selection" in the Equipment Responsibilities Matrix, that shall be construed as meaning that Project Co is to be responsible for such service and that it will not be subject to the Equipment Selection Process.
- 2.5 Without prejudice to paragraph 5 of this Schedule 11 (*Equipment*), [in respect of the services referred to at paragraphs 2.1.2, 2.1.3 and 2.1.5 of this Schedule 11 (*Equipment*), if the Authority is identified as being responsible in the columns headed "Initial procure", "Initial installation" and/or "Initial commissioning (and staff training where required)" in the Equipment Responsibilities Matrix then the provisions of paragraph 4 shall apply, if the relevant item of Equipment is Key Clinical Equipment.]²⁵ If the Authority is identified as being responsible in the column headed "Initial procure" in the Equipment Responsibilities Matrix [and the Equipment is

²⁵ Insert "Key Clinical Equipment" project specific drafting, where appropriate.

not Key Clinical Equipment]²⁶ then the Authority shall provide to Project Co such information as Project Co may reasonably require from time to time in relation to the load, spatial requirements and/or mechanical and electrical requirements for such Equipment.

2.6 In respect of the services referred to at paragraphs 2.1.2, 2.1.3 and 2.1.5 of this Schedule 11 (*Equipment*), where Project Co is identified as being responsible in the columns headed "Initial procure", "Initial installation" and "Initial commissioning (and staff training where required)" in the Equipment Responsibilities Matrix, Project Co shall provide such services at its own expense in order to meet the Completion Criteria by the relevant [Phase Completion Date], in accordance with the timetable set out in the Final Commissioning Programme and in accordance with Project Co's Proposals.

2.7 In respect of the services referred to in paragraphs 2.1.6, 2.1.7, 2.1.8 and 2.1.9 of this Schedule 11 (*Equipment*), where Project Co is identified as being responsible in the columns headed "Maintenance", "Refresh/ Replacement", "Decommissioning" and "Disposal" in the Equipment Responsibilities Matrix), Project Co shall provide such services at its own expense:

2.7.1 in the case of the services referred to in paragraph 2.1.6, so that the Equipment is maintained in a good safe and sound condition;

2.7.2 as necessary in order that the Services may be provided regularly and reliably without unplanned interruption and in accordance with the terms of the Service Level Specification throughout the Project Term;

2.7.3 in the case of the services referred to in paragraph 2.1.7, so that any replacement Equipment:

2.7.3.1 is new;

2.7.3.2 without prejudice to paragraph 2.7.3.4 of this Schedule 11 (*Equipment*), at least meets the original specification or intention of the item being replaced;

2.7.3.3 is of a type and nature generally being bought by NHS bodies or contractors in hospitals or similar businesses; and

2.7.3.4 is of a type which has kept pace with the evolution of that type or piece of Equipment; and

2.7.4.4 in accordance with Good Industry Practice,

and promptly at the Authority's request, Project Co shall provide details of arrangements made by Project Co for the maintenance or replacement of all such Equipment together with a schedule of maintenance completed from the commencement of the Operational Term to the date of the request.

2.8 In respect of the services referred to in paragraphs 2.1.6, 2.1.7, 2.1.8 and 2.1.9 of this Schedule 11 (*Equipment*), where the Authority is identified as being responsible in the columns headed "Maintenance", "Refresh", "Decommissioning" and "Disposal" in the Equipment Responsibilities Matrix, if the Authority chooses to provide such services, the Authority shall provide such services at its own cost:

2.8.1 as necessary in order that the Services can be performed in accordance with the Service Level Specifications; and

²⁶ Insert "Key Clinical Equipment" project specific drafting, where appropriate.

2.8.2 in accordance with Good Industry Practice and Law,

provided the parties agree that if the Authority does not perform any such service which is specified as the Authority's responsibility in the Equipment Responsibilities Matrix, then such failure shall be treated as an Excusing Cause for the purposes of Clause 52 (*Excusing Causes*) only.

- 2.9 In respect of the service referred to in paragraph 2.1.1, if the Authority is identified as being responsible in the column headed "Refresh specification and selection" in the Equipment Responsibilities Matrix, that shall be construed as meaning that Project Co is to be responsible for such service, if the Equipment Selection Process is applicable pursuant to paragraph 3.1.2 of this Schedule 11 (*Equipment*).
- 2.10 In respect of the service referred to in paragraph 2.1.1 of this Schedule 11 (*Equipment*), in respect of items of Equipment for which Project Co is identified as being responsible in the column headed "Refresh specification and selection" in the Equipment Responsibilities Matrix, three (3) months prior to the start of each Contract Year during the Operational Term, Project Co shall supply the Authority with a list of Equipment which Project Co considers will be likely to need replacement in the following Contract Year.
- 2.11 For the avoidance of doubt if the Equipment Responsibilities Matrix specifies that tasks are to be undertaken by an "Authority Specialist Contractor", then the Authority shall be responsible for the same.

[3. AUTHORITY INPUT INTO SELECTION OF EQUIPMENT

- 3.1 The process set out in this paragraph 3 of Schedule 11 (*Equipment*) (the "**Equipment Selection Process**") shall apply in two circumstances, namely:
- 3.1.1 in respect of the initial selection and procurement of items of Equipment in respect of which:
- 3.1.1.1 in the column headed "Initial Specification and Selection", responsibility is allocated to the Authority; and
- 3.1.1.2 in the column headed "Initial Procure", responsibility is allocated to Project Co; and
- 3.1.2 in respect of the selection and procurement of replacement items of Equipment in respect of which:
- 3.1.2.1 in the column headed "Refresh Specification and Selection", responsibility is allocated to the Authority; and
- 3.1.2.2 in the column headed "Refresh" responsibility is allocated to Project Co.
- 3.2 Project Co shall give the Authority prior written notice that the Equipment Selection Process in respect of an Authority Input Item is to commence. Such notice shall be given by the date:
- 3.2.1 [set out in the column headed "Specification Details from Project Co to Authority" against the relevant Authority Input Item in the Key Clinical Equipment Programme, in the case of any Authority Input Item that is Key Clinical Equipment;]²⁷

²⁷ Insert "Key Clinical Equipment" project specific drafting, where appropriate.

- 3.2.2 which is three (3) months prior to the Final Specification Date[, in the case of any Authority Input Item that is not Key Clinical Equipment.]²⁸
- 3.3 The notice provided by Project Co pursuant to paragraph 3.2 of this Schedule 11 (*Equipment*) shall include details of the potential suppliers who Project Co proposes to approach in connection with the procurement of the relevant Authority Input Item.
- 3.4 Project Co must comply with the Authority Input Item Specifications. Following receipt of notification from Project Co pursuant to paragraph 3.2 of this Schedule 11 (*Equipment*), the Authority shall be entitled at any time up to the date that is twenty (20) Business Days prior to the Final Specification Date to propose amendments to relevant Authority Input Item Specifications, provided any such proposal shall be regarded as a Change.
- 3.5 Following receipt of notification from Project Co pursuant to paragraph 3.2 of this Schedule 11 (*Equipment*), the Authority shall be entitled at any time up to the date that is twenty (20) Business Days prior to the Final Specification Date to issue written comments to Project Co on the list of potential suppliers for the relevant Authority Input Item. In making such comments, the Authority shall be entitled to:
- 3.5.1 object to any proposed supplier, if the Authority, acting reasonably, considers that:
- 3.5.1.1 such supplier is not capable of meeting the relevant Authority Input Item Specification; or
- 3.5.1.2 its own previous experience of using that supplier for the supply of equipment broadly similar to the relevant Authority Input Item is such that its staff engaged in the provision of [Clinical Services] are unlikely to have confidence in the relevant Authority Input Item by that supplier; and/or
- 3.5.2 to propose additional or alternative suppliers, provided such suppliers will, in the opinion of the Authority (acting reasonably):
- 3.5.2.1 be capable of meeting the relevant Authority Input Item Specification;
- 3.5.2.2 comply with Project Co's tendering processes;
- 3.5.2.3 accept Project Co's contractual requirements applicable to its suppliers engaged in the Project.
- 3.6 By the Final Specification Date, the parties shall meet and the Authority shall be entitled to make representations in relation to the list of suppliers to be approached by Project Co for the supply of the relevant Authority Input Item, having regard to Project Co's proposed list (but without prejudice to the right of Project Co to determine the final list of suppliers in its sole discretion) and Project Co shall in good faith consider any comments issued by the Authority pursuant to paragraph 3.5 of this Schedule 11 (*Equipment*) and the criteria set out in paragraphs 3.5.2.1 to 3.5.2.2 of this Schedule 11 (*Equipment*), provided always Project Co complies with the Authority Input Item Specification.
- 3.7 Project Co shall approach the suppliers agreed or determined pursuant to paragraph 3.6 of this Schedule 11 (*Equipment*) in order to obtain the Technical Documentation for the relevant Authority Input Item.
- 3.8 As soon as practicable after Technical Documentation has been received by Project Co pursuant to paragraph 3.7, of this Schedule 11 (*Equipment*), Project Co shall provide to the

²⁸ Insert "Key Clinical Equipment" project specific drafting, where appropriate.

Authority details of each supplier, together with the Technical Documentation received from that supplier.

- 3.9 The Authority may request Project Co to supply further reasonable information and/or reasonable written clarification on the details supplied pursuant to paragraph 3.8, provided such request is made in writing within ten (10) Business Days of the provision by Project Co of the information by Project Co pursuant to paragraph 3.8 of this Schedule 11 (*Equipment*).
- 3.10 The Authority shall inform Project Co in writing of its preference of supplier (the "**Authority's Preferred Supplier**") for the relevant Authority Input Item:
- 3.10.1 in the case of any Authority Input Item referred to in paragraph 3.1.1 of this Schedule 11 (*Equipment*):
- 3.10.1.1 within twenty (20) Business Days of the date Project Co has provided the Authority with its response in accordance with paragraph 3.8 of this Schedule 11 (*Equipment*); and
- 3.10.1.2 where no request has been made in accordance with paragraph 3.9, of this Schedule 11 (*Equipment*) within twenty (20) Business Days of the date Project Co provided the information referred to in paragraph 3.7 of this Schedule 11 (*Equipment*); and
- 3.10.2 in the case of any Authority Input Item referred to in paragraph 3.1.2 of this Schedule 11 (*Equipment*):
- 3.10.2.1 within twenty (20) Business Days of the date Project Co has provided the Authority with its response in accordance with paragraph 3.8 of this Schedule 11 (*Equipment*); or
- 3.10.2.2 where no request has been made in accordance with paragraph 3.9 of this Schedule 11 (*Equipment*), within twenty (20) Business Days of the date Project Co provided the information referred to in paragraph 3.8 of this Schedule 11 (*Equipment*).

The Authority may request Project Co to make further representations to assist with its review of the proposed suppliers and/or Technical Documentation and Project Co shall be required to comply in a timely manner with all such reasonable written requests, provided such requests for further representations shall not cause the deadlines under this paragraph 3.10 of this Schedule 11 (*Equipment*) to be extended.

- 3.11 Following notification by the Authority pursuant to paragraph 3.10 of this Schedule 11 (*Equipment*), Project Co shall notify the Authority whether it proposes to use the Authority's Preferred Supplier to supply the relevant Authority Input Item. The Authority shall be entitled to make further representations to Project Co as regards the identity of the supplier to be selected but without prejudice to the right of Project Co to select a supplier in its sole discretion, provided always Project Co complies with the Authority Input Item Specification.]

[4. KEY CLINICAL EQUIPMENT RESPONSIBILITIES AND PROCESS

- 4.1 The Key Clinical Equipment Programme sets out the responsibilities and the dates relevant to the procurement and installation of the Key Clinical Equipment. The parties agree that the Key Clinical Equipment Programme shall form the basis under which Key Clinical Equipment procurement and installation [prior to the Phase Actual Completion Date for the relevant Phase] will be further developed. The Key Clinical Equipment Programme shall be included within the Outline Commissioning Programme.

- 4.2 The Authority will, by the relevant Final Specification Date, issue to Project Co written, generic specification details for any item of Key Clinical Equipment in sufficient detail to enable Project Co to determine the structural, architectural, and services constraints on the design of the Works.
- 4.3 The column headed "Installation/Commissioning" in the Key Clinical Equipment Programme indicates the intended approach to commissioning of Key Clinical Equipment. Sub-columns P1, 2 and 3 indicate the timescale within which installation and/or commissioning is to occur:

| | |
|---|---|
| P | Installed and commissioned prior to the relevant [Phase Actual Completion Date]; |
| 1 | Installed and/or placed prior to the relevant [Phase Actual Completion Date] and commissioned after the relevant [Phase Actual Completion Date]; |
| 2 | Equipment fixings installed prior to the relevant [Phase Actual Completion Date] to allow completion of construction; installed and commissioned after the relevant [Phase Actual Completion Date]; |
| 3 | Installed and commissioned after the relevant [Phase Actual Completion Date]. |

- 4.4 The column headed "Dept/Area" in the Key Clinical Equipment Programme indicates the department or area of the Facilities in which the relevant item of Key Clinical Equipment is to be installed.
- 4.5 The column headed "Design Requirement" in the Key Clinical Equipment Programme indicates the elements of the Works for which subsequent design cannot be completed until the information required pursuant to paragraph 4.2 is provided. In that column:
- 4.5.1 "STRUC" refers to the structure of the Facilities;
- 4.5.2 "ARCH" refers to the architectural details of the Facilities; and
- 4.5.2 "SERV" refers to the mechanical and electrical service elements of the Facilities.
- 4.6 The column headed "ADB Component Code" in the Key Clinical Equipment Programme indicates the code by which the relevant item of Key Clinical Equipment is identified in the Equipment lists at Appendix [♦] of Schedule 11 (*Equipment*).
- 4.7 The column headed "Component Description" in the Key Clinical Equipment Programme indicates the basic specification available to Project Co at Financial Close. In addition, sample specifications are also set out in Appendix 1 to this Schedule 11 (*Equipment*) in respect of some items of Key Clinical Equipment. Project Co shall make provision within its structural design to spatially accommodate and to take the weight of the generic equipment of the types referred to in the basic and sample specifications.
- 4.8 The column headed "Installation earliest date" in the Key Clinical Equipment Programme indicates the earliest date that the Key Clinical Equipment is to be installed or positioned in the Facilities.
- 4.9 The column headed "Installation period" in the Key Clinical Equipment Programme indicates the number of weeks required [by the Authority (or it's specialist contractor)] in order to carry out installation and/or positioning of the item of Key Clinical Equipment.
- 4.10 The column headed "Commissioning period" in the Key Clinical Equipment Programme indicates the number of weeks required [by the Authority (or it's specialist contractor)] in order to carry out commissioning of the item of Key Clinical Equipment.]

5. AUTHORITY EXCLUSIVE ACCESS

In respect of the services referred to at paragraphs 2.1.3 to 2.1.6 of this Schedule 11 (*Equipment*), where the Authority (or a specialist contractor on behalf of the Authority) is identified as being responsible for the installation or commissioning of [Key Clinical Equipment]/[Medical Equipment], Project Co shall be responsible (at its own cost) for complying with the Exclusive Access requirements set out at paragraphs 6 and 7 of Schedule 10 (*Outline Commissioning Programme*).

6. EQUIPMENT COMMITTEE

- 6.1 The parties shall establish an equipment committee ("**Equipment Committee**") within [forty (40)] Business Days of the date of this Agreement. Subject to paragraph 6.6 of this Schedule 11 (*Equipment*), the Equipment Committee shall at all times comprise (as a minimum) three permanent Authority representatives and three permanent Project Co representatives (together the "**Permanent Members**"). One of the Authority's Permanent Members shall be appointed by the Authority to chair the Equipment Committee (the "**Committee Chairman**"). The Committee Chairman shall nominate a Permanent Member (or appoint a non-voting note taker) to take minutes of meetings and circulate drafts of these minutes to all other Permanent Members for ratification within ten (10) Business Days of the meeting.
- 6.2 Subject to paragraph 6.6 of this Schedule 11 (*Equipment*), non-permanent members of the Equipment Committee may be drawn from other key roles and/or from other organisations as determined by the Permanent Members.
- 6.3 Without prejudice to paragraph 6.8.1 of this Schedule 11 (*Equipment*), the Equipment Committee shall meet in accordance with the requirements of this Schedule 11 (*Equipment*) and at such times as are agreed by the Permanent Members, provided all Permanent Members shall make themselves available to meet at least quarterly. Any Permanent Member of the Equipment Committee may call a meeting on an emergency basis with a minimum of three (3) Business Days' notice.
- 6.4 Equipment Committee matters shall be approved by way of agreement by the majority of Permanent Members and recorded in the minutes of the meeting. All decisions must have the approval of the majority of Permanent Members of the Equipment Committee. No Equipment Committee members shall unreasonably withhold their approval. All decisions must be recorded and fully auditable.
- 6.5 If any member of the Equipment Committee finds themselves in a situation whereby they have either a commercial or financial interest in any relevant Equipment procurement then this must be declared to the Equipment Committee in writing. The Equipment Committee will then meet without that member being present to discuss that member's further involvement in the relevant procurement. Full minutes will be kept to ensure there is a record of the discussion and decision in case of a challenge by a supplier later in the process and issued within five (5) Business Days of any meeting. The types of interest that a member may have are financial i.e. the ownership of shares or being employed by a supplier in any capacity paid or otherwise. This may be extended at the Authority's discretion to close family e.g. wife/husband, partner or children.
- 6.6 The members of the Equipment Committee should have proven equipment knowledge either from a user or medical physics perspective and/or have a financial background. The member's background or specialist knowledge will determine their specialist roles on the Equipment Committee. Should the members' backgrounds not match the needs of the Equipment Committee then ad hoc specialists can be drawn for agreed periods from other key roles and/or from other organisations on a non-permanent basis.

- 6.7 If the Equipment Committee fails to reach agreement and is unable to resolve any matter in accordance with their Terms of Reference the matter shall be referred to the Dispute Resolution Procedure.
- 6.8 [The terms of reference of the Equipment Committee are as follows:
- 6.8.1 Without prejudice to the allocation of responsibility for Equipment pursuant to this Schedule 11 (*Equipment*), as between the Authority and Project Co, all members shall act in a manner that is cognisant of the planned programme of delivery of the Equipment.
 - 6.8.2 One member of the Equipment Committee shall be nominated to monitor the progress of the procurement and if there is deviation from the programme that member should immediately make all members of the Equipment aware of such delay and the Equipment Committee shall work together to restore the programme.
 - 6.8.3 The Equipment Committee will publish a report to the Authority and Project Co at least once a year during the Operational Term. The reports (including minutes of Equipment Committee meetings) will be written and published prior to the main replacement programme and subsequently at the end of the programme. The first report shall detail the coming programme and the Equipment due for replacement. The second report shall give details of the success of the programme.
 - 6.8.4 Selected items of Equipment approved through the Equipment Committee should have two (2) post procurement reviews, one at approximately six (6) months and one at approximately twelve (12) months post procurement. These reviews should be published to the Authority and Project Co as they will provide important information for future procurement of the same/similar Equipment. The reviews will be expected to cover, as a minimum:
 - 6.8.4.1 evaluation of performance against specification;
 - 6.8.4.2 functional use;
 - 6.8.4.3 clinical suitability;
 - 6.8.4.4 level of downtime/unavailability (including proportion of total required time);
 - 6.8.4.5 maintenance requirements;
 - 6.8.4.6 assessment of condition (including grading against condition as new); and
 - 6.8.4.7 availability of maintenance parts.
 - 6.8.5 The responsibilities of the Equipment Committee shall include (but not be limited to):
 - 6.8.5.1 [♦].²⁹

²⁹ To be completed on a project specific basis.

SCHEDULE 11

EQUIPMENT

APPENDIX 1

[AUTHORITY INPUT ITEM SPECIFICATIONS]

SCHEDULE 11

EQUIPMENT

APPENDIX 2

EQUIPMENT RESPONSIBILITIES MATRIX

| | Initial specification and selection | Initial Procure | Initial installation | Initial commissioning (and staff training where required) | Maintenance | Refresh/ Replacement | Refresh specification and selection | Refresh installation | Refresh commissioning (and staff training where required) | Decommissioning | Disposal |
|-----|-------------------------------------|-----------------|----------------------|---|-------------|----------------------|-------------------------------------|----------------------|---|-----------------|----------|
| [1] | | | | | | | | | | | |
| [2] | | | | | | | | | | | |
| [3] | | | | | | | | | | | |
| [4] | | | | | | | | | | | |

SCHEDULE 11

EQUIPMENT

APPENDIX 3

[KEY CLINICAL EQUIPMENT PROGRAMME]³⁰

| Component Description | ADB Component Code | Dept/ Area | Design Requirement | Final Specification Date | Installation/Commissioning | | | | Installation earliest date | Installation period | Commissioning period |
|-----------------------|--------------------|------------|--------------------|--------------------------|----------------------------|---|---|---|----------------------------|---------------------|----------------------|
| | | | | | P | 1 | 2 | 3 | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |

³⁰ Insert project specific drafting, where appropriate.

SCHEDULE 11

EQUIPMENT

APPENDIX [◆]

[EQUIPMENT LISTS]

Chapter 6: Education Sector Specific Guidance

Authorities intending to procure a project for the design, build, finance and maintenance of an education facility in Wales should use the MIM Standard Form Project Agreement (Accommodation Version), tailored in accordance with the following guidance. All references to the MIM Standard Form Project Agreement in this Chapter 6 refer to the MIM Standard Form Project Agreement (Accommodation Version).

Authorities should note the approach has been largely adopted for the delivery of schools but may be used, with appropriate and prior agreed modifications, for further education facilities. The list of sector specific amendments detailed below is not exhaustive and Authorities should discuss any additional needs with Welsh Government.

In particular, drafting assumes procurement of schools by the relevant local authority. However, procurement strategy is under review by Welsh Government at the time of publication.

Authorities must liaise and agree an approach to the production of their specific Project Agreement with Welsh Government, prior to submitting derogations.

| Clause | Comment |
|--------|---|
| 5.4 | Consider what joint working arrangements are necessary to provide a practical approach to interface with the soft service provider (which may be the Authority itself) in the completion of the template FM Interface Protocol in the Service Requirements. |
| 6.1 | <p>The MIM Standard Form Project Agreement does not envisage <i>any</i> third party revenue generation activities will form part of the Project. However, some MIM projects may charge for services or activities that are ancillary to the primary use of the asset (e.g. renting school facilities to third parties outside of school hours).</p> <p>Authorities should note, under Chapter 2 of the EPEC/EUROSTAT Guide, EUROSTAT will not classify a project as off balance sheet if, at Financial Close, the revenues that the Authority (and/or government more widely) is forecast to receive from users of the asset over the life of the contract will exceed 50% of the total value of payments that the Authority is forecast to make to Project Co over the life of the contract. Revenues and forecast payments should be compared on a net present value basis at Financial Close. The amount of revenues forecast should be those specifically related to the MIM asset. Comprehensive details of revenue generation activities related to the MIM asset must be included in the Authority's Outline Business Case and approved by Welsh Government. Authorities must also seek approval from Welsh Government to any anticipated change to such forecast revenues, to allow ongoing review of statistical treatment will be required to be taken in defining the Authority Services to include such activities.</p> <p>Where Project Co undertakes third party revenue schemes, this Clause (and the Agreement generally) will need to be amended, as appropriate. However, as noted above, the amount of third party revenues that the Authority is forecast to receive over the life of the PPP contract (whether through itself charging for the use of the asset or through sharing of revenues Project Co generates) will influence statistical treatment so reference must be made to the thresholds set out at section 5.5 of Chapter 3 the EPEC/EUROSTAT Guide.</p> |

| Clause | Comment |
|---|---|
| | See further comment at Clause 22 below. |
| 8.15, Schedule 20 (Dispute Resolution Procedure) and Schedule 24 (Liaison Procedure) | <p>Liaison Procedures</p> <p>Liaison procedures may be adopted where this is considered beneficial to a specific project. The role of the Liaison Committee should only be to make recommendations to the parties, which they may accept or reject in their complete discretion. Neither the Liaison Committee itself, nor the members acting in that capacity, should have the authority to vary any of the provisions of the Project Agreement or make any decision that is binding on the parties.</p> |
| 8 | <p>Where the Facilities are a school, required drafting to provide for a school representative is set out below.</p> <p>Insert the following new Clause 8.16:</p> <p>8.16 School Representative</p> <p>8.16.1 The head teacher of [each] Facility or such other member of staff of a Facility as the head teacher may notify in advance to Project Co from time to time, shall undertake the role of a school representative (the "School Representative"), which School Representative shall provide a day to day contact with Project Co for the routine operation of this Agreement.</p> <p>8.16.2 Unless pursuant to a specific delegation under Clause 8.16.3 or otherwise specifically provided for in terms of this Agreement, the School Representative shall have no power or authority to bind the Authority or vary the terms of this Agreement in any way and Project Co acknowledges that it shall not act on the instructions of or as a consequence of or otherwise rely upon any act or omission of a School Representative for the purposes of this Agreement unless under a specific delegation issued pursuant to Clause 8.16.3 or otherwise specifically provided for in this Agreement.</p> <p>8.16.3 The Authority's Representative may from time to time by notice to Project Co in writing, delegate any of his powers, duties or responsibilities under this Agreement to a School Representative, subject to such terms and conditions, and for such duration as may be specified by the Authority's Representative.</p> <p>Insert the following new definition at Schedule 1:</p> <p>"School Representative" has the meaning given to it in Clause 8.16.1 (<i>School Representative</i>);</p> <p>Insert "and School's Representative" after "and that the Authority's Representative" at Clause 13.1.3 (<i>Access to Site</i>).</p> <p>Insert "and Schools Representative" after "shall notify the Authority's Representative" at Clause 23.9 (<i>Programmed and Unprogrammed Maintenance</i>).</p> |

| Clause | Comment |
|-----------|---|
| 10.3-10.4 | <p>To the extent that it is not practical to investigate areas of the Site (for example, due to Authority occupation of existing premises on the Site which is to be developed in order to construct the Facilities), the drafting at Clauses 10.3 and 10.4 can be included to provide Project Co with appropriate relief. These Clauses provide that the Authority bears any additional costs arising out of unforeseen conditions in areas which Project Co cannot investigate and which cannot be reasonably identified by Project Co. Areas of the Site to which this carve out applies should be clearly identified in the Project Agreement.</p> <p>It may be appropriate, where additional surveys are recommended by Project Co acting in accordance with good industry practice and in good faith during the bidding process but were not instructed by the Authority or permitted by the Authority to be carried out, that these should be specifically carved out of Clause 10.3.</p> <p>The risk that an Authority assumes in terms of Clauses 10.3 and 10.4 where relevant (i.e. where there are areas of the Site under existing buildings that are not capable of survey) will include the risk of asbestos. The risk of asbestos on other areas of the Site should be considered on a project specific basis. The MIM Standard Project Agreement assumes, and it will ordinarily be expected, Project Co takes this risk (including on projects that involve the demolition of existing buildings where Project Co ought to be in a position, on the basis of its knowledge and expertise, to evaluate the need for asbestos removal and factor this in to its demolition proposals).</p> <p>In exceptional cases (e.g. on refurbishment projects) where the treatment of asbestos will be a particularly sensitive issue it may be appropriate for an Authority to consider risk sharing that involves a process for carrying out asbestos surveys and Project Co pricing asbestos works on the basis of those surveys. If the Authority considers that risk-sharing will offer an appropriate and value for money solution it should use the drafting set out below, where approved by Welsh Government.</p> <p>Asbestos</p> <p>10.6 Subject to Clauses 10.7 to 10.14 below Project Co shall be responsible for and shall hold the Authority harmless from the removal of any Asbestos at the Site(s) and the Authority shall have no liability in respect of the removal of any Asbestos at the Site(s) other than as set out in Clauses 10.7 to 10.14.</p> <p>10.7 ³¹Prior to the commencement of the Works at a Demolition Site, Project Co shall procure:</p> <p>[10.7.1 the appointment of an Asbestos Surveyor in accordance with Clause 10.8 and 10.10; and]</p> |

³¹ The drafting assumes that Project Co has not appointed an Asbestos Surveyor and Licensed Contractor before Financial Close. On the basis that the Additional Asbestos is an Authority risk the drafting allows for the Authority to select the Asbestos Surveyor and Licensed Contractor (with an opportunity for Project Co to make its recommendations). Compensation payable to Project Co in relation to the removal of Additional Asbestos will be calculated on the basis of the Licensed Contractor's tender. If an Asbestos Surveyor and Licensed Contractor are appointed before Financial Close the drafting in Clauses 10.6 to 10.10 and 10.12 will need to be revised accordingly and the Licensed Contractor's schedule of rates should be set out in the Schedule to the Project Agreement and used for calculating compensation payable to Project Co under Clauses 10.13 and 10.14).

| Clause | Comment |
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| | <p>10.7.2 the Asbestos Surveyor [appointed in accordance with Clause 10.8 and 10.10] carries out an Asbestos Survey and submits an Asbestos Survey Report in respect of the relevant Demolition Site.</p> |
| 10.8 | <p>[Project Co shall seek competitive tenders from a minimum of three [(3)] persons competent to carry out Asbestos Surveys on the basis that the successful tenderer shall provide:</p> <p>10.8.1 Asbestos Surveys in respect of all of the Demolition Sites; and</p> <p>10.8.2 for each Demolition Site, as soon as reasonably practicable after the relevant Asbestos Survey has been carried out, an Asbestos Survey Report in a format suitable for pricing by a Licensed Contractor tendering for the Asbestos Works.]</p> |
| 10.9 | <p>[In parallel with the process referred to in Clause 10.8 above, Project Co shall procure competitive tenders from a minimum of [three (3)] Licensed Contractors, based on the surveys contained in [♦] of Schedule [♦] (<i>Asbestos Surveys</i>) which tenders shall include a schedule of rates to assist in the pricing of the Asbestos Works.]</p> |
| 10.10 | <p>[As soon as reasonably practicable following receipt of the tenders referred to in Clauses 10.8 and 10.9, Project Co shall submit copies of such tenders to the Authority together with Project Co's recommendation as to which tenders should be accepted. Within five (5) Business Days of having received copies of all of the tenders referred to in Clauses 10.8 and 10.9, the Authority shall notify Project Co which tenders to accept, provided that failing such notification Project Co shall be entitled to accept the tenders it had recommended to the Authority.]</p> |
| 10.11 | <p>Project Co shall procure that a copy of each Asbestos Survey Report issued by the Asbestos Surveyor is submitted to the Authority within seven (7) Business Days of receipt of the same by Project Co.</p> |
| 10.12 | <p>[Following the issue of each Asbestos Survey Report Project Co shall procure that [the Licensed Contractor appointed pursuant to Clause 10.10 provides a revised tender, clearly setting out its assumptions, resources analysis and all costs for carrying out the Asbestos Works at the relevant Demolition Site on the basis of the Asbestos Survey Report to enable robust and transparent verification of all allowances within the tender, and shall procure that] the Asbestos Works are completed by the Licensed Contractor in accordance with the requirements of Clause 6.2.</p> |

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| | <p>10.13 To the extent, only as a result of the nature and/or extent and/or location of the Additional Asbestos, the period of time taken to complete the Asbestos Works at a Demolition Site is longer than the relevant Asbestos Works Period (“Additional Asbestos Delay”), Project Co will be entitled to apply for relief from its obligations and/or compensation in accordance with Clause 30 (<i>Delay Events</i>)³² provided compensation for any additional direct costs and associated expenditure incurred by Project Co for the removal and disposal of the Additional Asbestos shall be calculated on the basis of the schedule of rates set out in [the Licensed Contractor’s tender] [Schedule [◆]] and paid as provided for in Clause 10.14 below and Clause 30 (<i>Delay Events</i>) shall be construed accordingly.</p> <p>10.14 In respect of any additional direct costs and associated expenditure incurred by Project Co as a result of the nature and/or extent and/or location of the Additional Asbestos at a Demolition Site (whether or not there has been an Additional Asbestos Delay):</p> <p>10.14.1 Project Co shall deliver to the Authority a VAT invoice for such additional direct costs and associated expenditure, calculated on the basis of the schedule of rates set out in [the Licensed Contractor’s tender] [Schedule [◆]], in each month in which they are incurred together with copies of the records maintained by the Building Contractor and the Licensed Contractor to show the amount of Additional Asbestos removed from the relevant Demolition Site and the associated expenditure during such month and such additional supporting information as the Authority may reasonably request; and</p> <p>10.14.2 the Authority shall pay to Project Co the amount of each such invoice (provided that it reflects the records and schedule of rates referred to in Clause 10.14.1 above) within twenty (20) Business Days of receipt of the same.</p> <p>10.15 Unless the exposure arises directly or indirectly as a result of any act or omission of Project Co or any Project Co Party, the Authority accepts full responsibility (including any financial and other consequences which result (whether directly or indirectly) for death and personal injury in respect of exposure to Asbestos on the Site, where the exposure takes place prior to the date on which Project Co is given possession of the Site for the purposes of carrying out the Works.</p> |

³² Add Additional Asbestos Delay to the list of Delay Events in Clause 29.3 and Compensation Events in Clause 29.10.

| Clause | Comment |
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| | <p>Where Clauses 10.6 to 10.15 are used, the following definitions should be added to Schedule 1:</p> <p>“Additional Asbestos” means Asbestos discovered at a Demolition Site to the extent only that it differs in nature and/or extent and/or location from the Asbestos identified in the surveys contained in [♦] of Schedule [♦] (<i>Asbestos Surveys</i>);³³</p> <p>“Additional Asbestos Delay” has the meaning given to it in Clause 10.13;</p> <p>“Asbestos” has the meaning given to it in the Control of Asbestos Regulations 2012;</p> <p>“Asbestos Survey” means a Refurbishment/Demolition Survey as described in Guidance Note HSG264 (<i>Asbestos: The Survey Guide</i>) published by the Health & Safety Executive;</p> <p>“Asbestos Survey Report” means a detailed report prepared by the Asbestos Surveyor on the results of an Asbestos Survey, which report shall include the Asbestos Surveyor’s detailed recommendations as to the nature and scope of the Asbestos Works required at the relevant Demolition Site;</p> <p>“Asbestos Surveyor” means a licensed asbestos surveyor appointed in accordance with Clauses 10.8 and 10.10;</p> <p>“Asbestos Works” means, in relation to a Demolition Site, the removal and disposal of all Asbestos;</p> <p>“Asbestos Works Period” means, in relation to a Demolition Site, the period of time programmed for the carrying out of Asbestos Works as identified in [♦] of Schedule [♦];</p> <p>“Demolition Site” means [♦];</p> <p>“Licensed Contractor” means a contractor licensed by the Health and Safety Executive to work with Asbestos;</p> |
| 11.1.2 | The costs associated with any planning agreements etc should be for the account of Project Co. |

³³ Details of Management Surveys to be included.

| Clause | Comment |
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| 12 | <p>If the Authority has specific fuel source requirements in relation to energy, such as biomass or photovoltaic cells, or multi-fuel capability, drafting should be added to ensure that if Project Co fails to provide or maintain the necessary equipment and that results in the Authority incurring increased fuel costs or losses of income, Project Co will be obliged to compensate the Authority whether or not it has incurred Deductions.</p> <p>Further guidance on this subject will be issued in due course.</p> |
| 12.5 | <p>It is essential the Authority reviews the final version of Project Co's Proposals shortly before contract signature in order to ensure these satisfy the Authority's requirements for Operational Functionality and that it is happy to give sign-off on this limited basis. The Authority must have the right to notify Project Co of its comments/qualifications in relation to Operational Functionality.</p> |
| 12,17 and schedules 6 and 10 | <p>A Welsh Government representative from the sponsoring department will require to be involved in parallel approval of Reviewable Design Data and the Final Commissioning Programme.</p> <p>The approach to such parallel review will be dealt with through the funding letter from the Welsh Government.</p> |
| 12.6.1, paragraph 1.2 and Appendix 3 of Schedule 8 (Review Procedure) | <p>The Authority should seek advice from its technical advisors on the status of design development and whether Project Co's Proposals are suitably and sufficiently well developed at Financial Close. Consideration should also be given to key risk areas, e.g. detailed design and construction information for cavity walls.</p> <p>Unless there is strong justification for an alternative approach, it will usually be appropriate to include a Reviewable Design Data Programme, to avoid significant volumes of RDD being submitted for review by the Authority without due notice. In such circumstances, the Authority should include the drafting in square brackets at Clause 12.6.1 and paragraph 1.2 of Schedule 8 (<i>Review Procedure</i>) and develop a more detailed process for submission of RDD at Appendix 3 of Schedule 8 (<i>Review Procedure</i>). The Authority must seek approval of the proposed approach from Welsh Government.</p> |
| 12.10, Schedule 30 (BIM Protocol) | <p>Clause 12.10 should be used where a Building Information Modelling solution is being used. These provisions are intended to ensure all parties involved in the use, production or delivery of the Model on a Project are required to abide by common principles on use and liability,</p> <p>Schedule 30 (<i>BIM Protocol</i>) should be developed by Project Co (and approved by the Authority and the Welsh Ministers) on a project by project basis and approved by Welsh Government. The terms of the protocol must be aligned with the Construction Industry Council's Building Information Modelling Protocol, adjusted to reflect the MIM contract structure and to provide for the Authority's licence to use the Model. The BIM Protocol will include the Authority's Information Requirements and associated execution plan (i.e. the level of detail, timing and protocol associated with 'data drops'). The terms of the BIM Protocol should take precedence over specified Clauses in the front end of the Project Agreement, where there is any conflict or inconsistency (for example intellectual property rights). Further guidance on the BIM Protocol will be issued in due course.</p> |
| 14.5 | <p>If the Authority wishes to place additional constraints on when service commencement may occur (for example only during school holidays) this Clause should be amended as required. Authorities should remember that the more restrictive its requirements the greater the risk that will be priced by bidders.</p> <p>Approach to this provision to be considered by Authorities on a project specific</p> |

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| | basis. |
| 14.7 to 14.8 | <p>Delay and Supervening Unavailability</p> <p>In the event the Certificate of Practical Completion has not been issued by the [Completion Date]/[final Phase Completion Date] for that Facility, the Authority may need recourse to either liquidated damages or the provision of temporary accommodation. Drafting has been included to deal with both of these options. The Authority must decide which option is the most appropriate for its project.</p> <p>In respect of the drafting below for OPTION 1, the Authority may wish to seek LADs in relation to a failure to vacate an Existing Facility if this delays a capital receipt. In these circumstances it may also want to include the OPTION 2 drafting relating to provision of temporary accommodation since there may also be a need for temporary accommodation as well as LADs. Generally, insistence on LADs without a project-specific need for them is unlikely to offer value for money.</p> <p>Liquidated Damages/Provision of Temporary Accommodation</p> <p>OPTION 1:</p> <p>[14.7 If for any reason a Certificate of Practical Completion shall not have been issued in relation to a [Facility/] [final Phase of a Facility] by the [Completion Date]/[final Phase Completion Date] for a Facility then from the [Completion Date]/[final Phase Completion Date] for that Facility until:</p> <p>14.7.1 the [Actual Completion Date]/[final Phase Actual Completion Date] for that Facility; or</p> <p>14.7.2 if earlier, the Termination Date; or</p> <p>14.7.3 the date on which the [Actual Completion Date]/[final Phase Actual Completion Date] for that Facility would otherwise have occurred if a Compensation Event occurs following the [Completion Date]/[final Phase Completion Date] for that Facility and this delays the achievement of the Certificate of Practical Completion,</p> <p>Project Co shall pay to the Authority by way of liquidated and ascertained damages the Initial Amount together with a further sum calculated at the Periodic Rate for each complete week or part of a week for that Facility].</p> <p>OR</p> <p>OPTION 2:</p> <p>[14.7 If for any reason a Certificate of Practical Completion is not issued in relation to a [Facility/] [final Phase of a Facility] by the [Completion Date]/[final Phase Completion Date] for that Facility then from the [Completion Date]/[final Phase Completion Date] for that Facility until:</p> <p>14.7.1 the [Actual Completion Date]/[final Phase Actual Completion Date] for that Facility; or</p> <p>14.7.2 if earlier, the Termination Date; or</p> |

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| | <p>14.7.3 the date on which the [Actual Completion Date]/[final Phase Actual Completion Date] for that Facility would otherwise have occurred if a Compensation Event occurs following the [Completion Date]/[final Phase Completion Date] for that Facility and this delays the achievement of the Certificate of Practical Completion,</p> <p>Project Co shall, upon demand by the Authority, provide and maintain temporary accommodation within the curtilage of the relevant Site which meets the requirements of [◆] of Section 3 (<i>Authority Requirements</i>) of Schedule 6 (<i>Construction Matters</i>) and can be used without interfering with the provision of education to Pupils at the Existing Facility, to allow the Existing Facility to accommodate all increases in pupil numbers at the Existing Facility or to accommodate all Pupils at the Existing Facility for whom accommodation is not available at the Facility prior to the [Actual Completion Date]/[final Phase Actual Completion Date] for that Facility.]</p> <p>Unavailability of Existing Facilities</p> <p>14.8 If a Disruption Event occurs at an Existing Facility (or part thereof) prior to the [Actual Completion Date]/[final Phase Actual Completion Date] for that Facility:</p> <p>14.8.1 where the Disruption Event arises from a breach by Project Co of the site conduct requirements set out in [◆] of Section 3 (<i>Authority Requirements</i>) of Schedule 6 (<i>Construction Matters</i>) and the Disruption Event will cease upon suspension of the part of the Works which are the subject of that breach, the Authority may require a suspension of that part of the Works. Project Co shall comply with such request until such time as it can carry out such Works in accordance with this Agreement and shall not be entitled to claim any relief or compensation in respect of any delay to the Works arising in such circumstances; and</p> <p>14.8.2 where Clause 14.8.1 does not apply, Project Co and the Authority shall agree (acting reasonably) as expeditiously as possible the steps to be taken to ensure any unavailable parts of an Existing Facility may be re-provided as soon as practicable. The steps the parties agree to consider are the following (in the agreed order of preference set out below) or any combination of the following as appropriate:</p> <p>14.8.2.1 remediation of the Disruption Event through temporary and/or permanent measures;</p> <p>14.8.2.2 use of other facilities at the Existing Facility;</p> <p>14.8.2.3 use of temporary accommodation at the Existing Facility;</p> <p>14.8.2.4 use of facilities at another school or Authority property;</p> <p>14.8.2.5 use of temporary accommodation at another school or Authority property; and/or</p> <p>14.8.2.6 use of commercial facilities (in the case only of</p> |

| Clause | Comment |
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| | <p style="text-align: center;">specialist facilities which cannot be otherwise provided under this Clause).</p> <p>14.8.3 The Project Co shall be responsible for providing the facilities or accommodation pursuant to Clause 14.8.2 and shall be responsible for all proper costs arising from all administrative arrangements associated with providing such facilities or accommodation pursuant to Clause 14.8.2, including, if relevant, the cost of providing temporary facilities or accommodation and/or costs of transportation to and from any facilities or accommodation so provided.</p> <p>14.8.4 Whenever Project Co fails to implement any steps in the manner agreed pursuant to Clause 14.8.2, the Authority may (provided it has first served written notice on Project Co to that effect) take such steps itself and Project Co shall reimburse to the Authority the costs incurred by the Authority in so doing.</p> <p>The following additional definitions should be inserted as appropriate in to Schedule 1 (<i>Definitions</i>) connection with the above drafting:</p> <p>"Disruption Event" means a failure by Project Co to carry out the Works in accordance with this Agreement the result of which is that an Existing School (or part thereof) cannot reasonably continue to be used for the provision of [Educational Services];</p> <p>"Existing Facilities" means [♦];</p> <p>"Initial Amount" means in relation to a Facility the amount shown in the column so headed in Schedule [♦] against that Facility;</p> <p>"Periodic Rate" in relation to a Facility, the amount shown in the column headed "Periodic Rate" in Schedule [♦];</p> <p>"Pupil" means [♦];</p> |
| 14.9 | <p>Where Post Completion Works are required to demolish Existing Facilities and/or build playing fields for example, the following drafting should be inserted (note the Clause numbering will be dependent on preceding project specifics). The Authority's legal advisers should review in detail the knock on consequences of including a Post Completion Works Phase to the drafting, including:</p> <ul style="list-style-type: none"> • the scope of the Independent Tester's services will need to be extended to include the Post Completion Works; • Access rights at Clause 9 (<i>Nature of Land Interests</i>) will need to be adjusted to accommodate access to carry out the Post Completion Works; • The Authority's rights to open up at Clause 13.3 to 13.8 (<i>Right to Open Up</i>) will need to include the Post Completion Works; • Clauses 17.12 and 17.13 will need to be adjusted to include reference to the Post Completion Works; • The notifications and inspection access provisions in Clause 17 (<i>Pre-Completion Commissioning and Completion</i>) will need to be adjusted to include the Post Completion Works; • Clauses 30 to 32 (Delay Events, Relief and Force Majeure) relief should be extended to the Post Completion Works; • Clause 33 (<i>Relevant Changes in Law</i>) should be adjusted to accommodate a Post Completion Works phase; |

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| | <ul style="list-style-type: none"> • The Completion Criteria will need to be adjusted to reflect achievement of the Works separately from the Post Completion Works; • The definition of "Deemed New Agreement" and "New Agreement" should be adjusted to accommodate Post Completion Works; • The definition of "Works" will need to be adjusted to include the Post Completion Works. <p>Post Completion Works Phase</p> <p>14.9 Subject to Clauses 14.10 and 14.11 following issue of a Certificate of Practical Completion in relation to a [Facility]/[final Phase of a Facility], Project Co shall or shall procure that the Contractor shall carry out the Post Completion Works at the Site relating to such Facility so that such Post Completion Works are completed by the relevant Post Completion Works Date provided:</p> <p>14.9.1 where the Certificate of Practical Completion for the Post Completion Works has not been issued by the Post Completion Works Date, the Authority shall be entitled to levy liquidated and ascertained damages in respect of each calendar week (or part thereof) that elapses after the Post Completion Works Date up to and including the date that a Certificate of Practical Completion for the Post Completion Works is issued, for the following amounts:</p> <table border="1" data-bbox="794 1019 1385 1422"> <tbody> <tr> <td data-bbox="794 1019 1090 1205">For the first calendar week following the Post Completion Works Date (the First Week)</td> <td data-bbox="1090 1019 1385 1205">£[INSERT FIGURE]³⁴</td> </tr> <tr> <td data-bbox="794 1205 1090 1422">For each subsequent week (or part thereof) following the First Week</td> <td data-bbox="1090 1205 1385 1422">An increase of £[INSERT FIGURE]³⁵ on all amounts prevailing at the end of the immediately preceding week</td> </tr> </tbody> </table> <p style="text-align: center;">and</p> <p>14.9.2 after the date that falls [INSERT NUMBER OF DAYS] after the Post Completion Works Date the Authority shall be entitled to employ an alternative contractor to carry out the Post Completion Works and shall be entitled to be reimbursed by Project Co for all costs properly and reasonably incurred in the carrying out of any such Post Completion Works.</p> <p>14.10 Where the Authority employs an alternative contractor to carry out any Post Completion Works in accordance with Clause 14.9.2 it shall cease to have the right to levy liquidated damages in accordance with Clause</p> | For the first calendar week following the Post Completion Works Date (the First Week) | £[INSERT FIGURE] ³⁴ | For each subsequent week (or part thereof) following the First Week | An increase of £[INSERT FIGURE] ³⁵ on all amounts prevailing at the end of the immediately preceding week |
| For the first calendar week following the Post Completion Works Date (the First Week) | £[INSERT FIGURE] ³⁴ | | | | |
| For each subsequent week (or part thereof) following the First Week | An increase of £[INSERT FIGURE] ³⁵ on all amounts prevailing at the end of the immediately preceding week | | | | |

³⁴ Where the post completion works are sports pitches the LADs figure will need to include all costs to be incurred in hiring alternative facilities, transporting pupils to the alternative facilities etc.

³⁵ The ratchet will need to be significant enough to encourage the Contractor to complete the Post Completion Works.

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| | <p>14.9.1 once a reasonable period of time for completing the relevant Post Completion Works (having regard to the nature and extent of the relevant Post Completion Works outstanding and the programme for carrying out of such Post Completion Works by the Authority's alternative contractor) has expired.</p> <p>14.11 For the avoidance of doubt Clause 14.9 and Clause 14.10 shall be the Authority's sole remedy in connection with any delays to the completion of the Post Completion Works and the Authority shall not be entitled to levy any Deductions under Schedule 14 (<i>Payment Mechanism</i>) in relation to any Areas which are subject to Post Completion Works prior to the Actual Post Completion Works Date.</p> <p>The following definitions will need to be added to Schedule 1 (<i>Definitions and Interpretation</i>):</p> <p>["Actual Post Completion Works Date" means, in relation to any Post Completion Works in respect of a Site, the date on which a Certificate of Practical Completion for the Post Completion Works is issued;]</p> <p>["Post Completion Works" means, in relation to each Site, those parts of the Works to be completed after the [Actual Completion Date]/[final Phase Actual Completion Date] in accordance with the Programme;]</p> <p>["Post Completion Works Date" means, subject to Clause 30(Delay Events), in relation to each Site, the date shown as the corresponding Post Completion Works Date in Section 2 of Schedule 7 (<i>Programme</i>) or such other date as the parties may agree;]</p> |
| 17 | <p>The MIM Standard Form Project Agreement assumes the Authority and Project Co will each undertake inspection and commissioning activities both prior to and after completion. Parties need to consider which commissioning activities have to occur before and which after completion (and, in each case, by whom) on a project specific basis. The MIM Standard Form Project Agreement envisages that the Final Commissioning Programme will set out all requirements and obligations in relation to the development, nature, principles and performance of the completion tests to be performed to enable certification of completion to take place.</p> <p>The commissioning process is to be developed and agreed on a project specific basis and the Agreement amended as necessary to reflect project specific arrangements. Pre-completion commissioning may not be relevant in many cases, in which event this Clause can be simplified by removing the references to it.</p> |
| 17.4 | <p>The Authority should describe any other core requirements to be complied with in relation to Project Co's commissioning activities.</p> |
| 17.7.2 | <p>The Authority should consider what the Authority's commissioning activities, if any, will entail. Parties will need to consider when the Authority's commissioning activities (including, for example, installing of its own equipment) will be carried out.</p> |

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| 18.1 to 18.4 | <p>The Authority should consider what commissioning/services start-up activities will be carried out by Project Co and what commissioning activities will be carried out by the Authority during this period. The Payment Mechanism and Service Level Specification may need to be structured so as to reflect the intention of the parties in relation to services start up during this period. The standard Payment Mechanism does not envisage any structuring of this type and may therefore need to be adjusted in project specific cases. It will depend on the significance of each party's activities during this period and will depend on how step-up of payments during this period are structured. If not relevant these Clauses may be deleted.</p> |
| 18.5 | <p>To be amended on a project specific basis. For example, operational manuals may need to be made available at an earlier date depending on the timing of commissioning activities. Further, it may be possible, for Project Co to provide draft manuals to the Authority for comment prior to finalisation and suitable amendments should be made to the Clause where relevant. It is expected that substantially complete manuals will be available by the Actual Completion Date with final drafts being made available within an agreed time thereafter. The Authority should list any other manuals required.</p> <p>Please note that in accordance with Welsh Language Standards certain documents may need to be translated and/or produced in bi-lingual form. Advice should be sought on this at the time, and prior to procurement so that bidders can be appraised of the project's specific requirements and any timescales for production.</p> |
| 18.8 | <p>The Authority will need to liaise with the Schools on their decant requirements which are to be reflected in the Equipment Schedule.</p> |
| 22 | <p>The starting assumption for a project should be that Project Co will not be responsible for letting areas of the Facilities to third parties. Historically, in schools projects it was usual to include drafting to deal with different types of use of the Facilities by the Authority during the school day, during additional hours and for third party use and sometimes managing third party use was transferred to the service provider with arrangements for sharing income derived from third party use. Under the more limited scope of the services, this drafting may no longer be relevant, especially if the service provider is not responsible for controlling the opening and closing of the Facilities. If, however, an Authority considers that it wishes to make provision for some of or all of these arrangements it should consult with Welsh Government. See further comment at 6.1 above.</p> <p>In any event, Project Co should be notified of School terms. Required drafting for notification of terms is set out below:</p> <p>Notification of terms</p> <p>22.7 The terms for [first] Academic Year are [◆].</p> <p>22.8 No later than [31st December] in each year the Authority must notify Project Co of the dates for terms (including any half-term holidays) in the period [1st August] to [31st July] following that notice.</p> <p>22.9 Without prejudice to Clause 22.10, in the event the Authority wishes either:</p> <p>22.9.1 to have an aggregate yearly duration in excess of the number of School Days detailed in the Academic Year; or</p> |

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| | <p>22.9.2 to make a change to Core Times, it must propose a change to the Service Level Specification in accordance with Schedule 16 (<i>Change Protocol</i>).</p> <p>22.10 The Authority is entitled, without proposing a change to the Service Level Specification in accordance with Schedule 16 (<i>Change Protocol</i>), to make de minimis changes to the Core Times provided the total number of hours falling within Core Times remains the same, unless Project Co can demonstrate to the Authority that such change will not have a de minimis impact on the cost of and/or the delivery of the Services.</p> |
| 23.13 | <p>The MIM Standard Form Project Agreement places responsibility for interior decoration of walls and ceilings with the Authority and this will be done on a regular basis. Authorities should consider on a project by project basis whether they also wish to take on responsibility for floor coverings. The drafting allows Project Co to step-in and perform such Authority Maintenance Obligation tasks where the Authority's failure to is likely to have an adverse effect on the Facilities, Services and/or Project Co's obligations.</p> <p>Authorities will need to consider the cost implications of these responsibilities in preparing their business cases for projects. They will also need to consider the interface between these obligations and the design and specification of the Facilities (i.e. the impact that the design and specification will have on the Authority's ongoing internal redecoration responsibilities), as would be the case on any capital-funded project.</p> <p>In scoping the Authority's Maintenance Obligations, careful note needs to be taken of the EPEC/EUROSTAT Guide and examples of services EUROSTAT considers to be "secondary" (i.e. not influencing statistical treatment).</p> |
| 23.13.2 | Include if the Authority wishes to take on this responsibility and adjust the Services Specification. |
| 23.13.3 | Include if the Authority wishes to take on this responsibility and adjust the Services Specification. |
| 23.13.4 | Delete if the right to carry out Derogated Low Value Changes is not included in Schedule 16 (<i>Change Protocol</i>). |
| 23.14 | Breach of this Clause will be an Excusing Cause by virtue of Clause 52.2.1. |
| 23.23 to 23.25 | This drafting has been introduced because of the risk transfer in regard to Utilities. If Project Co makes material use of Utilities to achieve Rectification of Availability Failures it should bear the associated costs. It is suggested a <i>de minimis</i> level is set to avoid the time and effort required to make relatively trivial claims. It is suggested this is linked to the average normal daily cost of each utility, but Authorities may prefer to adopt a simpler cash sum in which case it should be index linked. |
| 26.3 | <p>The MIM Standard Form Project Agreement Warning Notice triggers in respect of Deduction levels assume a single Facility.</p> <p>Where the project is a multi-facility project, such as batched schools, it may be appropriate for the Authority to include Warning Notice triggers relevant to the level of Deductions applied in respect of each Facility.</p> <p>A similar approach, appropriately calibrated, may be taken to the additional</p> |

| Clause | Comment |
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| | drafting to be included in multi-facility education projects in respect of Project Co Events of Default. Please see comments on Clause 40.1.8 below. |
| 27.49 to 27.59 | <p>As noted in Chapter 4, the Project Agreements envisage no staff transfers. However, pensions drafting is included below, for use where staff transfer provisions are necessary.</p> <p>27.49 Project Co to secure Appropriate Pension Provision</p> <p>Project Co shall or shall procure that any Obligated Party shall ensure all Eligible Employees are offered Appropriate Pension Provision with effect from the Effective Date up to and including the date of the termination or expiry of this Agreement.</p> <p>27.50 Project Co Becoming an Admission Body within LGPS</p> <p>Where Project Co or any Obligated Party employs any LGPS Eligible Employees from a [Relevant] Service Transfer Date the provisions of this Clause 27.50 shall apply, save where the Authority accepts that exceptional circumstances exist where there are special reasons which mean that it would not be appropriate for the provisions of this Clause 27.50 to apply, in which case the provisions of Clause 27.53 shall apply instead.</p> <p>27.50.1 Project Co shall offer such LGPS Eligible Employees membership of the LGPS and shall procure that it and/or each relevant Obligated Party shall become an Admission Body. Project Co shall before the [Relevant] Service Transfer Date execute and procure that each relevant Obligated Party executes an Admission Agreement, which will have effect from and including the [Relevant] Service Transfer Date.</p> <p>27.50.2 The Authority shall before the [Relevant] Service Transfer Date execute each of the Admission Agreements referred to in Clause 27.50.1 and shall use reasonable endeavours to ensure the Administering Authority (if different from the Authority) executes each such Admission Agreement before the [Relevant] Service Transfer Date. Without prejudice to the generality of this Clause 27.50, Project Co hereby indemnifies the Authority and/or any Future Service Provider and, in each case, their sub-contractors on demand from and against all Direct Losses suffered or incurred by it or them which arise from any breach by Project Co or any Obligated Party of the terms of any Admission Agreement to the extent such liability arises before or as a result of the termination or expiry of this Agreement (howsoever caused).</p> <p>27.50.3 Without prejudice to the generality of the requirements of this Clause 27.50, Project Co shall procure that it and each relevant Obligated Party shall as soon as reasonably practicable obtain any indemnity or bond required in accordance with the Admission Agreements.</p> |

| Clause | Comment |
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| | <p data-bbox="507 277 1402 461">27.50.4 The Authority shall have a right to set off against any payments due to Project Co under this Agreement an amount equal to any overdue employer and employee contributions and other payments (and interest payable) due from Project Co or from any relevant Obligated Party (as applicable) under the Admission Agreement.</p> <p data-bbox="411 495 1134 524">27.51 Project Co Participating in other Legacy Scheme</p> <p data-bbox="507 562 1402 775">Where Project Co or any Obligated Party employs any Non-LGPS Eligible Employees from a [Relevant] Service Transfer Date the provisions of this Clause 27.51 shall apply, save where the Authority accepts that exceptional circumstances exist where there are special reasons which mean that it would not be appropriate for the provisions of this Clause 27.51 to apply, in which case the provisions of Clause 27.53 shall apply instead.</p> <p data-bbox="507 808 1402 1081">27.51.1 Project Co shall offer such Non-LGPS Eligible Employees membership of the applicable Legacy Scheme and shall procure that it and/or each relevant Obligated Party shall enter into an appropriate Participation Agreement in respect of such membership. Project Co shall before the [Relevant] Service Transfer Date execute and procure that each relevant Obligated Party executes any appropriate Participation Agreement, which will have effect from and including the [Relevant] Service Transfer Date.</p> <p data-bbox="507 1115 1402 1328">27.51.2 The Authority shall, where appropriate, before the [Relevant] Service Transfer Date execute each of the Participation Agreements referred to in Clause 27.51.1 and shall, where required, use reasonable endeavours to ensure that any Participating Authority (if different from the Authority) executes each such Participation Agreement before the [Relevant] Service Transfer Date.</p> <p data-bbox="507 1361 1402 1635">27.51.3 Without prejudice to the generality of this Clause 27.51, Project Co hereby indemnifies the Authority and/or any Future Service Provider and, in each case, their sub-contractors on demand from and against all Direct Losses suffered or incurred by it or them which arise from any breach by Project Co or any Obligated Party of the terms of any Participation Agreement to the extent that such liability arises before or as a result of the termination or expiry of the Agreement (howsoever caused).</p> <p data-bbox="507 1668 1402 1816">27.51.4 Without prejudice to the generality of the requirements of this Clause 27.51, Project Co shall procure that it and each relevant Obligated Party shall as soon as reasonably practicable obtain any indemnity or bond required in accordance with any Participation Agreement.</p> |

| Clause | Comment |
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| | <p data-bbox="509 277 1402 461">27.51.5 The Authority shall have a right to set off against any payments due to Project Co under the Agreement an amount equal to any overdue employer and employee contributions and other payments (and interest payable) due from Project Co or from any relevant Obligated Party (as applicable) under any Participation Agreement.</p> <p data-bbox="413 495 1078 521">27.52 Project Co Ceases to be an Admission Body</p> <p data-bbox="509 562 1402 622">If Project Co or any Obligated Party employs any Eligible Employees from a [Relevant] Service Transfer Date and:</p> <p data-bbox="509 656 1402 775">27.52.1 exceptional circumstances exist where there are special reasons for not providing LGPS Eligible Employees membership of the LGPS and/or Non-LGPS Eligible Employees membership of the applicable Legacy Scheme; or</p> <p data-bbox="509 808 1402 992">27.52.2 if for any reason after the [Relevant] Service Transfer Date Project Co or any relevant Obligated Party ceases to be an Admission Body or ceases to be able to participate in any applicable Legacy Scheme other than the LGPS other than on the date of termination or expiry of this Agreement or because it ceases to employ any Eligible Employees;</p> <p data-bbox="509 1025 1402 1115">then the provisions of Clauses 27.50 and/or 27.51 shall not apply (without prejudice to any rights of the Authority under those Clauses) and the provisions of Clause 27.53 (Project Co's Scheme) shall apply.</p> <p data-bbox="413 1149 778 1176">27.53 Project Co's Scheme</p> <p data-bbox="509 1216 1402 1276">Where this Clause 27.53 applies pursuant to Clause 27.52, the following shall apply:</p> <p data-bbox="509 1310 1402 1516">27.53.1 Project Co shall or shall procure any relevant Obligated Party shall not later than the [Relevant] Service Transfer Date or the Cessation Date (as the case may be) nominate to the Authority in writing the occupational pension scheme or schemes which it proposes shall be Project Co's Scheme for the purposes of this Clause 27.53. Such pension scheme or schemes must be:</p> <ul style="list-style-type: none"> <li data-bbox="655 1554 1402 1644">(a) established within three (3) months of the [Relevant] Service Transfer Date or Cessation Date (as the case may be); <li data-bbox="655 1682 1402 1771">(b) reasonably acceptable to the Authority (such acceptance not to be unreasonably withheld or delayed); <li data-bbox="655 1809 1402 1870">(c) a registered pension scheme for the purposes of Part 4 of the Finance Act 2004; and |

| Clause | Comment |
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| | <p style="text-align: right;">(d) certified by GAD or an actuary nominated by the Authority in accordance with relevant guidance produced by GAD as providing benefits which are the same as, broadly comparable to or better than those benefits provided by the applicable Legacy Scheme;</p> <p>27.53.2 Project Co undertakes to the Authority (for the benefit of the Authority itself and for the Authority as agent and trustee for the benefit of the Eligible Employees) that it shall and shall procure that any relevant Obligated Party shall procure that:</p> <p>(a) the Eligible Employees shall by three (3) months before the [Relevant] Service Transfer Date or the Cessation Date (as the case may be) be offered membership of Project Co's Scheme with effect from and including the [Relevant] Service Transfer Date or Cessation Date (as the case may be);</p> <p>(b) Project Co's Scheme shall provide benefits in respect of the Eligible Employees' periods of service on and after the [Relevant] Service Transfer Date or Cessation Date (as the case may be) which GAD or an actuary nominated by the Authority in accordance with relevant guidance produced by GAD shall certify to be the same as, broadly comparable to or better than the benefits which the Eligible Employees were entitled to under the applicable Legacy Scheme at the [Relevant] Service Transfer Date or the Cessation Date (as the case may be);</p> <p>(c) if Project Co's Scheme is terminated, a replacement pension scheme shall be provided with immediate effect for those Eligible Employees who are still employed by Project Co or any Obligated Party. The replacement scheme must comply with this Clause 27.53 as if it were Project Co's Scheme;</p> <p>(d) [before the [Relevant] Service Transfer Date or Cessation Date (as the case may be) the trustees of Project Co's Scheme shall undertake by deed to the Authority and to any Administering Authority or Participating Authority as may be required by the provisions governing any Legacy Scheme that they shall co-operate with the provisions of Clauses 27.53 and 27.54 to the extent applicable to them;] and</p> |

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| | <p>(e) where Project Co's Scheme has not been established at the [Relevant] Service Transfer Date or Cessation Date (as the case may be), the Eligible Employees shall be provided with benefits in respect of death-in-service which are no less favourable than the death-in-service benefits provided by the Legacy Scheme immediately before the [Relevant] Service Transfer Date or Cessation Date (as the case may be). Such benefits will continue to be provided until death-in-service benefits are provided by Project Co's Scheme; and</p> <p>27.53.3 The Authority's actuary shall determine the terms for any bulk transfers from a Legacy Scheme to Project Co's Scheme following the [Relevant] Service Transfer Date and any subsequent bulk transfers on termination or expiry of this Agreement.</p> <p>27.54 Undertaking from Project Co</p> <p>Project Co undertakes to the Authority (for the benefit of the Authority itself and for the Authority as agent and trustee for the benefit of the Eligible Employees) that:</p> <p>27.54.1 all information which the Authority or any Administering Authority or Participating Authority or their respective professional advisers may reasonably request from Project Co or any relevant Obligated Party for the administration of the Legacy Scheme or concerning any other matters raised in Clause 27.53 or this Clause 27.54 shall be supplied to them as expeditiously as possible;</p> <p>27.54.2 it shall not and shall procure that any relevant Obligated Party shall not, without the consent in writing of the Authority or any other person as may be required by the provisions governing any Legacy Scheme (which shall only be given subject to the payment by Project Co or the relevant Obligated Party of such reasonable costs as the Authority or any Administering Authority or Participating Authority may require) consent to instigate, encourage or assist any event which could impose on the Legacy Scheme or on the Authority a cost in respect of any Eligible Employee greater than the cost which would have been payable in respect of that Eligible Employee had that consent, instigation, encouragement or assistance not been given;</p> <p>27.54.3 until the [Relevant] Service Transfer Date, it shall not and shall procure that any relevant Obligated Party shall not issue any announcements (whether in writing or not) to the Eligible Employees concerning the matters stated in Clauses 27.50 or 27.51 without the consent in writing of the Authority and any Administering Authority or Participating Authority (not to be unreasonably withheld or delayed);</p> |

| Clause | Comment |
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| | <p data-bbox="507 277 1402 645">27.54.4 it shall not and shall procure that any relevant Obligated Party shall not take or omit to take any action which would materially affect the benefits under any Legacy Scheme or under Project Co's Scheme of any Eligible Employees who are or will be employed wholly or partially in connection with the Services without the prior written agreement of the Authority or any other person as may be required by the provisions governing any Legacy Scheme (not to be unreasonably withheld or delayed) provided Project Co and/or such Obligated Party will be so entitled without the requirement of consent to give effect to any pre-existing contractual obligations to any Eligible Employees; and</p> <p data-bbox="507 676 1402 920">27.54.5 it shall and shall procure that any relevant Obligated Party shall offer any of its Eligible Employees who cease to be engaged in the provision of the Services and thereby cease to be eligible for membership of a Legacy Scheme membership of Project Co's Scheme as soon as reasonably practicable after ceasing to be so engaged unless such an Eligible Employee has voluntarily ceased to be engaged in the provision of the Services.</p> <p data-bbox="411 952 798 983">27.55 Discretionary Benefits</p> <p data-bbox="507 1016 1402 1234">27.55.1 Where Project Co or an Obligated Party participates in a Legacy Scheme, Project Co shall and/or shall procure any relevant Obligated Party shall award benefits (where permitted) to the Eligible Employees under the Legacy Scheme in circumstances where the Eligible Employees would have received such benefits had they still been employed by the Authority; and</p> <p data-bbox="507 1265 1402 1541">27.55.2 Where the award of benefits in Clause 27.55.1 is not permitted under the Legacy Scheme or Project Co and/or an Obligated Party does not participate in the applicable Legacy Scheme, Project Co shall and/or shall procure any Obligated Party shall award benefits to the Eligible Employees which are identical to the benefits the Eligible Employees would have received under the Legacy Scheme in circumstances where the Eligible Employees would have received such benefits had they still been employed by the Authority.</p> <p data-bbox="507 1572 1402 1848">27.55.3 Under Clause 27.55.1 and 25.55.2, where such benefits are of a discretionary nature, they shall be awarded on the basis of the Authority's written policy in relation to such benefits at the time of the [Relevant] Service Transfer Date (which the Authority shall provide upon request). Where the payment of such benefits is not, for whatever reason, possible, Project Co shall and/or shall procure any relevant Obligated Party shall compensate the Eligible Employees in a manner which is broadly comparable or equivalent in cash terms.</p> |

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| | <p>27.56 Claims from Eligible Employees or Trade Unions</p> <p>Project Co hereby indemnifies the Authority and/or any Future Service Provider and, in each case, their sub-contractors from and against all Direct Losses suffered or incurred by it or them which arise from claims by Eligible Employees of Project Co and/or of any Obligated Party or by any trade unions, elected employee representatives or staff associations in respect of all or any such Eligible Employees which losses:</p> <p>27.56.1 relate to pension rights in respect of periods of employment on and after the [Relevant] Service Transfer Date until the date of termination or expiry of this Agreement; or</p> <p>27.56.2 arise out of the failure of Project Co and/or any relevant Obligated Party to comply with the provisions of Clauses 27.49 to 27.59 before the date of termination or expiry of this Agreement.</p> <p>27.57 Liability for Costs</p> <p>The costs of the Authority necessarily and reasonably incurred in connection with the Admission Agreement and/or of obtaining the necessary certification of comparability in accordance with Clause 27.53 shall be borne by Project Co.</p> <p>27.58 Transfer to another Employer</p> <p>Save on expiry or termination of this Agreement, if the employment of any Eligible Employee transfers to another employer (by way of a transfer under TUPE) Project Co shall and shall procure any relevant Obligated Party shall:</p> <p>27.58.1 consult with and inform those Eligible Employees of the pension provisions relating to that transfer; and</p> <p>27.58.2 procure that the employer to which the Eligible Employees are transferred (the "New Employer") complies with the provisions of Clauses 27.57 to 27.59 provided references to the "Sub-Contractor" will become references to the New Employer, references to "[Relevant] Service Transfer Date" will become references to the date of the transfer to the New Employer and references to "Eligible Employees" will become references to the Eligible Employees so transferred to the New Employer.</p> |

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| | <p>27.59 Pension Issues on Expiry or Termination</p> <p>Project Co shall and shall procure that any relevant Obligated Party shall:</p> <p>27.59.1 maintain such documents and information as will be reasonably required to manage the pension aspects of any onward transfer of any person engaged or employed by Project Co or any Obligated Party in the provision of the Services on the expiry or termination of this Agreement (including without limitation identification of the Eligible Employees);</p> <p>27.59.2 promptly provide to the Authority such documents and information mentioned in Clause 27.59.1 which the Authority may reasonably request in advance of the expiry or termination of this Agreement; and</p> <p>27.59.3 fully co-operate (and procure that the trustees of Project Co's Scheme shall fully co-operate) with the reasonable requests of the Authority relating to any administrative tasks necessary to deal with the pension aspects of any onward transfer of any person engaged or employed by Project Co or any Obligated Party in the provision of the Services on the expiry or termination of this Agreement.</p> <p>Where this alternative drafting is used in this Clause 27, the following definitions should be added to Schedule 1:</p> <p>"Administering Authority" has the meaning given to it in Schedule 1 of the Local Government Pension Scheme Regulations 2013 (SI No. 2356);</p> <p>"Admission Agreement" has the meaning given to it in Schedule 1 of the Local Government Pension Scheme Regulations 2013 (SI No. 2356);</p> <p>"Admission Body" has the meaning given to it in Schedule 1 of the Local Government Pension Scheme Regulations 2013 (SI No. 2356);</p> <p>"Appropriate Pension Provision" means in respect of Eligible Employees, either:</p> <p>(a) membership, continued membership or continued eligibility for membership of their Legacy Scheme; or</p> |

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| | <p>(b) membership or eligibility for membership of a pension scheme, which is certified by the GAD as being broadly comparable to the terms of their Legacy Scheme;</p> <p>"Authority" means the contracting authority or public sector body in Wales to whom the Code of Practice is addressed;</p> <p>"Cessation Date" any date on which Project Co ceases to be an Admission Body or ceases to be eligible to participate in a Legacy Scheme other than the LGPS other than as a result of the termination or expiry of this Agreement or because it ceases to employ any Eligible Employees;</p> <p>"Direct Losses" means all damages, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an indemnity basis), proceedings, demands and charges whether arising under statute, contract or at common law;</p> <p>"Effective Date" means the date(s) on which the Services (or any part of the Services), transfer from the Authority or any Third Party Employer to another Obligated Party, and a reference to the Effective Date shall be deemed to be the date on which the employees in question transferred or will transfer to another Obligated Party;</p> <p>"Eligible Employees" means LGPS Eligible Employees and Non-LGPS Eligible Employees;</p> <p>"Fair Deal Employee" means those Transferring Employees who are on the [Relevant] Service Transfer Date entitled to the protection of New Fair Deal and remain LGPS Eligible Employees, in any questions of doubt the Authority shall decide whether a person is a Fair Deal Employee, and in this Agreement means such employees employed by the Obligated Party;</p> |

| Clause | Comment |
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| | <p>"Future Service Provider" means at the Authorities request any service provider who shall provide any service equivalent to any of the Services immediately after expiry or earlier termination of this Agreement;</p> <p>"GAD" means the Government Actuary's Department;</p> <p>"Legacy Scheme" means the pension scheme of which the Eligible Employees are members, or are eligible for membership of, or are in a waiting period to become a member of, prior to the Relevant Transfer;</p> <p>"LGPS" means the Local Government Pension Scheme established pursuant to regulations made in exercise of powers under sections 7 and 12 of the Superannuation Act 1972 (as amended from time to time);</p> <p>"LGPS Eligible Employee" means:</p> <ul style="list-style-type: none"> (a) Transferring Employees who are active members of (or are eligible to join) the LGPS [or a broadly comparable scheme] on the date of a Relevant Transfer including the Effective Date; and/or (b) Third Party Employees who are former employees of the Authority and who were active members of (or who were eligible to join) the LGPS on the date of a previous Relevant Transfer of the Services; <p>"New Fair Deal" means the revised Fair Deal position set out in the HM Treasury guidance "Fair Deal for staff pensions: staff transfer from central government" issued in October 2013;</p> <p>"Non-LGPS Eligible Employee" means:</p> <ul style="list-style-type: none"> (a) Transferring Employees who are active members of (or are eligible to join) a Legacy Scheme other than the LGPS on the date of a Relevant Transfer including the Effective Date; and/or |

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| | <p>(b) Third Party Employees who are former employees of the Authority and who were active members of (or who were eligible to join) a Legacy Scheme other than the LGPS on the date of a previous Relevant Transfer of the Services;</p> <p>"Obligated Party" means Project Co, any Contractor, any sub-contractor or any Service Provide whilst they employ [Fair Deal Employees];</p> <p>"Participating Authority" means any organisation which is required under the provisions governing any Legacy Scheme to supervise the administration of all or part of such Scheme;</p> <p>³⁶"Participation Agreement" means an agreement between a Participating Authority and Project Co or any Obligated Party that named individuals, or all or any specified class of Project Co's or Obligated Party's employees, may be members of a Legacy Scheme other than the LGPS;</p> <p>"Relevant Transfer" means a relevant transfer for the purposes of TUPE;</p> <p>"Service Transfer Date" means the transfer on a date agreed by the Parties to Project Co of responsibility for provision of (or procuring the provision by an Obligated Party of) the Services in accordance with this Agreement;</p> <p>"Services" means the Services Project Co is required to provide under this Agreement;</p> <p>"Third Party Employees" means Employees of Third Party Employers whose contracts of employment transfer with effect from the Effective Date to Project Co or an Obligated Party by virtue of the application of TUPE;</p> |

³⁶ The terms relating to the ability of third-party employers to participate in public sector pension schemes other than the LGPS have not been finalised here. Various references, including "Non-LGPS Eligible Employees", "Participating Authority", "Participation Agreement" and Clause 2.3 will need to be amended in line with the precise terms.

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| | <p>"Third Party Employer" means a service provider engaged by the Authority to provide Services to the Authority before the Effective Date and whose employees will transfer to Project Co on the Effective Date;</p> <p>"Transferring Employee" means an employee of the Authority (excluding, without limitation, any person engaged by the Authority as an independent contractor or persons employed by any sub-contractor engaged by the Authority) whose contract of employment becomes, by virtue of the application of TUPE in relation to what is done for the purposes of carrying out this Agreement between the Authority and Project Co, a contract of employment with someone other than the Authority;</p> <p>"TUPE" means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI No. 246) as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (SI No. 16).</p> |
| 28.1 | The MIM Project Agreement assumes the Project is a stand-alone development and not part of a larger site and therefore the Authority's rights here apply in relation to the Facilities only. Authorities should refer to any other relevant areas (e.g. existing premises from which the Authority operates) as necessary on a project specific basis. |
| 30.3.8 | Include where Clauses 10.3 and 10.4 are used. |
| 30.10.3 | Include where Clauses 10.3 and 10.4 are used. |
| 39.1 | <p>Insert the following additional Clause:</p> <p style="padding-left: 40px;">39.1.4 an expropriation, sequestration or requisition of a material part of the Assets and/or shares of Project Co or Hold Co by the Authority or any Relevant Authority; or</p> <p>At Clause 39.2.2, after "Clause 39.1.3" should be inserted "or Clause 39.1.4".</p> |
| 40.1.8 | <p>Where the project is a multi-facility project, such as batched schools, it will, in most cases, be appropriate for the Authority to include termination triggers relevant to the level of Deductions applied in respect of a particular Facility.</p> <p>In such circumstances the existing Clause 40.1.8 should be renumbered as 40.1.8 (a) and the following additional drafting should be included and cross referencing amended as appropriate:</p> <p>(b) the Facility Unavailability Threshold occurs in relation to the same Facility in any three (3) consecutive months or any four (4) months during any twelve (12) month period;</p> |

| Clause | Comment |
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| | <p>(c) in any three (3) month period an individual Facility has been Unavailable for twenty (20) days or more;</p> <p>The following new definitions which are drafted on the basis of a schools project, but may be amended for other projects in the education sector, will be required:</p> <p>"Facility Unavailability Threshold" [means in any Contract Month, the Total Unavailability Deductions relating to any Facility [exceed 25% in the case of a Secondary School], or exceed [30% in the case of a Primary School], of the Monthly Service Payment attributable to that Facility in accordance with paragraph [◆] of Schedule 14 (<i>Payment Mechanism</i>) provided that for the purpose of making such a calculation where a Contract Month has between six (6) and twenty (20) (inclusive) [School Days] such Monthly Service Payment shall be multiplied by the number of [School Days] in that month divided by twenty (20);]</p> <p>"Total Unavailability Deductions" has the meaning given to that term in paragraph [◆] of Section 3 (<i>Deductions from Monthly Service Payments</i>) of Schedule 14 (<i>Payment Mechanism</i>);</p> |
| 49.1.1 | This mirrors the indemnity given by the Authority in relation to its employees in Clause 49.2.1. Project Co should manage the risks covered by the indemnity (and the fact that there is no carve out for causation) by putting appropriate insurance cover in place (which it is required by law to do), which contains satisfactory non-vitiation provisions (see Clause 54.6 (<i>Subrogation and Vitiation</i>)). |
| 49.1.2 | Deliberate acts or omissions do not include acts or omissions which are within the contemplation of the parties or provided for in this Agreement (see paragraph 11 of Section 2 (<i>Interpretation</i>) of Schedule 1 (<i>Definitions and Interpretation</i>)). |
| 49.2 | A general indemnity has not been included in relation to Authority breach. Project Co has its express rights under the agreement (for example, Delay Event, Compensation Event and Excusing Causes) and its rights to sue for breach of contract in order to recover any additional loss. |
| 49.2.1 | See note on Clause 49.1.1 |
| 49.2.3 | <p>The Authority's indemnities relating to physical damage in Clauses 49.2.3 and 49.2.4 do not cover physical damage caused by negligent acts or omissions. Project Co should insure against that risk. Authorities should not act as insurers of last resort in those circumstances.</p> <p>The indemnity in Clause 49.2.3 also excludes liability for acts of malicious damage, which are dealt with under Clause 50.</p> |
| 50.2 | <p>In schools projects:</p> <ul style="list-style-type: none"> the malicious damage drafting should be amended to refer to the notification to helpdesk being "by an Authorised Caller or after Project Co has itself or by a Service Provider"; and |

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| | <ul style="list-style-type: none"> the "School Representative" should be notified by Project Co of the rectification of malicious damage and should have the right to inspect such rectification. |
| 52 | <p>Additional Excusing Causes may be appropriate on education projects. For example:</p> <ul style="list-style-type: none"> specific instructions from the School Representative/head teacher pursuant to Clause 8.16.3, against the reasonable advice of Project Co; and extreme adverse weather affecting playing fields, where no infrastructure or remedial works have been required to mitigate the effects of adverse weather e.g. drainage. <p>Authorities must contact Welsh Government for appropriate drafting, where applicable.</p> |
| 58.11 | <p>Where the Authority is a local authority, insert the following at Clause 58.11:</p> <p>58.11 The rights and obligations of the Authority under this Agreement shall not be assigned, novated or otherwise transferred (whether by virtue of any Law or any scheme pursuant to any Law or otherwise) to any person other than to any public body (being a single entity) acquiring the whole of the Agreement and having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Agreement being:</p> <p>58.11.1 the Welsh Ministers or a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975;</p> <p>58.11.2 any other public body whose obligations under this Agreement and the Funders' Direct Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to Project Co) by the Authority, the Welsh Ministers or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Agreement,</p> <p>without the consent of Project Co. The prior written consent of Project Co (not to be unreasonably withheld or delayed) shall be required for any other assignation, transfer or disposal by the Authority of the whole or any part of this Agreement.</p> |
| 74 | <p>Where the Authority is a local authority the Clause set out below containing the consent to certification of the Project Agreement and incorporation of relevant discharge terms set out below should be included at Clause 74 (and subsequent Clauses renumbered), subject to checking all current, applicable legislation.</p> <p>74. Local Government (Contracts) Act 1997</p> <p>74.1 Project Co hereby consents to the issue by the Authority of certificates under section 3 of the Local Government (Contracts) Act 1997 in respect of this Agreement and the Funders' Direct Agreement.</p> |

| Clause | Comment |
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| | <p data-bbox="507 277 1402 371">74.2 The relevant discharge terms within the meaning of section 6 of the Local Government (Contracts) Act 1997 are set out in Schedule [◆] (<i>Relevant Discharge Terms</i>).</p> <p data-bbox="419 400 1402 461">Where Clause 74 applies, the following drafting must be included in the Schedules to the Agreement:</p> <p data-bbox="804 495 1007 524" style="text-align: center;">SCHEDULE [◆]</p> <p data-bbox="699 555 1114 584" style="text-align: center;">RELEVANT DISCHARGE TERMS</p> <p data-bbox="419 618 1106 647">1. The parties hereby acknowledge and agree that:</p> <p data-bbox="644 680 1402 864">1.1 where following an application for judicial review or an audit review (within the meaning of the Local Government (Contracts) Act 1997), a court of final appeal determines or orders that this Agreement or this Agreement and the Funders' Direct Agreement do not have effect or are otherwise unenforceable:</p> <p data-bbox="644 898 1402 1081">1.1.1 Project Co shall be entitled to be paid by the Authority a sum equivalent to the amount calculated in accordance with Section 1 (<i>Compensation on Termination for Authority Default and Voluntary Termination</i>) of Schedule 17 (<i>Compensation on Termination</i>); and</p> <p data-bbox="644 1115 1402 1299">1.1.2 the relevant provisions of Clause 46 (<i>Compensation on Termination</i>) and Section 4 (<i>General</i>) of Schedule 17 (<i>Compensation on Termination</i>) shall apply mutatis mutandis, subject to compensation being deemed to be payable in a lump sum within six (6) months of the order of the court; and</p> <p data-bbox="531 1332 1402 1574">1.2 where following an application for judicial review or an audit review (within the meaning of the Local Government (Contracts) Act 1997) a court of final appeal determines or orders that the Funders' Direct Agreement does not have effect or is otherwise unenforceable but this Agreement remains in full force and effect then, without prejudice to the application of paragraph 1.1 of this Schedule [◆] (<i>Relevant Discharge Terms</i>) at any time thereafter:</p> <p data-bbox="644 1608 1402 1697">1.2.1 the Monthly Service Payment shall be reduced by the amount payable by Project Co in respect of the Senior Debt; and</p> |

| Clause | Comment |
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| | <p style="text-align: center;">1.2.2</p> <p>the Authority shall pay Project Co a sum equal to the Revised Senior Debt Termination Amount (excluding, provided that the Senior Funders do not enforce any security over credit balances on any bank accounts held by or on behalf of Project Co, limb (b)(i) of the definition set out in Section 5 (<i>Definitions</i>) of Schedule 17 (<i>Compensation on Termination</i>) and the relevant provisions of Clause 46 (<i>Compensation on Termination</i>) and Section 4 (<i>General</i>) of Schedule 17 (<i>Compensation on Termination</i>) shall apply mutatis mutandis subject to any reference to the Termination Date in this Agreement shall be deemed to be the date on which the Funders' Direct Agreement was declared not to have effect or otherwise to be unenforceable in accordance with the provisions of this paragraph 1; and,</p> <p>the parties agree that such provisions shall be deemed to be relevant discharge terms for the purposes of section 6(2) of the Local Government (Contracts) Act 1997 (the "Relevant Discharge Terms").</p> <p>2. The parties acknowledge and agree that:</p> <p>2.1 in the event that the circumstances envisaged by paragraph 1.2 occur prior to the circumstances envisaged by paragraph 1.1 then the amount calculated in accordance with Section 1 (<i>Compensation on Termination for Authority Default and Voluntary Termination</i>) of Schedule 17 (<i>Compensation on Termination</i>) shall be calculated to ensure no double counting between that amount and any sums paid to Project Co pursuant to paragraph 1.2.2; and</p> <p>2.2 the Authority shall have the option to require Project Co to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority; and</p> <p>2.3 any payment of compensation in accordance with this Schedule [◆] (<i>Relevant Discharge Terms</i>) shall be in full satisfaction of any claim of Project Co in relation to the termination of this Agreement and/ or the Funders' Direct Agreement and shall be the sole remedy of Project Co against the Authority in the circumstances contemplated by this Schedule [◆] (<i>Relevant Discharge Terms</i>).</p> <p>The following definition should be inserted in Schedule 1 (<i>Definitions and Interpretation</i>), in connection with Schedule [◆]:</p> <p>"Assets" means all assets and rights to enable the Authority or a successor contractor to own, operate and maintain the Facilities in accordance with this Agreement including:</p> <p>(a) any land or buildings;</p> <p>(b) any furniture and equipment;</p> <p>(c) any books and records (including operating and maintenance manuals, health and</p> |

| Clause | Comment |
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| | <p>safety manuals and other know how);</p> <p>(d) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred);</p> <p>(e) any revenues and any other contractual rights; and</p> <p>(f) any intellectual property rights,</p> <p>but excluding any assets and rights in respect of which the Authority is full legal and beneficial owner.</p> |

| Schedule | Comment |
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| 1 | Definitions |
| 1 | <p>Academic Year</p> <p>The Authority should insert a new definition for Academic Year as follows:</p> <p>"means the period from the first day of the Authority's school year until the last day of the Authority's school year (excluding holiday periods) (as published from time to time prior to the commencement of each Academic Year), [such year to be divided into three terms each containing a half-term holiday, and in any event] such period not to include more than [285]³⁷ School Days;"</p> |
| 1 | <p>Authorised Caller</p> <p>The Authority should insert a new definition for "Authorised Caller" as follows:</p> <p>"means the following persons:</p> <p>(a) the Authority's Representative;</p> <p>(b) the School Representative [(in respect of the relevant Facilities)];</p> <p>(c) a head teacher, deputy head teacher and each assistant head teacher [(in respect of the relevant Facilities)];</p> <p>(d) any person authorised by the Authority to call the Helpdesk and notified in writing in advance to Project Co as being an Authorised Caller;</p> <p>(e) any [Authority] employee in the event of an Emergency;</p> <p>(f) Project Co; and</p> <p>(g) the Service Provider;"</p> |

³⁷ An Authority should verify the number of School Days against their curriculum requirements.

| Schedule | Comment |
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| 1 | <p>Authority Services</p> <p>The Authority should complete this definition on a project specific basis to reflect services (whether public facing or administrative or support services) being provided at the Facilities.</p> |
| 1 | <p>Equipment</p> <p>To be drafted on a project-specific basis linked as appropriate to Clause 16 Schedule 11 (<i>Equipment</i>) and to the Service Level Specification.</p> |
| 1 | <p>School Day</p> <p>The Authority should insert a new definition for School Day as follows (and amend references to "Day" accordingly):</p> <p>"means each day that the Authority requires the use of the Facilities for the delivery of Authority Services in any Academic Year; "</p> |
| 1 | <p>Section 2</p> <p>Whilst the Project Agreement will be in English, Welsh Medium schools should stipulate their language of preference for instructions, notices etc and any Welsh language requirements ought to be priced as part of the Annual Service Payment for the Project.</p> |
| 6 | <p>Construction Matters</p> |
| 6 | <p>Section 5</p> <p>This section should include the design that is to be developed in accordance with principles set out in the Review Procedure e.g. 1:200 drawings of site plans, 1:50 drawings of room layouts, etc.</p> |
| 6 | <p>Section 6</p> <p>This section should include a room by room design and contents schedule.</p> |
| 6 | <p>Section 7</p> <p>This section should include provisions relating to the monitoring (through design and construction) and testing (on completion) of the Authority's thermal and energy efficiency requirements.</p> |
| 8 | <p>Review Procedure</p> |
| 8 | <p>Paragraph 1.2.3 (Table of Finishes)</p> <p>This is project specific. This table is intended to be for guidance only.</p> |
| 8 | <p>Appendix 2</p> <p>To be completed by the Authority on a project-specific basis.</p> |

| Schedule | Comment |
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| 10 | Outline Commissioning Programme |
| 10 | <p>Schedule 10 will require to be developed on a project specific basis, with input from technical advisers. The approach needs to be considered in light of Clauses 17 (<i>Pre-Completion Commissioning</i>) and 18 (<i>Post Completion Commissioning</i>) and the commissioning activities/start-up of services to be carried out during those periods. This should outline who is responsible for what (and when) and set out the principles for all completion tests and inspections. For many projects there is likely to be no requirement for commissioning either before or after the Facilities are otherwise complete. In those cases this Schedule may become no more than the Completion Criteria against which to test completion of the Facilities.</p> <p>In any event, the Completion Criteria should be limited to matters for which the construction sub-contractor will be solely responsible as senior funders will want to be certain that the construction sub-contractor is liable for liquidated damages if the Payment Commencement Date is delayed for any reason other than a Compensation Event. Authorities should also beware of including requirements in the Completion Criteria, such as decanting Authority equipment from existing premises, that risk leaving the Authority with no option but to accept service commencement despite not all the Completion Criteria having been met.</p> <p>Any amendment to the MIM Standard Form Project Agreement will require Welsh Government approval.</p> |
| 10 | <p>Appendix A, Table A:</p> <p>Examples of Authority hardware could include interactive white boards, teacher walls, and audio systems.</p> |
| 10 | <p>Paragraph 2.1.13</p> <p>Authorities may need to adjust requirements to accommodate a post-completion works phase for playing fields.</p> |
| 10 | <p>Paragraph 2.1.25:</p> <p>Examples of specialist systems could include, sound, lighting and entertainment systems.</p> |
| 10 | <p>Paragraph 5.1 (Documentation):</p> <p>The following should be considered, where relevant, for educational facilities:</p> <ul style="list-style-type: none"> • Swimming pool systems and equipment commissioning certificate; • Multi Use Games Area (MUGA) completion certificate; and • Acoustic test results in accordance with the guidance of chapter 1.3 of Building Bulletin 93 Acoustic Design of Schools – A Design Guide. |
| 10 | <p>Appendix B</p> <p>Authorities should refer to Theme 2 of Chapter 3 of the EPEC/EUROSTAT Guide and ensure the specific criteria for determining whether construction of the asset is complete must be objective, clearly set out and robust.</p> |

| Schedule | Comment |
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| 11 | Equipment |
| 11 | Sector specific drafting for schools projects is included at Appendix 1 of this Chapter 6 and could be adapted as appropriate for other education sector projects. The drafting is subject to project specific requirements. |
| 12 | Service Requirements |
| 12 | <p>Section 1 - Service Level Specification</p> <p>Specific reference ought to be made to Chapter 2 of the EPEC/EUROSTAT Guide regarding the scope of services to be provided by Project Co on accommodation projects and Theme 4 of Chapter 3 of the EPEC/EUROSTAT Guide in connection with contractual standards.</p> <p>Service aspects that have previously often been regarded as part of hard FM services that have been excluded are:</p> <ul style="list-style-type: none"> • Window cleaning • Internal decoration (which may also include cleaning and replacement of carpets and other floor coverings) • Maintenance of soft landscaped areas • Cutting and marking of natural sports pitches <p>More extensive service requirements are not precluded, where they can be shown to demonstrate value for money, but the general expectation is that the Authority will arrange for the provision of these at revenue funded facilities on the same basis as it uses for their existing and capital funded facilities. Consideration will need to be given to practical interface with the Authority and any other soft service providers at the Facilities (e.g. in relation to access arrangements), as set out at Clause 5.4.</p> <p>The Authority will need to consider carefully the interface between the design and specification of the Facilities and the risks the Authority is retaining in relation to the Facilities (e.g. utilities consumption, security, internal redecoration) in the same way it would need to on a capital funded project.</p> <p>Note that the basic helpdesk service is restricted to dealing with Services related events. If an Authority wishes a more broadly based helpdesk that handles a broader scope of service requests, it should consider carefully whether this is best provided under the project or separately. In the latter case, the broad-based helpdesk must be one of the parties able to make reports to the project helpdesk.</p> |

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| | <p>One matter that may require particular consideration by Authorities is the issue of site-based staff for the Facilities, such as school caretakers. Where it is normal to have one or more persons based at the Facilities providing a range of services that includes aspects of the hard FM service (such as operating the building management system and providing a first line of reactive maintenance response), but also include roles such as opening and closing the Facilities, materials handling and laying out flexible spaces such as halls for particular uses (which do not form part of the hard FM service), there can be compelling arguments both ways on whether such staff should remain employed by the Authority (or the school) or be transferred to the private sector service provider. There are examples of both solutions and also of hybrid arrangements whereby the employee concerned performs roles for both parties. Anecdotal evidence is that experience of hybrid arrangements is mixed and depends largely on how well both parties plan and manage the arrangement. The Authority needs to recognise that, if it retains site staff who currently perform reactive maintenance (which will become the responsibility of the private sector), there may be implications for response times and/or costs of service compared with what might be agreed if those site staff were available to the private sector service provider. The Welsh Government does not consider that there is a right solution for all circumstances and recommends that the Authority approach this on a case by case basis.</p> <p>The Performance and Availability Standards provide for Response Times. The aim is to ensure that irrespective of the Rectification Period, the Authority is told what steps will be taken to rectify the service event and when. In addition, if the nature of the event is such that there are health and safety or security implications Project Co must attend the Facilities and make them safe. The specific requirements in terms of response are project specific according to the nature and location of the Facilities and what it is reasonable and cost effective to require Project Co to achieve.</p> |
| 14 | Payment Mechanism |
| 14 | <p>This will require to be tailored on a project and sector specific basis (including to take account of phased completion where applicable, ratchet and consequential unavailability mechanisms). Authorities should discuss sector specific tailoring with Welsh Government, including for example relief from Unavailability where Alternative Accommodation is provided on specified terms.</p> <p>It includes the following principal features:</p> <ul style="list-style-type: none"> • It operates Deductions on the basis of whole days rather than several sessions within a day. This can be adapted to suit the circumstances. • There are minimum Deductions for Performance Failures and for Availability Failures. • Whole Facility unavailability remains an option for Facilities where loss of key areas or more than a specific percentage of the areas in the facility renders the whole of the Facilities unusable by the Authority. The relevant criteria will be project specific and may include, for example, a specific meals/catering areas condition. • The concept of Unavailable but Used is retained where the Authority elects to continue to occupy areas despite them not meeting the Availability Standards and the Deduction will be at 50% of the rate for Unavailability. |

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| | <ul style="list-style-type: none"> • Deductions for Performance Failures are fixed monetary amounts at one of three levels according to the severity of the failure. • Repeated failures will incur increased Deductions • Reporting failures incur Deductions in addition to any Deduction for the original failure. • Operational insurance premiums, energy, rates and water charges are pass-through costs. Note the Authority is directly responsible for connection and telephony costs. • Temporary rectification/making safe is potentially acceptable to rectify Service failures. • The Total Unavailability Deduction for each Contract Month will be the aggregate of all Deductions arising from Availability Failures (including where the relevant Facility is Unavailable but Used) for all Core Times in that Contract Month. <p>Authorities must contact the Welsh Government for further guidance on sector specifics and calibration of the Payment Mechanism / Service Level Specification.</p> |
| 14 | <p>Section 1</p> <p>Core Times</p> <p>These should be the times during which the Facilities are generally expected to be in use. It may be that different Core Times apply to different Functional Areas within the Facilities (e.g. limited to sports facilities at a school at weekends). See comments below for the implications this will have in relation to the Gross Monthly Availability Deduction and the Service Unit Rate.</p> <p>External Utility Failure</p> <p>No relief for External Utility Failure should be required where Project Co is required to provide back-up arrangements and so this definition may require amendment on a project by project basis.</p> <p>Gross Monthly Availability Deduction</p> <p>The monthly cap on Deductions operates so as to ensure that, over the course of a year, the total Deductions will be capped at an amount equal to the Annual Service Payment. In any Contract Month where the monthly cap exceeds the Monthly Service Payment, the drafting provides for the excess to be carried forward and set-off against future Monthly Service Payments (rather than being an amount payable by Project Co to the Authority). If different Core Times apply to different Functional Areas within the Facilities, then the drafting that defines the Gross Monthly Availability Deduction by reference to the “Daily SUF” should be selected.</p> <p>Minimum Availability Deduction</p> <p>The Minimum Availability Deduction indexes in line with the Annual Service Payment.</p> |

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| | <p>Logged Rectification Time & Logged Report Time</p> <p>The drafting in these definitions should be aligned with the Service Level Specification requirements for record keeping in the event of Helpdesk system failure.</p> <p>The definition of "Logged Report Time" should be amended in schools projects to refer to the Service Report being received "from an Authorised Caller".</p> <p>Rectification Period</p> <p>The drafting assumes Service Events reported outside Core Times will be relatively rare and will generally be of a type that requires Project Co to Respond by attending and making safe. Rectification Periods will, therefore, only begin at the start of the next Core Time. If an Authority wishes a higher level of service so that Rectification Periods are the same irrespective of when the Logged Report Time it should evaluate the costs and benefits of that requirement.</p> <p>The definition of "Rectification Period" should be amended in schools contracts so that the obligation on Project Co to promptly notify, is to the "School Representative and" the Authority Representative.</p> <p>Service Unit Rate</p> <p>If a single set of Core Times applies to the whole of the Facilities, then the Service Unit Rate for a Contract Year is the Annual Service Payment for that Contract Year divided by the product of multiplying the Service Units for the Facilities and the number of Days in the relevant Contract Year. If on some days only some Functional Areas have Core Times (such as sports facilities at a school at weekends) the Service Unit Rate should be calculated using TAGSUF (the aggregate of the Daily Service Units of the Facilities). It must be remembered that Service Unit Rate will need to be recalculated if there is a change to Core Times that affects the number of days on which only some Functional Areas have Core Times or the total Gross Service Units of the Functional Areas on such days changes.</p> |
| 14 | <p>Section 2</p> <p>Authorities will need to adjust paragraph 1 to reflect the appropriate approach to staged payments, i.e. to reflect the Phasing of the Works and/or retentions for Snagging Items and/or WiFi completion.</p> |
| 14 | <p>Section 3</p> <p>Paragraph 4.3</p> <p>Add the following wording at the end of Paragraph 4.3:</p> <p>"In such circumstances, Project Co shall co-operate with the Authority in the making of any arrangements to provide suitable temporary alternative accommodation (and travel to/from such temporary alternative accommodation) by it and shall keep the Authority informed and updated on a daily basis of the date or dates it anticipates the relevant Functional Areas will cease being Unavailable."</p> |

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| | <p>Paragraph 4.4</p> <p>The following drafting should be inserted where Clause 40.1.8 of the education sector specific drafting is used:</p> <p>"4.4 Calculation of Unavailability Deductions</p> <p>The Total Unavailability Deductions for each Contract Month will be the aggregate of all Unavailability Deductions and Unavailable but Used Deductions for all Core Times in that Contract Month being:</p> <p>The Unavailability Deductions for the period of Unavailability in respect of each Unavailable Functional Area shall be calculated as follows:</p> $\text{TUD} = \text{UD} + \text{UUD}$ <p>where:</p> <p>TUP = the Total Unavailability Deductions for all Facilities;</p> <p>UD = the aggregate of the Unavailability Deductions for each Functional Area in each Facility</p> <p>UUD = the aggregate of the Unavailable but Used Deductions for each Functional Area in each Facility"</p> <p>Definitions of Unavailability Deductions and Unavailable but Used Deductions will also be required and reference should be made here to any applicable ratchets and/or consequential unavailability as relevant.</p> <p>IF</p> <p>The indexation factor should reflect the proportion of the Annual Service Payment that represents the indexing of Project Co costs.</p> <p>RPI₀ and RPI_n</p> <p>The Authority should consider whether RPI is the most appropriate index to use.</p> <p>Authorities may wish to consider the application of multipliers to Deductions affecting certain Functional Areas at certain times (e.g. school halls during exam periods) in which case the standard drafting will require to be amended.</p> |
| 14 | <p>Section 6</p> <p>Paragraph 1</p> <p>Delete this paragraph if the Authority procures Energy, water and telecoms services in its own name.</p> <p>Paragraph 2</p> <p>To be decided by the Authority on a project by project basis whether it wants to make Project Co responsible for paying Rates, and reimburse these as a Pass Through Cost or pay Rates itself.</p> |
| 16 | <p>Section 7</p> <p>In multi-facility projects in the education sector, such as batched schools, an</p> |

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| | <p>Authority may wish to have the ability to remove one facility from the Project. Where this is the case, the following drafting should be included as a new Section 7 of Schedule 16 (<i>Change Protocol</i>):</p> <p>Partial Termination</p> <p>1 Provided the Authority’s right under this paragraph 1 of this Section 7 shall not be exercised more than [◆] times during the Project Term, at any time following the date that falls ten (10) years after the [Actual Completion Date/ final Phase Actual Completion Date] the Authority may serve notice of its intention to remove a Facility from this Agreement by way of an Authority Change Notice for a High Value Change (a "Partial Termination Authority Notice of Change") in accordance with this paragraph 1 and with paragraph 2 of this Section 7.</p> <p>2 The Authority’s right under paragraph 1 of this Section 7 may only be exercised by the Authority where a Partial Termination Event has arisen. No change of status of a Facility or a [School Entity] will trigger a partial termination under this Section 7.</p> <p>3 Subject to paragraphs 4 and 5 of this Section 7, where the Authority has served a Partial Termination Authority Notice of Change, the provisions of paragraphs 2 to 17 of Section 4 of this Schedule 16 shall apply save that Project Co shall include in its High Value Change Proposals details of the amount that is standing to the credit of the [Maintenance Reserve Account] (as defined in the [Credit Agreement]), or that would have been standing to the credit of that account had Project Co complied with its obligations under the [Credit Agreement] that relate to the Schedule of Programmed Maintenance for the affected Facility. Project Co shall not be entitled to serve a notice under paragraph 3.1 of Section 4 of this Schedule 16 in respect of any Partial Termination Authority Notice of Change.</p> <p>4 Proposals delivered by Project Co under paragraph 3.1 of Section 4 of this Schedule 16 relating to a Partial Termination Authority Notice of Change shall be calculated on the basis that the partial termination shall be carried out on the basis that:</p> <p>4.1 the Base Case Equity IRR shall be adjusted by []% relative to a “no better no worse” position in accordance with paragraph 9 of Section 6 (<i>Changing the Financial Model</i>) of this Schedule 16; and</p> <p>4.2 the Annual Service Payment shall other than as set out in paragraph 4.1 of this Section 7 be adjusted so as to leave Project Co in a “no better no worse” position in accordance with paragraph 9 of Section 6 (<i>Changing the Financial Model</i>) of this Schedule 16.</p> <p>5 In the event a High Value Change Proposal pursuant to a Partial Termination Authority Notice of Change is confirmed by the Authority in accordance with paragraph 8.2.1 of Section 4 of this Schedule 16 the adjustment to the Annual Service Payment under paragraph 13 of Section 4 of this Schedule 16 shall be carried out on the basis that the Base Case Equity IRR shall be adjusted by [◆]% relative to a “no better no worse” position in accordance with paragraph 9 of Section 6 (<i>Changing the Financial Model</i>) of this Schedule 16;</p> |

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| | <p>The following additional definitions will also be required:</p> <p>"Base Case Equity IRR" means [INSERT NUMBER] per cent;</p> <p>"Partial Termination Authority Notice of Change" has the meaning given to that term in paragraph 1 of Section 7 (Partial Termination) of Schedule 16 (<i>Change Protocol</i>);</p> <p>"Partial Termination Event" means any of the following:</p> <p>(a) the affected Facility is to transfer from its current site to a new site and a [school] will no longer operate from the current Site; or</p> <p>(b) the affected Facility is to be discontinued and a [school] will no longer operate from the current Site;</p> <p>["School Entity" means [◆];]</p> |
| 28 | Disaster Plan |
| 28 | <p>The Authority and Project Co should develop and agree a planned course of action in the event of a disaster occurring, which should be set out in Schedule 28. To the extent a responsible and sensible plan can be put in place and then implemented should any disaster occur, it is likely to assist the Authority and Project Co in claiming under any relevant policies of insurance. The Disaster Plan should tie in with the Authority's Major Incident Plan policies and should include the following:</p> <ul style="list-style-type: none"> • Project Co obligation to ensure Service continuity during any incident, such that Authority Services can continue with as little disruption as possible, together with detail of how this will be achieved (e.g. utility failure); • Project Co obligation to ensure co-operation in the maintenance of any temporary accommodation; • Project Co obligation to identify and provide a command room, incident command team and command management structure; • Project Co obligation to participate in emergency planning; • Project Co obligation to participate in training, where required by the Authority; • Project Co obligation to participate in the preparation of Authority emergency planning policies; and • Authority obligation to pay the proper cost incurred by Project Co for any additional/alternative services against Project Co's invoice in respect of each Contract Month during which the additional/alternative services are being provided. |

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| | The Authority should consult with its insurance advisers in developing the Disaster Plan. |

Appendix 1 to Chapter 6

SCHEDULE 11 – EQUIPMENT

PART 1 – General

1. EQUIPMENT

1.1 Project Co Equipment

Without limiting its other obligations under this Agreement, Project Co will procure, deliver to and where necessary [construct, install, commission and (subject to paragraph 1.1(g) below) maintain] at the Facilities, the Project Co Equipment.

- (a) Project Co represents, warrants and undertakes to the Authority that in so procuring, delivering, constructing, installing, commissioning and (subject to paragraph 1.1(g) below) maintaining the Project Co Equipment it will:
 - (i) comply with Good Industry Practice, Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*), Schedule 12 (*Service Requirements*), this Schedule 11 (*Equipment*), Clause 20 (*Quality Assurance*) and Law and all Consents;
 - (ii) comply with its obligations under Clause 23 (*Maintenance*); and
 - (iii) replace any item of Project Co Equipment and make it available for use before it becomes unreliable, unsafe, has significant deterioration from the condition it should have been in or becomes unsuitable for its intended purpose or unable to properly operate and function.
- (b) Project Co will not remove any Project Co Equipment from the Facilities during the Project Term, (except for such temporary removal as may be required for replacement, maintenance and repair agreed in advance with the Authority's Representative) without the consent of the Authority's Representative (such consent not to be unreasonably withheld or delayed).
- (c) The Project Co Equipment will have the benefit of any warranties available from manufacturers and/or suppliers and which are included in the price of the Project Co Equipment. Project Co will use all reasonable endeavours to procure such warranties are assignable in favour of the Authority.
- (d) Any interest of any third party in any Project Co Equipment will be notified to the Authority as soon as reasonably practicable after Project Co is or should be aware of any such interest. No third party will have any interest in any Project Co Equipment which would or might act to the detriment of the Authority in exercising its rights under this Agreement.
- (e) The Project Co Equipment will remain in the ownership of Project Co until the end of the Project Term.
- (f) Project Co will ensure any Leased Equipment will be leased on terms which allow Clause 48 (*Handback Procedure*) to have effect at no cost to the Authority in excess of any included in respect thereof in the Base Case.
- (g) Project Co will not be responsible for the maintenance or replacement of Supply Only Equipment, unless agreed in writing between Project Co and the Authority or unless otherwise provided for in this Agreement.

1.2

Authority Equipment

(a) Decanting and Installation of Authority Equipment

Project Co will, at its own cost, decant and relocate the Authority Equipment from the relevant [Existing Facility] directly to the relevant Facility pursuant to the Decant Protocol so that it is available for use in accordance with Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) and Schedule 12 (*Service Requirements*) and the terms of this Agreement, from the relevant [Actual Completion Date for a Facility]. In the event Project Co fails in its obligations to decant the Authority Equipment as required under this Agreement, the Authority may within three (3) Business Days of the Planned Decant Completion Date undertake such decanting and recover the cost of doing so from Project Co as a debt.

(b) The Authority shall comply with its obligations under Part 4 (*Decant Protocol*) of this Schedule 11 (*Equipment*) and shall procure that Project Co, its Sub-Contractors and their respective employees and agents have access to the [Existing Facilities] at the times agreed in the Decant Timetable for the sole purpose of allowing Project Co to perform its obligations pursuant to Clause 1.2(a) above.

(c) [Notwithstanding anything to the contrary in this Agreement, where the only failure(s) to satisfy the Completion Criteria in relation to a Facility arise as a direct result of a breach by the Authority of its obligations contained in the Decant Protocol, then:

(i) the Independent Tester shall issue a Certificate of Practical Completion if it is satisfied all the other Completion Criteria have been met in relation to the relevant Facility; and the parties shall agree, acting reasonably, any necessary revision to the Decant Timetable for the relevant Facility in accordance with the Decant Protocol. To the extent Project Co subsequently breaches the Decant Protocol in relation to the relevant Facility, the provisions of Schedule 14 (*Payment Mechanism*) shall apply.]

(d) Maintenance of Authority Equipment

Authority Equipment will at all times remain in the ownership of the relevant Existing Facility or Facility and Project Co will not be responsible for its maintenance and replacement unless agreed in writing between Project Co and the Authority or unless otherwise provided for in this Agreement.

(e) Handback

The Authority Equipment will not be subject to the Handback Requirements.

PART 2 – PROJECT CO EQUIPMENT

1. Project Co Equipment Classification

- (a) The Project Co Equipment shall include the supply only equipment, the supply and maintain equipment and all fixed and loose furniture required in accordance with Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) and the [◆] room layout drawings.
- (b) The Project Co Equipment requirements are split into [◆]³⁸ separate sections:
 - (i) Supply Only Equipment as detailed in Appendix [◆] to this Schedule 11 (*Equipment*);
 - (ii) Supply and maintain Project Co Equipment as detailed in Appendix [◆] to this Schedule 11 (*Equipment*); and
 - (iii) Furniture (fixed & loose) as detailed in Appendix [◆] Data Sheets of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*).

³⁸ Further split in classes of equipment to be considered as necessary.

APPENDIX [◆] TO PART 2

[◆]

PART 3 – AUTHORITY EQUIPMENT

1. **Authority Equipment Classification**

- (a) Project Co shall relocate all Authority Equipment in accordance with the requirements of Part 4 (*Decant Protocol*) of this Schedule 11 (*Equipment*).
- (b) Notwithstanding the requirements of Part 4 (*Decant Protocol*) of this Schedule 11 (*Equipment*), Project Co shall install and commission the Authority Equipment as outlined in paragraph (c) below. Project Co shall provide for such relocation, installation and commissioning in the design of the Works.
- (c) Authority Equipment shall include:

| [School 1] | |
|------------|--------|
| Item | Number |
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| [School 2] | |
| Item | Number |
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| [School 3] | |
|------------|--------|
| Item | Number |
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| | |
| | |
| [School 4] | |
| Item | Number |
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PART 4 – DECANT PROTOCOL

1 Introduction and Interpretation

- (a) This Part 4 (*Decant Protocol*) of Schedule 11 (*Equipment*) sets out the scope, responsibilities, organisation, management and processes agreed for the planning and implementation of the Decant.
- (b) A recommended decant sequence is provided in this protocol. Any actions set out in this protocol, unless stated otherwise, are to be performed by Project Co.
- (c) Project Co shall notify the Authority of its proposed move contractor and, at Project Co's own cost, Project Co shall procure the appointment of an appropriately skilled and qualified move contractor with the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed) in order to carry out the Decant.
- (d) Project Co shall plan and, save to the extent set out in the Programme and/or the Decant Timetable or otherwise agreed by the Authority, execute the Decant to ensure it occurs outside of School Term and that there shall be no disruption to the Authority Services. No part of the Decant shall coincide with periods of Critical Academic Function. This should be reflected in Project Co's Decant Timetable for each Facility. In developing the Decant Timetable Project Co shall consider all third party interfaces which may be required.

2 Buildings

Each Existing Facility may have a number of areas with difficulties such as outside classrooms, single and multi-storey blocks, isolated buildings with long winding corridors and different levels within each block. Each of these areas will be tackled on their own merits and their priority listing would be to generally start from the top of each building, and work down to the ground floor as the decant process progresses.

Within the Existing Facilities where lifts are present within the buildings these will be utilised to remove boxed items to the ground floor.

Existing Facilities for which decanting will be required are:

- [◆]
- [◆]

3 Information

The Authority shall, not less than [three (3)] months before the Planned Decant Start Date in respect of each Existing Facility, provide to Project Co an updated Authority Equipment list, which will include the identification of the following items of Authority Equipment:

- (a) items considered by the Authority to be of a fragile nature; and
- (b) all hazardous materials.

If the Authority requires any hazardous materials not included on the Authority Equipment list to be moved as part of the Authority Equipment, such hazardous material must be identified

to Project Co, and Project Co shall have a right to object to such move if such move would cause material increase in cost to Project Co.

If Project Co reasonably believes the Decant of an item of Loose Equipment to any Facility will cause the Facility not to comply with applicable Law at the time of such Decant, then Project Co shall have a right to notify the Authority as soon as reasonably practicable of such anticipated non-compliance and a proposed solution or solutions within two (2) Business Days of becoming aware of such anticipated non-compliance, and, provided such Decant will actually cause such non-compliance with applicable Law, the Authority will take into account the reasonable representations in relation to such solution or solutions made by Project Co.

4 Access

The Existing Facilities will only be approached by designated vehicular routes, which shall be agreed in writing between the Authority's Representative and Project Co prior to the commencement of the Decant.

Drivers will carry out their duties within the school areas and drive between the Existing Facilities and the Facilities and will be instructed on a variety of issues, including:

- (a) to drive at a safe speed, taking cognisance of the weather, speed and use of the road by others including pedestrians;
- (b) to reverse only in the presence of a second employee acting as banks man; and/or
- (c) to comply with all speed limits.

5 Crates

Crates, sealing tape and labels for use by the staff of the Existing Facilities will be delivered in accordance with the Decant Timetable.

An area within the Existing Facility will be identified by the Authority for the short term storage of the empty crates upon delivery.

Guidance will be provided by Project Co in the use of the crates, labels and tape.

Project Co will allow for the provision of sufficient crates to move all the Authority Equipment (total weight of each crate when packed will not exceed [(25kg)]). The crates will be rigid plastic with lids that are safely stackable six high (or similar). Any equipment which cannot fit into a crate will be labelled by the staff of the Existing Facilities and moved by Project Co.

Project Co shall provide all necessary information to each School Representative relating to training in the safe assembly, handling, sealing and stacking of crates provided by Project Co.

6 Labelling

Colour coded labels shall be used for designated areas of both the Existing Facilities and the Facilities. This is crucial to the success of the decant process when receiving and distributing crates within each Facility. Coloured labels will be supplied by Project Co. The Authority will inform Existing Facility staff in advance of the dates detailed in the Decant Timetable as set out in paragraph 1 of this Part 4 (the "**Decant Timetable**").

7 Authority Equipment

- (a) For the purposes of this Agreement, all equipment (including Loose Equipment) and items stored in crates, labelled or prepared for removal from the Existing Facilities to the Facilities in accordance with this Part 4 (*Decant Protocol*) shall comprise Authority Equipment.
- (b) Project Co shall supply all labour, materials, transportation and equipment (including move crates, labels, tape, seals, protective material, wrapping, specialist packaging and tackle) necessary to manage and implement the Decant.
- (c) Project Co will be responsible for:
 - (i) identifying a sufficient number of crates required for the Decant;
 - (ii) providing such crates by the relevant date specified in accordance with the Decant Timetable; and
 - (iii) ensuring the Decant of all Authority Equipment can be carried out by Project Co in a timely manner and in accordance with this Part 4 (*Decant Protocol*).
- (d) The Authority shall, unless prevented by reason of any breach by Project Co of its obligations under this Agreement, be responsible for:
 - (i) the packing of Authority Equipment (excluding Loose Equipment) within the crates provided in accordance with paragraph 7(c)(ii) above by the date specified in the Decant Timetable for such packing; and
 - (ii) labelling such packed crates (with the colour coded labels provided by Project Co as referred to in paragraph 6 above (*Labelling*)).
- (e) Project Co shall, unless prevented by reason of any breach by the Authority of its obligations under this Agreement, be responsible for the packing and unpacking for all Loose Equipment, all information technology equipment, photocopiers and heavy items (as necessary).
- (f) The Authority shall, unless prevented by reason of any breach by Project Co of its obligations under this Agreement, unpack such items of Authority Equipment referred to in paragraph 7(d) above from the crates within two (2) full School Days (or such other period as may be agreed between the Parties) of the Authority being notified by Project Co that such crates being located within their correct locations within the relevant Facility.
- (g) Once the Authority has packed the crates in accordance with paragraph 7(d) above then Project Co shall move such crates along with the Loose Equipment to their new location in accordance with the provisions of this Part 4 (*Decant Protocol*).
- (h) The parties agree to provide each other with all reasonable assistance in relation to the Decant. In particular, Project Co agrees to provide such assistance as the Authority may reasonably require in respect of the lifting of any items of Authority Equipment weighing more than [twenty five (25) kilograms], and the provision of guidance on the use of crates, labels and tape.

8 Protection

Project Co will identify and use appropriate external entry doors to those parts of the Facilities that have adequate space to receive the dimensions of inbound crates. The flooring of these areas will be protected using hardboard, or other appropriate material. The hardboard will be laid and removed at the start and completion of the Decant process. All relevant doors and passageways will also be protected as necessary. Project Co will be responsible for the provision of all necessary safety signage and protection barriers as may be required.

9 Identification of Project Co Related Parties

Project Co Related Parties carrying out their duties within the confines of the Existing Facilities will be clearly identifiable as staff of the removals firm (“**Porters**”) by wearing suitably marked hi-viz vests or similar. If these persons are required to perform these duties during the School Day then security clearance must be obtained for each Project Co Party in accordance with Clause [◆] of this Agreement.

For the avoidance of doubt, all potential Project Co Related Parties or persons performing any portion of the Decant likely to come into contact with any pupil whilst at the Existing Facilities shall obtain security clearance in accordance with Clause [◆] of this Agreement

10 Report Times on Sites

Project Co Parties carrying out decant related works will arrive on the Sites/at the Existing Facilities and remain on site during periods previously agreed with the School/Authority ([◆] to [◆] minimum period on Site) until such time as all decanting work has been completed.

The Authority will be responsible for the control of opening and closing of the Existing Facilities buildings during the Decant. Access to and from the Existing Facilities decant outside the School Day will not be unreasonably withheld by the Authority and both parties acknowledge the requirement to work together to achieve the dates detailed within the Decant Timetable.

Discussion will be required if the Authority indicates that the Existing Facilities will close at a time which may be contradictory to the Decant Timetable. Guidance will be required at an early date and before the start date of a specific task.

11 Project Co’s Sole Point of Contact (“Manager”)

A migration manager will be appointed by Project Co who will be the sole point of contact for the Decant. The School Representative for each Facility will be solely responsible for direct liaison with the migration manager and the issue of any instructions.

It is to be agreed that all instructions, deviations from agreed plans etc, will be conveyed through the migration manager for instruction thereafter to the relevant Project Co Related Parties. It must be acknowledged by all parties that no approach can be made directly to any Project Co Party to alter his work practices or schedule to accommodate a task not designated in a particular system of undertaking at that time.

12 Packing and Preparation

The majority of items for packing by the Schools will consist of stationery, text books and may include small, lightweight teaching aid items and will include sports equipment in the form of balls, rackets, bats and the like.

Glassware and fragile instruments shall be wrapped in bubble wrap provided by Project Co and will be transferred by Project Co

13 The Move

The decant process is to be carried out in accordance with the Decant Timetable. A sufficient number of vehicles, (including where deemed appropriate by Project Co mechanical moving equipment) and porters to undertake the Decant within the specified period will be provided by Project Co Care in the handling of all crates and all Loose Equipment to be transferred will be provided and tidiness on site will be considered an essential part of that process.

14 Damage and losses during the move

- (a) Project Co shall be responsible for all the Authority Equipment in its care, including but not limited to the period during which such property is in transit from the Existing Facilities to the Facilities.
- (b) Subject to paragraph 14(c) below, Project Co shall remedy and make good any loss or damage to the Authority Equipment in accordance with paragraphs 14(d) to 14(l) inclusive.
- (c) To the extent any Authority Equipment is broken or otherwise damaged, or lost, the Authority shall as soon as reasonably practicable upon becoming aware, provide evidence to Project Co of such breakage, damage or loss.
- (d) If an item of Authority Equipment is broken or otherwise damaged during the Decant and Project Co has:
 - (i) repaired or replaced the item with an object of equivalent specification and quality to the Authority's satisfaction by 0730 on the first School Day following such Decant, then it will be deemed to have been moved in accordance with Project Co's obligations in this Part 4 (*Decant Protocol*), or
 - (ii) not repaired or replaced the item in accordance with paragraph 14(d)(i) above, as soon as reasonably practicable, and no later than two (2) Business Days after becoming aware of the breakage, Project Co shall present to the Authority the following options in respect of any broken item insofar as they are applicable:
 - (A) Project Co pays compensation to the Authority such compensation as shall be sufficient to purchase an item of equivalent specification and quality applicable to such item to the satisfaction of the Authority (acting reasonably);
 - (B) Project Co procures the repair of the broken item and gives an estimated date for the repair;
 - (C) Project Co procures the temporary repair of the broken item such that it functions until Project Co procures its repair or replacement in accordance with paragraphs 14(d)(ii)(B) or (D) in respect of which estimated dates will be given;
 - (D) Project Co procures the replacement of the broken item with an item of equivalent specification and quality and gives an estimated date for the installation of the replacement; and/or

- (E) Project Co procures the temporary replacement of the broken item until Project Co procures a repair or replacement in accordance with paragraphs 14(d)(ii)(B) or (D) above in respect of which an estimated date will be given;
- (e) The Authority and Project Co, both acting reasonably, shall agree which option or options in paragraph 14(d) shall be implemented (including, but not limited to, the rectification period within which the temporary and permanent repair or replacement must be completed), and if such agreement cannot be reached, determined in accordance with Clause 57 (*Dispute Resolution Procedure*) of this Agreement, and Project Co shall implement such agreed or determined option or options.
- (f) In respect of a broken item it shall be deemed to be moved (for the purposes of determining whether the sign off procedure is complete) as follows:
 - (i) where the option in paragraph 14(d)(ii)(A) is agreed the item shall be deemed to be moved on the day the compensation is paid by Project Co to the Authority;
 - (ii) where the option in paragraph 14(d)(ii)(B) is agreed it shall be deemed to be moved on the day the repair is effected; and
 - (iii) where the option in paragraph 14(d)(ii)(D) is agreed it shall be deemed to be moved on the day the replacement is installed,

and in each case Project Co and the School Representative shall each in their respective opinions verify the same and the Decant Completion Certificate in accordance with Appendix [◆] of Schedule 22 (*Certificates*) shall be updated accordingly.
- (g) If an item is lost during the Decant and Project Co:
 - (i) has found or replaced the item with an object of equivalent specification and quality to the Authority's satisfaction by 0730 on the first (1st) School Day following such Decant, then it will be deemed to have been moved; or
 - (ii) has not found or replaced the item in accordance with paragraph 14(g)(i), Project Co shall promptly, and no later than two (2) Business Days after becoming aware of the loss, advise the Authority of the estimated date upon which a replacement item of equivalent specification and quality can be installed and if such replaced item is to the Authority's satisfaction and can be installed within five (5) Business Days following the planned Decant completion date, Project Co shall promptly order the replacement item and install such replacement item within five (5) Business Days.
- (h) If such estimated date for replacement is later than the five (5) Business Days following the planned Decant completion date, Project Co and the Authority shall within two (2) School Days of the notification referred to in paragraph 14(g)(ii) above, both acting reasonably, agree which of the following options to implement:
 - (i) Project Co shall pay compensation to the Authority such compensation as shall be sufficient to purchase an item of equivalent specification and quality applicable to such item to the satisfaction of the Authority (acting reasonably); or

- (ii) Project Co procure the replacement of the lost item with an item of equivalent specification and quality to the satisfaction of the Authority (acting reasonably) (including, but not limited to, the rectification period within which the replacement must be completed),

and if such agreement cannot be reached, the option to be implemented shall be determined in accordance with Clause 57 (*Dispute Resolution Procedure*) of this Agreement.

- (i) Project Co shall order the replacement item pursuant to paragraph 14(g)(ii) or, if applicable shall implement the option agreed pursuant to paragraph 14(h).
- (j) In respect of an item which is lost it shall be deemed to be moved (for the purpose of determining whether the Decant Completion Certificate may be issued) as follows:
 - (i) where the option in paragraph 4.14(h)(i) is selected by the Authority, the item shall be deemed to be moved on the next Business Day after the day Project Co pays the compensation to the Authority (which date for payment shall not be earlier than the fifth (5th) Business Day following the Decant and not later than the tenth (10th) Business Day following the Decant); and
 - (ii) where Project Co orders the replacement item pursuant to paragraph 4.14(g)(ii) or where, if applicable, the option in paragraph 4.14(h)(ii) is agreed, the item shall be deemed to be moved on the date the replacement is installed, and
 - (iii) each of the migration manager and the School Representative shall in their respective opinions verify the same and the Decant Completion Certificates shall be updated accordingly.
- (k) If Authority Equipment is broken, lost, or otherwise damaged by Project Co, its employees, agent or sub-contractor in carrying out the Decant, Project Co shall remain responsible for such breakage, loss or damage notwithstanding any acknowledgement of the Decant Completion Certificate by the Authority's Representative, and the certification of the Decant Completion Certificate by the migration manager shall not waive, prejudice or in any way compromise the Authority's rights under this Agreement.
- (l) Liability for all loss, breakage or other damage of any Authority Equipment shall be responsibility of Project Co and Project Co shall bear all costs in relation to any repair or replacement preferred to in this paragraph 14.

15 Decant Completion Date

The Decant Completion Certificate shall be in the form included Appendix [◆] of Schedule 22 (Certificates) .

16 Insurance

For the avoidance of doubt, Project Co shall be required to maintain insurances in relation to the Decant as specified within the Clause 54 (*Insurances*) of this Agreement.

17 Decant Process / Decant Completion

To achieve a systematic and economical Decant the following procedure will be undertaken:

- (a) one floor at a time will be completely “boxed up” and cleared out of the Existing Facility before commencing onto lower floors, regardless of where it is going in the Schools. The migration manager along with the School Representative will upon completion of each floor check and sign off each area within the Existing Facilities on the relevant Decant Completion Certificate; and
- (b) subject to paragraph 15(a) above, upon the delivery of the last crate(s) to the correct locations in the relevant School and the subsequent sign-off by Migration Manager along with the School Representative on the relevant Decant Completion Certificate, the Decant will be deemed to be complete.

18 Post Decant Activities

For the avoidance of doubt, the following activities will occur after completion of the Decant process:

(a) Unpacking

The staff of the Existing Facilities will be responsible for the unpacking of crates.

(b) Removal of empty crates

Following the unpacking of the crates, the staff of the Existing Facilities will make available the empty crates by the date in the Decant Timetable. Project Co shall collect the empty containers from an agreed central storage location and remove from Site on the date in the Decant Timetable or other such date as may be agreed with the Authority's Representative.

(c) Removal of Existing Facility items of Equipment

Within a period of two weeks following the relevant [Actual Completion Date for each School], the Authority will be entitled to remove from the Existing Facilities any equipment that does not form part of the Authority Equipment.

19 Decant Timetable

| School | [◆] | [◆] | [◆] |
|--|-----|-----|-----|
| Existing Facility | [◆] | [◆] | [◆] |
| Planned Decant Start Date | | | |
| Empty crates delivered to the Existing School by Project Co | | | |
| Empty crates packed and labelled by the Existing Facility | | | |
| Loose Equipment, all information technology equipment, photocopiers and heavy items to be packed by Project Co | | | |
| Filled crates and Loose Equipment transported from the Existing Facility to the Schools by Project Co | | | |
| Empty crates available for removal by Project Co | | | |

The dates in this timetable will be varied by an agreement of the parties (acting reasonably) in the event there is a material delay to relevant Planned Completion Date in respect of a School.

Additional Definitions:

- "Authority Equipment"** means the equipment set out in Part 3 (*Authority Equipment*) to Schedule 11 (*Equipment*);
- "Base Case"** means the base case for the purpose of the Financial Model at Financial Close as the same may be amended from time to time in accordance with in accordance with Section 6 (*Changing the Financial Model*) of Schedule 16 (*Change Protocol*);
- "Critical Academic Function"** [has the meaning given to it in Schedule 14 (*Payment Mechanism*);]

| | |
|---|---|
| "Decant" | means the completion by Project Co of the removal of all equipment, items and materials to be removed from the Existing Facilities to the Facilities in accordance with the terms of the Decant Protocol; |
| "Decant Completion Certificate" | means the certificate to be issued in accordance with Appendix [◆] of Schedule 22 (<i>Certificates</i>); |
| "Decant Protocol" | means the Protocol set out in Part 4 (<i>Decant Protocol</i>) to Schedule 11 (<i>Equipment</i>) identifying the obligations and responsibilities of the Parties in relation to the removal of items from the Existing Facilities and their relocation and installation in the Facilities; |
| "Decant Timetable" | means the decant timetable set out at paragraph 19 of Part 4 (<i>Decant Protocol</i>) of Schedule 11 (<i>Equipment</i>); |
| ["Leased Equipment" | means any Project Co Equipment which is subject to an operating lease with any third party, as set out in Appendix [◆] of Part 2 (<i>Project Co Equipment</i>) to Schedule 11 (<i>Equipment</i>) and shall be deemed to include any replacement;] |
| "Loose Equipment" | means any items identified by the Authority (using labels provided by Project Co) which cannot be packed into crates; |
| "Planned Decant Completion Date" | means the date upon which the Decant is set to complete as detailed in paragraph 19 (<i>Decant Protocol Timetable</i>) of Part 4 (<i>Decant Protocol</i>) of Schedule 11 (<i>Equipment</i>); |
| "Planned Decant Start Date" | means the date upon which the Decant is set to commence as detailed in paragraph 19 (<i>Decant Timetable</i>) of Part 4 (<i>Decant Protocol</i>) of Schedule 11 (<i>Equipment</i>); |
| "Project Co Equipment" | means the equipment supplied only by Project Co and the Equipment which is both supplied and maintained by Project Co, details of which are set out in Part 2 (<i>Project Co Equipment</i>) to Schedule 11 (<i>Equipment</i>); |
| "School Term" | [◆]; |
| ["Schools" | means |
| ["Supply Only Equipment" | means the equipment identified as supply only equipment in Appendix [◆] of Part 2 (<i>Supply Only Equipment</i>) to Schedule 11 (<i>Equipment</i>); |

Chapter 7: Roads Sector Specific Guidance

Authorities intending to procure a project for the design, build, financing and maintenance of a road in Wales should use the MIM Standard Form Project Agreement (Roads Version), in accordance with the following additional guidance. All references to the MIM Standard Form Project Agreement in this Chapter 7 refer to the MIM Standard Form Project Agreement (Roads Version).

| Clause | Comment |
|--|---|
| 5.5-5.6 | <p>General provisions are included to make clear that Project Co must keep the Project Road open for public use and so it can be used safely/conveniently by road users. This is particularly relevant in the case of road widening schemes for existing roads, where it will be important for the road to be kept open, albeit with traffic management.</p> <p>The Clauses should be amended further to relate the period in which the existing road shall be kept open e.g. for the term of the Project Agreement, and any differing periods for: new roads e.g. once completed and then for the term of the Project Agreement; temporary highways areas e.g. from the commencement until completion of the new road/completion of the works to the existing road.</p> |
| 9.1-9.2 | <p>It is often the case with Roads PPP Projects that the extent of access and occupation rights required by Project Co will differ during the works and services phase of the project. During the works phase, Project Co may require access to additional areas including temporary areas, for example, lay down areas and temporary highways for access. These are referred to in the Project Agreement as "Temporary Areas". The drafting provides a mechanism which can be tailored to reflect the extent of access and occupation rights required.</p> <p>Additional drafting is provided at Clause 9.6 where Project Co requires land rights in addition to those provided by the Authority. Such additional rights are the responsibility of Project Co to procure at its own cost.</p> |
| 9.8, Section 4 to Schedule 5 and associated definitions | <p>Roads PPP Projects carry the risk that the value of neighbouring land may reduce as a result of the works being carried out by Project Co. Neighbouring landowners may bring a claim for compensation for this loss of value. This is commonly referred to as a claim for injurious affection. It is typical in Roads PPP projects for the risk of compensation claims arising for injurious affection to be payable by Project Co.</p> <p>Under Roads PPP projects more generally, it is usual for the Authority to retain the risk of other compensation claims that may arise. These include claims for the market value of any land taken, disturbance payments to occupiers affected as a result of land take, statutory loss payments, claims for severance (where retained land loses value as a result of part being compulsorily acquired) and Part 1 claims arising from the use of the road, once operational. This responsibility of the Authority should be reviewed as to whether it extends to claims related to the additional land rights referred to in 9.1/9.2 above.</p> <p>The MIM Standard Form Project Agreement addresses the arrangements for any compensation claims arising from the compulsory purchase of land required for the Roads project. Where not applicable, these provisions should be deleted or amended to suit.</p> |
| 9.9 | <p>It is possible that following the completion of the Works Project Co does not require the same extent of land to undertake the operation and maintenance obligations under the Project Agreement.</p> |

| Clause | Comment |
|--|---|
| | <p>The drafting allows the Authority to consider whether such land can be excluded from the Project and be used for alternative purposes or disposed of accordingly.</p> <p>Prior to exercising such rights the Authority should take advice in relation to land disposal.</p> |
| 10 | <p>Site conditions and contamination are a Project Co risk. During procurement dialogue, the Authority should consider the value for money potential for bidders to be able to rely on (i) historical surveys undertaken prior to dialogue and (ii) provide the opportunity for bidders to be able to rely on surveys commissioned during dialogue. Such reliance will be provided by the party undertaking the survey and the Authority should not warrant any information contained in the surveys.</p> <p>Owing to the geographical extent of Roads PPP Projects, a diverse range of land, condition of land and other environmental matters may be encountered, for example, Sites of Special Scientific Interest and endangered species, which may not be encountered to such an extent in relation to accommodation type PPPs. Clause 10.3 sets out certain standards in relation to environmental law compliance.</p> |
| 11.4 -11.15, a new Schedule 29 and associated definitions | <p>It is common for Roads PPP projects to be subject to one or more third party agreements between the Authority and third parties. These third party agreements may relate to:</p> <ul style="list-style-type: none"> • rights of access and occupation of land, for example rights of way; and • the provision of other rights, permissions, consents and requirements. These may include, for example, Natural Resources Wales agreements to address the remediation of contaminated land or Network Rail Overbridge Agreements, each of which may be subject to certain conditions and obligations. <p>The Authority should consider the extent to which such rights and obligations exist and whether they should be passed on to Project Co or indeed retained as a responsibility of the Authority. To this end the Authority will need to undertake due diligence in relation to the extent of rights and obligations concerning third parties which may affect the Roads PPP Project.</p> <p>The MIM Standard Form Project Agreement provides a mechanism for the Authority to address the arrangements for third party agreements. Where not applicable, these provisions ought to be deleted.</p> <p>In addition and owing to the number of potential interested third parties it is often the case that liaison procedures and liaison forums are established to allow interested parties to be kept informed of activity. Drafting has been included to provide a mechanism which can developed on a per project basis to deal with liaison matters.</p> |
| 12.4, 12.6 to 12.17, a new appendix 3 to schedule 8 and associated definitions | <p>During the procurement dialogue and up until Financial Close on Roads PPP Projects, bids are formulated and evaluated by reference to a conceptual design. Following Financial Close, Project Co will develop its design into a detailed design, in order to include sufficient detail for construction and design purposes.</p> <p>A number of design and certification procedures, including the issue of appropriate certificates in relation to the relevant element of the Works need to be completed prior to the detailed design being utilised as part of the Works, including in relation to: existing structures; temporary works; earthworks; geotechnical works; temporary traffic management; archaeology, landscape and ecology, contaminated land; and road safety audits.</p> <p>The MIM Standard Form Project Agreement provides a mechanism which will</p> |

| Clause | Comment |
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| | <p>allow for these design and certifications procedures to be completed on a per project basis (tailored to suit the needs of the project).</p> <p>Under Schedule 8 (Review Procedure) (paragraph 1.5-1.8), there is a mechanism requiring Project Co to provide a Review Submission Schedule which sets out the Submitted Items to be submitted for review under the Review Procedure. This provides the Authority advance notice of the extent and nature of Submitted Items. On a practical level, there is potential for the Authority to receive either high volumes of or highly complex detailed design Submitted Items for review and for which it is prudent to allow the Authority advance warning in order to resource accordingly in preparation.</p> <p>Where Project Co fails to provide a Review Submission Schedule or submits a Submitted Item that is not in accordance with the Review Submission Schedule, then the Authority is able to respond as soon as practicable or within a longer time scale.</p> <p>Under paragraph 3.1 of Schedule 8 (Review Procedure) additional grounds for objection have been included, which are necessary to ensure that there is sufficient ability to comment on detailed design development which is inconsistent with the Authority's Work and Services requirements. Consideration of the Authority's statutory duties may also be relevant, particularly if the Authority is the highway authority, where it will need to take into consideration such statutory duties and its ability to discharge the same.</p> |
| 16 | <p>Rather than the Works being certified as complete by the issue of a Certificate of Practical Completion, for Roads PPP projects, a Permit to Use is issued which provides that the Works have been completed and may be made available for public use without traffic management restrictions. The drafting in Clause 16 reflects the approach taken to the issue of a Permit to Use.</p> <p>It may be the case that the Works are completed in one or more phases. The drafting in Clause 16 includes some illustrative drafting to accommodate phasing; however, these should be reviewed and tailored to suit the needs of the Authority on a per project basis.</p> <p>The Authority should consider the extent to which commissioning is relevant to the Roads PPP project. Much will depend on the nature of the relevant Roads PPP project, for example, whether the project utilises technology which will require separate testing and commissioning. Bespoke drafting will need to be developed in order to reflect the commissioning requirements based on the following:</p> <ul style="list-style-type: none"> • which parties will be responsible for commissioning; • the nature of the technologies involved; • the extent of integration between technologies; • the stages where commissioning is required to be undertaken e.g. pre-installation; • the conditions required for commissioning, for example, will live traffic conditions be required?; • whether successful commissioning is required as a condition to the commencement of the Service Payment; and |

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| | <ul style="list-style-type: none"> the performance testing criteria required for commissioning. <p>Under Clauses 16.15 to 16.18, the drafting in relation to WiFi related works completion and testing has been included from the Accommodation Project Agreement. This drafting should be reviewed on a per project basis, it may be relevant to future developments in technology, including, driverless vehicles and smart cars.</p> <p>The drafting may need to be amended to suit the needs of the relevant Roads project, including whether such WiFi testing should form part of the PTU criteria, rather than as a post-completion activity.</p> |
| 20.7-20.19 | <p>Provisions have been included within the main body of the Project Agreement in relation to traffic management and traffic signage. Such provisions include Project Co's obligations in relation to the general management of traffic, temporary traffic measures, providing traffic signage and following instructions of the police, emergency services and Relevant Authority in the event of an emergency.</p> <p>The detail in relation to traffic management and signage will need to be developed as part of the technical schedules to the Project Agreement. The drafting therefore provides a baseline position which can be reviewed and tailored for any given Roads PPP Project.</p> |
| 21, 39.2 a new schedule 33 and associated definitions | <p>Restricted Services are those operational and maintenance services which are required by the Authority to be undertaken during the construction of the Works. Their purpose is threefold:</p> <ul style="list-style-type: none"> to ensure the safe operation of the roads during construction; to ensure that certain standards of reporting and performance are met; and <p>to remove interface issues that would otherwise arise if the maintenance operations were carried out by a third party.</p> <p>Restricted Services typically include:</p> <ul style="list-style-type: none"> CAT 1 Defects i.e. defects that are a hazard; Winter Service; Incident Response; Litter picking, sweeping, sign cleaning and grass cutting; Abnormal Load Routing; Routine Maintenance Management System activities; Customer Helpline; and Reporting. <p>The Authority will need to consider whether and the extent to which any Restricted Services are required for any given project.</p> <p>The MIM Standard Form Project Agreement provides a mechanism that can be tailored on a per project basis.</p> <p>The Independent Tester will certify when Project Co has carried out the necessary measures to achieve the Restricted Services Readiness Criteria to enable Project Co to commence the Restricted Services. The Restricted Services Readiness Criteria must be set out in the Restricted Services Readiness Certificate in Schedule 33.</p> <p>Project Co is not entitled to receive any payment in respect of the Restricted</p> |

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| | Services until the Independent Tester has provided its readiness certification and the Restricted Services have commenced. The arrangements for payment of the Restricted Service Payments are set out in Schedule 14. |
| 22 and 23 | <p>The maintenance and lifecycle replacement Clauses have been retained in the Roads Project Agreement in order to provide a consistent approach with the Welsh Government's Accommodation Project Agreement. Clause 22 provides a high level overview of the maintenance that is planned to be undertaken and replacement commitments, with specific detail associated with the relevant service to the roads to be developed and included within the technical schedules to the Project Agreement.</p> <p>The Authority should consider this Clause with its technical advisor, with a view to tailoring the technical schedules to accommodate the service and replacement requirements of the Project, for example: asset management, routine inspection, reactive maintenance, routine/planned maintenance, winter and emergency call out, alongside the high level approach taken under Clause 22.</p> |
| 25 and associated definitions | <p>Latent defects are those defects that may exist in the project roads, structures and/or other facilities at the date of the Project Agreement, which could not reasonably have been identified by a competent person during a thorough inspection and investigation of the site, or from an analysis of the information available prior to entering into the Project Agreement.</p> <p>The MIM Standard Form Project Agreement addresses the arrangements in relation to latent defects and provides that the risk of latent defects shall be a Project Co risk. Project Co shall be responsible for any reconstruction, repair, reinstatement, remediation or other works required as a result of any defect in the Project Facilities, including any latent defect and shall bear the cost of carrying out the same.</p> <p>This position should be reviewed on a per Project basis and it may be the case that on some Projects making Project Co solely liable for latent defects does not represent best value. For example, where the Project includes existing roads with very old structures or structures which have a history of defects issues this may result in costly risk pricing. In these circumstances, the Authority may wish to consider alternative approaches (for example, the Authority may wish to take the risk for certain of these specific structures).</p> |
| 27.49 | <p>As noted in Chapter 4, the Project Agreements envisage no staff transfers. However, pensions drafting is included below, for use where staff transfer provisions are necessary.</p> <p>27.49 Project Co to secure Appropriate Pension Provision</p> <p>Project Co shall or shall procure that any Obligated Party shall ensure that all Eligible Employees are offered Appropriate Pension Provision with effect from the Effective Date up to and including the date of the termination or expiry of this Agreement.</p> |

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| | <p>27.50 Project Co Becoming an Admission Body within LGPS</p> <p>Where Project Co or any Obligated Party employs any LGPS Eligible Employees from a [Relevant] Service Transfer Date the provisions of this Clause 27.50 shall apply, save where the Authority accepts that exceptional circumstances exist where there are special reasons which mean that it would not be appropriate for the provisions of this Clause 27.50 to apply, in which case the provisions of Clause 27.53 shall apply instead.</p> <p>27.50.1 Project Co shall offer such LGPS Eligible Employees membership of the LGPS and shall procure that it and/or each relevant Obligated Party shall become an Admission Body. Project Co shall before the [Relevant] Service Transfer Date execute and procure that each relevant Obligated Party executes an Admission Agreement, which will have effect from and including the [Relevant] Service Transfer Date.</p> <p>27.50.2 The Authority shall before the [Relevant] Service Transfer Date execute each of the Admission Agreements referred to in Clause 27.50.1 and shall use reasonable endeavours to ensure that the Administering Authority (if different from the Authority) executes each such Admission Agreement before the [Relevant] Service Transfer Date. Without prejudice to the generality of this Clause 27.50, Project Co hereby indemnifies the Authority and/or any Future Service Provider and, in each case, their sub-contractors on demand from and against all Direct Losses suffered or incurred by it or them which arise from any breach by Project Co or any Obligated Party of the terms of any Admission Agreement to the extent that such liability arises before or as a result of the termination or expiry of this Agreement (howsoever caused).</p> <p>27.50.3 Without prejudice to the generality of the requirements of this Clause 27.50, Project Co shall procure that it and each relevant Obligated Party shall as soon as reasonably practicable obtain any indemnity or bond required in accordance with the Admission Agreements.</p> <p>27.50.4 The Authority shall have a right to set off against any payments due to Project Co under this Agreement an amount equal to any overdue employer and employee contributions and other payments (and interest payable) due from Project Co or from any relevant Obligated Party (as applicable) under the Admission Agreement.</p> <p>27.51 Project Co Participating in other Legacy Scheme</p> <p>Where Project Co or any Obligated Party employs any Non-LGPS Eligible Employees from a [Relevant] Service Transfer Date the provisions of this Clause 27.51 shall apply, save where the Authority accepts that exceptional circumstances exist where there are special reasons which mean that it would not be appropriate for the provisions of this Clause 27.51 to apply, in which case the provisions of Clause 27.53 shall apply instead.</p> |

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| | <p>27.51.1 Project Co shall offer such Non-LGPS Eligible Employees membership of the applicable Legacy Scheme and shall procure that it and/or each relevant Obligated Party shall enter into an appropriate Participation Agreement in respect of such membership. Project Co shall before the [Relevant] Service Transfer Date execute and procure that each relevant Obligated Party executes any appropriate Participation Agreement, which will have effect from and including the [Relevant] Service Transfer Date.</p> <p>27.51.2 The Authority shall, where appropriate, before the [Relevant] Service Transfer Date execute each of the Participation Agreements referred to in Clause 27.14.1 and shall, where required, use reasonable endeavours to ensure that any Participating Authority (if different from the Authority) executes each such Participation Agreement before the [Relevant] Service Transfer Date.</p> <p>27.51.3 Without prejudice to the generality of this Clause 27.14, Project Co hereby indemnifies the Authority and/or any Future Service Provider and, in each case, their sub-contractors on demand from and against all Direct Losses suffered or incurred by it or them which arise from any breach by Project Co or any Obligated Party of the terms of any Participation Agreement to the extent that such liability arises before or as a result of the termination or expiry of the Agreement (howsoever caused).</p> <p>27.51.4 Without prejudice to the generality of the requirements of this Clause 27.14, Project Co shall procure that it and each relevant Obligated Party shall as soon as reasonably practicable obtain any indemnity or bond required in accordance with any Participation Agreement.</p> <p>27.51.5 The Authority shall have a right to set off against any payments due to Project Co under the Agreement an amount equal to any overdue employer and employee contributions and other payments (and interest payable) due from Project Co or from any relevant Obligated Party (as applicable) under any Participation Agreement.</p> |
| | <p>27.52 Project Co Ceases to be an Admission Body</p> <p>If Project Co or any Obligated Party employs any Eligible Employees from a [Relevant] Service Transfer Date and:</p> <p>27.52.1 exceptional circumstances exist where there are special reasons for not providing LGPS Eligible Employees membership of the LGPS and/or Non-LGPS Eligible Employees membership of the applicable Legacy Scheme; or</p> <p>27.52.2 if for any reason after the [Relevant] Service Transfer Date Project Co or any relevant Obligated Party ceases to be an Admission Body or ceases to be able to participate in any applicable Legacy Scheme other than the LGPS other than on the date of termination or expiry of this Agreement or because it ceases to employ any Eligible Employees;</p> |

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| | <p>then the provisions of Clauses 27.50 and/or 27.51 shall not apply (without prejudice to any rights of the Authority under those Clauses) and the provisions of Clause 27.53 (Project Co's Scheme) shall apply.</p> <p>27.53 Project Co's Scheme</p> <p>Where this Clause 27.53 applies pursuant to Clause 27.52, the following shall apply:</p> <p>27.53.1 Project Co shall or shall procure that any relevant Obligated Party shall not later than the [Relevant] Service Transfer Date or the Cessation Date (as the case may be) nominate to the Authority in writing the occupational pension scheme or schemes which it proposes shall be Project Co's Scheme for the purposes of this Clause 27.16. Such pension scheme or schemes must be:</p> <ul style="list-style-type: none"> (a) established within three (3) months of the [Relevant] Service Transfer Date or Cessation Date (as the case may be); (b) reasonably acceptable to the Authority (such acceptance not to be unreasonably withheld or delayed); (c) a registered pension scheme for the purposes of Part 4 of the Finance Act 2004; and (d) certified by GAD or an actuary nominated by the Authority in accordance with relevant guidance produced by GAD as providing benefits which are the same as, broadly comparable to or better than those benefits provided by the applicable Legacy Scheme; <p>27.53.2 Project Co undertakes to the Authority (for the benefit of the Authority itself and for the Authority as agent and trustee for the benefit of the Eligible Employees) that it shall and shall procure that any relevant Obligated Party shall procure that:</p> <ul style="list-style-type: none"> (a) the Eligible Employees shall by three (3) months before the [Relevant] Service Transfer Date or the Cessation Date (as the case may be) be offered membership of Project Co's Scheme with effect from and including the [Relevant] Service Transfer Date or Cessation Date (as the case may be); |

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| | <p>(b) Project Co's Scheme shall provide benefits in respect of the Eligible Employees' periods of service on and after the [Relevant] Service Transfer Date or Cessation Date (as the case may be) which GAD or an actuary nominated by the Authority in accordance with relevant guidance produced by GAD shall certify to be the same as, broadly comparable to or better than the benefits which the Eligible Employees were entitled to under the applicable Legacy Scheme at the [Relevant] Service Transfer Date or the Cessation Date (as the case may be);</p> <p>(c) if Project Co's Scheme is terminated, a replacement pension scheme shall be provided with immediate effect for those Eligible Employees who are still employed by Project Co or any Obligated Party. The replacement scheme must comply with this Clause 27.16 as if it were Project Co's Scheme;</p> <p>(d) [before the [Relevant] Service Transfer Date or Cessation Date (as the case may be) the trustees of Project Co's Scheme shall undertake by deed to the Authority and to any Administering Authority or Participating Authority as may be required by the provisions governing any Legacy Scheme that they shall co-operate with the provisions of Clauses 27.16 and 27.17 to the extent applicable to them;] and</p> <p>(e) where Project Co's Scheme has not been established at the [Relevant] Service Transfer Date or Cessation Date (as the case may be), the Eligible Employees shall be provided with benefits in respect of death-in-service which are no less favourable than the death-in-service benefits provided by the Legacy Scheme immediately before the [Relevant] Service Transfer Date or Cessation Date (as the case may be). Such benefits will continue to be provided until death-in-service benefits are provided by Project Co's Scheme; and</p> <p>27.53.3 The Authority's actuary shall determine the terms for any bulk transfers from a Legacy Scheme to Project Co's Scheme following the [Relevant] Service Transfer Date and any subsequent bulk transfers on termination or expiry of this Agreement.</p> <p>27.54 Undertaking from Project Co</p> <p>Project Co undertakes to the Authority (for the benefit of the Authority itself and for the Authority as agent and trustee for the benefit of the Eligible Employees) that:</p> |

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| | <p data-bbox="507 277 1396 488">27.54.1 all information which the Authority or any Administering Authority or Participating Authority or their respective professional advisers may reasonably request from Project Co or any relevant Obligated Party for the administration of the Legacy Scheme or concerning any other matters raised in Clause 27.53 or this Clause 27.54 shall be supplied to them as expeditiously as possible;</p> <p data-bbox="507 506 1396 904">27.54.2 it shall not and shall procure that any relevant Obligated Party shall not, without the consent in writing of the Authority or any other person as may be required by the provisions governing any Legacy Scheme (which shall only be given subject to the payment by Project Co or the relevant Obligated Party of such reasonable costs as the Authority or any Administering Authority or Participating Authority may require) consent to instigate, encourage or assist any event which could impose on the Legacy Scheme or on the Authority a cost in respect of any Eligible Employee greater than the cost which would have been payable in respect of that Eligible Employee had that consent, instigation, encouragement or assistance not been given;</p> <p data-bbox="507 936 1396 1146">27.54.3 until the [Relevant] Service Transfer Date, it shall not and shall procure that any relevant Obligated Party shall not issue any announcements (whether in writing or not) to the Eligible Employees concerning the matters stated in Clauses 27.13 or 27.14 without the consent in writing of the Authority and any Administering Authority or Participating Authority (not to be unreasonably withheld or delayed);</p> <p data-bbox="507 1178 1396 1550">27.54.4 it shall not and shall procure that any relevant Obligated Party shall not take or omit to take any action which would materially affect the benefits under any Legacy Scheme or under Project Co's Scheme of any Eligible Employees who are or will be employed wholly or partially in connection with the Services without the prior written agreement of the Authority or any other person as may be required by the provisions governing any Legacy Scheme (not to be unreasonably withheld or delayed) provided that Project Co and/or such Obligated Party will be so entitled without the requirement of consent to give effect to any pre-existing contractual obligations to any Eligible Employees; and</p> <p data-bbox="507 1568 1396 1809">27.54.5 it shall and shall procure that any relevant Obligated Party shall offer any of its Eligible Employees who cease to be engaged in the provision of the Services and thereby cease to be eligible for membership of a Legacy Scheme membership of Project Co's Scheme as soon as reasonably practicable after ceasing to be so engaged unless such an Eligible Employee has voluntarily ceased to be engaged in the provision of the Services.</p> |

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| | <p>27.55 Discretionary Benefits</p> <p>27.55.1 Where Project Co or an Obligated Party participates in a Legacy Scheme, Project Co shall and/or shall procure that any relevant Obligated Party shall award benefits (where permitted) to the Eligible Employees under the Legacy Scheme in circumstances where the Eligible Employees would have received such benefits had they still been employed by the Authority; and</p> <p>27.55.2 Where the award of benefits in Clause 27.55.1 is not permitted under the Legacy Scheme or Project Co and/or an Obligated Party does not participate in the applicable Legacy Scheme, Project Co shall and/or shall procure that any Obligated Party shall award benefits to the Eligible Employees which are identical to the benefits the Eligible Employees would have received under the Legacy Scheme in circumstances where the Eligible Employees would have received such benefits had they still been employed by the Authority.</p> <p>27.55.3 Under Clause 27.55.1 and 27.55.2, where such benefits are of a discretionary nature, they shall be awarded on the basis of the Authority's written policy in relation to such benefits at the time of the [Relevant] Service Transfer Date (which the Authority shall provide upon request). Where the payment of such benefits is not, for whatever reason, possible, Project Co shall and/or shall procure that any relevant Obligated Party shall compensate the Eligible Employees in a manner which is broadly comparable or equivalent in cash terms.</p> <p>27.56 Claims from Eligible Employees or Trade Unions</p> <p>Project Co hereby indemnifies the Authority and/or any Future Service Provider and, in each case, their sub-contractors from and against all Direct Losses suffered or incurred by it or them which arise from claims by Eligible Employees of Project Co and/or of any Obligated Party or by any trade unions, elected employee representatives or staff associations in respect of all or any such Eligible Employees which losses:</p> <p>27.56.1 relate to pension rights in respect of periods of employment on and after the [Relevant] Service Transfer Date until the date of termination or expiry of this Agreement; or</p> <p>27.56.2 arise out of the failure of Project Co and/or any relevant Obligated Party to comply with the provisions of Clauses 27.49 to 27.59 before the date of termination or expiry of this Agreement.</p> |

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| | <p>27.57 Liability for Costs</p> <p>The costs of the Authority necessarily and reasonably incurred in connection with the Admission Agreement and/or of obtaining the necessary certification of comparability in accordance with Clause 27.16 shall be borne by Project Co.</p> <p>27.58 Transfer to another Employer</p> <p>Save on expiry or termination of this Agreement, if the employment of any Eligible Employee transfers to another employer (by way of a transfer under TUPE) Project Co shall and shall procure that any relevant Obligated Party shall:</p> <p>27.58.1 consult with and inform those Eligible Employees of the pension provisions relating to that transfer; and</p> <p>27.58.2 procure that the employer to which the Eligible Employees are transferred (the "New Employer") complies with the provisions of Clauses 27.49 to 27.59 provided that references to the "Sub-Contractor" will become references to the New Employer, references to "[Relevant] Service Transfer Date" will become references to the date of the transfer to the New Employer and references to "Eligible Employees" will become references to the Eligible Employees so transferred to the New Employer.</p> <p>27.59 Pension Issues on Expiry or Termination</p> <p>Project Co shall and shall procure that any relevant Obligated Party shall:</p> <p>27.59.1 maintain such documents and information as will be reasonably required to manage the pension aspects of any onward transfer of any person engaged or employed by Project Co or any Obligated Party in the provision of the Services on the expiry or termination of this Agreement (including without limitation identification of the Eligible Employees);</p> <p>27.59.2 promptly provide to the Authority such documents and information mentioned in Clause 27.59.1 which the Authority may reasonably request in advance of the expiry or termination of this Agreement; and</p> <p>27.59.3 fully co-operate (and procure that the trustees of Project Co's Scheme shall fully co-operate) with the reasonable requests of the Authority relating to any administrative tasks necessary to deal with the pension aspects of any onward transfer of any person engaged or employed by Project Co or any Obligated Party in the provision of the Services on the expiry or termination of this Agreement.</p> <p>Where this alternative drafting is used in this Clause 27, the following definitions should be added to Schedule 1:</p> |

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| | <p>"Administering Authority " has the meaning given to it in Schedule 1 of the Local Government Pension Scheme Regulations 2013 (SI No. 2356);</p> <p>"Admission Agreement" has the meaning given to it in Schedule 1 of the Local Government Pension Scheme Regulations 2013 (SI No. 2356);</p> <p>"Admission Body" has the meaning given to it in Schedule 1 of the Local Government Pension Scheme Regulations 2013 (SI No. 2356);</p> <p>"Appropriate Pension Provision" means in respect of Eligible Employees, either:</p> <ul style="list-style-type: none"> (a) membership, continued membership or continued eligibility for membership of their Legacy Scheme; or (b) membership or eligibility for membership of a pension scheme, which is certified by the GAD as being broadly comparable to the terms of their Legacy Scheme; <p>"Authority" means the contracting authority or public sector body in Wales to whom the Code of Practice is addressed;</p> <p>"Cessation Date" any date on which Project Co ceases to be an Admission Body or ceases to be eligible to participate in a Legacy Scheme other than the LGPS other than as a result of the termination or expiry of this Agreement or because it ceases to employ any Eligible Employees;</p> <p>"Direct Losses" means all damages, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an indemnity basis), proceedings, demands and charges whether arising under statute, contract or at common law;</p> |

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| | <p>"Effective Date" means the date(s) on which the Services (or any part of the Services), transfer from the Authority or any Third Party Employer to another Obligated Party, and a reference to the Effective Date shall be deemed to be the date on which the employees in question transferred or will transfer to another Obligated Party;</p> <p>"Eligible Employees" means LGPS Eligible Employees and Non-LGPS Eligible Employees;</p> <p>"Fair Deal Employee" means those Transferring Employees who are on the [Relevant] Service Transfer Date entitled to the protection of New Fair Deal and remain LGPS Eligible Employees, in any questions of doubt the Authority shall decide whether a person is a Fair Deal Employee, and in this Agreement means such employees employed by the Obligated Party;</p> <p>"Future Service Provider" means at the Authorities request any service provider who shall provide any service equivalent to any of the Services immediately after expiry or earlier termination of this Agreement;</p> <p>"GAD" means the Government Actuary's Department;</p> <p>"Legacy Scheme" means the pension scheme of which the Eligible Employees are members, or are eligible for membership of, or are in a waiting period to become a member of, prior to the Relevant Transfer;</p> <p>"LGPS" means the Local Government Pension Scheme established pursuant to regulations made in exercise of powers under sections 7 and 12 of the Superannuation Act 1972 (as amended from time to time);</p> |

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| | <p>"LGPS Eligible Employee" means:</p> <ul style="list-style-type: none"> (a) Transferring Employees who are active members of (or are eligible to join) the LGPS [or a broadly comparable scheme] on the date of a Relevant Transfer including the Effective Date; and/or (b) Third Party Employees who are former employees of the Authority and who were active members of (or who were eligible to join) the LGPS on the date of a previous Relevant Transfer of the Services; <p>"New Fair Deal" means the revised Fair Deal position set out in the HM Treasury guidance "Fair Deal for staff pensions: staff transfer from central government" issued in October 2013;</p> <p>"Non-LGPS Eligible Employee" means:</p> <ul style="list-style-type: none"> (a) Transferring Employees who are active members of (or are eligible to join) a Legacy Scheme other than the LGPS on the date of a Relevant Transfer including the Effective Date; and/or (b) Third Party Employees who are former employees of the Authority and who were active members of (or who were eligible to join) a Legacy Scheme other than the LGPS on the date of a previous Relevant Transfer of the Services; <p>"Obligated Party" means Project Co, any Contractor, any sub-contractor or any Service Provide whilst they employ [Fair Deal Employees];</p> <p>"Participating Authority" means any organisation which is required under the provisions governing any Legacy Scheme to supervise the administration of all or part of such Scheme;</p> |

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| | <p>³⁹"Participation Agreement "</p> <p>means an agreement between a Participating Authority and Project Co or any Obligated Party that named individuals, or all or any specified class of Project Co's or Obligated Party's employees, may be members of a Legacy Scheme other than the LGPS;</p> <p>"Relevant Transfer"</p> <p>means a relevant transfer for the purposes of TUPE;</p> <p>"Service Transfer Date"</p> <p>means the transfer on a date agreed by the Parties to Project Co of responsibility for provision of (or procuring the provision by an Obligated Party of) the Services in accordance with this Agreement;</p> <p>"Services"</p> <p>means the Services that Project Co is required to provide under this Agreement;</p> <p>"Third Party Employees"</p> <p>means Employees of Third Party Employers whose contracts of employment transfer with effect from the Effective Date to Project Co or an Obligated Party by virtue of the application of TUPE;</p> <p>"Third Party Employer"</p> <p>means a service provider engaged by the Authority to provide Services to the Authority before the Effective Date and whose employees will transfer to Project Co on the Effective Date;</p> <p>"Transferring Employee"</p> <p>means an employee of the Authority (excluding, without limitation, any person engaged by the Authority as an independent contractor or persons employed by any sub-contractor engaged by the Authority) whose contract of employment becomes, by virtue of the application of TUPE in relation to what is done for the purposes of carrying out this Agreement between the Authority and Project Co, a contract of employment with someone other than the Authority;</p> |

³⁹ The terms relating to the ability of third-party employers to participate in public sector pension schemes other than the LGPS have not been finalised here. Various references, including "Non-LGPS Eligible Employees", "Participating Authority", "Participation Agreement" and Clause 2.3 will need to be amended in line with the precise terms.

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| | <p>"TUPE" means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI No. 246) as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (SI No. 16).</p> |
| <p>28, 49.1.7</p> | <p>Roads PPP schemes will typically cover a broad geographical area which can make such projects susceptible to the risk of trespassers and protesters. This may include the risk of livestock being present on the project road.</p> <p>The MIM Standard Form Project Agreement addresses the arrangements in relation to trespasser and protesters and allocates the risk to Project Co, along with the risk of site security.</p> <p>Project Co is required to maintain all security at the Site for the protection of the Works and for the safety and convenience of the public or others; and must take all reasonable practicable steps to prevent unauthorised access to the Site.</p> <p>The management of any Protester Action including the impact of any Protester Action on the Project Operations is the responsibility of Project Co. Project Co, at its own expense, shall take appropriate action, including legal action to remove the protesters and trespassers.</p> <p>If the legal remedies available to Project Co to remove trespassers or protesters have been exhausted, the Authority may authorise Project Co to conduct proceedings in the name of and on behalf of the Authority (assuming the Authority's legal remedies are more extensive due to its ownership of the affected land). Project Co indemnifies the Authority in respect of any costs, liabilities, expenses and claims which arise from such legal proceedings.</p> |
| <p>30</p> | <p>The highway authority is under a statutory duty to undertake the highway functions designated to it under the Highways Act 1980 and any regulations made under this Act. Such highway functions relate to the construction, maintenance and improvement of the relevant road.</p> <p>The MIM Standard Form Project Agreement has been prepared on the basis that the Authority is the highway authority and that there will be no delegation of statutory highways functions. This will need to be reviewed by the Authority on a per project basis.</p> <p>By virtue of the Contracting Out (Highways Functions) Order 2009, it may be possible for highway authorities to delegate certain of their statutory functions pursuant to the Highways Act 1980 and any regulations made under this Act to another party. Such delegated statutory functions may be exercised on behalf of the highway authority by Project Co. Whether the Contracting Out (Highways Functions) Order 2009 applies to the Authority will need to be reviewed for each specific project.</p> <p>As the MIM Standard Form Project Agreement does not include delegation of statutory highways functions, instead it follows a sub-contracting approach which means that, rather than formally delegating statutory functions, the Authority subcontracts arrangements to Project Co in such a way as to assist the Authority in the discharge its statutory functions.</p> <p>If there is a failure by Project Co to perform the works and the services, the Authority will have a contractual remedy against Project Co pursuant to the provisions of the Project Agreement. Clause 53.1 provides an indemnity from Project Co in favour of the Authority in respect of liability for breach of statutory</p> |

| Clause | Comment |
|---------------------------------|--|
| | <p>duty arising from the performance or non-performance by Project Co of its obligations under the Project Agreement.</p> <p>If the Authority is capable of delegating its statutory highways functions and wishes to do so, this Clause will need to be re-drafted to reflect a delegated approach.</p> |
| 31 | <p>Noting that the Authority may be the highway authority and hold other statutory functions (including street authority), a regime has been included to allow Project Co to request the Authority to exercise a statutory function, where it is essential to enable Project Co to perform its obligations.</p> |
| 32, 33 | <p>The TWA Order will provide the Authority with a broad range of rights in relation to the undertaking of the Works and the ability to acquire land and rights.</p> <p>It is usual for a TWA Order to allow the Authority (presuming the Authority is the authorised party under the TWA Order) to authorise another party to undertake such rights on behalf of the Authority. Clause 32 sets out the arrangements which authorise Project Co to undertake those rights provided under the TWA Order in order to undertake the Works. Note that the Authority is likely to retain certain rights and these rights can be set out in the Project Agreement as "Retained TWA Order Functions".</p> <p>In undertaking the authorised functions, Project Co needs to be mindful that its activity will not place the Authority in breach of its administrative responsibilities and should report to the Authority on when such authorised functions are undertaken.</p> <p>Clauses 33.5 - 33.9 set out the arrangements in relation to Project Co acknowledging that the Authority may hold certain retained functions/duties, including as Street Authority and Traffic Manager under the Traffic Management Act. Project Co is required to undertake and co-ordinate its activity in accordance with such requirements and so as to ensure that the Authority is able to comply with its duties.</p> <p>An indemnity is provided by Project Co to the Authority in Clause 33.18 for any losses or claims arising from its exercise or failure to exercise the rights granted in relation to Clause 32 and 33.</p> <p>It will be necessary to review Clauses 32 and 33 for each relevant Roads project to ensure that the extent of the Authority's retained functions and duties are captured under these arrangements.</p> |
| 52 Schedule 18 | <p>Authorities should note that under Chapter 2 of the EPEC/EUROSTAT Guide, on a project involving the refurbishment, renovation or upgrade of an existing asset, such as a road, the amount of capital expenditure must represent at least 50% of the value of the asset after completion of the works.</p> |
| 53.1 | <p>The indemnity from Project Co to the Authority has been aligned to follow the same approach as other recent Roads PPP Projects in the market place.</p> |

| Schedule | Comment |
|----------|---|
| 1 | Definitions and Interpretation |
| | <p>Works</p> <p>When considering the scope of the Works on a Roads PPP Project, it will be</p> |

| Schedule | Comment |
|-----------|--|
| | important to take into account the paragraph entitled 'Refurbishment, renovation or upgrade of existing assets' included within Chapter 2 of the EPEC/EUROSTAT Guide. |
| 12 | Service Requirements |
| | Specific reference ought to be made to Chapter 2 of the EPEC/EUROSTAT Guide regarding the scope of services to be provided by Project Co on roads projects and Theme 4 of Chapter 3 of the EPEC/EUROSTAT Guide in connection with contractual standards. |
| 14 | Payment Mechanism |
| | A paper setting out the principles that will be included in the payment mechanism for Roads projects is attached at Appendix 1 to this Chapter 7. |
| 27 | Disaster Plan |
| | The Disaster Plan may be encompassed within the Services Specification on a Roads Project. |

Appendix 1 to Chapter 7

Payment Mechanism Principles to be applied to MIM Roads Projects

Introduction

The primary function of any Payment Mechanism is to encourage behaviours from Project Co which are aligned to meeting the Authority's overarching objectives for the project under consideration. In other words, striking the right balance between incentivisation for good performance and proportionate penalties for poor performance.

For a road project, examples of overarching objectives might include helping economic development by improving links/access to specific areas or reducing journey times, improving the environment by reducing congestion and/or pollution at specific locations, improving the overall journey experience and so forth.

Welsh Government believes that an Availability & Performance based Payment Mechanism offers significantly more scope to address these wider objectives than one where the Project Co is remunerated based purely on the number of vehicles using the road, via Real or Shadow Toll mechanisms. Therefore, roads projects procured via the MIM programme, will adopt an Availability & Performance based payment mechanism which will be familiar to the market from projects in other jurisdictions.

Welsh Government believes the following key aspects of Availability & Performance based road Payment Mechanisms can help to deliver the type of underlying objectives noted above:

- the road should be free from obstructions at all times e.g. road works, accidents, break downs, flooding, snow etc. subject to remedial periods and certain exceptions;
- it should meet minimum performance criteria e.g. minimum lane widths, skid resistance, surface rutting, residual life of the surface and general ride quality;
- there should be a minimum number of running lanes in each direction at all times;
- defects should be repaired within agreed timescales; and
- operations and maintenance services to be performed in line with the service specification e.g. safety inspections, winter maintenance, gritting, grass cutting, lighting maintenance etc.

The following sections of this paper set out the key aspects of the proposed roads Payment Mechanism and the key principles which procuring authorities using the MIM model to procure road projects will rely upon in order to develop the drafting of the Payment Mechanism on a project specific basis.

1 Restricted Services Payments

Where a project includes the upgrade or refurbishment of existing carriageway, the Authority may request Project Co to deliver certain Operations & Maintenance ("**O&M**") services to certain sections of the existing carriageway during the construction phase. Such services are known as Restricted Services reflecting that it is likely that a lower level of service specification will apply to these services during the construction phase, than would be the case during the operations phase post construction completion.

Project Co is paid for the services they provide on these sections through a Restricted Services Payment⁴⁰. The Authority can use Restricted Services Availability Deductions ("**RSAD**") and Restricted Services Performance Deductions ("**RSPD**") in order to incentivise Project Co to comply with the relevant Availability Criteria, Services Specification and Good Industry Practice.

Principles for the calculation of Restricted Services Payments ("**RSP**") and Deductions

- RSP will be paid monthly based on the number of days in the month that Restricted Services are provided.
- Total RSAD and RSPD during the Restricted Services Period shall not exceed total RSP payable during the Restricted Services Period.
- If any RSAD or RSPD remains outstanding after the end of the Restricted Services Payment Period the Authority shall be entitled to deduct said RSAD and/or RSPD from the next available or any subsequent Monthly Service Payment. (See further in section 2 of this paper.)
- RSAD will be time weighted e.g. higher during peak mid-week hours.
- RSPD shall reflect the importance of the service involved in determining the deduction level e.g. a winter services failure will accrue a higher deduction than an information reporting failure.
- Failures to comply with Good Industry Practice will result in RSPD being levied.
- Excess LOCs may be deducted from the RSP.

⁴⁰ For the purposes of this paper, it is assumed that Welsh Government will pay for any Restricted Services as delivered, on a monthly basis. Where Welsh Government chooses not to follow this method, Project Co will be expected to fund the cost of the Restricted Services on the same basis as any other costs incurred during the construction phase, with remuneration coming from the Annual Service Payment post construction completion. In this scenario, any Restricted Services deductions will be applied to future Monthly Service Payments until fully recovered.

2 Calculation of Service Payment

2.1 Monthly Service Payment ("MSP")

2.1.1 The MSP for a Contract Month shall be calculated as follows:

$$\text{MSP} = ((\text{Annual Service Payment}/12) - \text{Deductions}) + \text{Pass through Insurance Costs}$$

where:

Deductions means AFD + SSD +(each where applicable) Excess LOC + RSPD + RSAD;

and where:

Availability Failure Deductions ("**AFD**") and Service Shortfall Deductions ("**SSD**") relate to the previous Contract Month (i.e. deductions shall be applied 1 month in arrears).

2.1.2 If the Deductions to be applied in any Contract Month exceed the MSP for that Contract Month, then the actual Deductions levied in that Contract Month shall be limited to the MSP for that Contract Month, with any unrecovered balance carried forward to the following Contract Month(s) until fully extinguished.

2.1.3 Notwithstanding 2.1.2 above, total deductions in any single Contract Year will not exceed the Annual Service Payment for that Contract Year.

2.1.4 Excess LOCs (see section 4 of this paper) which are not deducted during the Restricted Services Payment Period may be deducted from the MSP in any future Contract Month, provided always that any AFD and/or SSD will be deducted first with Excess LOCs applied against any residual MSP or carried over to the next Contract Month.

2.1.5 RSAD and/or RSPD which are not deducted during the Restricted Services Payment Period may be deducted from the MSP in any future Contract Month, provided always that any AFD and/or SSD and/or Excess LOCs will be deducted first with such RSAD and/or RSPD applied against any residual MSP or carried over to the next Contract Month.

3 Deductions

A deduction can be incurred under two primary circumstances. The first of these is unavailability of the road and the second is service standard shortfalls. In order to apply these deductions the payment mechanism needs to clearly set out what constitutes availability of the road and what performance standards the contractor needs to meet. In addition to these performance and availability deductions, Project Co could also incur financial deductions, through the Payment Mechanism, to recover any Excess LOCs, RSAD and RSPD incurred during the construction period.

Where there are circumstances of repeated failure to meet the same availability and/or performance standards in consecutive months on the same section of road, a ratchet/multiplier mechanism will be applied to reflect the failure to properly address the underlying issue.

Through the application of Remedial Periods, Project Co will be afforded the opportunity to take corrective action to address any failures, be they availability or performance based, prior to the imposition of deductions from the Service Payment. In addition Project Co will receive relief from deductions where the availability or performance failure is not applied due to the Exception clause which covers circumstances such as certain actions of the Authority, actions or instructions of the Police and so forth. Similarly, there will be certain Permitted Deviations from the service standards and Permitted Lane Occupations which will also offer relief from deductions to Project Co.

3.1 Availability Failure Deductions

An availability deduction occurs if there is a failure to meet the Availability Criteria which has not been remedied within the appropriate Remedial Period and is not the result of an Exception.

The deduction calculation will take into account the section weighting applicable to the part of the road where the failure occurred, the time weighting applicable to the day and time of the incident and the number of sections and lanes affected by the incident.

Availability Criteria will include factors such as:

- the road should be free from obstructions at all times e.g. road works, accidents, break downs, flooding, snow etc.;
- it should meet minimum performance criteria e.g. minimum speeds, minimum lane widths, skid resistance, surface rutting, residual life of the surface and general ride quality; and
- a minimum number of running lanes in each direction at all times.

3.2 Service Shortfall Deductions

A service/performance deduction occurs if there is a failure to meet the Performance Standard applicable to the Service concerned and has not been remedied within the appropriate Remedial Period and is not within the Permitted Deviation for that Service, where applicable and is not the result of an Exception.

The deduction calculation will take into account whether the failure applies to individual sections of the road or whether it applies to the whole road, the period of time (measured in days) for which the failure persists and the number of Service Shortfall Points applicable to the particular failure concerned.

There will be an appendix in the payment mechanism which contains full details of the Services to be delivered, the Performance Standards to be met, the Permitted Deviations that apply and the Service Shortfall Points attributable to the Performance Standard (see example schedule at Attachment 1).

3.3 Availability Failure Deductions and Service Shortfall Deductions

Notwithstanding that Availability Failure Deductions are applied to a Carriageway Section, such Carriageway Sections may also be subject to Service Shortfall Deductions for the same day.

4 Lane Occupation Charges

With online roads projects the traffic flow on existing lanes will suffer disruption, as fewer lanes may be available for traffic, lane widths may be made narrower and travel speeds will be slower. The existing road will often be a critical route and/or form part of an important junction and in those circumstances the payment mechanism will include provisions to encourage the Project Co to minimise disruption to traffic flows. To encourage the right outcome, disruption to traffic flows on existing roads, junctions and slip roads may attract charges ("**Lane Occupation Charges**"). The level of charges will vary and may depend on factors such as the time of day, day of the week, number of lanes available, width of available lanes, maximum speed limits set for the available lanes and the importance of the stretch of road/junction to traffic flows. In setting any charges it is likely that reference will be made to QUADRO. Where such provisions are included, Lane Occupation Charges are inevitable and Project Co will bid on the basis of a level of "**Permitted Lane Occupations**" for which no charge will be levied. In the event Lane Occupation Charges exceed the Permitted Lane Occupations, Project Co will be charged excess Lane Occupation Charges ("**Excess LOCs**") which will be deducted from the Restricted Service Payment and/or the Monthly Service Payment (see sections 1 and 2 of this paper).

5 Community Benefits

The Authority's remedy in relation to failures to comply with Community Benefits requirements are set out in the main body of the MIM Standard Form Project Agreement. The Project Agreement main body sets out a series of Community Benefit targets which Project Co must achieve during each of the undertaking of the Works and the Operational Term. Where Project Co fails to meet such targets, identifiable sums are payable to the Authority. Such sums will be due and payable by Project Co within a fixed period following a written demand from the Authority.

ATTACHMENT 1
PART 1
SERVICES (SPECIFIC)

Drafting Note: The table below is for illustrative purposes only. The Services should link to the Service Level Specification in Section [] of Schedule 12 to the Agreement. Shortfall Points should reflect the importance to the Authority of compliance with the Service Level Specification from an operational and policy stand point. The Performance Standard in the Service Level Specification should be based on the Welsh Government Trunk Road Maintenance Manual.

| Services (Specific) | Requirements | Performance Standard | Deviation | Service Shortfall Points |
|--|--------------|----------------------|-----------|--------------------------|
| Correction of Errors or omissions in RMMS | | | | |
| Repair CAT 1 defects (Temp) | | | | |
| Repair CAT 1 defects (Permanent) | | | | |
| Repair of CAT 2 defects (Permanent) | | | | |
| Safety Patrols | | | | |
| Safety Inspection | | | | |
| Carry out Safety Inspection of Cycle tracks or footway on foot | | | | |
| Entering Data in RMMS | | | | |
| Detailed Inspection of any element | | | | |
| Night Inspections | | | | |
| Response to Hazard or Observation Resulting from Inspection (ORI) Notice | | | | |
| Covers, Gratings, Frames and Boxes - (General) - temporary repair | | | | |
| Covers, Gratings, Frames and Boxes - (Maintenance Requirements) | | | | |
| Kerbs, Edgings and Pre-formed Channels – (Maintenance Requirements) | | | | |
| Road Drainage – (General) – | | | | |

| Services (Specific) | Requirements | Performance Standard | Deviation | Service Shortfall Points |
|---|--------------|----------------------|-----------|--------------------------|
| Piped Drainage Systems – (Maintenance Requirements) – Cleaning of kerb block drains and slot drains | | | | |
| Gulley, Manholes, Catchpit, and Interceptors – (Maintenance Requirements) | | | | |
| Piped Grips – (Maintenance Requirements) | | | | |
| Ditches – (Maintenance Requirements) | | | | |
| Filter Drains and Soakaways – (Maintenance Requirements) | | | | |
| Culverts and Small Span Bridges – (Maintenance Requirements) | | | | |
| Flooding – (Inspection Requirements) | | | | |
| Flooding Maintenance Requirements | | | | |
| Embankments and Cuttings – (Maintenance Requirements) | | | | |
| Sweeping and Cleansing of the Road – Maintenance Requirements | | | | |
| Fences, Screens, Walls and Noise Barriers – (Inspection Requirements) | | | | |
| Road Traffic Signs – (General) – | | | | |
| Road Traffic Signs – (Inspection Requirements) | | | | |
| Road Lighting – (Inspection Requirements) | | | | |
| Road Lighting – (Maintenance Requirements) | | | | |
| Road Lighting – (Maintenance Requirements) | | | | |

| Services (Specific) | Requirements | Performance Standard | Deviation | Service Shortfall Points |
|--|--------------|----------------------|-----------|--------------------------|
| Lighting Repair (Cat 2 as per TD23) | | | | |
| Ice Sensors – (Maintenance Requirements) | | | | |
| Removal of Graffiti – (Maintenance Requirements) | | | | |
| Obtain written consent for Winter Service Plan | | | | |
| Submit Winter Service Report | | | | |
| Precautionary Treatment | | | | |
| Spreading of salt – prior to forecast ice | | | | |
| Comply with Winter Service Response Times | | | | |
| Spreading of salt – Time for Completion of Precautionary Treatment | | | | |
| Comply with the approved Winter Service Plan in respect of Snow Clearance of Carriageways and Hard shoulders | | | | |
| General – (Road Safety) | | | | |
| General – (Nuisance) | | | | |
| General – (Invasive Species) | | | | |
| General – (Special Ecological Measures) | | | | |
| Verges and Grassed Areas – (Maintenance Requirements) | | | | |
| Trees, Hedges and other Planted Areas – (Inspection Requirements) | | | | |
| Trees, Hedges and other Planted Areas – (Reporting Requirements) | | | | |
| Trees, Hedges and other Planted Areas – (Maintenance | | | | |

| Services (Specific) | Requirements | Performance Standard | Deviation | Service Shortfall Points |
|--|--------------|----------------------|-----------|--------------------------|
| Requirements) | | | | |
| Comply with Emergency response times | | | | |
| Erection or removal of any traffic management installations, temporary diversion or Stage 3 Safety Audit | | | | |
| Erection or removal of any traffic management installations, temporary diversion or Stage 3 Safety Audit | | | | |
| Provide two Lanes in each direction between the hours of 0600 and 2000 | | | | |
| Provide O&M Works Management Activities | | | | |
| Fences, Screens, Walls and Noise Barriers – (Inspection Requirements) | | | | |
| Road Lighting – (Maintenance Requirements) | | | | |

PART 2
SERVICES (GENERAL)

| Class of Services (General) | Performance Standard | Deviation | Service Shortfall Points |
|-----------------------------|----------------------|-----------|--------------------------|
| Class A | | | |
| Class B | | | |
| Class C | | | |

Where:

Class A means a failure in the provision of any service set out in [Schedule X] which results in a risk to the health and safety of Users and/or any person authorised to be on the works site;

Class B means a failure in the provision of any service set out in [Schedule X] which results in a material reduction in the level of the overall standard of service by Project Co in the provision of the Operations or has a material adverse impact on the amenity of the works site; and

Class C means a failure in the provision of any service set out in [Schedule X] which has a non-material effect on the overall standard of service by Project Co in the provision of the Operations or on the amenity of the works site.

Examples of the Services (General) which would fall within each of the above Classes are:

| Services by Classification | Requirements | Performance Standard | Deviation | Service Shortfall Points |
|----------------------------|--------------|----------------------|-----------|--------------------------|
| Class A | | | | |
| | | | | |
| Class B | | | | |
| | | | | |
| Class C | | | | |
| | | | | |

END