

Date:

**(1) THE MAYOR AND BURGESSES OF
THE LONDON BOROUGH OF WANDSWORTH**

AND

(2) ENABLE LEISURE AND CULTURE

**CONCESSION CONTRACT FOR THE PROVISION
OF LEISURE AND CULTURAL SERVICES**

SHARPE PRITCHARD[®]

Ref: SPS 102877/111

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This Agreement is made on

day of

2015

Between

- (1) **THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF WANDSWORTH** of The Town Hall, Wandsworth High Street, London SW18 2PU; (the "Council"); and
- (2) **ENABLE LEISURE AND CULTURE** (company registered number 09487276) whose registered office is at The Park Offices, Battersea Park, Albert Bridge Road, London SW11 4NJ (the "Concessionaire").

Background

- (A) The Council is seeking the provision of leisure and cultural services at certain premises within the London Borough of Wandsworth (the 'Services').
- (B) The Concessionaire offered to provide the Services and the Council accepted the Concessionaire's offer.
- (C) The Concessionaire shall provide the Services for a period of four years.

Now it is agreed as follows:

PART 1 – PRELIMINARY

1 INTERPRETATION

1.1 General

In this Agreement except where the context otherwise requires:

- 1.1.1 the masculine includes the feminine and vice-versa;
- 1.1.2 the singular includes the plural and vice versa;
- 1.1.3 a reference to any clause, sub-clause, paragraph, schedule, recital or annex is, except where expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, schedule, recital or annex of and to this Agreement;
- 1.1.4 save where stated to the contrary, any reference to this Agreement or to any other document shall include any permitted variation, amendment or supplement to such document;
- 1.1.5 any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument as amended, replaced, consolidated or re-enacted;
- 1.1.6 a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
- 1.1.7 words and phrases with a first capital letter or any derivation thereof shall (as the context so requires) have the meanings set out in Schedule 1;
- 1.1.8 headings are for convenience of reference only; and
- 1.1.9 words preceding “include”, “includes”, “including” and “included” shall be construed without limitation by the words which follow those words.

Schedules

- 1.2 The Schedules to this Agreement form part of this Agreement.

Precedence of Documentation

- 1.3 In the event of any inconsistency between the provisions of the body of this Agreement and the Schedules, or between the Schedules, the inconsistency shall be resolved according to the following descending order of priority;
 - 1.3.1 this Agreement and Schedule 1 (Definitions);
 - 1.3.2 Schedule 2 (Services Specification);
 - 1.3.3 the Schedules (excluding Schedule 1 (Definitions), Schedule 2 (Services Specification) and Schedule 3 (Concessionaire's Proposals));
 - 1.3.4 Schedule 3 (Concessionaire's Proposals).

For the avoidance of doubt, the Services Specification shall at all times have priority over the Concessionaire's Proposals and the Concessionaire shall be obliged to comply with the Services Specification and provide the Services in accordance with the Services Specification.

- 1.4 Any changes to the Concessionaire's Proposals may only be made in accordance with the Change Procedure.

Responsibility for Related Parties

- 1.5 Subject to the provisions of this Agreement, the Concessionaire shall be responsible as against the Council for the acts and omissions of the Concessionaire Related Parties as if they were the acts and omissions of the Concessionaire and the Council shall be responsible as against the Concessionaire for the acts and omissions of the Council Related Parties as if they were the acts and omissions of the Council. The Concessionaire shall, as between itself and the Council, be responsible for the selection of and pricing by any Concessionaire Related Party.

Approval

- 1.6 Neither the examination, acknowledgement, knowledge of the terms of any agreement or document nor the review of any document or course of action by or on behalf of the Council, nor the failure of the same, shall unless otherwise expressly stated in this Agreement, relieve the Concessionaire of any of its obligations under the Contract Documents or of any duty which it may have hereunder to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the examination, acknowledgement or knowledge.

Succession

- 1.7 References to a public organisation (other than the Council) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation. References to other persons (other than the Council) shall include their successors and assignees.

2 THIRD PARTY RIGHTS

No term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement with the exception of clause 17 (Pensions) which may be enforced by the Eligible Employees.

3 COMMENCEMENT AND DURATION

This Agreement and the rights and obligations of the parties shall take effect on the Commencement Date and shall continue until the Expiry Date unless the Agreement is terminated sooner in accordance with these conditions or in accordance with common law or statute.

Forthwith on the Commencement Date the Parties shall enter into the Loan Agreement.

4 GENERAL WARRANTIES AND INDEMNITIES

Concessionaire Warranties

- 4.1 The Concessionaire warrants and represents to the Council that on the date hereof:
- 4.1.1 it is properly constituted and incorporated under the laws of England and Wales and has the corporate power to own its assets and to carry on its business as it is now being conducted;

- 4.1.2 it has the corporate power to enter into and to exercise its rights and perform its obligations under the Agreement;
 - 4.1.3 all action necessary on the part of the Concessionaire to authorise the execution of and the performance of its obligations under the Contract Documents has been taken or, in the case of any Contract Document executed after the date of this Agreement, will be taken before such execution;
 - 4.1.4 the obligations expressed to be assumed by the Concessionaire under the Contract Documents are, or in the case of any Contract Document executed after the date of this Agreement will be, legal, valid, binding and enforceable to the extent permitted by law and each Contract Document is or will be in the proper form for enforcement in England;
 - 4.1.5 the execution, delivery and performance by it of the Contract Documents does not contravene any provision of:
 - 4.1.5.1 any existing Legislation either in force, or enacted but not yet in force binding on the Concessionaire;
 - 4.1.5.2 the Memorandum and Articles of Association of the Concessionaire;
 - 4.1.5.3 any order or decree of any court or arbitrator which is binding on the Concessionaire; or
 - 4.1.5.4 any obligation which is binding upon the Concessionaire or upon any of its assets or revenues;
 - 4.1.6 no claim is presently being assessed and no litigation, arbitration or administrative proceedings are presently in progress or, to the best of the knowledge of the Concessionaire, pending or threatened against it or any of its assets which will or might have a material adverse effect on the ability of the Concessionaire to perform its obligations under any Contract Document;
 - 4.1.7 it is not the subject of any other obligation, compliance with which will or is likely to have a material adverse effect on the ability of the Concessionaire to perform its obligations under any Contract Document;
 - 4.1.8 no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Concessionaire, threatened) for its winding-up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator, trustee or similar officer in relation to any of its assets or revenues;
 - 4.1.9 the copies of the Contract Documents which the Concessionaire has delivered or, when executed, will deliver to the Council are or, as the case may be, will be true and complete copies of such documents and there are not in existence any other agreements or documents replacing or relating to any of the Contract Documents which would materially affect the interpretation or application of any of the Contract Documents;
- and the Council relies upon such warranties and representations.

Concessionaire Undertakings

- 4.2 The Concessionaire undertakes with the Council that for so long as this Agreement remains in full force:
- 4.2.1 it will upon becoming aware that any litigation, arbitration, administrative or adjudication or mediation proceedings before or of any court, arbitrator or Relevant Authority may be threatened or pending and immediately after the commencement thereof (or, where the litigation or arbitration or administrative or adjudication or mediation proceedings is against a Sub-Contractor, within twenty (20) Working Days of becoming aware the same may be threatened or pending or with twenty (20) Working Days after the commencement thereof) give the Authorised Officer notice of all such litigation, arbitration, administrative or adjudication or mediation proceedings which would adversely affect, to an extent which is material in the context of the Project, the Concessionaire's ability to perform its obligations under this Agreement;
 - 4.2.2 it will not without the prior written consent of the Authorised Officer (such consent not to be unreasonably withheld or delayed) (and whether by a single transaction or by a series of transactions whether related or not) sell, transfer, lend or otherwise dispose of (other than by way of security) the whole or any part of its business or assets which would materially affect the ability of the Concessionaire to perform its obligations under this Agreement;
 - 4.2.3 it will not cease to be resident in the United Kingdom or transfer in whole or in part its undertaking, business or trade outside the United Kingdom; and
 - 4.2.4 it will not undertake the performance of its obligations under this Agreement for the provision of the Services otherwise than through itself or a Sub-Contractor.

Status of Warranties

- 4.3 All warranties, representations, undertakings, indemnities and other obligations made, given or undertaken by the Concessionaire in this Agreement are cumulative and none shall be given a limited construction by reference to any other.

5 COUNCIL WARRANTIES

No Warranty by Council

- 5.1 The Council does not give any warranty or undertaking as to the relevance, completeness, accuracy or fitness for any purpose of any of the Disclosed Data. Where Building Condition Surveys for any of the Premises are supplied by the Council to the Concessionaire, these shall be supplied for information purposes only.

No Liability to Concessionaire

- 5.2 Neither the Council nor any of its agents or employees shall be liable to the Concessionaire in contract, tort (including negligence or breach of statutory duty), statute or otherwise as a result of:
- 5.2.1 any inaccuracy, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Disclosed Data
 - 5.2.2 any failure to make available to the Concessionaire any materials, documents, drawings, plans or other information relating to the Services.

Fraudulent Statements

- 5.3 Nothing in this Clause 5 shall exclude any liability which the Council or any of its agents or employees would otherwise have to the Concessionaire in respect of any statements made fraudulently prior to the date of this Agreement.

Concessionaire's Due Diligence

- 5.4 Without prejudice to any other obligation of the Concessionaire under this Agreement, the Concessionaire shall, be deemed to have gathered all information necessary to perform its obligations under this Agreement.
- 5.5 Save as otherwise provided in this Agreement the Concessionaire shall be deemed to have:-
- 5.5.1 Satisfied itself before entering into this Agreement as to the accuracy and efficiency of the Concession Fee and other financial information stated by the Concessionaire in its Proposals;
 - 5.5.2 Taken its own advice and carried out its own investigations regarding the likely usage of Premises and any projected income relating to the Premises;
 - 5.5.3 Obtained for itself all necessary information as to risk contingencies, due diligence and any other circumstances which might influence or affect its obligations under this Agreement.
- 5.6 To avoid doubt the Concessionaire accepts responsibility for all matters referred to in Clause 5.5. However where the information provided by the Council was materially incorrect or insufficient or where a matter arises which was not within the knowledge or reasonable contemplation of the Concessionaire prior to the Commencement Date and which has a material and adverse impact on its ability to deliver the Services, the Council, acting reasonably, will give due consideration to an adjustment to the Concession Fee (or as alternative to a single payment to the Concessionaire), to reflect the Concessionaire's increased costs.
- 5.7 Save as expressly provided in this Agreement the Concessionaire shall in no circumstances be entitled to any additional payment for its encountering and/or dealing with any such circumstances described in Clause 5.5 and 5.6 whether unforeseen or otherwise.

PART 2 - LAND ISSUES

6 NATURE OF LAND INTERESTS

Grant of Lease for Leased Premises

6.1 On the date hereof or as soon as reasonably practicable thereafter, the Council shall grant to the Concessionaire and the Concessionaire shall accept Leases of the Leased Premises, in the form of Lease set out in Schedule 7 tailored to reflect the site specific requirements in respect of each of the Leased Premises. The following shall also apply:

6.1.1 The agreement contained in this Clause shall not and shall not be deemed to operate as a demise of the premises or any part thereof and until the Lease is granted any occupation of the premises by the Concessionaire shall be deemed to be that of a bare licensee only.

6.1.2 The Council hereby grants to the Concessionaire a licence to occupy the Leased Premises pending the grant of the Leases and subject to the Concessionaire paying to the Council a licence fee equivalent to the rent that would have been payable had the said Lease been granted on the day and in the manner provided for by the said Lease until such time as the Lease is completed or this agreement is discharged. In addition the Concessionaire shall be responsible for all other payments outgoings and obligations provided for under the said Leases as if the same had been granted.

Exclusion of Security for the Leased Premises

6.2 The Concessionaire hereby confirms that before it became contractually bound to enter into any tenancy created by each Lease pursuant to this Agreement:

6.2.1 The Council served on the Concessionaire a notice in relation to the tenancy created by each Lease ("the Head Lease Notice") in a form complying with the requirements of Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 ("the Order").

6.2.2 The Concessionaire, or a person duly authorised by the Concessionaire, in relation to each Lease Notice made a statutory declaration ("the Lease Declaration") in a form complying with the requirements of Schedule 2 of the Order.

6.2.3 The Concessionaire further confirms that, where Lease Declarations were made by a person other than the Concessionaire, the declarant was duly authorised by the Concessionaire to make the Lease Declarations on the Concessionaire's behalf.

6.2.4 The Council and Concessionaire agree to exclude the provisions of sections 24 to 28 (inclusive) of the Landlord and Tenant Act 1954 in relation to the tenancy created by each Lease listed at Schedule 7.

Grant of the Leases

6.3 The grant of the Leases shall take place at the offices of the Council's solicitors. The term of the Leases relating to the Leased Premises shall commence on the Commencement Date.

Delivery of Engrossments

6.4 Within ten (10) Working Days after the Commencement Date, the Council shall deliver engrossments of the counterpart Lease for the Leased Premises to the Concessionaire. The

Concessionaire shall execute and deliver each counterpart Lease as a deed to the Council within a further five (5) Working Days of receipt. The Council shall execute and deliver each original Lease as a deed to the Concessionaire within five (5) Working Days of receipt of the counterpart Leases by the Council.

Registration

- 6.5 The Concessionaire shall use all reasonable endeavours to apply for, and register (or note as appropriate) the Leases at the Land Registry as soon as reasonably practicable after the Leases are completed. The Council shall use all reasonable endeavours to assist the Concessionaire in responding to any requisitions raised by the Land Registry.

Grant of Licence of Licensed Premises

- 6.6 Subject to the provisions in clauses 6.8, and 6.9 the Council hereby grants a non-exclusive licence to the Concessionaire from the Commencement Date to access and use such part or parts of the Licensed Premises as identified in Section 4 of the Services Specification and otherwise during such times and of such parts of the Licensed Premises as may be notified by the Council to the Concessionaire from time to time, for such purposes as may be reasonably necessary for the delivery of the Services only, or as may be set out in any licence agreement between the Parties for the Licensed Premises ("Licence").
- 6.7 The Council shall retain all repair maintenance and insuring obligations in respect of the Licensed Premises save to the extent set out in paragraph 4.2 of Section 1 of the Services Specification (Concessionaire's Repair Obligations) however the Concessionaire shall use the Licensed Premises in a proper and reasonable manner at all times and leave it in a reasonable state of tidiness at the end of each day and in the event of causing or permitting to be caused any damage to the Licensed Premises it shall make good such damage at its own expense to the Council's reasonable satisfaction.
- 6.8 The Concessionaire acknowledges that:
- 6.8.1 the access and use of parts of the Licensed Premises by the Concessionaire pursuant to this Licence is ancillary to the provision of the Services
 - 6.8.2 it shall have rights to access and use parts of the Licensed Premises as a licensee only and that no relationship of Landlord and Tenant is created between the Council and the Concessionaire by this Licence;
 - 6.8.3 the Council retains control, possession and management of the Licensed Premises and the Concessionaire has no right to exclude the Council or any other occupier from the Licensed Premises;
 - 6.8.4 the Licence granted by clause 6.7 is personal to the Concessionaire and is not assignable to any other person body or group;
 - 6.8.5 the Council shall be entitled at any time on giving not less than 90 days' notice to require the Concessionaire to transfer to an alternative space elsewhere within the Licensed Premises and the Concessionaire shall comply with such requirement

Early Termination

6.9 If this Agreement is terminated in whole or in part or varied (and such variation no longer requires Services to be carried out at a Leased or Licensed Premises) for any reason prior to the Expiry Date, the relevant Lease or Licence shall automatically cease and determine with effect from the date of termination or variation of this Agreement (or, if not granted at the time, the obligation to grant the Leases or Licence shall automatically cease to apply).

6.10 Where the Leases have been entered into, the Concessionaire shall forthwith deliver to the Council the Leases together with all relevant title deeds, releases from any charge and a direction to the Chief Land Registrar to cancel the registered titles relating to the Leases. The Concessionaire shall take all steps as may be proper and reasonable to cancel or assist in the cancellation of all entries at the Land Registry and the Land Charges Registry in relation to the Leases.

No Compensation

6.11 The Concessionaire shall not be entitled to any compensation in respect of any variation of the terms of the Leases or Licences or the unexpired part of its interest as tenant/licensee under the Leases or Licences on assignment or surrender or automatic determination in accordance with this clause 6

Compliance with the Title Deeds

6.12 The Concessionaire shall procure that:

6.12.1 the provision of the Services at the Premises by or on behalf of the Concessionaire shall be carried out in a manner which does not breach any provisions of the Title Deeds relating to the Premises as notified to the Concessionaire by the Council; and

6.12.2 whilst providing the Services at the Premises, there shall be no action, or omission to act by the Concessionaire or any Concessionaire Related Party, which shall give rise to a right for any person to obtain title to or any right or interest over the Premises or any part of it (save in accordance with the terms of this Agreement) save as otherwise exists as at the Commencement Date and otherwise agreed with the Council following the Commencement Date.

6.13 The Council does not warrant title in the Premises. In the event that the Concessionaire is required to cease occupation of any of the Premises (or part thereof) as a result of any matter forming part of the Council's title to those Premises, or otherwise is restricted from using or accessing the Premises to deliver the Services or is subject to an additional financial burden for use of the Premises, then this will be treated as a Council Notice of Change in accordance with Clause 36. The provisions of Clauses 36.3 and 36.4 shall then apply for the Parties to determine the appropriate action for the Parties to take, and the appropriate payment by the Council (where agreed) of the Concessionaire's Direct Losses, but subject to the following principles:

6.13.1 the Concessionaire shall use reasonable endeavours to mitigate its Losses;

6.13.2 the Concessionaire shall use reasonable endeavours to provide the Services (or elements of the Services) from its other facilities.

PART 3 - THE SERVICES

7 SERVICE STANDARD

- 7.1 During the Contract Period, the Concessionaire shall at its own cost be solely responsible for procuring that the Services are performed to the following standards (the "Service Standard"):
- 7.1.1 the Services at each Premises are provided in accordance with all the requirements of this Agreement, the Services Specification, Good Industry Practice, relevant Guidance and all Council's Policies and Legislation with effect from the Commencement Date
 - 7.1.2 the Services are at all times performed:
 - 7.1.2.1 in accordance with and so as to meet the Performance Standards;
 - 7.1.2.2 using all reasonable skill care and diligence;
 - 7.1.2.3 in a manner that is not reasonably likely to be injurious to health or to cause damage to property;
 - 7.1.2.4 in a manner consistent with the Council discharging its statutory duties to the extent that these may have an effect on the Services;
 - 7.1.2.5 in a manner consistent with and to ensure compliance with any applicable Byelaws;
 - 7.1.2.6 by appropriately qualified, supervised and trained personnel;
 - 7.1.2.7 in compliance with all instructions issued in accordance with this Agreement by or on behalf of the Council by the Authorised Officer and which he is empowered to issue under this Agreement , provided that all such instructions are reasonable and compliance will not cause the Concessionaire to be in breach of this Agreement; and
 - 7.1.2.8 so as not to cause nuisance to or interference with the rights of quiet enjoyment otherwise enjoyed by persons on neighbouring land or land adjacent to the Premises including the Council's property;
 - 7.1.3 the Premises are open, operable, accessible and available to Customers during all the agreed hours appropriate to any particular Premises as set out in the Services Specification;
 - 7.1.4 the Premises are clean and hygienic at all times and that if the Concessionaire itself becomes aware or is notified by a Customer that any area is not clean, it shall ensure that action is taken to remedy the matter if any action is required upon inspection of the area as soon as reasonably practicable;
 - 7.1.5 all Staff are courteous and polite and helpful to Customers at all times; and
 - 7.1.6 nothing by the Concessionaire is done to prejudice or breach any licence or certificate which is required in respect of the management of the Premises in accordance with Legislation and the Concessionaire shall use all reasonable endeavours to prevent any Customer from doing the same;

PROVIDED THAT the obligations contained in Clauses 7.1.1 to 7.1.6 shall not apply where:-

- 7.1.7 it may be reasonably necessary to close all or any of the Premises or any part thereof or to cease the operation of any of the Services or any part thereof while planned works are being carried out for which the Authorised Officer's consent has been obtained (such consent not to be unreasonably withheld or delayed) or in an Emergency; and/or
- 7.1.8 the Concessionaire is prevented from complying with such provisions or any part of them by reason of a Force Majeure Event.
- 7.2 The Concessionaire's performance of the Services and compliance with the Service Standard shall be monitored in accordance with the agreed procedure in Clause 21.
- 7.3 The Parties shall, at all times, act in and with complete honesty towards each other and their respective staff and employees. The Concessionaire and the Council recognises that the success of the Services requires co-operation between them and representatives of each Party and shall discuss and deal with the Services in good faith and shall use their respective reasonable endeavours to resolve any disagreement arising between them relating to the Services.
- 7.4 The Concessionaire shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment by the Concessionaire of any Sub-Contractor. The Concessionaire shall, as between itself and the Council, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all its Sub-Contractors, employees and agents. All references in this Agreement to any act, default, omission, breach or negligence of the Concessionaire shall be construed accordingly to include any such act, default, omission, breach or negligence of any such employees, agents or Sub-Contractors of any tier.
- 7.5 Neither the examination, acknowledgement, knowledge of the terms of any agreement or document nor the review of any document or course of action by or on behalf of the Council, shall unless otherwise expressly stated in this Agreement, relieve the Concessionaire of any of its obligations under the Contract Documents or of any duty which it may have hereunder to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the examination, acknowledgement or knowledge.

8 CONFLICT OF INTEREST

Conflict

- 8.1 The Concessionaire shall not voluntarily enter into any arrangement which results in a conflict between any duty or obligation imposed by the arrangement and its obligations under this Agreement. This Clause 8 shall not be interpreted to mean that the Concessionaire may not purchase, acquire or maintain other local facilities and premises but rather that it shall not do so to the material detriment of this Agreement or the Services.

Prejudice

- 8.2 The Concessionaire shall not voluntarily enter into any arrangement which shall prejudice its ability to perform the Services under this Agreement.

Resolution

- 8.3 In the event of conflict under Clause 8.1 or prejudice under Clause 8.2 the Concessionaire shall use all reasonable endeavours to resolve the conflict or eliminate the prejudice so far as is possible.
- 8.4 Notwithstanding this Clause 8, in the event that conflict or prejudice of a type referred to in Clauses 8.1 and 8.2 does arise (voluntarily or not) the Concessionaire shall (upon becoming aware of the same) notify the Authorised Officer of the conflict or prejudice as soon as reasonably practicable.

9 MARKETING, PUBLICITY AND SPONSORSHIP

Marketing, Advertising and Sponsorship Strategy

- 9.1 The Concessionaire shall prepare and thereafter implement a thorough, comprehensive and accessible marketing, communications, social media, advertising and sponsorship strategy (including website) to promote the Premises and Services generally to every household in the borough (four times per year or at such other less regular intervals as agreed between the parties, acting reasonably).
- 9.2 The Marketing Strategy shall be submitted to the Authorised Officer and the Council's Corporate Communications Team for approval prior to its implementation, such approval not to be unreasonably withheld or delayed, and revised with the Authorised Officer's approval on an annual basis such approval not to be unreasonably withheld or delayed. Without limitation to the generality of the foregoing the Contractor shall ensure the Marketing Strategy sets out the means by which the Concessionaire will collect and collate Customer contact details including email addresses and seek consent from the Customers to share such Personal Data with the Council for the Council's own communications and marketing purposes.

Approval

- 9.3 Except where the Concessionaire is promoting its business generally and except in any publicity or marketing material which is not exclusive to the Premises, the Concessionaire shall submit:
- 9.3.1 proofs of all marketing and advertising material to the Authorised Officer prior to publication and shall not circulate such material without the consent of the Authorised Officer which shall not be unreasonably withheld or delayed and which shall be deemed granted unless the Authorised Officer expressly informs the Concessionaire within 5 Working Days of receipt of the proofs that such consent is not granted; and
- 9.3.2 details of any sponsorship deal brokered to the Authorised Officer for approval. The provisions of Clause 9.3.1 shall apply in relation to approval timescales and deemed approval.
- 9.4 The Authorised Officer and the Council's Corporate Communications Team should be made aware of any events or services or changes to services no less than five (5) days in advance to ensure incorporation in the Council's own publicity and marketing materials, where deemed appropriate by the Council's Corporate Communications Team.
- 9.5 The Concessionaire shall ensure that any marketing, advertising or sponsorship shall comply with any of the Council's advertising policies notified to the Concessionaire in writing and shall for the avoidance of doubt not promote the sale of products containing or derived from

tobacco or the manufacture or sale of arms and weapons or other specified areas, as notified by the Council to the Concessionaire from time to time.

Acknowledgement

- 9.6 All publicity and marketing material which is specific to the Services and the Premises shall acknowledge the Council and all advertising and membership material including all newspaper advertisements, site advertisements and signs and leaflets shall at all times comply with the Council's Corporate Identity guidelines as appended hereto at Schedule 14, including such updated versions of the same as notified by the Council to the Concessionaire.
- 9.7 The Concessionaire shall ensure all marketing and communication outputs, across ALL communication channels set out in the Marketing Strategy aimed at service users and residents, and any new signage in the Premises, clearly presents the Council as the organisation with primary responsibility for the Premises and Services.

Council to publish

- 9.8 The Council may publish information about the Premises and/or the Services as they may deem appropriate from time to time and may provide copies and details of the Agreement to any government department or other body having the purpose of compiling precedents PROVIDED THAT nothing in this Clause 9.8 shall permit the Council to publish any Confidential Information including Commercially Sensitive Information. The Council shall prior to publication in accordance with this Clause 9.8 use its reasonable endeavours to consult with the Concessionaire about the content of the publication relating to the Concessionaire, the Services and/or Premises.

Media / Press

- 9.9 The Concessionaire shall not submit any press release, statements or speak to any member of the media specifically about the Premises or the Services without the prior and express consent of the Authorised Officer and the Corporate Communications Team, whether such contact with the media or press release is in relation to the promotion or marketing of the Premises or the Services or is in relation to media interest of other kinds such as the production of a documentary of or incident at the Premises. The provisions of Clause 9.3.1 shall apply in relation to timescales for approval and deemed approval.

10 NOVATIONS ETC OF CONTRACTS

- 10.1 The Council hereby novates or assigns with effect from the Commencement Date to the Concessionaire:
- 10.1.1 all the Contracts which are capable of assignment without the consent of other parties to those contracts as listed in Schedule 12 part 1; and
 - 10.1.2 all the Contracts which are not assignable without the consent of other parties to those Contracts but where the consent has been obtained prior to the Commencement Date as listed in Schedule 12 part 2.
- 10.2 The Concessionaire shall use best endeavours to obtain consent from contractors to the assignment prior to the Commencement Date. If any of the Contracts listed in Schedule 12 part 3 cannot be transferred to the Concessionaire except by an assignment made with the consent of another party or by an agreement of novation:

- 10.2.1 this Agreement shall not constitute an assignment or an attempted assignment of the Contract if the assignment or attempted assignment would constitute a breach of the Contract;
- 10.2.2 after the Commencement Date the parties shall use their respective reasonable endeavours to obtain the consent of the other party to the assignment, or to procure the novation, of the Contract; and
- 10.2.3 until the consent or novation is obtained:
 - 10.2.3.1 the Council shall hold the same on trust for the Concessionaire and shall (at its cost) do all such acts and things as the Concessionaire may reasonably require to enable due performance of the Contract and to provide for the Concessionaire the benefits of the Contract (including enforcement of any right of the Council against the other party to the Contract arising out of its termination by the other party or otherwise);
 - 10.2.3.2 the Concessionaire shall (if sub-contracting is permissible and lawful under the Contract in question), as the Council's sub-contractor, perform all the obligations of the Council under such Contract and where sub-contracting is not permissible, the Concessionaire shall perform such obligations as agent for the Council; and
 - 10.2.3.3 unless and until any such Contract is assigned or novated, the Council shall (so far as it lawfully may) at the Concessionaire's cost give all such assistance as the Concessionaire may reasonably require to enable the Concessionaire to enforce its rights under such Contract, including, providing access to all relevant books, documents and other information in relation to such Contract as the Concessionaire may reasonably require from time to time.
- 10.3 All receipts relating to the Contracts and all Losses and outgoings incurred or payable in relation to the Contracts up to the Commencement Date ("**Historic Liabilities**") shall belong to, and be paid and discharged by, the Council. The Council undertakes to indemnify and keep the Concessionaire indemnified against any Historic Liabilities.
- 10.4 All receipts relating to the Contracts and all Losses and outgoings incurred or payable in relation to the Contracts as from and including the Commencement Date ("**Future Liabilities**") shall belong to, and be paid and discharged by the Concessionaire. The Concessionaire undertakes to indemnify and keep the Council indemnified against any Future Liabilities.
- 10.5 The Concessionaire agrees that, following the Commencement Date, it shall provide the Council with sufficient information, as reasonably requested by the Council, to enable the Council to accurately determine and discharge any Historic Liabilities for which it is responsible. In the event that the Council makes an underpayment or overpayment in relation to any Historic Liabilities the Council and the Concessionaire agree to repay any such sums to the other (as appropriate).
- 10.6 **Appointment of Concessionaire as Council's sub-contractor**

The Council hereby appoints the Concessionaire, in consideration of £10 (receipt of which the Concessionaire hereby acknowledges), as its sub-contractor in relation to the Council's contract with the North-East Surrey Crematorium Board (NESCIB) for the management of the

North-East Surrey Crematorium under which the Council is contracted to provide a crematorium management service. The appointment is for the remainder of the term of that contract. The Council confirms that it has obtained the consent of the NESCB to the sub-contracting. The Concessionaire having been provided with a copy of the contract confirms that it will deliver the services described within it as if it were the main contractor and in accordance with the performance indicators set out in Appendix 5 of the Specification; however the Parties acknowledge that the Council remains ultimately responsible for the delivery of the contract and retains primary liability. Where the Parties agree detailed arrangements for the operation of this sub-contract then these shall be deemed to form part of this Agreement.

11 EQUIPMENT

Council's Equipment

- 11.1 The inventory of Council's Equipment is at Appendix 2 of the Specification ("Inventory").
- 11.2 The Council shall, at no cost to the Concessionaire, make available to the Concessionaire from the Commencement Date the items of Council's Equipment.
- 11.3 The Council's Equipment shall vest in and remain the property of the Council and shall be delivered up at the end of the Contract Period or earlier termination for any reason in good and substantial repair and condition except that the Concessionaire shall not be obliged to put the Equipment in any better state of repair or condition than it was in at the Commencement Date. The Concessionaire shall be responsible for the maintenance and replacement of the Council's Equipment at its own expense except where it is expressly stated in the Contract Documents that any such maintenance and/or replacement shall be carried out at the Council's expense.
- 11.4 Where an item of Council's Equipment has been replaced in accordance with Clause 11.9 below, the replacement item shall become Council Equipment and shall be delivered up to the Council in accordance with this Clause 11.
- 11.5 The Concessionaire shall be entitled to reject any item of Council Equipment which is in disrepair, obsolete, unsafe or no longer reliable, effective or fit for purpose for the purpose for which it was intended as at the Commencement Date. Subject to that, the Council does not guarantee, warrant or give any assurances as to the sufficiency, age, condition or state of repair of any item of Council Equipment and the Concessionaire shall be deemed to have carried out its own inspections and made its own assessment of the Council Equipment prior to the Commencement Date and to accept the Council Equipment as seen.
- 11.6 The Council Equipment may only be used for the purposes of delivering the Services.
- 11.7 At any time during the Contract Period the Council may, upon reasonable notice to the Concessionaire, carry out an inspection of the Equipment for the purposes of verifying the Inventory and/or ensuring that the Concessionaire is complying with its obligations under this Clause 11.

Concessionaire Equipment

- 11.8 The Concessionaire shall, at its own cost, provide and supply in good and substantial repair and condition all items of Concessionaire Equipment.

Maintenance and Repair

- 11.9 The Concessionaire shall, at its own expense, repair or replace the Equipment as necessary throughout the Contract Period. For the purposes of this Clause the expression “as necessary” means that the Concessionaire shall repair or replace the item of Equipment:-
- 11.9.1 when it is damaged or broken in a material way, however caused;
 - 11.9.2 when it is in poor condition due to wear and tear and its appearance reflects detrimentally on the quality of Services required to be provided under this Agreement;
 - 11.9.3 when it is used up;
 - 11.9.4 when it is no longer safe or when a manufacturer's recommendation, Legislation, code of practice or Guidance provides that it is no longer likely to be safe;
 - 11.9.5 when it is no longer reliable or effective; when it is no longer fit for the purpose for which it was provided or intended; and/or
 - 11.9.6 when it is commonly considered to be outdated.

The tests set out in the above list shall be agreed and applied reasonably by the Parties. The Concessionaire shall only be required to replace an item of Equipment pursuant to this clause 11.9 on a “like for like” basis, but it may replace the item of Equipment (at its discretion) with an item of equipment of an equivalent or higher specification or value.

End of Contract Period

- 11.10 At the end of the Contract Period the Concessionaire shall offer to the Council for sale any item of Concessionaire Equipment which is not Council Equipment, which shall for the avoidance of doubt remain the property of the Council, on a first refusal basis and at Net Book Value. If any of the Concessionaire Equipment is encumbered by a lease/hire, the Concessionaire shall ensure that the benefit and burden of such arrangements can be assigned to the Council or to any New Service Provider at the Council's request and on terms no less favourable than enjoyed by the Concessionaire.
- 11.11 In the event of dispute as to the Net Book Value of any item the matter shall be referred to the Dispute Resolution Procedure and if necessary the Expert and during such process the item of Concessionaire Equipment in question shall remain subject to the Council's right of first refusal.
- 11.12 The Concessionaire shall update the Inventory at least every twelve (12) months during the Contract Period and provide a copy of the Inventory upon reasonable request by the Council. In addition, the Concessionaire shall provide the Council with a final copy of the Inventory (the “Final Inventory”) three (3) months prior to the end of the Contract Period. The Final Inventory shall contain details of the Net Book Value of all items of Concessionaire Equipment.
- 11.13 Within two (2) weeks of receipt of the Final Inventory, the Council shall notify the Concessionaire of the items it wishes to purchase and if no such notification is received by the Concessionaire in respect of any item of Concessionaire Equipment the Concessionaire may treat that item of Concessionaire Equipment as released from the obligation to sell it to the Council.

Provision of Vehicles by the Council

- 11.14 The Council shall make available for use by the Concessionaire two police cars and one police dog van, fitted to Home Office standards. These will be maintained by the Council, and servicing shall take place according to a schedule agreed with the Concessionaire. The Council shall also be responsible for:
- 11.14.1 insuring the vehicles;
 - 11.14.2 complying with all relevant Legislation around vehicle taxation and MOT;
 - 11.14.3 maintaining the lease payments, in the event that any of the vehicles are leased.
- 11.15 The Concessionaire shall ensure that only those staff seconded to it from the Council as forming part of the Parks and Events Police shall drive the vehicles.

12 CONDITION OF THE PREMISES

12.1 Council's Repair Obligations

- 12.1.1 The Council shall retain responsibility for and carry out the Council's Repair Obligations at the Premises. The Council shall not be liable for breach of this clause to the extent that:
- 12.1.1.1 the Council's failure to complete such repairs and/or maintenance is a direct result of an earlier or on-going breach by the Concessionaire of its obligations set out in Clause 12.3 below; or
 - 12.1.1.2 where the Council is prevented as a result of an act or omission of the Concessionaire from performing its obligations under this clause; or
 - 12.1.1.3 the Concessionaire has not notified the Council of the repair and/or maintenance and provided the Council with reasonable period of time to carry out the repairs or maintenance.
- 12.1.2 The Council's Repair Obligations do not extend to carrying out all or any repairs or maintenance or replacement works that may be identified or recommended within any Building Condition Survey. However it will carry out the Council's Repair Obligations to a standard that enables every Premises to be fit for the purpose of the Concessionaire delivering the Services. The Council's reasonably and properly incurred costs of any works of repair and maintenance that are required as a result of any Concessionaire negligent act or omission in its use of any Premises shall be recharged to the Concessionaire by the Council.
- 12.1.3 Where in performance of the Council's Repair Obligations, the Council requires that all or part of any Premises is closed or otherwise not available for use by Customers, then the provisions of section 4.3 of the Specification shall apply.

12.2 Breach of the Council's Repair Obligations

- 12.2.1 If the Council fails to carry out any of the Council Repair Obligations the Concessionaire shall notify the Council of such failure to repair and/or maintain and shall provide the Council with a reasonable period of time to rectify the failure.
- 12.2.2 If following notification in accordance with Clause 12.2.1 the Council continues to fail to rectify the repair or maintenance in a reasonable period of time ("Compensation Event") and as a direct result the Concessionaire will:

12.2.2.1 be unable to comply with its obligations under this Agreement; and/or

12.2.2.2 incur costs or lose Income,

then the Concessionaire is entitled to apply for relief from its obligations and/or to claim compensation under this Agreement.

Procedure for Relief and Compensation

12.2.3 Subject to Clause 12.2.5, to obtain relief and/or claim compensation the Concessionaire must as soon as practicable, and in any event within twenty (20) Working Days after it became aware that the Compensation Event has caused or is likely to cause breach of an obligation under this Agreement and/or the Concessionaire to incur costs or lose Income, give to the Council a notice of its claim for payment of compensation and/or relief from its obligations under this Agreement. Such notice to include the following:

12.2.3.1 full details of the Compensation Event and the relief from its obligations requested and/or any estimated costs incurred or income lost; and

12.2.3.2 demonstrate to the reasonable satisfaction of the Council that:

12.2.3.2.1 the Compensation Event was the direct cause of:

- the increased costs; and/or
- loss of Income; and/or
- breach of the Concessionaire's obligations under this Agreement; and

12.2.3.2.2 the estimated increased cost or loss or Income and/or relief from the obligations under this Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Concessionaire acting in accordance with Good Industry Practice.

Giving of Relief and Compensation

12.2.4 In the event that the Concessionaire has complied with its obligations under clause 12.2.3, then to the extent the relief or compensation could not reasonably have been mitigated and without double counting:

12.2.4.1 in the case of an additional cost being incurred, the Council shall compensate the Concessionaire for the estimated additional cost as adjusted to reflect the actual costs reasonably incurred. Such costs to be calculated with the relevant Detailed Rates as set out in Schedule 4 (Pricing Tables) and if no such rates apply then such commensurate rates as are applicable and/or;

12.2.4.2 in the case of any loss of Income the Concessionaire shall provide evidence of usage patterns and income for the relevant Premises or part thereof as applicable, for the average of the previous 3 years shown on a hourly and daily rate basis; and/or

- 12.2.4.3 the Council shall give the Concessionaire such relief from its obligations under this Agreement as is reasonable for such a Compensation Event.

Late Provision of Notice or Information

- 12.2.5 In the event that information is provided after the dates referred to in Clause 12.2.3 (Procedure for Relief and Compensation), then the Concessionaire shall not be entitled to any compensation or relief from its obligations under this Agreement in respect of the period for which the relevant information is delayed.

Failure to Agree

- 12.2.6 If the parties cannot agree the extent of any compensation, relief from the Concessionaire's obligations under this Agreement, or the Council disagrees that the Compensation Event has occurred (or as to its consequences), or that the Concessionaire is entitled to relief under Clauses 12.2.2 to 12.2.6, the parties shall resolve the matter in accordance with the Dispute Resolution Procedure.

Concessionaire's Responsibilities

- 12.3 Subject to Clause 12.1 above the Concessionaire shall ensure on a continuing basis that at all times its maintenance and operating procedures set out in the Concessionaire's Proposals are and remain sufficient to ensure that:
 - 12.3.1 it complies with the Concessionaire Repair Obligations as set out in the Services Specification;
 - 12.3.2 the Premises are available for use by the Customers as required by this Agreement and the Services Specification;
 - 12.3.3 the Concessionaire can continuously deliver the Services in accordance with and at all times required by this Agreement and the Services Specification; and
 - 12.3.4 the Premises are handed back to the Council on the Expiry Date in accordance with the provisions of any relevant Lease or Licence and in a clean and tidy condition free of any rubbish.
- 12.4 From time to time the Concessionaire shall review and implement its Concessionaire's Proposals to ensure that the requirements of Clause 12.3 above are met.
- 12.5 Without prejudice to the generality of Clause 12.3 above the Concessionaire shall ensure that at all times during the Contract Period the Premises are kept:
 - 12.5.1 safe, secure and well lit;
 - 12.5.2 in working order, properly serviced by utilities, drainage, heat and light, in accordance with the terms of this Agreement;
 - 12.5.3 properly and sufficiently equipped; and
 - 12.5.4 reasonably accessible to all Customers, including those with impaired mobility and other disabilities.

13 USE OF THE PREMISES

- 13.1 The Premises shall be made available for use in the provision of the Services during the Contract Period as set out in the Services Specification.

- 13.2 The Concessionaire may enter into arrangements for third party use of the Premises provided that:
- 13.2.1 any such use is in accordance with Legislation and does not involve the commission of, or incitement to the commission of, a criminal offence;
 - 13.2.2 the use is not one which the Authorised Officer (acting reasonably) or the Metropolitan Police has objected to and such objection has been notified to the Concessionaire.
- 13.3 Emergencies
- 13.3.1 If an Emergency arises during the Contract Period which cannot be dealt with by performance of the Services, the Authorised Officer may instruct the Concessionaire to divert any or all of the Concessionaire's resources committed under this Agreement as may for the time being be deemed necessary to undertake such duties as the Authorised Officer shall reasonably require to ensure that the Emergency is dealt with and normal operation of the relevant Premises resumes as soon as is reasonably practicable PROVIDED THAT the Concessionaire shall not be obliged to provide any service which it is neither qualified nor competent to provide. For the avoidance of doubt the Council may require the Concessionaire to hand over all or part of the Premises to the Council for its use during the Emergency and without limitation to provide the Premises or any part thereof, as further set out in Clause 13.4 below.
 - 13.3.2 Payment for diverted staff resources shall be made by the Council at the Concessionaire's hourly rates as set out in the Detailed Rates for the individual members of staff redeployed.
- 13.4 Use of Premises for Elections and Civic Emergencies
- 13.4.1 On at least 56 calendar days' notice by the Council, the Concessionaire shall permit the Council to use the Premises for the purpose of Elections.
 - 13.4.2 The Concessionaire shall be entitled to recover its reasonable and fully evidenced staffing costs incurred in the opening, setting up, cleaning and closing of the relevant part of the Premises for the Elections together with any Utilities consumed during the period of usage. In addition, the Council shall pay the Concessionaire compensation for loss of income. The Concessionaire shall be required to provide such evidence as reasonably requested by the Council to evidence such loss of income. Any dispute arising regarding the level of compensation payable shall be dealt with in accordance with the Dispute Resolution Procedure.
 - 13.4.3 In the event of an Emergency, or a practice exercise for an Emergency under the Civil Contingencies Act 2004, the Council shall be entitled to use any Premises for any purpose including as an emergency reception centre. In the case of a practice exercise, this right can only be exercised if 90 prior days' notice has been given. The Concessionaire shall be entitled to recover its reasonable and fully evidenced staffing costs incurred in the opening, setting up, cleaning and closing of the relevant part of the Premises for the Emergency or practice exercise together with any Utilities consumed during the period of usage, but only once 24 hours has elapsed from the first use of the Premises for that purpose. In addition, the Council shall pay the

Concessionaire compensation for loss of income. The Concessionaire shall be required to provide such evidence as reasonably requested by the Council to evidence such loss of income. Any dispute arising regarding the level of compensation payable shall be dealt with in accordance with the Dispute Resolution Procedure.

14 HEALTH AND SAFETY

- 14.1 Throughout the Contract Period the Concessionaire shall prepare a health and safety manual which shall be available at all Premises. The Concessionaire shall ensure the health and safety manual:-
- 14.1.1 is maintained and reviewed as often as may be necessary in the light of changing Legislation, working practices or any other factor, and shall notify the Council by email of such revisions upon request; and
 - 14.1.2 is revised in response to any changes, amendments or further instructions reasonably requested or issued by the Council in connection with the Concessionaire's health and safety procedures; and
 - 14.1.3 includes emergency operating procedures which are to be communicated to all Concessionaire Related Parties and periodically tested, including without limitation accident procedures, procedures for ensuring Police assistance is obtained where necessary and procedures in the event of threatening behaviour from the public.
- 14.2 The Concessionaire shall, in performing the Services, ensure that it and all Concessionaire Related Parties comply with:-
- 14.2.1 all applicable health and safety Legislation;
 - 14.2.2 all applicable health and safety precautions necessary including all safe methods of work in order to protect the health and safety of all staff, Council Related Parties, and any other persons including (without limitation) members of the public and Customers;
 - 14.2.3 all reasonable instructions given to it by the Council and/or the police and/or fire officers concerning matters arising out of or connected to the Services and representing a danger to persons or property; and
 - 14.2.4 the Concessionaire's health and safety manual.
- 14.3 For the avoidance of doubt the Council shall not be obliged to make and the Concessionaire shall not be entitled to receive any additional payment save where the Council's requirements exceed any statutory requirements by reason of:-
- 14.3.1 any steps which the Council requires the Concessionaire to take to secure compliance with Legislation or Guidance on health or safety (including at the Council's request, the appointment of an independent health and safety adviser to review the Concessionaire's working procedures); and/or
 - 14.3.2 any part of the Services being omitted because of a stoppage required by the Council due to health or safety reasons.
- 14.4 Reporting

14.4.1 The Concessionaire shall:

- 14.4.1.1 record and retain a record as required by health and safety Legislation;
- 14.4.1.2 ensure that all accidents to staff which ordinarily require reporting in accordance with health and safety Legislation are recorded and shall also be reported to the Council at the regular Review Meetings; and
- 14.4.1.3 immediately on it becoming aware, provide the Council with full details of any incident which requires notification to the Health and Safety Executive which related in any way to the Services.

14.5 Hazardous Materials

- 14.5.1 In the event that the Concessionaire uses or stores, or intends to use or store any hazardous materials or equipment used in the provision of the Services the Concessionaire shall ensure that they are kept under control and in safe keeping in accordance with all relevant Legislation and Good Industry Practice including maintaining registers at the relevant Premises of such hazardous materials and/or equipment, and shall ensure that all such materials are properly and clearly labelled on their containers. The Concessionaire shall make the registers available for inspection by the Council upon reasonable request.
- 14.5.2 As applicable and as relevant the Concessionaire shall maintain a COSHH register in relation to each Premises and shall ensure that a copy of each register is held at the relevant Premises, at the Concessionaire's registered office and that a copy is given to the Authorised Officer upon request.

PART 3 - EMPLOYEES

15 SECONDED EMPLOYEES

- 15.1 The Parties acknowledge that at the date of this Agreement the Council has seconded a number of its employees (the “Seconded Employees”) to the Concessionaire to provide certain Services.
- 15.2 The Concessionaire and the Council shall enter into a Secondment Agreement substantially in the form set out at Schedule 10 and as further agreed between the Parties.

16 TUPE AND EMPLOYEES

16.1 Relevant Transfers

- 16.1.1 The Council and the Concessionaire agree that the following events:

16.1.1.1 the Commencement Date; and

16.1.1.2 where the identity of a provider (including the Council) of any service which constitutes or which will constitute the Services in whole or in part is changed whether in anticipation of changes pursuant to this Agreement or not,

shall constitute a Relevant Transfer and that the contracts of employment of any Relevant Employees shall have effect (subject to Regulation 4(7) of TUPE) thereafter as if originally made between those employees and the new provider except insofar as such contracts relate to those parts of an occupational pension scheme relating to the old age, invalidity or survivors’ benefits.

- 16.1.2 The Council shall comply and the Concessionaire shall comply and shall procure that each Sub-Contractor shall comply with its TUPE obligations (including without limitation the obligation under Regulation 13(4) of TUPE) in respect of each Relevant Transfer pursuant to this Agreement and the Council and the Concessionaire shall indemnify the other against any Direct Losses sustained as a result of any breach of Clause 16.1.1 by the Party in default save to the extent it is caused by an act or omission of the other party.

16.2 Emoluments, Outgoings and Obligations

- 16.2.1 The Council shall be responsible for all remuneration, benefits, entitlements and outgoings in respect of the Relevant Employees, including without limitation all wages, holiday pay, bonuses, commissions, payments of PAYE, national insurance contributions, pension contributions and otherwise, up to the Commencement Date.
- 16.2.2 The Concessionaire shall be responsible or shall procure that any relevant Sub-Contractor is responsible for all remuneration, benefits, entitlements and outgoings in respect of the Relevant Employees and any other person who is or will be employed or engaged by the Concessionaire or any Sub-Contractor in connection with the provision of any of the Services, including without limitation all wages, holiday pay, bonuses, commission, payment of PAYE, national insurance contributions, pension contributions and otherwise, from and including the Commencement Date.

- 16.2.3 The Council undertakes to the Concessionaire as at the date of this Agreement until the Commencement Date to (a) perform all the Council's obligations under or in connection with the contracts of employment of the Relevant Employees arising or in respect of any period on or before the Commencement Date and (b) to meet any costs on an indemnity basis arising from an act or omission of the Council prior to the Commencement Date that has led to a Relevant Employee raising a grievance but only where the grievance has not been resolved prior to the Commencement Date.
- 16.2.4 The Concessionaire undertakes to perform all the Concessionaire's obligations under or in connection with the contracts of employment of the Relevant Employees on or after the Commencement Date.

16.3 Employment Costs

- 16.3.1 The Council has supplied to the Concessionaire the information, as at the date of this Agreement, which is contained in Schedule 6 (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 Council who it is expected, if they remain in the employment of the Council until immediately before the Commencement Date, would be Relevant Employees but the Council gives no warranty as to the accuracy or completeness of this information.
- 16.3.2 The Council shall use all reasonable endeavours to supply the Concessionaire with updates of the First Employee List at monthly intervals from the date of this Agreement and an updated list ten (10) Working Days before the Commencement Date. The Council shall also supply to the Concessionaire within five (5) Working Days after the Commencement Date information, which was correct as at the Commencement Date, in respect of the Relevant Employees on all the same matters as should be provided in the First Employee List. This list is the "Final Employee List". The Council give 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.
- 16.3.3 Without prejudice to Clauses 16.3.1, 16.3.2 and 16.3.5 the Council shall provide the Employee Liability Information to the Concessionaire at such time or times as are required by TUPE; and update the Employee Liability Information to take account of any changes as required by TUPE.
- 16.3.4 The Council gives and shall give no warranty as to the accuracy or completeness of the Employee Liability Information supplied by the Council.
- 16.3.5 The Parties have agreed the details set out in Schedule 6 which show or may be used to calculate, in respect of the Services, the monthly costs of employing the Relevant Employees who are expected to be engaged in the provision of the Services. These costs (the "Remuneration Costs") have been calculated on the basis of (amongst other things) the information contained in the First Employee List.
- 16.3.6 If following the submission of the Final Employee List the Council agrees that the Remuneration Costs should to be adjusted on account of any material differences between the information contained in the First Employee List and that contained in the Final Employee List, or on account of any material inaccuracies in or omissions from the information contained in the First Employee List or the Final Employee List

then (subject to Clauses 16.3.7, 16.3.8 and 16.6) there shall be a corresponding adjustment to the Concession Fee to compensate for any such difference.

16.3.7 If the circumstances described in Clause 16.3.6 arise:

16.3.7.1 in circumstances where there are more Relevant Employees than shown on the Final Employee List then the parties shall discuss the implications for the provision of the Services; and

16.3.7.2 the Concessionaire and the relevant Sub-Contractor shall take all reasonable steps to mitigate any additional costs and any adjustment to the Concession Fee shall be calculated as if they had done so.

16.3.8 In calculating any adjustment to be made to the Concession Fee pursuant to Clause 16.3.6:

16.3.8.1 no account shall be taken of a decrease in the Remuneration Costs to the extent that it arises from a reduction in the number of Relevant Employees or their whole time equivalent such that there are, immediately after the Commencement Date, fewer suitably qualified persons available than are shown on the First Employee List and to the extent that the Concessionaire has employed replacement staff on equivalent remuneration and has used all reasonable endeavours to mitigate all expenses in recruiting and employing such replacement staff;

16.3.8.2 to avoid double counting, no account shall be taken of any change to the Remuneration Costs to the extent that the Concessionaire has been or will be compensated as a result of any indexation of the Concession Fee under this Agreement;

16.3.8.3 to avoid doubt, any changes in costs which fall to be dealt with under Clause 16.3.5 and which arise from a Change in Law shall be dealt with in accordance with the provisions of Clause 16.3.6 and shall not be taken into account for the purposes of Clause 38 (Change in Law);

16.3.8.4 no adjustments under Clause 16.3.5 shall be made in respect of overpayments made by the Concessionaire or a relevant Sub-Contractor to Relevant Employees which arise from reliance on the Final Employee List to the extent that the Concessionaire or a relevant Sub-Contractor is unable to correct overpayments in respect of continuing employment having taken reasonable steps to do so;

16.3.8.5 if there are underpayments by the Concessionaire or a relevant Sub-Contractor to Relevant 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 Concession Fee in respect of all such liabilities of the Concessionaire or relevant Sub-Contractor for all such underpayments which are retrospective (save that any such liabilities which relate to the period prior to the Commencement Date shall be dealt with in

- accordance with clauses 16.2) and an appropriate increase in respect of such liabilities of the Concessionaire which represent ongoing costs;
- 16.3.8.6 in order to prevent duplication, no adjustment shall be made under this Clause 16.3.8 to the extent that any indemnity given by the Council under any other provision of this Agreement would apply; and
 - 16.3.8.7 no adjustments under Clause 16.3.6 shall be made to the extent that any payment is made to the Concessionaire or a relevant Sub-Contractor under Regulation 12 of TUPE.
- 16.3.9 Either party may propose an adjustment to Concession Fee pursuant to Clause 16.3.6 by giving not less than ten (10) Working 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 16.3.6.
- 16.3.10 In relation to all matters described in Clauses 16.3.7 and 16.3.8 the Concessionaire and the Council shall, and the Concessionaire shall procure that the relevant Sub-Contractor 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.
- 16.4 Union Recognition
- 16.4.1 The Council shall use reasonable endeavours to supply to the Concessionaire no later than five (5) Working Days prior to the Commencement Date true copies of union recognition agreement(s) and the Concessionaire shall and shall procure that each and every Sub-Contractor shall in accordance with TUPE recognise the trade unions representing Relevant Employees (as relevant to each Sub-Contractor) after the transfer to the same extent as they were recognised before the Commencement Date.
 - 16.4.2 The Concessionaire shall procure that, on each occasion on which the identity of a Sub-Contractor changes pursuant to this Agreement, in the event that there is a Relevant Transfer, the new Sub-Contractor shall in accordance with TUPE recognise the trade unions representing the employees whose contracts of employment transfer to the new Sub-Contractor to the same extent as they were recognised before the change of identity of the Sub-Contractor in respect of the provision of the Services at the Council's premises.
- 16.5 Indemnities
- 16.5.1 The Council shall indemnify and keep indemnified in full the Concessionaire (for itself and for the benefit of each relevant Sub-Contractor) against all Direct Losses incurred by the Concessionaire or any relevant Sub-Contractor in connection with or as a result of:
 - 16.5.1.1 a breach by the Council of its obligations under Clauses 16.1 and 16.2 above;
 - 16.5.1.2 any claim or demand by any Relevant Employee arising out of the employment of any Transferring Employee or Relevant Employee

provided that this arises from any act, fault or omission of the Council in relation to any Transferring Employee or Relevant Employee prior to the date of the Relevant Transfer (save to the extent that such act, fault or omission arises as a result of the Concessionaire's or any relevant Sub-Contractor's failure to comply with Regulation 13(4) of TUPE) and any such claim is not in connection with the Relevant Transfer.

- 16.5.2 any claim or other legal recourse by any trade union or staff association or employee representatives arising from or connected with the failure by the Council to comply with its legal obligations under TUPE arising before the Commencement Date in relation to all or any of the Relevant Employees. The Concessionaire shall indemnify and keep indemnified in full the Council against:
 - 16.5.2.1 all Direct Losses incurred by the Council or any New Service Provider in connection with or as a result of any claim or demand against the Council or any New Service Provider by any person who is or has been employed or engaged by the Concessionaire or any Sub-Contractor in connection with the provision of any of the Services where such claim arises as a result of any act, fault or omission of the Concessionaire and/or any Sub-Contractor after the Commencement Date;
 - 16.5.2.2 all Direct Losses incurred by the Council or any New Service Provider in connection with or as a result of a breach by the Concessionaire of its obligations under Clause 16.1.2 above; and
 - 16.5.2.3 all Direct Losses incurred by the Council or any New Service Provider in connection with or as a result of any claim by any trade union or staff association or employee representative (whether or not recognised by the Concessionaire and/or the relevant Sub-Contractor in respect of all or any of the Relevant Employees) arising from or connected with any failure by the Concessionaire and/or any Sub-Contractor to comply with any legal obligation to such trade union, staff association or other employee representative whether under Regulations 13 or 14 of TUPE or any award of compensation under Regulation 15 of TUPE, under the Directive or otherwise and, whether any such claim arises or has its origin before or after the date of the Commencement Date.
- 16.5.3 The Concessionaire shall indemnify and keep indemnified in full the Council, against all Direct Losses incurred by the Council in connection with or as a result of:
 - 16.5.3.1 A breach by the Concessionaire of its obligations under Clause 16.1
 - 16.5.3.2 any proposed or actual change by the Concessionaire or any Sub-Contractor to the Relevant Employees' working conditions, terms or conditions or any proposed measures of the Concessionaire or the relevant Sub-Contractor which are to any of the Relevant Employee's material detriment or to the material detriment of any person who would have been a Relevant Employee but for their resignation (or decision to treat their employment as terminated under Regulation 4(9) of TUPE) on or before the Commencement Date as a result of any such

proposed changes or measures and whether such claim arises before or after the Commencement Date; and

- 16.5.3.3 Any claim arising out of a wilfully negligent misrepresentation or misstatement made by the Concessionaire or Sub-Contractor to the Relevant Employees or their representatives whether before on or after the Commencement Date and whether liability for any such claim arises before on or after the Commencement Date,

Provided that, in relation to this Clause, the Concessionaire shall be entitled to conduct the claim in accordance with Clause 34.5.

16.6 Provision of Details and Indemnity

The Concessionaire shall as soon as reasonably practicable and in any event within ten (10) Working Days following a written request by the Authorised Officer provide to the Authorised Officer details of any measures which the Concessionaire or any Sub-Contractor envisages it or they will take in relation to any employees who are or who will be the subject of a Relevant Transfer, and if there are no measures, confirmation of that fact, and shall indemnify the Council against all Direct Losses resulting from any failure by the Concessionaire to comply with this obligation.

16.7 Re-Tendering

- 16.7.1 The Concessionaire shall (and shall procure that any Sub-Contractor shall) within the period of twelve (12) months immediately preceding the expiry of this Agreement or following the service of a notice under Clause 30 (Termination):

- 16.7.1.1 Within twenty (20) Working Days or such longer period as the parties, acting reasonably, agree on receiving a request from the Council provide in respect of any person engaged or employed by the Concessionaire or any Sub-Contractor in the provision of the Services (“the Assigned Employees”) full and accurate details 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 Assigned Employees who it is expected, if they remain in the employment of the Concessionaire or of any Sub-Contractor as the case may be until immediately before the Termination Date, would be Returning Employees as defined in Clause 16.8 below (the “Retendering Information”);
- 16.7.1.2 provide the Retendering Information at no cost to the Council;
- 16.7.1.3 notify the Authorised Officer forthwith in writing of any material changes to the Retendering Information promptly as and when such changes arise;
- 16.7.1.4 be precluded from making any material increase or decrease in the numbers of Assigned Employees other than in the ordinary course of business;

- 16.7.1.5 be precluded from making any increase in the remuneration or other change in the terms and conditions of the Assigned Employees other than in the ordinary course of business; and
- 16.7.1.6 be precluded from transferring any of the Assigned Employees to another part of its business or moving other employees from elsewhere in its or their business who have not previously been employed or engaged in providing the Services to provide the Services other than in the ordinary course of business.
- 16.7.2 Without prejudice to Clauses 16.7.1 and 16.7.3 the Concessionaire shall provide and shall procure that any Sub-Contractor shall provide the Employee Liability Information to the Council at such time or times as are required by TUPE, and shall warrant at the time of providing such Employee Liability Information that such information will be updated to take account of any changes to such information as required by TUPE.
- 16.7.3 The Concessionaire shall use best endeavours to provide up-to-date and accurate Retendering Information and / or Employee Liability Information in relation to its own employees and those of any Sub-Contractor and according to the timescales set out in this Agreement or required by TUPE. Where it fails to meet this standard and the Council suffers Direct Losses as a result, then
 - 16.7.3.1 the Concessionaire shall be entitled to conduct all claims where it is the Indemnifying Party in accordance with Clause 36.5 and the Council shall provide all reasonable assistance and co-operation required in relation to such claims;
 - 16.7.3.2 subject to Clause 16.7.3.3 the Concessionaire shall indemnify and shall keep indemnified in full the Council against such Direct Losses;
 - 16.7.3.3 the Council will only claim against the indemnity set out in Clause 16.7.3.2 to the extent that such Direct Losses are not met by the Future Service Provider in accordance with any indemnity that it has given in the Council's favour, and the Council confirms that it will use its best endeavours to claim to the maximum extent possible against any indemnity from the Future Service Provider.
- 16.8 Termination of Agreement
 - 16.8.1 On the expiry or earlier termination of this Agreement, the Council and the Concessionaire agree that it is their intention that TUPE shall apply in respect of the provision thereafter of any service equivalent to the Services but the position shall be determined in accordance with the Legislation at the date of expiry or termination as the case may be and this clause is without prejudice to such determination.
 - 16.8.2 For the purposes of this Clause 16.8.2 "Returning Employees" shall mean those employees wholly or mainly engaged in the provision of the Services as the case may be as immediately before the expiry or termination of this Agreement whose employment transfers to the Council or a New Service Provider pursuant to TUPE. Upon expiry or termination of this Agreement for whatever reason (such date being termed the "Return Date"), the provisions of this Clause 16.8.2 will apply:

16.8.2.1 The Concessionaire shall or shall procure that all wages, salaries and other benefits of the Returning Employees and other employees or former employees of the Concessionaire or the Sub-Contractors (who had been engaged in the provision of the Services) and all PAYE tax deductions, pension contributions and national insurance contributions relating thereto in respect of the employment of the Returning Employees and such other employees or former employees of the Concessionaire or Sub-Contractors up to the Return Date are satisfied;

16.8.2.2 Without prejudice to Clause 16.8.2.1, the Concessionaire shall:

16.8.2.2.1 remain (and procure that Sub-Contractors shall remain) (as relevant) responsible for all the Concessionaire's or Sub-Contractor's employees (other than the Returning Employees) on or after the time of expiry or termination of this Agreement and shall indemnify the Council against all Direct Losses incurred by the Council (including any claim made against it by a New Service Provider) resulting from any claim whatsoever whether arising before on or after the Return Date by or on behalf of any of the Concessionaire's or Sub-Contractor's employees who do not constitute the Returning Employees;

16.8.2.2.2 in respect of those employees who constitute Returning Employees indemnify the Council against all Direct Losses incurred by the Council ((including any claim made against it by a New Service Provider) resulting from any claim whatsoever by or on behalf of any of the Returning Employees in respect of the period on or before the Return Date (whether any such claim, attributable to the period up to and on the Return Date, arises before, on or after the Return Date) including but not limited to any failure by the Concessionaire or any Sub-Contractor to comply with its or their obligations under Regulations 13 and 14 of TUPE and any award of compensation under Regulation 15 of TUPE and/or Article 6 of the Directive as if such legislation applied, even if it does not in fact apply save to the extent that any such failure to comply arises as a result of an act or omission of the Council or any New Service Provider.

16.8.3 The Council shall be entitled to assign the benefit of this indemnity to any New Service Provider.

16.9 Sub-Contractors

In the event that the Concessionaire enters into any Sub-Contract in connection with this Agreement, it shall impose obligations on its Sub-Contractors in the same terms as those imposed on it pursuant to Clauses 16 and 17 and shall procure that the Sub-Contractor complies with such terms. The Concessionaire shall indemnify and keep the Council indemnified in full against all Direct Losses, incurred by the Council as a result of or in

connection with any failure on the part of the Concessionaire to comply with this clause and/or the Sub-Contractor's failure to comply with such terms.

17 PENSIONS

17.1 Concessionaire to Become an Admission Body/Participating Employer /Function Provider

Where the Concessionaire or a Sub-Contractor employs any Eligible Employees from a Relevant Transfer Date and wishes to offer those Eligible Employees membership of the LGPS or TPS as applicable, the Concessionaire shall procure that it and/or each relevant Sub-Contractor shall become an Admission Body in respect of the LGPS and a Function Provider or Participating Employer in respect of the TPS. The Concessionaire shall before the Relevant Transfer Date execute and procure that each relevant Sub-Contractor executes an Admission Agreement and Participation Agreement as applicable which will have effect from and including the Relevant Transfer Date.

17.2 Admission Agreement

The Council shall in its capacity as the employer under this agreement and as Administering Authority before the Relevant Transfer Date execute each of the Admission Agreements referred to in clause 17.1 (Concessionaire to Become an Admission Body). The Council shall act as guarantor of the Admission Agreement for the LGPS and has provided an Indemnity in relation to the TPS as set out in Schedule 16.

Indemnity for a Breach of the Admission Agreement

17.3 Without prejudice to the generality of this clause 17, the Concessionaire hereby indemnifies the Council and, in each case, their Sub-Contractors on demand from and against all Direct Losses ((including any claim made against it by a New Service Provider) suffered or incurred by it which arise from any breach by the Concessionaire or any Sub-Contractor of the terms of the Admission Agreement or Participation Agreement or their obligations as an Admission Body or Function Provider to the extent that such liability arises before or as a result of the termination or expiry of this Agreement (howsoever caused).

17.4 Right of Set Off

17.4.1 The Council shall have a right to set off against any payments due to the Concessionaire under this Agreement an amount equal to any overdue employer and employee contributions and other payments (and interest payable under the LGPS Regulations and/or the TPS Administration Regulations) due from the Concessionaire or from any relevant Sub-Contractor (as applicable) under the Admission Agreement and/or the Participation Agreement or as a Function Provider.

17.4.2 In the event that any employee and employer contribution is due under the terms of the Admission Agreement and remains unpaid for a period of nineteen days from the end of the calendar month then the Council shall have the right to deduct an amount equivalent to two months' employee and employer contribution from the next payment due to the Concessionaire under this Agreement and continue to deduct each month amounts equivalent to the employee and employer contributions for as long as such contributions shall remain unpaid by the Concessionaire. The amounts deducted pursuant to this clause shall be paid by the Council to the Fund. Once all outstanding employer and employee contributions have been paid in full by the Concessionaire any amounts in excess of this sum deducted by the Council pursuant

to this clause shall be reimbursed to the Concessionaire On each occasion this provision is invoked the Concessionaire shall pay to the Council an administration fee of £100 (which amount shall be increased on each anniversary of the Commencement Date by the increase in RPI during the previous year plus 3%) and in addition the Concessionaire shall pay to the Council any interest which the Council has paid as a result of the late payment of any contributions by the Concessionaire.

17.5 Concessionaire Ceases to be an Admission Body and or a Participating Employer/Function Provider

If the Concessionaire or any Sub-Contractor employs any Eligible Employees from a Relevant Transfer Date and:

- 17.5.1 the Concessionaire or any relevant Sub-Contractor does not wish to offer those Eligible Employees membership of the LGPS or the TPS as applicable; or
- 17.5.2 the Council, the Concessionaire or any relevant Sub-Contractor are of the opinion that it is not possible to operate the provisions of Clauses 17.1 to 17.4 inclusive; or
- 17.5.3 if for any reason after the Relevant Transfer Date the Concessionaire or any relevant Sub-Contractor ceases to be an Admission Body or a Participating Employer/Function Provider other than on the date of termination or expiry of this Agreement or because it ceases to employ any Eligible Employees,

then the provisions of Clauses 17.1 to 17.4 inclusive shall not apply (without prejudice to any rights of the Council under those clauses) and the provisions of Clause 17.6 shall apply.

17.6 Concessionaire Scheme

Where this Clause 17.6 applies pursuant to Clause 17.5, the following shall apply:

- 17.6.1 The Concessionaire shall or shall procure that any relevant Sub-Contractor shall not later than the Relevant Transfer Date or the Cessation Date (as the case may be) nominate to the Council in writing the occupational pension scheme or schemes which it proposes shall be “the Concessionaire Scheme” for the purposes of this Clause 17.6. Such pension scheme or schemes must be:
 - 17.6.1.1 established within three (3) months prior to the Relevant Transfer Date or Cessation Date (as the case may be);
 - 17.6.1.2 reasonably acceptable to the Council (such acceptance not to be unreasonably withheld or delayed);
 - 17.6.1.3 registered within the meaning of Section 150(2) of the Finance Act 2004; and
 - 17.6.1.4 certified in accordance with relevant guidance as providing benefits which are broadly comparable to those provided by the LGPS.
- 17.6.2 The Concessionaire undertakes to the Council (for the benefit of the Council itself and for the Council as agent and trustee for the benefit of the Eligible Employees) that it shall and shall procure that any relevant Sub-Contractor shall procure that:-
 - 17.6.2.1 the Eligible Employees shall by three (3) months before the Relevant Transfer Date or the Cessation Date (as the case may be) be offered

membership of the Concessionaire Scheme with effect from and including the Relevant Transfer Date or Cessation Date (as the case may be);

- 17.6.2.2 the Concessionaire Scheme shall provide benefits in respect of the Eligible Employees' periods of service on and after the Relevant Transfer Date or Cessation Date (as the case may be) which the Government Actuary's Department or an actuary nominated by the Council in accordance with relevant guidance produced by the Government Actuary's Department shall certify to be broadly comparable to the benefits which the Eligible Employees would have been entitled to under the LGPS or the TPS had they continued in membership of the LGPS or the TPS as the case may be;
- 17.6.2.3 if the Concessionaire Scheme is terminated, a replacement pension scheme shall be provided with immediate effect for those Eligible Employees who are still employed by the Concessionaire or relevant Sub-Contractor. The replacement scheme must comply with this Clause 17.6 (Concessionaire Scheme) as if it were the Concessionaire Scheme; and
- 17.6.2.4 before the Relevant Transfer Date or Cessation Date (as the case may be) the trustees of the Concessionaire Scheme shall undertake by deed to the Council and to the Administering Council that they shall comply with the provisions of Clauses 17.6 (Concessionaire Scheme), 17.7 (Undertaking from the Concessionaire).

17.7 Undertaking from the Concessionaire

The Concessionaire undertakes to the Council (for the benefit of the Council itself and for the Council as agent and trustee for the benefit of the Eligible Employees) that:-

- 17.7.1 all information which the Council or their respective professional advisers may reasonably request from the Concessionaire or any relevant Sub-Contractor or concerning any other matters raised in Clause 17.6 (Concessionaire Scheme) or Clause 17.7 (Undertaking from the Concessionaire) shall be supplied to them as expeditiously as possible;
- 17.7.2 it shall not and shall procure that any relevant Sub-Contractor shall not, without the consent in writing of the Council (which shall only be given subject to the payment by the Concessionaire or the relevant Sub-Contractor of such reasonable costs as the Council or the Administering Authority may require) consent to instigate, encourage or assist any event which could impose on the LGPS, the TPS or on the Council 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;
- 17.7.3 until the Relevant Transfer Date, it shall not and shall procure that any relevant Sub-Contractor shall not issue any announcements (whether in writing or not) to the Eligible Employees concerning the matters stated in Clauses 17.1 to 17.5 inclusive without the consent in writing of the Council and the Administering Authority (not to be unreasonably withheld or delayed);

- 17.7.4 it shall not and shall procure that any relevant Sub-Contractor shall not take or omit to take any action which would materially affect the benefits under the LGPS or TPS or under the Concessionaire 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 Council (not to be unreasonably withheld or delayed) provided that the Concessionaire and/or such Sub-Contractor will be so entitled without the requirement of consent to give effect to any pre-existing contractual obligations to any Eligible Employees; and
- 17.7.5 it shall and shall procure that any relevant Sub-Contractor shall offer any of its Eligible Employees, who continue as employees but cease to be engaged in the provision of the Services and thereby cease to be eligible for membership of the LGPS or TPS, membership of the Concessionaire Scheme immediately after ceasing to be so engaged.
- 17.8 LGPS - Ill health retirements
 - 17.8.1 In the event that an Eligible Employee is subject to an Ill Health Retirement, if the fact and the nature of the ill health or infirmity of body or mind which resulted in the Ill Health Retirement were notified by that employee to the Council prior to the Commencement Date then any additional costs to the LGPS Fund resulting from such Ill Health Retirement shall be payable by the Council. In the event that such ill health or infirmity of body or mind was caused both by employment by the Council and by employment by the Concessionaire the apportionment of causation shall be undertaken by a medical practitioner who is an independent occupational health physician jointly appointed by the parties or, failing agreement as to the appointment, in accordance with clause 43 (Dispute Resolution).
- 17.9 Claims from Eligible Employees or Trade Unions
 - 17.9.1 The Concessionaire hereby indemnifies the Council and, in each case, their Sub-Contractors from and against all Direct Losses suffered or incurred by it or them to the extent that they arise from claims by Eligible Employees of the Concessionaire and/or of any Sub-Contractor or by any trade unions, elected employee representatives or staff associations in respect of all or any such Eligible Employees which losses:
 - 17.9.1.1 relate to pension rights in respect of periods of employment on and after the Relevant Transfer Date until the date of termination or expiry of this Agreement; or
 - 17.9.1.2 arise out of the failure of the Concessionaire and/or any relevant Sub-Contractor to comply with the provisions of this Clause 17 before the date of termination or expiry of this Agreement
 - 17.9.2 The Council hereby indemnifies the Concessionaire and/or relevant Sub-Contractor from and against all Direct Losses suffered or incurred by it or them which arise from claims by Eligible Employees or by any trade unions, elected employee representatives or staff associations in respect of all or any such Eligible Employees which Direct Losses:

- 17.9.2.1 relate to pension rights in respect of periods of employment before the Relevant Transfer Date; or
- 17.9.2.2 arise out of the failure of the Council to comply with the provisions of this clause 17 before the date of termination or expiry of this Agreement.

17.10 Contracts (Rights of Third Parties) Act 1999

The Council and the Concessionaire and any relevant Sub-Contractor agree that the Contracts (Rights of Third Parties) Act 1999 shall apply to enable the Eligible Employees to assert their rights under this Clause 17.

17.11 Transfer to another Employer

17.11.1 Save on expiry or termination of this Contract, if the employment of any Eligible Employee transfers to another employer (by way of a transfer under TUPE) the Concessionaire shall and shall procure that any relevant Sub-Contractor shall:-

- 17.11.1.1 consult with and inform those Eligible Employees of the pension provisions relating to that transfer; and
- 17.11.1.2 procure that the employer to which the Eligible Employees are transferred (the "New Employer") complies with the provisions of this clause provided that references to the "Sub-Contractor" will become references to the New Employer, references to "Relevant 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.

17.12 Undertakings

17.12.1 The Concessionaire shall (and shall procure that each relevant Sub-Contractor shall):-

- 17.12.1.1 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 the Concessionaire or any Sub-Contractor in the provision of the Services on the expiry or termination of this Agreement (including without limitation identification of the Eligible Employees);
- 17.12.1.2 promptly provide to the Council such documents and information mentioned in clause 17.12.1.1 which the Council may reasonably request in advance of the expiry or termination of this Agreement; and
- 17.12.1.3 fully co-operate (and procure that the trustees of the Concessionaire Scheme shall fully co-operate) with the reasonable requests of the Council relating to any administrative tasks necessary to deal with the pension aspects of any onward transfer of any person engaged or employed by the Concessionaire or any Sub- Contractor in the provision of the Services on the expiry or termination of this Agreement.

17.13 LGPS Employer Contributions

- 17.13.1 The Concessionaire shall on a monthly basis pay to the Council any amounts by which an amount equal to payments at the Agreed Contribution Rate in respect of Eligible Employees who are active members of the Fund in that period, would exceed the payments which are required to be made by the Concessionaire to the Administering Authority or the Fund under the terms of the Admission Agreement in respect of such employees during that period.
- 17.13.2 Subject to Clauses 17.13.3 and 17.15 below, the Council shall on a monthly basis reimburse the Concessionaire for an amount equal to any payments required to be made by the Concessionaire to the Administering Authority or the Fund under the terms of the Admission Agreement which (as set out in Clause 17.13.1) is in excess of any amount equal to payments at the Agreed Contribution Rate in respect of Eligible Employees who are active members of the Fund in that period (each such amount being a "Reimbursed Pension Contribution").
- 17.13.3 For the avoidance of doubt, any payments required to be made to the Administering Authority or the Fund as a result of a Concessionaire Decision shall be payable by the Concessionaire, and the Council may recover from the Concessionaire any part of the Reimbursed Pension Contributions which is subsequently found to relate to any part of any payments made by the Concessionaire to the Administering Authority as the result of a Concessionaire Decision. Any payments required to be made to the Administering Authority or the Fund as a result of a Concessionaire Decision shall, on behalf and at the request of the Administering Authority, be calculated by the actuary appointed to advise the Fund and notified to, and agreed by, the Concessionaire and, if not agreed between the parties, determined by reference to an independent actuary appointed by agreement of the Parties.

Admission Agreement Termination Contributions

- 17.14 In addition the Council shall reimburse to the Concessionaire any Deficit Contribution payable by the Concessionaire in accordance with the terms of the Admission Agreement within twenty (20) Working Days of any payment save to the extent that the Deficit Contribution arose as a result of a Concessionaire Decision.
- 17.15 If, during the term of the Admission Agreement the increases in pay (where "pay" has the same meaning as that set out in Regulation 4 of the Benefits Regulations) of the Relevant Eligible Employees are in excess of the Pension Index on a cumulative basis over the elapsed part of the Contract Period, then either party on becoming aware of this shall bring such matter to the attention of the other party and any such increases in pay in excess of the Pension Index shall, if the Council so elects, be treated as a Concessionaire Decision and the provisions of clause 17.13 shall apply in order to ensure that Reimbursed Pension Contributions are not in excess of those which would have been paid by the Council, if the increases in pay referred to in this Clause 17.15 had been the same as the Pension Index. Deductions from the Reimbursed Pension Contributions pursuant to this Clause 17.15 shall be made at each valuation by ascertaining an appropriate portion of the employer's contribution rate payable by the Concessionaire pursuant to the Admission Agreement which will not be reimbursed by the Council through Reimbursed Pension Contributions (which shall be agreed or determined in accordance with Clause 17.13 above).

- 17.16 The Concessionaire shall notify the Council of those Concessionaire Decisions numbered (a) to (e) in the definition of "Concessionaire Decision" within twenty (20) Working Days of the date of such decision.
- 17.17 The Concessionaire shall provide to the Council on request such information it may reasonably require to satisfy itself that any Relevant Eligible Employee is substantially employed by the Concessionaire in carrying out duties relevant to this Agreement. In addition, the Concessionaire shall, on each anniversary of the Agreement Date, notify the Council whether any of the Relevant Eligible Employees have not been wholly employed by the Concessionaire in the provision of the Services. In the event that they have not, the Concessionaire shall meet with the Council to discuss in respect of each such Relevant Eligible Employee the particular circumstances which have led to them not being wholly employed in the provision of the Services. In these circumstances, and if the Council (acting reasonably) so elects, the parties shall seek to agree a fair and reasonable recovery by the Council of the Reimbursed Pension Contribution(s) pursuant to Clause 17.13 above according to the percentage of their time each such Relevant Eligible Employee was not wholly employed in the provision of the Services. In this connection the Concessionaire shall supply such supporting information as the Council may reasonably require. In the event that the Council, acting reasonably, consider that the proportion based on the percentage of each employee's time would not represent a fair and reasonable recovery, then the parties shall seek to agree a fair and reasonable recovery on another basis. If the parties cannot agree the fair and reasonable recovery to be made by the Council the matter shall be resolved by reference to the procedure in Clause 43 (Dispute Resolution).
- 17.18 Liability for Costs
- 17.18.1 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 17.6.1.4 shall be borne by the Concessionaire subject to those costs not exceeding £5,000 (exclusive of VAT).
- 17.19 Adjustment
- 17.19.1 In addition, if
- 17.19.1.1 the employer contributions or payments made in respect of any new employee of the Concessionaire employed in connection with the Contract (the "New Employees"), who is not an Eligible Employee, is less than the Agreed Contribution Rate payable in respect of an Eligible Employee; and/or
- 17.19.1.2 there are any Eligible Employees who are eligible to join the LGPS or the TPS on a Relevant Transfer Date but have not yet joined the LGPS or TPS (the "Non Joiners"), an Eligible Employee who subsequently joins the LGPS or TPS will automatically no longer be categorised as a Non Joiner;
- then the Concessionaire will pay to the Authority on a monthly basis an amount equal to A-B, where:
- A equals the employer contributions or payments that would have been paid to the Fund in the relevant month at the Agreed Contribution Rate if the New Employees and/or Non Joiners had been members of the LGPS or TPS; and

B equals the employer contributions or payments (if any) which have been paid to a pension scheme in respect of the New Employees (capped at 6% of basic salary).

17.20 Employee Contributions

The Concessionaire shall, in respect of the Eligible Employees who are active members of the LGPS or TPS deduct any employee contributions due from them from their salaries and remit such contributions to the relevant Fund as soon as practicable.

18 EMPLOYEES

18.1 Resources and Training

The Concessionaire shall procure that:

18.1.1 there shall be at all times a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the Services with the requisite level of skill and experience. This obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absences and anticipated and actual peaks in demand for each of the Services; and

18.1.2 all staff receive such training and supervision as is necessary to ensure the proper performance of the Services under this Agreement.

18.2 Concessionaire's Representative

18.2.1 The Concessionaire shall employ a representative the identity of whom will be subject to the prior approval of the Authorised Officer (not to be unreasonably withheld or delayed) to act as the Concessionaire's Representative during the Contract Period.

18.2.2 The Concessionaire's Representative shall have full authority to act on behalf of the Concessionaire for all purposes of this Contract. The Council and the Authorised Officer shall be entitled to treat any act or omission of the Concessionaire's Representative in connection with this Agreement as being expressly authorised by the Concessionaire (save where the Concessionaire has notified the Authorised Officer that such authority has been revoked) and the Council shall not be required to determine whether any express authority has in fact been given.

18.2.3 The Concessionaire may terminate the appointment of the Concessionaire's Representative and appoint a substitute. Where the Concessionaire wishes to do so it shall by written notice to the Council propose a substitute for approval by the Authorised Officer (such approval not to be unreasonably withheld or delayed).

18.3 Authorised Officer

18.3.1 The Council shall appoint an individual to be the Authorised Officer and his deputy during the Contract Period and keep the Concessionaire informed of the identity from time to time of the Authorised Officer, deputy and any replacements.

18.3.2 The Authorised Officer shall have full authority to act on behalf of the Council for all purposes of this Contract. The Concessionaire shall be entitled to treat any act of the Authorised Officer in connection with this Agreement as being expressly authorised by the Council (save where the Council has notified the Concessionaire that such

authority has been revoked) and the Concessionaire shall not be required to determine whether any express authority has in fact been given.

18.3.3 No act or omission (save for an express consent or authorisation) of the Council, the Authorised Officer or any officer, employee or other person engaged by the Council shall, except as otherwise expressly provided in this Contract:-

18.3.3.1 in any way relieve or absolve the Concessionaire from, modify, or act as a waiver or estoppel of, any liability, responsibility, obligation or duty under this Contract; or

18.3.3.2 in the absence of an express order or authorisation under Clause 36, constitute or authorise a Council Change.

18.3.4 The Council shall not be responsible for and the Concessionaire shall not be entitled to rely on and shall not do so or claim relief, additional time, losses, expenses, damages, costs or other liabilities should the Concessionaire act on any notice, communication or other purported instruction given by a person alleging to act for and on behalf of the Council unless such person was the Authorised Officer.

18.4 **Safeguarding Children and Vulnerable Adults**

18.4.1 Where the Concessionaire is a Regulated Activity Provider (as defined by the SVGA 2006) with ultimate responsibility for the management and control of the Regulated Activity (as defined by the SVGA 2006) provided under this Agreement and for the purposes of the SVGA 2006, the Concessionaire shall

18.4.1.1 comply with all of its obligations under the SVGA 2006 including without limitation information sharing, Disclosure and Barring Service (DBS, as defined by the SVGA 2006) referral obligations and checking that a person is subject to monitoring;

18.4.1.2 be appropriately registered in relation to all persons who are or will be employed or engaged by the Concessionaire in the provision of the Regulated Activity;

18.4.1.3 ensure that all individuals engaged in Regulated Activity are subject to a valid enhanced disclosure check undertaken through the DBS including a check against the adults' barred list or the children's barred list, as appropriate;

18.4.1.4 monitor the level and validity of the checks under Clause 18.4.1.3 for each member of staff;

18.4.1.5 not employ or use the services of any person who is barred from, or whose previous conduct or records indicate that he would not be suitable to carry out the Regulated Activity or who may otherwise present a risk to a recipient of the Services;

18.4.1.6 in accordance with the SVGA 2006, refer information about any person providing the Regulated Activity to the DBS where it removes permission for such person to provide the Services (or would have, if such person had not otherwise ceased to provide the Services) because, in its

opinion, such person has harmed or poses a risk of harm to a recipient of the Services;

18.4.1.7 immediately provide the Council with all information that the Council may reasonably require to enable the Council to verify that the Concessionaire has satisfied its obligations under this Clause 18.4 and the SVGA 2006 and immediately inform the Council if there is any reason to believe that any obligations under the SVGA 2006 are not being complied with in relation to the Services; and

18.4.1.8 ensure that all personnel working with or alongside children have regard to the need to safeguard and promote the welfare of children.

18.4.2 The Concessionaire acknowledges that the Council may acting in accordance with the SVGA 2006 disclose information in relation to an Employee where required to do so by the Independent Safeguarding Authority without consultation with the Concessionaire.

Conduct of Staff

18.5 Whilst engaged at the Premises the Concessionaire shall and shall procure that any Sub-Contractor shall comply with the Council's Policies relating to the conduct of staff and security arrangements. The Authorised Officer (acting reasonably) may instruct the Concessionaire that an investigation is undertaken in relation to any employee of the Concessionaire or any Sub-Contractor involved in the provision of the Services (in accordance with the terms and conditions of employment of the employee concerned) where such employee misconducts himself or is incompetent or negligent in his duties. The Concessionaire shall notify the Council of the outcome of the investigation, including any disciplinary action and/or exclusion from any location or from delivering the Services.

Personnel Policies and Procedures

18.6 The Concessionaire shall procure that there are set up and maintained by it and by all Sub-Contractors involved in the provision of the Services, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). The Concessionaire shall procure that the terms and implementation of such policies and procedures comply with Legislation and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are forthwith issued to the Council.

Part 4 – Monitoring

19 OPERATING MANUAL

- 19.1 The Concessionaire shall throughout the Services Period maintain and update an operating and maintenance manual setting out the Concessionaire's procedures for providing the Services (the "Operating Manual").

20 QUALITY ASSURANCE

- 20.1 Prior to the Commencement Date the Concessionaire shall submit to the Authorised Officer a proposed quality management system for the services.
- 20.2 The Concessionaire shall identify a quality manager who may either be appointed as a dedicated quality manager or as part of another role, to:
- 20.2.1 ensure the effective operation of and implementation of the aforementioned quality management system;
 - 20.2.2 audit the aforementioned quality management system at regular intervals and report the findings of such audit to the Concessionaire and the Council;
 - 20.2.3 review the aforementioned quality management system at intervals agreed with the Authorised Officer to ensure their continued suitability and effectiveness; and
 - 20.2.4 liaise with the Authorised Officer on all matters relating to quality management.
- 20.3 The Authorised Officer may carry out periodic audits of the aforementioned quality management systems.

21 PERFORMANCE MONITORING

21.1 Concessionaire Monitoring

- 21.1.1 The Concessionaire shall institute at the Commencement Date and maintain and keep under review throughout the Contract Period systems designed to ensure that the Services are performed in accordance with this Agreement and the Concessionaire shall promptly bring to the Authorised Officer's attention failure to perform the Services to this standard. The Concessionaire's performance of the Services shall be measured against the obligations, standards, targets and benchmarks set out in the Contract Documents.

21.2 Council Monitoring

- 21.2.1 The Authorised Officer may elect to undertake performance monitoring on behalf of the Council at any stage during the Contract Period for any purpose, including in order to ensure that the Services are being provided in accordance with this Agreement. The Concessionaire will use its reasonable endeavours to assist the Authorised Officer in such an exercise. The Authorised Officer shall be entitled to notify the Concessionaire of the outcome of the performance monitoring exercise, and the Concessionaire shall have due regard to the Authorised Officer's comments in relation to the future provision of the Services.

- 21.2.2 Without prejudice to the Councils' rights under Clause 21.2.1 and to any other express rights under this Agreement, where the Concessionaire has been found to, or the Authorised Officer reasonably believes the Concessionaire to have:
- 21.2.2.1 been fraudulent in the submission of monitoring reports or claims for payment under Clause 26; or
 - 21.2.2.2 submitted at least two (2) monitoring reports each containing a material error, within a three (3) month period,
- the Authorised Officer may by notice to the Concessionaire increase the level of his monitoring of the Concessionaire, and/or (at the Authorised Officer's option), of the Concessionaire's monitoring of its own performance of its obligations under this Agreement in respect of the relevant Service or Services the subject of such fraudulent or materially erroneous reporting until such time as the Concessionaire shall have demonstrated to the reasonable satisfaction of the Authorised Officer that it will perform (and is capable of performing) its obligations under this Agreement.
- 21.2.3 For the purposes of Clause 21.2.2, if the Concessionaire has otherwise failed to have demonstrated to the reasonable satisfaction of the Authorised Officer as required by Clause 21.2.2 but:
- 21.2.3.1 if the Concessionaire has removed the person or persons responsible for the fraudulent reporting; or
 - 21.2.3.2 (under Clause 21.2.2.2), if in the following three (3) month period following the Authorised Officer's notice (if it has not already been established) there have been no further materially erroneous reports of any kind;
 - 21.2.3.3 this shall be regarded as sufficient demonstration that the Concessionaire will perform and is capable of performing its obligations.
- 21.2.4 If the Authorised Officer issues a notice under Clause 21.2.2 and it has been shown that there has been fraudulent reporting, the Concessionaire shall bear its own costs and indemnify and keep the Council indemnified at all times from and against all reasonable costs and expenses incurred by or on behalf of the Council in relation to such increased level of monitoring arising due to circumstances under Clause 21.2.2.1.

22 COMPLAINTS

- 22.1 At the Commencement Date the Concessionaire shall set up a clearly defined complaints procedure (subject to approval by the Authorised Officer) with agreed performance measures and recording systems, including a complaints register, to enable the number and types of complaints to be checked and monitored. For each complaint the records should identify the complainant, the nature and category of the complaint, the action taken in response to the complaint, preventative action taken to stop similar occurrences and the relevant dates.
- 22.2 The Concessionaire shall deal with all complaints regarding the Concessionaire's management and operation of the Services and/or Premises received from whatever source in a prompt courteous and efficient manner.

- 22.3 A copy of the Complaints Register and statistics shall be incorporated within the Concessionaire's monitoring reports submitted to the Authorised Officer in accordance with the Specification on an annual basis.

23 CO-OPERATION FOR INVESTIGATION AND SECURITY

- 23.1 The Concessionaire shall co-operate with any investigation relating to a breach of security which is carried out by or on behalf of the Council (acting reasonably) and:
- 23.1.1 shall use its reasonable endeavours to make its employees (and other Concessionaire Related Parties) identified by the Council available to be interviewed by the Council for the purposes of the investigation; and
 - 23.1.2 shall, subject to any legal restriction on their disclosure, provide all copies of documents, records or other material of any kind which may reasonably be required by the Council for the purposes of the investigation. The Council shall have the right to retain copies of any such material for use in connection with the investigation.
- 23.2 The Council shall, insofar as is practical, inform the Concessionaire of any specific or general security information which would reasonably be expected to affect the security of the Concessionaire or any Concessionaire Related Party or their property.
- 23.3 The Concessionaire shall comply with the Council's reasonable reporting requirements relating to infectious and notifiable diseases to the extent made known to the Concessionaire.

24 EQUAL OPPORTUNITIES

- 24.1 The Council and the Concessionaire shall comply with all Equality Legislation in force from time to time insofar as it relates to service provision.
- 24.2 The Concessionaire shall not unlawfully discriminate within the meaning and scope of the provisions of Equality Legislation in respect of its employees and employment practices. The Concessionaire shall take all reasonable steps to secure that all servants, agents and Sub-Contractors of it do not unlawfully discriminate as set out in this Clause.

25 CONCESSIONAIRE'S RECORDS

- 25.1 Financial Records and Open Book Accounting
- The Concessionaire shall (and shall use all reasonable endeavours to procure that each Sub-Contractor shall):
- 25.1.1 at all times maintain detailed financial records in accordance with Good Industry Practice, relevant accounting standards and statutory requirements and shall make such records available for inspection upon request by the Council;
 - 25.1.2 upon request by the Council, provide access for inspection to the matters listed in Clause 25.1.1 on an open book basis; and
 - 25.1.3 provide such premises as the Council may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Clause.
- 25.2 Books of Account

Compliance with Clause 25.1 (Financial Records and Open Book Accounting) shall require the Concessionaire to keep (and where appropriate to use all reasonable endeavours to procure that each Sub-Contractor shall keep) books of account in accordance with best accountancy practices with respect to this Contract, showing in detail:

- 25.2.1 full records of the income from and costs of performing the Services, in such form and detail as the Council may reasonably require;
- 25.2.2 administrative overheads;
- 25.2.3 payments made to Sub-Contractors;
- 25.2.4 capital and revenue, income and expenditure; and
- 25.2.5 such other items as the Council may reasonably require from time to time to conduct costs audits for verification of cost expenditure or estimated expenditure or income received, for the purpose of this Contract provided that all such information shall be treated as confidential information and shall not be disclosed to any third parties other than to the Council's external auditors and as otherwise specifically provided for in this clause 25.

25.3 Maintenance of Service Records

- 25.3.1 The Concessionaire shall maintain or procure that detailed records relating to the delivery of the Services, in each case in accordance with Good Industry Practice, the requirements of Clause 20 (Quality Assurance) and any applicable Legislation.
- 25.3.2 The Concessionaire shall procure that a full record of all incidents relating to health and safety which occur during the term of this Contract are maintained and available for inspection by the Council (and its advisers) upon reasonable notice, and shall present a report of them to the Council as and when reasonably requested from time to time.

25.4 Auditor

The Concessionaire shall permit all records referred to in this Clause 25 (Concessionaire's Records) to be examined and copied from time to time by the Council's external and internal auditors, fraud investigators and their representatives for the purposes of statutory auditing and fraud investigation only.

25.5 Retention

The records referred to in this Clause 25 (Concessionaire's Records) shall be transferred to the Council for retention upon termination or expiry of this contract, though the Concessionaire shall retain copies where required to do so by any Legislation.

25.6 Termination or Expiry

Upon termination or expiry of this Contract, or in the event that the Council wishes to enter into another agreement for the operation and management of services the same as or similar to the Services then on request from the Council, the Concessionaire shall (and shall ensure that the Sub-Contractors will) comply with all reasonable requests of the Council to provide information relating to the Concessionaire's costs of performing the Services for statutory auditing purposes only and for the purpose of running a retendering exercise. This Clause does not permit disclosure by the Council of any information which is Confidential and/or

Commercially Sensitive including to other tenderers in the course of a retendering exercise apart from the following information:

- (a) Usage information by Customers for the different facilities at the Premises;
- (b) Utility consumption at the Premises;
- (c) Retendering Information as set out in Clause 16.7 above.

25.7 Confidentiality

All information referred to in this Clause 25 (Concessionaire's Records) is subject to the obligations set out in Clauses 40 and 41 (Freedom of Information and Confidentiality).

PART 5 - PAYMENT

26 PAYMENT PROVISIONS

26.1 The Concessionaire shall pay the Council the Concession Fee. The Concession Fee shall be payable in 13 instalments accruing daily and payable four weekly by BACS in arrears. The Concession Fee shall be subject to any adjustments or variations in accordance with the provisions of the Agreement and without prejudice to Clause 25.6 below.

26.2 Statement

Within 10 Working Days of the end of each Payment Period from the Commencement Date the Concessionaire shall submit a statement to the Council stating at least the following information:

26.2.1 the gross four weekly Concession Fee;

26.2.2 any adjustments to the gross four weekly instalment of the Concession Fee which shall be made in accordance with this Agreement;

26.2.3 any amounts owed by one Party to the other in accordance with the Agreement including, without limitation, any income share in accordance with Clauses 27 below; and

26.2.4 a summary and reconciliation setting out the net effect of the foregoing.

The statement submitted in accordance with Clause 26.2 shall be fully supported by background information or documentation.

26.3 Invoices

Provided that the Authorised Officer is satisfied acting properly and reasonably that the statement submitted in accordance with Clause 26.2 above is accurate and complete an invoice for the amount set out in the statement shall be raised on behalf the Council and the Concessionaire shall pay the sum set out in the invoice within 14 Working Days of receipt.

26.4 Disputed Amounts

In the event that the Authorised Officer is not satisfied that a sum or sums in the statement submitted in accordance with Clause 26.2 is accurate or complete, the Authorised Officer shall notify the Concessionaire.

26.5 Response to Council Notice

Within 14 Working Days of the Concessionaire having received notification from the Authorised Officer in accordance with Clause 26.4 above, the Concessionaire shall respond setting out how the disputed amount was calculated.

26.6 Dispute

The Parties shall meet as soon as reasonably practicable after the receipt of the Concessionaire's response and shall attempt to resolve the dispute amicably between them. If the Parties are unable to reach agreement the matter shall be referred to the Dispute Resolution Procedure.

26.7 Determination of Dispute

In the event that the outcome of the Dispute Resolution Procedure, Expert determination or an agreement between the Parties is that any additional sums were due, the Concessionaire shall pay such sum within 7 Working Days together with interest thereon at the Prescribed Rate from the date on which such payment was due.

26.8 Indexation

The Concession Fee shall be revised on an annual basis in line with the provisions set out in Schedule 4.

26.9 Utilities

Throughout the Contract Period the Concessionaire shall pay for and procure the provision of Utilities at the Premises. The Concessionaire shall be responsible for the usage levels at the Premises and shall for the avoidance of doubt pay for any increase in cost arising from an increase in the usage of any Utility at any of the Premises. In relation to Multi-Occupier-Premises, the provisions of Schedule 13 (Utilities at Multi-Occupier Premises) shall apply.

26.10 The Wilditch Community Centre

Part of the Wilditch Community Centre is occupied under licence from the Council by One Trust, a provider of services for adults with Learning Difficulties. The Concessionaire's Lease for these Premises is subject to those rights. The Concessionaire shall invoice the Council at agreed intervals for such amounts as is equivalent to the amount of the licence fee paid by One Trust to the Council, which the Council shall pay within 30 days of receipt.

27 INCOME AND CHARGES

27.1 The provisions of paragraphs 6 and 7 of the Specification shall apply.

VAT

27.2 Unless the context otherwise requires, all sums payable or other consideration to be provided pursuant to this Agreement are stated to be exclusive of any VAT payable (including for the avoidance of doubt any VAT payable as a consequence of any election under paragraph 2 of Schedule 10 to the Value Added Taxes Act 1994 or any similar statute or provision to waive the exemption applicable to the Premises) and when any such sums shall become payable or other consideration shall be provided or due the payer shall pay in addition to such sums or consideration all the VAT so chargeable within twenty (20) Working Days of the date on which a valid VAT receipt is issued to it.

27.3 If as a result of any Party performing or observing any of its obligations under this Agreement it provides or is deemed for VAT purposes to provide any goods or services in respect of which VAT is chargeable, the recipient of the goods or services shall within twenty (20) Working Days of the date on which a valid VAT invoice is issued to it from the recipient of the goods and services, pay all the VAT so payable.

PART 6 - TERMINATION

28 DEFAULTS AND REMEDIES AVAILABLE TO THE CONCESSIONAIRE

28.1 Interest

28.1.1 In the event that any undisputed invoice correctly rendered by the Concessionaire remains unpaid by the Council after 14 (fourteen) Working Days the Concessionaire shall notify the Council in and the Concessionaire shall be entitled to charge interest from the date on which the invoice was due and payable at the Prescribed Rate.

29 DEFAULTS AND REMEDIES AVAILABLE TO THE COUNCIL

29.1 Remedy Notice

In the event of a Performance Default the Authorised Officer shall issue a notice (a "Remedy Notice") to the Concessionaire which shall:

29.1.1 be signed by the Authorised Officer;

29.1.2 state on its face that it is a Remedy Notice;

29.1.3 set out in general terms the matter or matters giving rise to such Remedy Notice; and

29.1.4 require that the Concessionaire (at its own cost and expense) remedy such Performance Default (and/or any damage directly or indirectly resulting from such failure) and/or take measures to prevent the recurrence of such Performance Default within a reasonable period (in either case, the "Remedial Period").

29.2 If the Concessionaire:

29.2.1 considers that a particular Remedial Period is unreasonable or impossible to comply with; and/or

29.2.2 disputes the Performance Default, including on the ground that an Excusing Cause has arisen),

then the Concessionaire shall notify the Authorised Officer within the Remedial Period, and in any event within three Working Days of receipt of the Remedy Notice, and the Parties shall attend a meeting to discuss the matter. If the matter still remains unresolved, it shall be referred to the Dispute Resolution Procedure.

29.3 Action Plan

Unless the Remedial Period is less than five (5) Working Days, the Concessionaire shall, within ten (10) Working Days (or such longer period as the Council, acting reasonably, shall agree) of receipt of a Remedy Notice, prepare a plan (an "Action Plan") setting out the measures which the Concessionaire shall carry out or has carried out to ensure that the Performance Default is remedied within the Remedial Period and to ensure that it does not occur again.

29.4 The Concessionaire shall submit the Action Plan to the Authorised Officer for approval (which approval shall not be unreasonably withheld or delayed). The Authorised Officer shall be entitled to suggest reasonable amendments to the Action Plan which the Concessionaire shall incorporate.

29.5 The Concessionaire shall implement the approved Action Plan within the timescale contained within the approved Action Plan.

29.6 **Escalation**

If:

29.6.1 the Concessionaire fails to remedy a Performance Default in accordance with the Remedy Notice and/or Action Plan;

29.6.2 the Concessionaire commits a Performance Default which is incapable of remedy;

29.6.3 the Concessionaire repeats the same or substantially similar Performance Default more than 2 (two) times in any 3 (three) month period;

29.6.4 more than 3 (three) Remedy Notices in respect of Performance Defaults (in each case not necessarily relating to the same breach or failure) have been issued to the Concessionaire in any continuous 3 (three) month period;

then unless the Council is satisfied that an Excusing Cause has arisen, the Council may (without prejudice to any other right or remedy available to it) serve a written notice ("Default Notice") on the Concessionaire.

29.7 **Default Notices**

The Default Notice shall:

29.7.1 be signed by the Authorised Officer;

29.7.2 state on its face that it is a Default Notice;

29.7.3 state on its face the Default Sum to be deducted in respect of the Performance Default;

29.7.4 set out in general terms the matter or matters giving rise to such Default Notice; and

29.7.5 set out the course of action (if any) which the Council requires the Concessionaire to take in order to ensure that the Performance Default is remedied and/or does not occur again together with the date by which such action is to be taken.

29.8 The Concessionaire shall comply with the terms of the Default Notice.

29.9 **Disputes**

29.9.1 If the Concessionaire considers that the time and/or measures stated in the Remedy Notice or Default Notice to remedy, make good or mitigate the Performance Default are unreasonable or impossible to comply with, the Concessionaire's Representative shall notify the Authorised Officer within three Working Days of receipt of the Remedy Notice or Default Notice and the Parties shall attend a meeting to discuss the matter and to agree a time period in which and measures by which the Performance Default shall be remedied, made good or mitigated. Thereafter, if unresolved, the matter shall be discussed at Chief Officer and Director level and if still unresolved referred to the Dispute Resolution Procedure.

29.10 **Default Sums**

29.10.1 The Council shall be entitled to deduct from the Concession Fee or recover as a debt as liquidated and ascertained damages the Default Sums calculated as set out in

Schedule 9 for its administrative costs (only) in relation to Remedy and Default Notices. Where such payment is made, this shall be in full and final settlement of the Council's losses relating to the Council's Losses in relation to such administrative costs. .

29.10.2 Such Default Sums are agreed to be a genuine pre-estimate of the Council's loss and damage in relation to the Council's administrative cost in serving Remedy and Default Notices, additional supervision and/or monitoring and inspection, including if necessary the production of reports and any other activities arising from the Performance Default. Default Sums shall not include and are not in respect of any other head of loss or damage which shall be recoverable as non-liquidated damages.

29.10.3 Where Default Sums are set out in a Remedy Notice or Default Notice the Notice shall serve as a certificate of deduction and the Council shall be entitled to deduct the Default Sums from any invoice issued by the Concessionaire or from any other payment due by the Council to the Concessionaire or to recover the same as a debt.

29.11 Other Remedies

In addition to the matters set out above, in the event the Concessionaire commits a Performance Default the Council shall be entitled, unless it is satisfied that an Excusing Cause has arisen, and without prejudice to any of its rights or remedies whether in contract, tort or under statute, to take all or any of the following measures:-

29.11.1 Remedy the Performance Default itself or engage others to do so and abate the Concession Fee by the reasonable cost of so doing this may include without limitation carrying out services which are essential and charging the Concessionaire its costs for doing so;

29.11.2 Require the Concessionaire to:

29.11.2.1 identify and remove from the provision of the Services the member or members of staff who caused the Performance Default; and/or

29.11.2.2 appoint a new Concessionaire's Representative; and/or

29.11.2.3 replace or appoint a new (or change the identity of a) Sub-Contractor; and/or

29.11.2.4 provide additional resources, staff and Equipment.

29.12 With the exception of Clause 29.10, the provisions of this Clause are without prejudice to any other right or remedy of the Council.

30 TERMINATION

30.1 Termination on Concessionaire Default

If any one or more of the matters in Clause 30.2 occurs the Council shall be entitled to forthwith terminate the Agreement by issuing a written notice to the Concessionaire to that effect in accordance with Clause 30.3. For the avoidance of doubt the occurrence of any one of the matters listed in Clause 30.2 shall be deemed to be a repudiatory breach of contract by the Concessionaire. The right of the Council to terminate shall be a contractual right pursuant to this clause and/or a common law right accepting the Concessionaire's repudiatory breach as the circumstances dictate.

- 30.2 The matters referred to in Clause 30.1 above are:-
- 30.2.1 the Concessionaire or any of its employees (whether with or without the Concessionaire's knowledge) shall have committed a Prohibited Act in connection with the provision of the Services or in relation to this Agreement and the matter has not been satisfactorily resolved by the Concessionaire by taking appropriate disciplinary action; or
 - 30.2.2 the Concessionaire suffers an event of incapacity rendering the Concessionaire unable or potentially unable to carry out its obligations under the Agreement and/or to meet any liability which may arise through the Concessionaire's negligence or breach of contract. An event of incapacity shall include the appointment of a liquidator, insolvency within the meaning of the relevant Legislation, having substantial distress attachment execution or other legal process levelled, enforced, sued or threatened upon any of its property, the appointment of an administrator or receiver, the suspension of any publicly offered equities or the freezing of substantial assets; or
 - 30.2.3 the Authorised Officer has served more than 60 Remedy Notices on the Concessionaire within any continuous 6 month period; or
 - 30.2.4 the Authorised Officer has served more than 20 Default Notices on the Concessionaire within any continuous 6 month period; or
 - 30.2.5 the Concessionaire commits a breach of any of its obligations under this Agreement which is not capable of remedy and which materially and adversely affects the performance of the Services for a continuous period of six weeks; or
 - 30.2.6 where in the opinion of the Authorised Officer, acting reasonably, the Concessionaire has acted in a way which has seriously damaged the reputation of the Council, provided that before exercising this right, the Authorised Officer shall have first consulted with the Concessionaire as to the circumstances of the damage to reputation.
- 30.3 Termination Notice
- 30.3.1 The Termination Notice issued pursuant to Clause 30.1 shall:
 - 30.3.1.1 set out the matter or matters giving rise to such Termination Notice, giving reasonable details;
 - 30.3.1.2 state on its face that it is a Termination Notice;
 - 30.3.1.3 state the date on which the termination is to take effect;
 - 1.1.1.1 if the termination is in relation to part of the Contract; the part of the Services to be determined; and
 - 30.3.1.4 be signed by the Council's Solicitor.
- 30.4 If the Contract is determined in part, the Concession Fee shall be adjusted to reflect fairly the Services which remain and if the parties are unable to agree such adjustment, the matter shall be referred to the Dispute Resolution Procedure. For the avoidance of doubt the Concessionaire shall not be entitled to recover through the adjusted Concession Fee any profit

that, but for the Termination, would have accrued to the Concessionaire in respect of the terminated Services.

- 30.5 The Council, in its discretion but acting reasonably and taking into account the representations of the Concessionaire, shall be entitled to suspend part of the Services which it would otherwise be entitled to terminate pursuant to this Clause until such time as the Concessionaire is able to demonstrate that it is able to perform the Services to the Service Standard without default. During the period of such suspension (which shall be notified in writing by the Council) the Council shall be entitled to abate the Concession Fee by such reasonable amount as is necessary for the Council to perform the Services itself or to engage a third party to do so.
- 30.6 The rights of the Council under this clause are in addition and without prejudice to any right that either Party may have against the other for prior breach and to any right the Council may have against the Concessionaire for the breach, default, negligence or event leading to the "Termination Date".

31 FORCE MAJEURE

- 31.1 The Parties shall not be liable for any loss of any kind whatsoever whether directly or indirectly caused by reason of any failure or delay in the performance of its obligations hereunder which is due to a Force Majeure Event, and for the avoidance of doubt, failure by either Party to comply with its contractual obligations by reason of a Force Majeure Event shall not constitute a breach of contract.
- 31.2 On becoming aware of circumstances of Force Majeure which give rise to or which are likely to give rise to any such failure or delay on its part, the Party affected by it ("the Affected Party") shall forthwith notify the other Party by the most expeditious method then available and such notice shall specify the period which it is estimated that such failure or delay shall continue.
- 31.3 As soon as practicable following such notification the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effect of the Force Majeure Event and facilitate the continued performance of the Agreement.
- 31.4 The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Concessionaire shall at all times during which a Force Majeure Event is subsisting take all reasonable steps to overcome or minimise the consequences of the Force Majeure Event.
- 31.5 The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement. Following such notification the Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.
- 31.6 It is expressly agreed that any failure by the Affected Party to perform or any delay by the Affected Party in performing its obligations under this Agreement which results from any failure or delay in the performance of its obligations by any Sub-Contractor or person, firm or company with which the Affected Party shall have entered into any such contract, supply arrangement or Sub-Contract or otherwise, shall be regarded as a failure or delay due to Force Majeure only in the event that that Sub-Contractor, person, firm or company shall itself be prevented from or delayed in complying with its obligations under such contract, supply

arrangement or Sub-Contract or otherwise as a result of circumstances of a Force Majeure event.

- 31.7 If on the expiry of six (6) months after the occurrence of a Force Majeure Event where the Force Majeure Event is continuing and continues to have a material adverse effect on the Affected Party's performance of its obligations under the Agreement then either Party may terminate this Agreement in its entirety.

32 CONSEQUENCES OF TERMINATION

- 32.1 On the Expiry Date or earlier termination pursuant to the Agreement the following provisions shall apply:-

- 32.1.1 subject to Clauses 16 (TUPE), 17 (Pensions), 26 (Payment Provisions), 25 (Concessionaire's Records), 46 (Audit Access), 32 (Consequences of Termination), 33 (Transition to Another Concessionaire), 34 (Indemnities Guarantees and Contractual Claims), 40 (Confidentiality), 41 (Freedom of Information), 42 (Data Protection) and 43 (Dispute Resolution), the Agreement shall determine and cease to have effect and the Parties shall (save as aforesaid) be released from any further liability under this Agreement; and
- 32.1.2 the Council shall be entitled immediately or at any time subsequently to take and retain possession of the Premises or any part of them; and
- 32.1.3 the Concessionaire shall at the Council's request use all reasonable endeavours to assign to the Council (or to any person that the Council may direct) the benefit rights and interest in any Sub-Contracts relating wholly or mainly to the Services, such assignment providing that the burden under the Sub-Contracts be apportioned so that the Concessionaire remains liable for payment for work or services completed up to the date of the assignment only and PROVIDED THAT where the Concessionaire is prevented from assigning any Sub-Contract due to an act or omission of the Council, then the Concessionaire shall be excused from assigning such Sub-Contract;
- 32.1.4 the Concessionaire and all Sub-Contractors shall vacate the Premises immediately on the Expiry Date or on the date of termination; and
- 32.1.5 the Concessionaire shall yield up the Premises and the Equipment to the Council in the condition required by this Agreement and the relevant Leases and shall execute any instruments as are necessary to transfer title of the Equipment to the Council in accordance with Clause 11;
- 32.1.6 the extant Leases shall cease and determine;
- 32.1.7 the Concessionaire shall offer for sale to the Council at Net Book Value any item of the Concessionaire's Equipment in accordance with Clauses 11.10 to 11.13;
- 32.1.8 the Concessionaire shall hand over to the Council in a form agreed with the Council all Contract Data books, records, manuals, logs, data or other information (including work force information) relating to the Premises and the Services and which the Council reasonably requests;
- 32.1.9 the Council shall be entitled to withhold from any sums due to the Concessionaire or recover as a debt the costs, damages or expenses incurred by the Council in putting

the Premises and the Council's Equipment back into the condition as required by this Agreement and the relevant Lease; and

32.1.10 within three months the Parties shall carry out an accountancy reconciliation setting out any sums owed by one Party to the other and the Parties shall settle such amounts within 20 Working Days of the reconciliation being settled and agreed.

32.2 The termination of this Agreement howsoever arising is without prejudice to the rights, duties and liabilities of either Party accrued prior to termination. The Clauses of this Agreement which expressly or impliedly have effect after termination will continue to be enforceable notwithstanding termination.

32.3 Notwithstanding any provision of this Agreement, on service of a notice of termination, this Agreement shall only terminate in accordance with the provisions of this Agreement.

32.4 **Continued effect – no waiver**

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

32.5 **Continued Performance**

Subject to any exercise by the Council of its rights to perform, or to procure a third Party to perform, the obligations of the Concessionaire, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the termination of the Agreement becomes effective in accordance with the provisions of this Clause.

33 TRANSITION TO ANOTHER CONCESSIONAIRE

Duty to Co-operate

33.1 During the final 6 months of the Contract Period (where this expires by effluxion of time) or during the period of any notice of termination of this Agreement or of any of the Services, and in either case for a period of 3 months thereafter, the Concessionaire shall co-operate fully with the transfer of responsibility for the Services (or any of the Services) to any New Service Provider, and for the purposes of this Clause 33 the meaning of the term "co-operate" shall include:

33.1.1 liaising with the Council and/or any New Service Provider, and providing reasonable assistance concerning the transfer of the Services to the Council or to such New Service Provider;

33.1.2 allowing any such New Service Provider access (at reasonable times and on reasonable notice) to the Premises but not so as to interfere with or impede the provision of the Services; and

33.1.3 providing upon written request to the Council and/or to any New Service Provider information concerning the Premises and the Services, save that the Concessionaire shall be under no obligation to disclose Commercially Sensitive Information,

including, for the avoidance of doubt, trade secrets and operational know-how or information which would prejudice the Concessionaire in relation to a subsequent tender process and subject always to the New Service Provider first signing a Confidentiality Undertaking regarding the use of any information provided by the Concessionaire.

33.2 Transfer of Responsibility

33.2.1 The Concessionaire shall use all reasonable endeavours so as to facilitate the smooth transfer of responsibility for the Services to a New Service Provider or to the Council, as the case may be, and the Concessionaire shall take no action at any time during the Contract Period or thereafter which is calculated or intended, directly or indirectly, to prejudice or frustrate or make more difficult such transfer.

34 INDEMNITIES, GUARANTEES AND CONTRACTUAL CLAIMS

34.1 Concessionaire's Indemnity

34.1.1 The Concessionaire shall be liable for and shall fully and promptly indemnify the Council and any Council Related Party, against all Direct Losses arising, in connection with:-

- 34.1.1.1 the Concessionaire's failure to provide all or any part of the Services in accordance with the Service Standard or at all;
- 34.1.1.2 a material breach by the Concessionaire of any of the provisions of the Contract;
- 34.1.1.3 any negligent, other tortious or fraudulent act or omission of, or breach of statutory duty by the Concessionaire, including wilful mis-use or deliberate failure to maintain Council Equipment, particularly where this causes injury to a member of the public.

34.1.2 For the purposes of Clause 34.1.1 above, references to the Concessionaire shall include any Concessionaire Related Party and for the purposes of Clause 34.1 "third party liabilities" shall mean any demands made by third parties including without limitation Customers against the Council and all liabilities of the Council to third parties.

34.2 Council's Indemnity

34.2.1 The Council shall be liable for and shall fully and promptly indemnify the Concessionaire against all Direct Losses whatsoever and howsoever arising whether directly, indirectly or in relation to any third party liabilities out of or in connection with:-

- 34.2.1.1 a breach of this Agreement;
- 34.2.1.2 the use or occupation by the Council of any property or premises belonging to the Concessionaire.

34.3 Limitation of Indemnity

34.3.1 Without prejudice to the generality of this Clause 34 the parties' liability to the other in respect of loss or damage to any property of any nature whatsoever shall include

an obligation to reimburse all costs and expenses reasonably incurred by the other in the re-instatement or replacement of any such property.

34.3.2 The Concessionaire's liability to the Council pursuant to Clause 34.1 and the Council's liability to the Concessionaire pursuant to Clause 34.2 shall be, for the avoidance of doubt, without prejudice to any other right or remedy available to the Parties whether under the common law principles of contract, equity or tort, under statute or as expressly provided in this Agreement and in particular (but without limitation) shall not prejudice in any way the Council's right to enforce at any time and in any manner whatsoever any guarantee or sub-contractor warranty.

34.3.3 In any event or notwithstanding anything contained in this Agreement, the Concessionaire's liability in contract, tort (including negligence or statutory duty) or otherwise arising by reason of or in connection with this Agreement (except in relation to death or personal injury caused by negligence) shall be limited for each and every claim to:-

34.3.3.1 where under the terms of Clause 35 the Concessionaire is obliged to hold insurance in respect of the matter from which the liability arises, the insurance levels set out in Clause 35;

34.3.3.2 in respect of matters for which the Agreement is not obliged to hold insurance under the provisions of Clause 35, £5 million.

34.3.4 In any event or notwithstanding anything contained in this Agreement, the Council's liability in contract, tort (including negligence or statutory duty) or otherwise arising by reason of or in connection with this Agreement (except in relation to death or personal injury caused by negligence) shall be limited in aggregate per year to £1 million. For the purposes of this Clause 34.3.4 "in aggregate per year" shall mean that the limitation of liability referred to in those Clauses shall be the monetary limit of liability in respect of breaches, failures or negligence committed in any Contract Year.

34.4 Notification of Claims

Where either Party (the "Indemnified Party") wishes to make a claim under this Agreement against the other (the "Indemnifying Party") in relation to a claim made against it by a third party (a "Third Party Claim"), the Indemnified Party shall give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim.

34.5 Conduct of Claims

Subject to the rights of the insurers under the Required Insurances, the Indemnifying Party may at its own expense and with the assistance and co-operation of the Indemnified Party have conduct of the Third Party Claim including its settlement and the Indemnified Party shall not, unless the Indemnifying Party has failed to resolve the Third Party Claim within a reasonable period, take any action to settle or prosecute the Third Party Claim.

34.6 Costs of Claims

The Indemnifying Party shall, if it wishes to have conduct of any Third Party Claim, give reasonable security to the Indemnified Party for any cost or liability arising out of the conduct of the Third Party Claim by the Indemnifying Party.

34.7 Parties Not Responsible to Indemnify

Any requirement in this Clause 34 or elsewhere in these Clauses for one party to indemnify the other shall not apply to the extent that the claim in question arises from the negligence or breach of contract of the indemnified Party.

34.8 Mitigation

The Parties shall have a general duty to mitigate losses, damages, costs and expenses arising from the other Party's breach of contract, breach of Lease terms or tort.

35 INSURANCE

35.1 Requirement to Maintain

Without prejudice to the Council's rights under the Agreement, the Concessionaire shall, during the Contract Period, take out with reputable insurers and maintain or procure the maintenance of such policies of insurance as may be necessary to insure the Concessionaire against all manner of risks which might arise in connection with the Concessionaire's performance of its obligations under the Agreement (except in relation to the risks to be insured by insurance maintained by the Council in accordance with Clause 35.2) including (without limitation) in respect of the following risks ("the Required Insurances"):-

- 35.1.1 employers' liability including (without limitation) personal injury or death of any person arising under a contract of service with the Concessionaire and/or arising out of an incident occurring during the course of such person's employment in compliance with the Employers' Liability (Compulsory Insurance) Act 1969; such insurance cover shall be not less than £10,000,000 (ten million pounds) in respect of any one incident;
- 35.1.2 public liability and occupiers' liability; such insurance cover shall be not less than £5,000,000 (five million pounds) in respect of any one incident;
- 35.1.3 professional indemnity - £2,000,000 (two million pounds);
- 35.1.4 contents insurance to cover without limitation loss or destruction by reason of loss or damage by such perils as are normally covered under a comprehensive contents policy of insurance or otherwise of all Equipment, assets, software and other equipment used in connection with the Services and owned or under the legal responsibility of the Concessionaire (including such internal parts of any buildings demised to it under a Lease) and such insurance shall be sufficient to cover the full replacement value;
- 35.1.5 damage to the Premises caused by the Concessionaire's act, error, omission, default or negligence; and
- 35.1.6 such other risks as may from time to time be reasonably required by the Council;

and such insurance cover above shall include an indemnity to principal condition. The Concessionaire shall use reasonable endeavours to ensure that the Council's interest is and remains noted on the insurances at all times during the Contract Period.

35.2 Building Insurance

- 35.2.1 The Council shall take out and maintain insurance, and/or self-insure, as applicable, providing for the restoration and rebuilding of the Premises or any of them in the event of damage by fire, aircraft, explosion, lightning, riot, civil commotion,

earthquake, storm and flood, escape of water, impact, sprinkler leakage and/or subsidence caused otherwise than by the Concessionaire's acts, errors or omissions and accidental damage provided the Concessionaire has not acted negligently insofar as such insurance can be obtained on reasonable commercial terms (the "Council Insurances"). The Council shall notify the Concessionaire of the type of insurance that has been obtained, including relevant deductibles and premiums. Unless the Council notifies the Concessionaire otherwise the Council shall apply any insurance proceeds paid in relation to insured risks relating to the Premises to the repair or reinstatement of Premises.

35.2.2 In relation to the Council insurances, the Concessionaire shall comply with all requirements of the insurers including any requirements of the fire authority as to fire precautions relating to the Premises provided that the Council has given the Concessionaire prior written notification of such requirements; and give notice to the Council of any requirements and recommendations of the fire authority as to fire precautions relating to the Premises.

35.2.3 The Concessionaire shall reimburse the Council in relation to the building insurance premium for the Premises, and including a contribution into the risk pool for the Council's uninsured losses. The building insurance premium as at the Commencement Date is £27,630. Any annual increase in this above the Index shall be treated as a Council Change under Clause 35.

35.2.4 Upon the discovery of any damage to the Premises ("Building Damage"):

35.2.4.1 the Concessionaire shall make the relevant Premises secure;

35.2.4.2 the Concessionaire shall (if the Concessionaire discovers the damage) or the Council shall (if the Council discovers the damage) record any relevant details of the damage (including photographs if necessary);

35.2.4.3 (if the Concessionaire discovers the damage) the Concessionaire shall notify the Authorised Officer or suitable deputy or person of suitable authority within the Council as soon as reasonably practicable after it becomes aware of the damage

35.2.4.4 (if the Council discovers the damage) the Council shall notify the Concessionaire's Representative or suitable deputy or person of suitable authority within the Concessionaire as soon as reasonably practicable after it becomes aware of the damage.

35.2.4.5 the Concessionaire shall if requested to do so by the Council, and at the Council's own cost, make safe the Building Damage.

35.3 Obligation on Parties

No Party to this Agreement shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co-insured or an additional insured person.

35.4 Evidence of Policies

The Concessionaire shall provide, to the Council:

- 35.4.1 copies on request of all insurance policies referred to in Clause 35.1 (together with any other information reasonably requested by the Council relating to such insurance policies) and the Council shall be entitled to inspect them during ordinary business hours; and
- 35.4.2 evidence that the premiums payable under all insurance policies have been paid and that the insurances are in full force and effect in accordance with the requirements of this Clause 35 (Insurance).
- 35.5 **Renewal Certificates**
- Renewal certificates or other evidence in relation to any of the insurances required by Clause 35.1 shall be obtained as and when necessary and copies (certified in a manner acceptable to the Council) shall be forwarded to the Council as soon as possible but in any event on or before the renewal date.
- 35.6 **Breach**
- If the Concessionaire is in breach of Clause 35.1, either fully or at all, the Council shall be entitled to:-
- 35.6.1 provide the insurance itself in place of the Concessionaire on fair and reasonable terms that represent value for money; and
- 35.6.2 to charge the cost of such substitute insurance together with an administration charge of 10% (ten per cent) of such cost, to the Concessionaire by way of (in the Council's discretion) either:-
- 35.6.2.1 adjusting the payment due from the Concessionaire to the Council to include such sums; or
- 35.6.2.2 recover the same as a debt due to the Council from the Concessionaire.
- 35.7 **Notification of Claims**
- The Concessionaire shall give the Council notification within ten (10) Working Days of any claim in excess of twenty thousand pounds (£20,000) (indexed in line with CPI) on any of the Required Insurances set out at Clause 35.1 or which, but for the application of the applicable insurance policy excess, would be made on any of the Required Insurances at Clause 35.1 and (if required by the Council) give full details of the incident giving rise to the claim and including compliance with any relevant claim(s)/personal injury legal protocols.
- 35.8 **Limit of Liability**
- Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Concessionaire of its other liabilities and obligations under this Agreement.
- 35.9 **Premiums**
- Save where expressly set out in this Agreement, the insurance premiums for the Required Insurances set out at Clause 35.1 and the amount of any loss that would otherwise be recoverable under any of the said Required Insurances but for the applicable uninsured deductible and limit of indemnity in respect of such insurance shall at all times be the responsibility of the Concessionaire.

35.10 Council Approval

The Required Insurances set out at Clause 35.1 shall be effected with insurers approved by the Council, such approval not to be unreasonably withheld or delayed.

35.11 Claims

The Concessionaire shall where it is obliged to effect insurance under this clause not bring any claim or action against the Council (or any Council Related Party) in respect of any loss or damage in circumstances where (a) the Council and its employees and agents were acting properly in the course of such employment or agency; and (b) the Concessionaire is able to recover such loss or damage under such insurance (or where it would have been able to recover such loss had it been complying with its obligations under this Contract) provided that, to avoid doubt, this sub-clause shall not by itself prevent the Concessionaire from claiming against the Council (or any Council Related Party) to the extent such loss or damage exceeds the maximum level of such insurance required by this Agreement.

PART 7 – CHANGES

36 COUNCIL CHANGES

36.1 The Council has the right to propose Council Changes in accordance with this Clause 36. If the Council requires a Council Change, it must serve a notice ("**Council Notice of Change**") on the Concessionaire in accordance with Clause 36.2 (Council Notice of Change). The Council shall not be entitled to propose a Council Change which requires the Services to be performed in a way that infringes any law or is inconsistent with Good Industry Practice or would otherwise be unlawful.

36.2 Council Notice of Change

The Council Notice of Change shall:

36.2.1 set out the change in the Services required in sufficient detail to enable the Concessionaire to calculate and provide the estimated change in the Concession Fee in accordance with Clause 36.3.7 (the "**Estimate**"); and

36.2.2 require the Concessionaire to provide to the Council within fifteen (15) Working Days of receipt of the Council Notice of Change an estimate of the likely effects of the proposed variation ("**Concessionaire's Response**").

36.3 Concessionaire's Response

As soon as practicable and in any event within fifteen (15) Working Days [after] having received the Council Notice of Change, the Concessionaire shall deliver to the Council the Concessionaire's Response or confirmation as to when the Concessionaire's Response is to be provided to the Council. The Concessionaire's Response shall include the opinion of the Concessionaire on:

36.3.1 whether relief from compliance with obligations is required, including the obligations of the Concessionaire to meet the requirements set out in the Specification during the implementation of the Council Change;

36.3.2 any impact on the provision of the Services including whether the proposed change is in contravention of Clause 36.1;

36.3.3 any amendment required to this Agreement and/or any Contract Document as a result of the Council Change;

36.3.4 any impact on income generation;

36.3.5 any capital expenditure that is required as a result of the Change;

36.3.6 any regulatory approvals which are required; and

36.3.7 the Estimate which shall set out any adjustments required to the Concession Fee. For the avoidance of doubt the Parties hereby acknowledge that the Estimate may result in an increase or decrease in the Concession Fee (or, if applicable and agreed by the Party making the payment, a capital payment). The Estimate should be broken down clearly showing all the requisite elements of the adjustments and should be priced in accordance with the amounts set out in the Pricing Tables (where applicable). Where there are no applicable prices and rates in the Pricing Tables any Estimate should be commensurate with the prices and rates contained within the Pricing Tables. The

Estimate shall include (without limitation) reasonable costs, claims and expenses that the Concessionaire incurs and can evidence in connection with the variation or early termination of any agreements entered into by the Concessionaire in connection with the performance of its obligations under this Agreement and all costs of employing staff or professional consultants to review, evaluate and implement the Change;

- 36.3.8 any redundancy costs, including any additional costs that may be incurred in the event that any employee of the Concessionaire may take early retirement on the basis of redundancy.

36.4 Discussion

- 36.4.1 As soon as practicable after the Council receives the Concessionaire's Response, the Parties shall discuss and agree the issues set out in the Concessionaire's Response, including:

- 36.4.1.1 providing evidence that the Concessionaire has and as applicable has used reasonable endeavours to oblige its Sub-Contractors to, including where practicable the use of competitive quotes, minimise any increase in costs or decrease in income and maximise any reduction in costs or increase in income;

- 36.4.1.2 demonstrating that any expenditure that has been avoided, has been taken into account in the amount which in its opinion has resulted or is required under Clause 36.3.

- 36.4.2 In such discussions the Council may modify the Council Notice of Change, and if the estimated increase or decrease in expenditure in respect of the Council Change is expected to exceed fifty thousand pounds (£50,000) (indexed in line with the CPI Index) and it is practical for the Concessionaire to do so, the Council may require the Concessionaire to seek and evaluate competitive tenders for any capital works relevant to the Change (at the Council's expense). In each case the Concessionaire shall, as soon as practicable, and in any event not more than ten (10) Working Days after receipt of such modification, notify the Council of any consequential changes to the Estimate.

36.5 Value for Money

If the Concessionaire does not intend to use its own resources to implement any Council Change it shall comply with Good Industry Practice with the objective of ensuring that it obtains best value for money (taking into account all relevant circumstances including, in particular, the requirements that the Concessionaire should not be worse off as a result of the implementation of the Council Change) when procuring any work, services, supplies, materials or equipment required in relation to the Council Change.

36.6 Disputes

If the Parties cannot agree on the contents of the Concessionaire's Response, then the dispute will be determined in accordance with the Dispute Resolution Procedure.

36.7 Confirmation or Withdrawal of Council Notice

As soon as practicable after the contents of the Concessionaire's Response have been agreed or otherwise determined pursuant to the Dispute Resolution Procedure, the Council shall:

36.7.1 confirm in writing to the Concessionaire the Concessionaire's Response (as modified);
or

36.7.2 withdraw the Council Notice of Change.

36.8 Failure to Confirm Council Change

36.8.1 If the Council does not confirm the Concessionaire's Response (as modified) within twenty (20) Working Days of the contents of the Concessionaire's Response having been agreed or determined, then the Council Notice of Change shall be deemed to have been withdrawn.

36.9 Implementation of Change

In the event that the Concessionaire's Response has been confirmed by the Council, then the Parties shall implement the Change in accordance with an agreed timetable for implementation.

36.10 Method of implementing Adjustments

Where the Council agrees to any adjustment set out in the Concessionaire's Response the Council and Concessionaire, acting reasonably, shall agree either a lump sum payment or an adjustment to the Concession Fee.

37 CONCESSIONAIRE CHANGES

37.1 If the Concessionaire wishes to introduce a change in the Services ("a Concessionaire Change"), it must serve a notice ("Concessionaire Notice of Change") on the Council.

37.2 The Concessionaire Notice of Change must:

37.2.1 set out the proposed change to Services in sufficient detail to enable the Council to evaluate it in full;

37.2.2 specify the Concessionaire's reasons for proposing the change to the Services;

37.2.3 request the Council to consult with the Concessionaire with a view to deciding whether to agree to the change to the Services and, if so, what consequential changes the Council requires as a result;

37.2.4 indicate any implications of the change to the Services;

37.2.5 indicate, in particular, whether a variation to the Concession Fee is proposed (and, if so, give a detailed cost estimate of such proposed change); and

37.2.6 indicate if there are any dates by which a decision by the Council is critical;

37.3 The Council shall evaluate the Concessionaire Notice of Change within in ten (10) Working Days of receipt in good faith, taking into account all relevant issues, including, without limitation, whether:

37.3.1 a change in the Concession Fee will occur;

37.3.2 the change affects the quality of the Services or the likelihood of successful delivery of the Services;

- 37.3.3 the change will interfere with the relationship of the Council with third parties;
 - 37.3.4 the financial strength of the Concessionaire is sufficient to perform the changed Services;
 - 37.3.5 the residual value of the Equipment or Premises is reduced; or
 - 37.3.6 the change materially affects the risk or costs to which the Council is exposed.
- 37.4 As soon as practicable after receiving the Concessionaire Notice of Change, the Parties shall meet and discuss the matters referred to in it. During their discussions the Council may propose modifications or, subject to Clause 37.5, approve or reject the Concessionaire Notice of Change.
- 37.5 If the Council approves the Concessionaire Notice of Change (with or without modification), the implementation of the relevant change to the Services shall be implemented in accordance with an agreed timetable for implementation. Within this period, the Parties shall consult and agree the remaining details as soon as practicable and shall enter into any documents to amend this Agreement which are necessary to give effect to the change.
- 37.6 If the Council, in its absolute discretion, rejects the Concessionaire Notice of Change, it shall give its reasons for such a rejection, save that the Council cannot reject a change which is required in response to a Change in Law or otherwise to comply with Legislation and/or Regulations.
- 37.7 Unless the Council's acceptance specifically agrees to a decrease in the Concession Fee, there shall be no decrease in the Concession Fee as a result of a change to the Services proposed by the Concessionaire.
- 37.8 If the change to the Services set out in the Concessionaire Notice of Change causes or will cause the Concessionaire's costs or those of a Sub-Concessionaire to decrease then there shall be a increase in the Concession Fee such that the costs that the Concessionaire has incurred in implementing such a change shall be deducted for the benefit of the Concessionaire and any savings shall be shared equally between the Concessionaire and the Council to reflect the decrease in costs on a 50:50 basis.

38 CHANGE IN LAW

- 38.1 The Concessionaire shall comply with all and any Legislation, amended Legislation or re-enacted Legislation which comes into force at any time during the Contract Period and shall ensure that the Services are provided in accordance with the same.
- 38.2 If at any time during the Contract Period either Party becomes aware of a Qualifying Change of Law which in its reasonable opinion will result in:-
- 38.2.1 a necessary change in the Services;
 - 38.2.2 a variation or amendment to the terms of this Agreement;
 - 38.2.3 the procurement of new or additional Equipment; and/or
 - 38.2.4 an amendment, revision, modification or refurbishment of the Premises or any part of the Premises

that Party shall issue a notice in writing to the other giving full details of the Qualifying Change of Law and the resulting effect.

- 38.3 As soon as practicable after receipt of any notice from either Party under Clause 38.2 above, the Parties shall discuss and agree the issues referred to in the notice and shall agree the way in which the Qualifying Change in Law should be effected and the steps which may be reasonably taken by the Concessionaire to mitigate the effect of the Qualifying Change in Law.
- 38.4 Following agreement between the Parties as to the way in which the Qualifying Change in Law is to be effected:
- 38.4.1 the Concessionaire shall bear the costs of effecting any General Changes in Law and there shall be no changes to the Concession Fee as a result; or
 - 38.4.2 any Qualifying Changes of Law shall be put into effect as provided in Clause 38 as if the Council had issued a Council Notice of Change and any changes to the Concession Fee (or, if applicable and agreed by the Council, a capital payment) shall be reasonably agreed between the Parties.
- 38.5 Both Parties shall consult with each other to agree the resultant changes required to the Specification or other Contract Documents to govern the performance of the Change in Law.

Part 8 - GENERAL

39 COUNCIL STEP-IN

39.1 Right to Step-In

If the Council reasonably believes that it needs to take action in connection with the Services:

39.1.1 because a serious risk exists to the health or safety of persons or property or to the environment;

39.1.2 to discharge a statutory duty; and/or

39.1.3 because an Emergency has arisen;

then the Council shall be entitled to take action in accordance with Clauses 39.2 (Notice to the Concessionaire) to 39.5 (Step-In on Concessionaire Breach).

39.2 Notice to the Concessionaire

If Clause 39.1 (Right to Step-In) applies and the Council wishes to take action, the Council shall notify the Concessionaire in writing of the following:

39.2.1 the action it wishes to take;

39.2.2 the reason for such action;

39.2.3 the date it wishes to commence such action;

39.2.4 the time period which it believes will be necessary for such action; and

39.2.5 to the extent practicable, the effect on the Concessionaire and its obligation to carry out the Works and/or provide the Services during the period such action is being taken.

39.3 Action by Council

Following service of such notice, the Council shall take such action as notified under Clause 39.2 (Notice to the Concessionaire) and any consequential additional action as it reasonably believes is necessary (together, the "Required Action") and the Concessionaire shall give all reasonable assistance to the Council while it is taking the Required Action. The Council shall provide the Concessionaire with notice of completion of the Required Action and shall use reasonable endeavours to provide such advance notice as is reasonably practicable of its anticipated completion.

39.4 Step-In without Concessionaire Breach

If the Concessionaire is not in breach of its obligations under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Concessionaire from providing any part of the Services the Concessionaire shall be relieved from its obligations to carry out such part of the Services.

39.5 Step-In on Concessionaire Breach

If the Required Action is taken as a result of a breach of the obligations of the Concessionaire under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Concessionaire from providing any part of the Services

39.5.1 the Concessionaire shall be relieved of its obligations to carry out such part of the Services; and

39.5.2 in respect of the period in which the Council is taking the Required Action, the Concession Fee due from the Concessionaire to the Council shall equal the amount the Council would receive if the Concessionaire were satisfying all its obligations and providing the Services affected by the Required Action in full over that period, plus an amount equal to all the Council's costs of operation in taking the Required Action.

40 CONFIDENTIALITY

40.1 Duty of Confidentiality

40.1.1 The parties agree that the terms of this Agreement shall, subject to Clause 40.1.2 below, not be treated as Confidential Information and may be disclosed without restriction.

40.1.2 Clause 40.1.1 above shall not apply to terms of this Agreement designated as Commercially Sensitive Information which in relation to Commercially Sensitive Information shall, subject to Clause 40.2 below, be kept confidential for the relevant periods specified in Schedule 5 (Commercially Sensitive Information).

40.1.3 The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this Agreement or the Services and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any Confidential Information.

40.2 Permitted Disclosure

Clauses 40.1.2 and 40.1.3 (Duty of Confidentiality) shall not apply to:

40.2.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the direct performance of those obligations, and this shall include the Council being able to request data about Customers for its own marketing purposes;

40.2.2 any matter which a party can demonstrate is already or becomes generally available and in the public domain (as evidenced by written records) otherwise than as a result of a breach of this Clause 40 (Confidentiality);

40.2.3 any disclosure to enable a determination to be made under the Dispute Resolution Procedure or in connection with a dispute between the Concessionaire or any of its Sub-Contractors, or as permitted under Clause 25.5;

40.2.4 any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the Party making the disclosure or the rules of any governmental or regulatory Council having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the governmental or regulatory Council concerned;

- 40.2.5 any disclosure of information which is already lawfully in the possession of the receiving Party without any restriction on disclosure, otherwise than as a result of a breach of this clause 40 and prior to its disclosure by the disclosing Party;
- 40.2.6 any disclosure of information to the parties' own solicitors, accountants or insurers;
- 40.2.7 any disclosure of information by the Council to any other department, office or agency of the Government or their respective advisors or to any person engaged in providing services to the Council for any purpose related to or ancillary to the Agreement; and any disclosure for the purpose of:
 - 40.2.7.1 the examination and certification of the Council's or the Concessionaire's accounts; or
 - 40.2.7.2 any examination pursuant to the 1999 Act of the economy, efficiency and effectiveness with which the Council has used its resources; or
 - 40.2.7.3 complying with a proper request from either party's insurance advisers or insurers on placing or renewing any insurance policies; or
 - 40.2.7.4 (without prejudice to the generality of Clause 40.2 above) compliance with the FOIA and/or the Environmental Information Regulations.

Provided that, for the avoidance of doubt, neither Clauses 40.2.7.4 nor 40.2.4 above shall permit disclosure of Confidential Information otherwise prohibited by clause 40.1.2 or 40.1.3 above where that information is exempt from disclosure under section 41 of the FOIA.

- 40.2.8 Any disclosure of information in accordance with the express prior written approval of the party to whom such information belongs.

40.3 Obligations Preserved

Where disclosure is permitted under Clause 40.2 (other than Clauses 40.2.2, 40.2.3 and 40.2.5 and 40.2.7) the Party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

40.4 Audit

For the purposes of

- 40.4.1 the examination and certification of the Council's accounts; and
- 40.4.2 an examination pursuant to the 1999 Act of the economy, efficiency and effectiveness of which the Council has performed its functions,

the Council's external auditors may examine such documents as he or it may reasonably require which are owned, held or otherwise within the control of the Concessionaire and any Sub-Contractor. and may require the Concessionaire and any Sub-Contractor to produce such oral or written explanations as he or it reasonably considers necessary as part of any statutory audit requirements.

40.5 Exploitation of Information

The Concessionaire shall not make use of this Agreement or any information issued or provided by or on behalf of the Council in connection with this Agreement otherwise than for the purposes of this Agreement, except with the written consent of the Council.

40.6 Information about Customers and Council Related Parties

Where the Concessionaire, in carrying out its obligations under this Agreement, is provided with information relating to Customers and Council Related Parties, the Concessionaire shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless:

- 40.6.1 the information is trivial or obvious;
- 40.6.2 the information is required to be disclosed by Legislation or by any Relevant Authority;
- 40.6.3 the Concessionaire has sought the prior written consent of that Customer or Council Related Party and has obtained such consent;
- 40.6.4 the information is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause 40.
- 40.6.5 the information is lawfully in the possession of the Concessionaire without any restriction on disclosure, otherwise than as a result of a breach of this Clause 40 and prior to its disclosure by the Concessionaire.

40.7 Expiry

On or before the Expiry Date or the Termination Date, the Concessionaire shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any Customer or Council Related Party including any documents in the possession, custody or control of a Sub-Contractor, subject to any restrictions under the Data Protection Act 1998, are delivered up to the Council. The Council undertakes to keep all such information confidential and shall only use such information for the purposes for which it was provided.

41 FREEDOM OF INFORMATION

41.1 The Concessionaire acknowledges that the Council is subject to the requirements of the FOIA and the Environmental Information Regulations and shall facilitate the Council's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in Clauses 41.2 to 41.5 (inclusive) below.

41.2 Where the Council receives a Request for Information in relation to Information that the Concessionaire is holding on its behalf the Council shall transfer to the Concessionaire such Request for Information that it receives as soon as practicable and in any event within two (2) Working Days of receiving a Request for Information and the Concessionaire shall:

- 41.2.1 provide the Council with a copy of all such Information in the form that the Council requires as soon as practicable and in any event within five (5) Working Days (or such other period as the Council acting reasonably may specify) of the Council's request; and
- 41.2.2 provide all necessary assistance as reasonably requested by the Council in connection with any such Information, to enable the Council to respond to a Request for

Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Regulations.

- 41.3 Following notification under Clause 40.2 and up until such time as the Concessionaire has provided the Council with all the Information specified in Clause 40.2.1, the Concessionaire may make representations to the Council as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Council shall be responsible for determining at its absolute discretion:-
- 41.3.1 whether the Information is exempt from disclosure under the FOIA and the Environmental Information Regulations;
 - 41.3.2 whether the Information is to be disclosed in response to a Request for Information, and
 - 41.3.3 in no event shall the Concessionaire respond directly, or allow its Sub-Contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Council.
- 41.4 The Concessionaire shall ensure that all Information held on behalf of the Council or retained for disclosure for at least 6 years (from the date it is acquired) and shall permit the Council to inspect such Information as requested from time to time.
- 41.5 The Concessionaire acknowledges that any lists provided by it listing or outlining Commercially Sensitive Information, are of indicative value only and that the Council may nevertheless be obliged to disclose Commercially Sensitive Information in accordance with Clause 41.7.
- 41.6 In the event of a request from the Council pursuant to Clause 41.2 above, the Concessionaire shall as soon as practicable, and in any event within five (5) Working Days of receipt of such request, inform the Council of the Concessionaire's estimated costs of complying with the request to the extent these would be recoverable if incurred by the Council under section 12(1) of the FOIA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Council's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in Section 12(1) of the FOIA and as set out in the Fees Regulations the Council shall inform the Concessionaire in writing whether or not it still requires the Concessionaire to comply with the request and where it does require the Concessionaire to comply with the request the 10 Working Days period for compliance shall be extended by such number of additional days for compliance as the Council is entitled to under Section 10 of the FOIA. In such case, the Council shall notify the Concessionaire of such additional days as soon as practicable after becoming aware of them and shall reimburse the Concessionaire for such costs as the Concessionaire incurs in complying with the request to the extent the Council is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.
- 41.7 The Concessionaire acknowledges that (notwithstanding the provisions of Clause 40) the Council may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the Freedom of Information Act 2000 (the "FOIA Code"), be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning the Concessionaire or the Agreement:-

- 41.7.1 in certain circumstances without consulting with the Concessionaire, or
- 41.7.2 following consultation with the Concessionaire and having taken their views into account.
- 41.7.3 Provided always that where Clause 41.7.1 applies, the Council shall, in accordance with the recommendations of the FOIA Code, draw this to the attention of the Concessionaire prior to any disclosure.

42 DATA PROTECTION

42.1 General

- 42.1.1 In relation to all Personal Data, the Concessionaire shall at all times comply with the DPA as a data controller if necessary, including maintaining a valid and up to date registration or notification under the DPA covering the data processing to be performed in connection with the Services.
- 42.1.2 The Concessionaire and any Sub-Contractor shall only undertake processing of Personal Data reasonably required in connection with the Services and shall not transfer any Personal Data to any country or territory outside the European Economic Area.

42.2 No Disclosure

- 42.2.1 The Concessionaire shall not disclose Personal Data to any third parties other than:
 - 42.2.1.1 to employees, agents and Sub-Contractors to whom such disclosure is reasonably necessary in order for the Concessionaire to carry out the Services; or
 - 42.2.1.2 to the extent required under a court order,
provided that disclosure under Clause 42.2.1.1 (No Disclosure) is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this Clause 42.2.1 (No Disclosure) and that the Concessionaire shall give notice in writing to the Council of any disclosure of Personal Data which either the Concessionaire or a Sub-Contractor is required to make under Clause 42.2.1.2 (No Disclosure) immediately upon becoming aware of such a requirement.
- 42.2.2 The Concessionaire shall bring into effect and maintain all technical and organisational measures to prevent unauthorised or unlawful processing of Personal Data and accidental loss or destruction of, or damage to, Personal Data including to take reasonable steps to ensure the reliability of staff having access to the Personal Data.
- 42.2.3 The Council may, at reasonable intervals, request a written description of the technical and organisational methods employed by the Concessionaire or the Sub-Contractors referred to in Clause 42.2.2 (No Disclosure). Within twenty (20) Working Days of such a request, the Concessionaire shall supply written particulars of all such measures detailed to a reasonable level such that the Council can determine whether or not, in connection with the Personal Data, it is compliant with the DPA.
- 42.2.4 The Concessionaire shall indemnify and keep indemnified the Council against all Direct Losses incurred by it to the extent that this arises from any breach of this

Clause 42 by the Concessionaire and/or any act or omission of any Sub-Contractor which causes the Concessionaire to be in breach of this Clause 42.

- 42.2.5 The Council shall indemnify and keep indemnified the Concessionaire against all Direct Losses incurred by it to the extent that this arises from any breach of the Data Protection Acts by the Council in the transfer of data to the Concessionaire at the Commencement Date which causes the Concessionaire to be in breach of the Act.

43 DISPUTE RESOLUTION

43.1 Disputes

Any dispute arising in relation to any aspect of this Agreement shall be resolved in accordance with this Clause 43.

43.2 Consultation

If a dispute arises in relation to any aspect of this Agreement, the Concessionaire's Representative and the Authorised Officer shall at first instance use their reasonable endeavours to resolve it. If the dispute is not resolved between the Concessionaire's Representative and the Authorised Officer the matter shall be referred to senior levels in both organisations and subsequently to Director and Chief Executive level if necessary.

43.3 Mediation

If the Parties fail to reach agreement the dispute shall be referred to non-binding mediation in accordance with the Chartered Institute of Arbitrators' Mediation Rules for the mediation of disputes current at the time when the request for mediation is made. The mediation shall be non-binding unless agreement is reached and a document signed with contractual effect. The mediation shall be conducted within six weeks of a referral by either Party.

43.4 Expert

If the Concessionaire and the Council fail to resolve the dispute through such mediation, either Party may refer the matter to an expert selected in accordance with Clauses 43.5 and 43.6 below (an "Expert"). For the avoidance of doubt, nothing shall compel a Party to refer a matter to an Expert before proceeding to litigation.

- 43.5 The Parties shall jointly appoint as Expert a person suitably qualified to determine such matter or dispute.

43.6 If

43.6.1 the Council and the Concessionaire are unable to agree on the identity of the appointee, or

43.6.2 the appointee declines to act,

the President for the time being of the Chartered Institute of Arbitrators shall appoint an Expert within twenty-five (25) Working Days of any application for such appointment by either Party.

- 43.7 Within five (5) Working Days of appointment in relation to a particular dispute, the Expert shall require the Parties to submit in writing their respective arguments. The Expert shall, in his absolute discretion, consider whether a hearing is necessary in order to resolve the dispute.

- 43.8 The Expert shall provide to both Parties his written decision on the dispute, within 25 Working Days of appointment (or such other period as the Parties may agree with the Expert). The Expert shall state reasons for his/her decision.
- 43.9 The Expert's decision shall be binding on both Parties who shall forthwith give effect to the decision, unless and until either Party refers the dispute to a court, in which event, the court shall be entitled to open up and review any decision of the Expert.
- 43.10 The Expert's costs of any reference shall be borne as the Expert shall specify or, in default, equally by the Parties. Each Party shall bear its own costs arising out of the reference, including legal costs and the costs and expenses of any witnesses.
- 43.11 The Expert shall be deemed not to be an arbitrator but shall render his decision as an expert and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Expert or his determination or the procedure by which he reached his determination.
- 43.12 All information, data or documentation disclosed or delivered by a Party to the Expert in consequence of or in connection with his appointment as Expert shall be treated as confidential.
- 43.13 The Expert is not liable for anything done or omitted in the discharge or purported discharge of his functions as Expert unless the act or omission is in bad faith. Any employee or agent of the Expert is similarly protected from liability.
- 43.14 Reference to the Courts
- If, following determination by the Expert in accordance with this Clause or no referral in accordance in accordance with Clause 43.4 above, the dispute remains unresolved, either Party may refer the matter to the exclusive jurisdiction of the courts of England.

44 ORDERING OF GOODS AND SERVICES

Neither party shall place or cause to be placed any orders with suppliers or otherwise incur liabilities in the name of the other party or any representative of the other party.

45 ASSIGNMENT AND SUB-CONTRACTING

- 45.1 The Council shall be entitled to assign, novate or otherwise transfer or dispose of its rights under this Agreement or any part thereof to any other public body. It may assign, novate or otherwise transfer or dispose of its rights under this Agreement to other bodies with the Concessionaire's consent, such consent not be unreasonably withheld or delayed
- 45.2 The Concessionaire shall, following the Commencement Date, not assign, underlet, sub-contract, charge, sell, bargain or otherwise deal in any way with the benefit of this Agreement in whole or in part except with the prior written consent of the Council, such consent not to be unreasonably withheld or delayed, in relation to subcontracting part of the Services to the specialist third party providers as identified in the Specification.
- 45.3 The Concessionaire shall perform its obligations under and observe all the terms of any sub-contract with a Sub-Contractor.
- 45.4 The Concessionaire shall inform the Council as soon as reasonably practicable and, in any event, within 30 days of any Change of Control of the Concessionaire.

46 AUDIT ACCESS

The Concessionaire shall provide to the Authorised Officer information, documents, records and the like in the possession of the Concessionaire as may be reasonably requested by the Authorised Officer for statutory audit reasons only.

47 NO AGENCY

47.1 No Partnership or Employment

Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Council and the Concessionaire.

47.2 Power to Bind

Save as expressly provided otherwise in this Agreement, the Concessionaire shall not be, or be deemed to be, an agent of the Council and the Concessionaire shall not hold itself out as having authority or power to bind the Council in any way.

47.3 Deemed Knowledge

Without limitation to its actual knowledge, the Concessionaire shall for all purposes of this Agreement, be deemed to have such knowledge in respect of the Services as is held (or ought reasonably to be held) by any Concessionaire Related Party,

48 ENTIRE AGREEMENT

48.1 Prior Representations etc Superseded

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

48.2 Acknowledgements

Each of the parties acknowledges that:

48.2.1 subject to Clause 4 (Concessionaire Warranties) it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement; and

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

49 NOTICES

49.1 Form and Service of Notices

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

Concessionaire	Council
The Park Offices Battersea Park Albert Bridge Road London SW11 4NJ	Wandsworth Town Hall Wandsworth High Street London SW18 2PU

49.2 Provision of Information to Representatives

Where any information or documentation is to be provided or submitted to the Authorised Officer or the Concessionaire's Representative it shall be provided or submitted by sending the same by first class post, facsimile or by hand, or leaving the same at:

Concessionaire's Representative	Authorised Officer
The Park Offices Battersea Park Albert Bridge Road London SW11 4NJ	Wandsworth Town Hall Wandsworth High Street London SW18 2PU

49.3 Change of Details

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

49.4 Notices by Post

Notices given by post shall be effective upon the earlier of actual receipt and two (2) Working Days after mailing. Notices delivered by hand shall be effective upon delivery. Notices given by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:

- 49.4.1 within two (2) hours after sending, if sent on a Working Day between the hours of 9am and 4pm; or

49.4.2 by 11am on the next following Working Day, if sent after 4pm on a Working Day but before 9am on that next following Working Day.

50 SEVERABILITY

If any term, condition or provision of this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality and enforceability of the other provisions of or any other documents referred to in this Agreement.

51 WAIVER

51.1 Waiver to be Written

No term or provision of this Agreement shall be considered as waived by any Party unless a waiver is given in writing by that Party.

51.2 Extent of Waiver

No waiver under Clause 51.1 (Waiver to be Written) shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.

52 INTEREST ON LATE PAYMENT

Save where otherwise specifically provided, where any payment or sum of money due from the Concessionaire to the Council or from the Council to the Concessionaire under any provision of this Agreement is not paid within 30 Working Days of the due date, it shall bear interest thereon at the Prescribed Rate from the due date (whether before or after any judgement) until actual payment and it is agreed between the parties that the Prescribed Rate provides the Concessionaire with a substantial remedy pursuant to Sections 8 and 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

53 GOVERNING LAW AND JURISDICTION

The Agreement shall be governed by and construed in all respects in the accordance with the laws of England and Wales. Subject to Clause 43 (Dispute Resolution), the English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement.

54 NO DOUBLE RECOVERY

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

55 CAPACITY

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

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

THE COMMON SEAL of THE MAYOR AND)
BURGESSES OF THE LONDON BOROUGH)
OF WANDSWORTH was affixed to this DEED)
BY ORDER:)

Authorised Officer:

Seal Register No:

EXECUTED as a Deed by)
ENABLE LEISURE AND CULTURE)
Acting by one director signing)
In the presence of a witness)

.....
Director signature

.....
Print Director name

.....
Witness signature

.....
Print name

.....
.....
Address

SCHEDULE 1
DEFINITIONS

SCHEDULE 1

DEFINITIONS AND INTERPRETATION

Definitions

In this Agreement unless the context otherwise requires the following terms shall have the meanings given to them below:

WORD OR PHRASE	MEANING
"1999 Act"	the Local Government Act 1999;
"Administering Authority"	means the Council in its capacity as administering authority of the LGPS;
"Admission Agreement"	means an agreement in the form set out at Schedule 8;
"Admission Body"	means a transferee admission body for the purposes of regulation 5A of the LGPS Regulations;
"Administration Regulations"	means the Local Government Pension Scheme Regulations 2013 SI no 2356 of 2013
"Affected Party"	has the meaning given to it in Clause 31.2;
"Affiliate"	in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company, and "holding company" and "subsidiary" shall have the meaning given to them in Section 1159 of the Companies Act 2006 provided that the Council shall not be construed for any purposes as being an Affiliate of the Concessionaire;
"Agreed Contribution Rate"	means (a) For the TPS, 16.48% of pensionable pay or as may otherwise be set by the TPS; (b) For the LGPS, 19% of pensionable pay (within the meaning of the LGPS Regulations) (being the employer contribution rate calculated by the Administering Authority on the basis of the actuarial assumptions used in the most recent valuation of the Fund prior to the Commencement Date) in respect of Eligible Employees who are active members of the Fund;

WORD OR PHRASE	MEANING
“Agreement”	this agreement (including its Schedules);
“Assets”	all assets and rights to enable the Council or a successor Concessionaire to own, operate and maintain each Premises in accordance with this Agreement including: (a) any land or buildings; (a) any equipment; (b) any books and records (including operating and maintenance manuals, health and safety manuals and other know how); (c) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred); and (d) any revenues and any other contractual rights; but excluding any assets and rights in respect of which the Council is full legal and beneficial owner;
“Assigned Employees”	has the meaning given to it in Clause 16.7 (Retendering);
“Authorised Officer”	shall be the Director of Housing and Community Services or such other person appointed by the Council pursuant to Clause 18.3;
“Byelaws”	the Byelaws in force in relation to the Premises in force from time to time as set out in Appendix 7 (Legislation) of the Services Specification;
“Cessation Date”	any date on which the Concessionaire or the relevant Sub-Contractor ceases to be an Admission Body as defined in Clause 17.1 (Concessionaire to become an Admission Body) other than as a result of the termination of this Agreement or because it ceases to employ any Eligible Employees;
“Change in Law”	the coming into effect after the date of this Agreement of: (a) Legislation, other than any Legislation which on the date of this Agreement has been published: (i) in a draft Bill as part of a Government Departmental Consultation Paper; (ii) in a Bill;

WORD OR PHRASE	MEANING
	(iii) in a draft statutory instrument; or (iv) as a proposal in the Official Journal of the European Communities; (b) any Guidance; or (c) any applicable judgment of a relevant court of law which changes a binding precedent;
“Change of Control”	is defined by section 1124 of the Corporation Tax Act 2010);
“Change Procedure”	means the procedure contained within Clauses 36 and 37;
“Charges”	means those fees charges to Customers by the Concessionaire in relation to which the Council sets the maximum fee, as listed in Appendix 1 of the Specification (including as varied from time to time);
“Client Side Services”	means the Services as set out in the Services Specification comprising the management services for the Council’s leisure and cultural service contracts;
“Commencement Date”	means 1 st October 2015;
“Commercially Sensitive Information”	the information listed in Schedule 5;
“Compensation Event”	a failure by the Council to carry out the Council Repair Obligations in accordance with clause 12.2.2;
“Concession Contract”	means a concession contract let by the Council or Concessionaire for sport or catering facilities;
“Concession Fee”	the fee payable by the Concessionaire to the Council in consideration of the right for the Concessionaire to use the Premises and provide the Services in accordance with this Agreement as such sum is calculated in accordance with Schedule 4 (Pricing Tables);
“Concessionaire Change”	has the meaning set out in Clause 37;
“Concessionaire Decision”	means a decision by the Concessionaire as an Admission Body to: (a) Increase the annual pension of any Eligible Employee in accordance with the Regulation 31 of the Administration Regulations;

WORD OR PHRASE	MEANING
	(b) the retirement of an Eligible Employee as a result of redundancy or in the interests of business efficiency—(as defined in the Administration Regulations); (c) Consent to the retirement of any Eligible Employee before the normal retirement age for that employee; (d) Consent to the retirement of an Eligible Employee as a result of ill health as defined in the Administration Regulations but excluding any liability for costs that were assumed as part of the latest actuarial valuation of the Fund; (e) Consent to the payment of a pension to an Eligible Employee as a result of the reduction in hours worked by that employee; (f) Engage any Eligible Employee on duties other than the provision of the Services under this Contract; or (g) Award a pay increase in excess of the Pension Index, other than with the Council’s consent but only where the Council so elects in accordance with clause 17.15;
“Concessionaire Notice of Change”	has the meaning given to it in Clause 37.2;
“Concessionaire Related Party”	(a) an officer, servant or agent of the Concessionaire, or any Affiliate of the Concessionaire and any officer, servant or agent of such a person; (b) any Sub-Contractor of any tier and any of their officers, servants or agents; and (b) any person on or at any of the Premises at the express or implied invitation of the Concessionaire (other than a Customer); but excluding in each case the Council and any Council Related Party;
“Concessionaire’s Equipment”	all items of Equipment that are not Council Equipment;
“Concessionaire's Proposals”	the proposals of the Concessionaire to deliver the Services to satisfy the Services Specification, as set out in Schedule 3;

WORD OR PHRASE	MEANING
"Concessionaire's Repair Obligations"	means as defined in paragraph 4.2 of Section Two the Specification;
"Concessionaire's Representative"	shall mean such person appointed by the Concessionaire pursuant to Clause 18.2;
"Concessionaire's Scheme"	the occupational pension scheme(s) established or to be established under Clause 17.6 of this Agreement;
"Confidential Information"	(a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party, including, but not limited to: Information concerning the financial, operational, technical or commercial affairs of the other party; and the following information which belongs to or relates to the Concessionaire: - the Concessionaire's financial statements and forecasts - the Concessionaire's proposed service costs - the Concessionaire's employee information - the Concessionaire's customer information - the Concessionaire's supplier terms and conditions; and - the Concessionaire's Business Plans. including, but not limited to, all personal data and sensitive personal data within the meaning of the Data Protection Act 1988; and (b) Commercially Sensitive Information;
"Consultancy and Advisory Services"	means the Services as set out in the Services Specification comprising the ad hoc consultancy services to be provided by the Concessionaire to the Council in relation to the leisure and cultural services;

WORD OR PHRASE	MEANING
"Contract Data"	any materials, documents or data acquired, brought into existence or used in relation to the Services or this Agreement;
"Contract Documents"	this Agreement together with all Schedules and all other agreements entered into [on the date hereof] between the Concessionaire and the Council in connection with the Services;
"Contract Month"	any month in a Contract Year provided that: (a) the first Contract Month shall commence on the Commencement Date and end on the last day of the month in which the Commencement Date occurs; and (b) the last Contract Month shall begin on the first day of the month in which the last day of the Contract Period occurs and end on that day;
"Contract Period"	the period from and including the Commencement Date to the Expiry Date, or if earlier, the Termination Date;
"Contracts"	means the contracts between the Council and a contractor as listed in Schedule 12 which Contracts shall be either assigned or novated to the Concessionaire;
"Contract Year"	a period of twelve (12) months commencing on the Commencement Date or an anniversary thereof;
"Council Change"	a change in the Services, the Premises, the number of Premises or a change in the Council's Policies requested by the Council which the Concessionaire is obliged to implement under Clause 36;
"Council Equipment"	means the items listed in the Council Equipment Inventory prepared by the Council and appended to this Agreement at Appendix 5 to Schedule 2 including any additional equipment procured by the Concessionaire on the Council's behalf and at the Council's cost and all replacement Council Equipment whether funded by the Council or the Concessionaire in accordance with Clause 11.3;
"Council Notice of Change"	has the meaning given to it in Clause 36.1 (Council Changes);

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“Council’s Policies”	the policies of the Council as set out in Schedule 11 as the same are amended from time to time and as such changes are notified to the Concessionaire;
“Council Related Party”	an officer, agent, employee of the Council acting in the course of his office or employment; and any person (except a Customer) visiting any Premises at the invitation (whether express or implied) of the Council but excluding in each case the Concessionaire and any Concessionaire Related Parties;
“Council’s Repair Obligations”	the repair obligations of the Council, which shall be to maintain and repair the Premises (including for the avoidance of doubt obligations in respect of asbestos and latent defects), with the exception of the Concessionaire’s Repair Obligations as set out in the Service Specification at Schedule 2;
“Customers”	those persons who use, or are entitled to use (whether they have done so or not) the Premises and/or any or all of the Services from time to time;
“Default Sums”	the sums set out in Schedule 9 deducted in accordance with Clause 29;
“Deficit Contribution”	means any contribution payable by the Contractor as a result of termination of the Admission Agreement as a result of a valuation carried out under regulation 64 of the Administration Regulations;
“Detailed Rates	the rates as set out in Schedule 4;
“Direct Losses”	all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an agent/client, client paying basis), proceedings, demands and charges whether arising under statute, contract or at common law; For the avoidance of doubt, the definition of Direct Losses shall exclude all Indirect Losses;
“Directive”	EC Council Directive 2001/23/EC;
“Disclosed Data”	Information relating to the Services disclosed to the

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	Concessionaire prior to the date of this Contract;
“Discriminatory Change in Law”	a Change in Law, the terms of which apply expressly to: (a) the Services and not to similar projects; and/or (b) the Concessionaire and not to other persons;
“Dispute Resolution Procedure”	the procedure for the resolution of disputes set out in Clause 43 (Dispute Resolution);
“DPA”	the Data Protection Act 1998;
“Eligible Employees”	means the Transferring Employees who are active members of or eligible to join the LGPS or the TPS on a Relevant Transfer Date; for so long as they are employed in connection with the provision of the Services or part of such Services;
“Emergency”	an event causing or, in the reasonable opinion of a party, threatening to cause death or injury to any individual, or serious disruption to the lives of a number of people or extensive damage to property, or contamination of the environment in each case on a scale beyond the capacity of the emergency services, or preventing the Services operating under normal circumstances and requiring the mobilisation and organisation of the emergency services;
“Employee Liability Information”	means the information which a transferor is obliged to notify to a transferee pursuant to Regulation 11(1) of TUPE regarding any person employed by him who is assigned to the organised group of resources or employees which is the subject of the Relevant Transfer and also such employees as fall within Regulation 11(4) of TUPE;
“Environmental Information Regulations”	means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such regulations;
“Equipment”	means the Council’s Equipment and the Concessionaire Equipment;

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"Estimate"	has the meaning given to it in Clause 36.3.7;
"Event"	means a one-off function or activity taking place at one of the Premises, which may be organised by the Concessionaire, the Council or an Events Organiser who hires the Premises for that purpose;
"Event Organiser"	means an person organising an Event at one of the Premises having hired the Premises for that purpose;
"Excusing Cause"	any of the following: (a) where there is a failure by a utility supplier to supply utilities to the relevant Premises through no fault of the Concessionaire, the Excusing Case shall only be for the period up to the point the relevant utility supplies are fully reinstated; (b) If the Council carries out maintenance to the Premises the Concessionaire shall be excused from Performance Defaults caused as a direct result of those maintenance works. (c) Any other cause reasonably beyond the control of the parties which renders performance of this Agreement impossible; (d) where the Council is in breach of its obligations under the Contract, or as a result of failure of building, plant, fixtures, fittings or equipment for which the Council has the responsibility of replacement and repair, provided always that such failure, defect or damage was not caused in whole or in part by the Concessionaire; (e) in the event of a Force Majeure Event occurring (as defined in this Agreement); (f) where a failure in performance of the Agreement by the Concessionaire has been caused by an act or omission of the Council; (g) where the Concessionaire has been notified in writing by the Council or the Authorised Officer that a particular activity shall cease; (h) where there is failure by a third party beyond the Concessionaire's control; (i) in the event of an Emergency; (j) where the Council has exercised its step-in rights under Clause 39;

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“Expiry Date”	30 th September 2019 or such later date on which this Agreement expires in accordance with this Agreement;
“Fees Regulations”	the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;
“Final Employee List”	has the meaning given to it in Clause 16.3.2 (Employment Costs);
“First Contractor”	any person with whom the Council initially contracted for the provision of services which are similar to the Services;
“First Employee List”	has the meaning given to it in 16.3.1 (Employment Costs);
“Fittings”	means free standing furniture equipment or assets that have no permanent connection to the structure of the building/ land utilities, or otherwise hung by screws, nails or hooks;
“Fixtures”	means an asset what has been attached to the fabric of a structure in such a way as to be part of the premises and its removal would be detrimental to the building or land, the asset becomes part of the building or land;
“FOIA”	the Freedom of Information Act 2000 and any subordinate legislation (as defined in Section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such Act;
“Force Majeure Event”	the occurrence after the date of this Agreement of: (a) national emergency; or (b) war, civil war, armed conflict or terrorism; or (c) prohibitive governmental regulations; or (d) nuclear, chemical or biological contamination unless the source or cause of the contamination is as a result of any act by the Concessionaire or its Sub-Contractors or any breach by the Concessionaire of the terms of this Agreement; or (e) pressure waves caused by devices travelling at

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	supersonic speeds, which directly causes: (i) either party; or (ii) (for the purpose of Clause 31.6) a Sub-Contractor, person, firm or company to be unable to comply with all or a material part of its obligations under this Agreement.
“Fund”	means the London Borough of Wandsworth Pension Fund within the LGPS or the Teachers Pension Fund;
“Function Provider”	means a function provider in accordance with regulation 14 of the TPS Regulations;
“General Change in Law”	a Change in Law which is not a Specific Change in Law. For the avoidance of doubt the Parties agree that a General Change in Law shall include without limitation any changes in the legislation relating to and the application of and entitlement to NNDR relief and/or exemption from VAT as applicable to the Concessionaire;
“Good Industry Practice”	that degree of skill, care, prudence and foresight and operating practice which would reasonably and ordinarily be expected from time to time of a skilled and experienced operator (engaged in the same type of undertaking as that of the Concessionaire) under the same or similar circumstances;
“Guidance”	any applicable guidance or directions issued by a Relevant Authority with which the Concessionaire is bound to comply;
“Income”	means the income received by the Concessionaire from Customers for the provision of the Services;
“Ill Health Retirement”	means the termination of an Eligible Employee’s employment on the grounds of ill health or infirmity or mind or body entitling that employee to immediate payment of benefits pursuant to regulation 20 of the Benefits Regulations;
“Indemnified Party”	has the meaning given to it in Clause 34.4 (Notification of Claims);

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“Indemnifying Party”	has the meaning given to it in Clause 34.4 (Notification of Claims);
“Index”	the Consumer Price Index (CPI) issued by the Office of National Statistics or any body upon which such duties in connection with the compilation and maintenance of such index may have devolved for the month preceding the price change in question;
“Indirect Losses”	loss of profits, loss of use, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature but excluding any of the same that relate to loss of Revenue;
“Information”	has the meaning given under Section 84 of the Freedom of Information Act 2000;
“Intellectual Property Rights”	any and all patents, trade marks, service marks, copyright, database rights, moral rights, rights in a design, know how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attached thereto which is created, brought into existence, acquired, used or intended to be used by the Concessionaire or any Concessionaire Related Party for the purposes of providing the Services and/or otherwise for the purposes of this Agreement;
“Inventory”	means the Council Inventory of the Equipment as referred to in clause 11;
“Lease”	the lease relating to one of the Leased Premises to be granted by the Council to the Concessionaire in the form set out at Schedule 7;
“Leased Premises”	the Premises in relation to which the Council will grant a Lease, being both (a) as listed in Section 4 of the Service Specification and (b) the Town Hall Accommodation;
“Legislation”	any one or more of the following: (a) any Act of Parliament; (b) any subordinate legislation within the meaning of

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	Section 21(1) of the Interpretation Act 1978; (c) any exercise of the Royal Prerogative; and (d) any enforceable EU right within the meaning of Section 2 of the European Communities Act 1972, in each case in the United Kingdom;
“Letting”	means a regular hire of a room or facilities at any of the Premises by a third party;
“Licence”	means a licence of one of the Licensed Premises granted by the Council to the Concessionaire in accordance with Clause 6.7;
“Licensed Premises”	means the Premises in relation to which the Concessionaire is to enter into a licence with the Council as listed in section 4 of the Service Specification;
“LGPS”	the Local Government Pension Scheme established pursuant to regulations made by the Secretary of State in exercise of powers under sections 7 and 12 of the Superannuation Act 1972 as amended from time to time;
“Losses”	all damages, losses, liabilities, claims, actions, costs, expenses (including legal and other professional charges and expenses), proceedings, demands and charges whether arising under statute, contract or at common law, or in connection with judgments, proceedings, internal costs or demands;
“Monthly Concession Fee”	has the meaning given in Schedule 4 (Pricing Tables);
“Net Book Value”	the original cost of an asset or liability minus depreciation and amortisation;
“New Employee”	those employees employed by the Concessionaire and/or any Sub-Contractor to provide the Services (excluding for the avoidance of doubt any Relevant Employee) who will be working alongside the Transferring Employees;
“New Employer”	has the meaning given to it in Clause 16 (TUPE and Employees);
“New Events”	those Events which are organised and take place at any of the Premises during the Contract Period which are not

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	listed as specific events already taking place at the Premises at the Commencement Date in Appendix 9 of the Specification;
“New Service Provider”	the person who has entered or who will enter into a new contract with the Council for the provision of services similar to the services;
“Operating Manual”	has the meaning given to it in Clause 19;
“Participating Employer”	means a participating employer in accordance with regulation 14E of the TPS Regulations;
“Payment Period”	each 4 week period or (in the case of the first and final Payment Period) part thereof during the Contract Period;
“Pension Index”	means RPI plus 1.5%;
“Performance Default”	a negligent act or omission, a material breach of contract or any failure by the Concessionaire which has a material and adverse impact on the Services, including (without limitation) any failure to perform the Services to the Performance Standards and the Service Standards;
“Performance Standards”	those standards set out in Appendix 5 of the Service Specification;
“Personal Data”	personal data as defined in the DPA which is supplied to the Concessionaire by the Council or obtained by the Concessionaire in the course of performing the Services;
“Plant”	fixed assets in the Premises used in carrying on of the Services from the Premises including without limitation machinery tools and instruments necessary for the operation of the Premises and delivery of the Services;
“Premises Management Services”	means the Services as set out in the Services Specification comprising the management of the various Premises for which the Concessionaire is responsible during the Contract Period;
“Premises”	the Premises listed in Section 4 of the Services Specification being the buildings and other facilities to be provided, maintained and serviced in accordance with this Agreement located on and consisting of the Premises including without limitation the Leased Premises and the

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	Licensed Premises;
"Prescribed Rate"	two per cent (2%) above the base rate from time to time of NatWest Bank plc;
"Pricing Tables"	means the tables set out in Schedule 4 (Pricing Tables);
"Prohibited Act"	(a) offering, giving or agreeing to give to any servant of the Council any gift or consideration of any kind as an inducement or reward: (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with the Council; or (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Council; (b) entering into this Agreement or any other contract with the Council in connection with which commission has been paid or has been agreed to be paid by the Concessionaire or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Council; or (c) committing any offence: (i) under the Prevention of Corruption Acts 1889-1916 or the Bribery Act 2010; (ii) under Legislation creating offences in respect of fraudulent acts; or (iii) at common law in respect of fraudulent acts in relation to this Agreement or any other contract with the Council; (d) defrauding or attempting to defraud or conspiring to defraud the Council;
"Qualifying Change in Law"	(a) a Discriminatory Change in Law; (b) a Specific Change in Law; or

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	(c) a General Change in Law, which comes into effect after the Commencement Date and which involves Capital Expenditure; which was not foreseeable at the date of this Agreement;
“Regulated Activity Provider”	as defined in section 6 of the Safeguarding Vulnerable Groups Act 2006
“Regulated Activity”	in relation to children: as defined in Part 1 of Schedule 4 to the Safeguarding Vulnerable Groups Act 2006; in relation to vulnerable adults: as defined in Part 2 of Schedule 4 to the Safeguarding Vulnerable Groups Act 2006;
“Relevant Authority”	any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom or of the European Union;
“Relevant Employees”	the employees who are the subject of a Relevant Transfer;
“Relevant Transfer Date”	the date on which an Eligible Employee transfers to the Concessionaire and/or one or more Sub-Contractor whether by virtue of any Relevant Transfers or deemed Relevant Transfers or otherwise;
“Relevant Transfer”	a relevant transfer for the purposes of TUPE;
“Remuneration Costs”	has the meaning given to it in Clause 16.3.5 ;
“Request for Information”	shall have the meaning set out in the FOIA or the Environmental Information Regulations as relevant (where the meaning set out for the term “request” shall apply);
“Required Action”	has the meaning given to it in Clause 39.3 (Action by Council);
“Required Insurances”	the insurances specified in Clause 35;
“Retendering Information”	has the meaning given to it in Clause 16.7.1.1

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	(Retendering);
“Return Date”	has the meaning given to it in Clause 16.8.2 ;
“Returning Employees”	has the meaning given to it in Clause 16.8.2;
“Secretary of State”	means the Secretary of State for the Department of Education;
“Service Standard”	has the meaning given to it in Clause 7 (Service Standard);
“Services Specification” or “Specification”	the requirements of the Council in respect of the Services set out in Schedule 2 (Services Specification);
“Services”	the services required to satisfy the Services Specification of the Council contained in Schedule 2 (Services Specification) including without limitation the Specific Services, the Client Side Services, the Premises Management Services and the Consultancy and Advisory Services;
“Site Plans”	the plans of the Premises;
“Specific Change in Law”	any Change in Law which specifically refers to the provision of a service the same as or similar to the Services or to the holding of shares in companies whose main business is providing a service the same as or similar to the Services;
“Specific Services”	means the Services as set out in the Services Specification comprising the leisure and cultural services which the Concessionaire is to provide directly to the Customers;
“Sub-Contractor”	a sub-contractor of the Concessionaire or a franchisee or concessionaire if any;
“Sub-Contracts”	the contracts entered into between the Concessionaire and the Sub-Contractors;
“Subsidiary”	the Council’s wholly owned trading company Wandsworth BC Trading Limited (company registration number 09779563) with registered office at the Council’s address;

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“Support Services”	means services that the Subsidiary delivers to the Concessionaire;
“Table 4 Premises”	means those Premises listed in Table 4 of Section Four of the Specification;
“Teachers' Pension Scheme” or “TPS”	means the Teachers' Pension Scheme established pursuant to regulations made by the Secretary of State in exercise of powers under sections 9 and 12 of Schedule 3 to the Superannuation Act 1972 as amended from time to time;
“Termination Date”	the date of early termination of this Agreement in accordance with its terms;
“Termination Notice”	a notice of termination issued in accordance with this Agreement;
“Title Deeds”	the title of the Council in respect of each of the Premises;
“Town Hall Accommodation”	the office accommodation at Wandsworth Town Hall, Wandsworth High Street, London SW18 2PU which the Parties have agreed that the Concessionaire will occupy from the Commencement Date on terms to be agreed;
“TPS Cessation Date”	means any date on which the Concessionaire ceases to participate as an employer in the Teachers' Pension Scheme other than because it ceases to employ any TPS Seconded Employees;
“TPS Regulations”	means the Teachers' Pension Scheme Regulations 2010/990 which shall include any regulations amending or replacing the regulations;
“Transferring Employee”	Means an employee of the Council (excluding, to avoid doubt (without limitation), any person engaged by the Council as an independent contractor or persons employed by any sub-contractor engaged by the Council) 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 Contract between the Council and the Concessionaire, a contract of employment with the Concessionaire or a Sub-Contractor as applicable;

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“TUPE”	the Transfer of Undertaking (Protection of Employment) Regulations 2014 (SI No. 246) as amended;
“Utilities”	gas, water, electricity, sewerage;
“VAT”	value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994;
“Working Day”	a day, other than Saturday, Sunday, or a bank or public holiday in England and Wales, on which the clearing banks in the City of London are open for business.