



SCHEDULE 16 – TUPE, EMPLOYEES AND PENSIONS



Contract for the Provision of Learning and Skills at HMP Berwyn

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PART 1: STAFF TRANSFER

1. DEFINITIONS

In this Schedule, the following definitions shall apply:

"Actuary"	means a Fellow of the Institute and Faculty of Actuaries;
"Administering Authority"	means, in relation to the Fund, the relevant Administering Authority of that Fund for the purposes of the Local Government Pension Scheme Regulations 2013;
"Admission Agreement"	means either or both of the CSPS Admission Agreement or the LGPS Admission Agreement, as the context requires;
"Broadly Comparable"	means: <ul style="list-style-type: none">(a) in respect of a pension scheme, a status satisfying the condition that there are no identifiable employees who will suffer material detriment overall in terms of future accrual of pension benefits as assessed in accordance with Annex A of New Fair Deal and demonstrated by the issue by the Government Actuary's Department of a broad comparability certificate; and/or(b) in respect of benefits provided for or in respect of a member under a pension scheme, benefits that are consistent with that pension scheme's certificate of broad comparability issued by the Government Actuary's Department, and "Broad Comparability" shall be construed accordingly;
"Contractor's Final Contractor Personnel List"	means a list provided by the Contractor of all Staff who will transfer under the Employment Regulations on the Service Transfer Date;
"Contractor's Provisional Contractor Personnel List"	means a list prepared and updated by the Contractor of all Staff who are at the date of the list wholly or mainly engaged in or assigned to the provision of the Services or any relevant part of the Services which it is envisaged as at the date of such list will no longer be provided by the Contractor;
"CSPS"	means the Principal Civil Service Pension Scheme available to Civil Servants and employees of bodies under Schedule 1 of the Superannuation Act 1972 (and eligible employees of other bodies admitted to participate under a determination under section 25 of the Public Service Pensions Act 2013), as governed by rules adopted by Parliament; the Partnership Pension Account and its (i) Ill health Benefits Scheme and (ii)



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Death Benefits Scheme; the Civil Service Additional Voluntary Contribution Scheme; the Designated Stakeholder Pension Scheme (which is scheduled to close to new members in September 2018) and "alpha" introduced under The Public Service (Civil Servants and Others) Pensions Regulations 2014;

"CSPS Admission Agreement"

means an admission agreement in the form available on the Civil Service Pensions website immediately prior to the Relevant Transfer Date, and including any variation of such admission agreement as directed by Civil Service Pensions, to be entered into for the CSPS in respect of the Services;

"CSPS Eligible Employee"

means any Fair Deal Employee who at the relevant time is an eligible employee as defined in the CSPS Admission Agreement;

"Employee Liabilities"

all and any liabilities, expenses, costs, claims, actions, proceedings, orders, demands, complaints, investigations (save for any claims for personal injury which are covered by insurance) and any award, compensation, damages, tribunal awards, fine, loss, order, penalty, disbursement, payment made by way of settlement and costs, expenses and legal costs reasonably incurred in connection with a claim or investigation related to employment including in relation to the following:

- (a) redundancy payments including contractual or enhanced redundancy costs, termination costs and notice payments;
- (a) unfair, wrongful or constructive dismissal compensation;
- (b) compensation for discrimination on grounds of sex, race, disability, age, religion or belief, gender reassignment, marriage or civil partnership, pregnancy and maternity or sexual orientation or claims for equal pay;
- (c) compensation for less favourable treatment of part-time workers or fixed term employees,
- (d) outstanding employment debts and unlawful deduction of wages including any PAYE and national insurance contributions;
- (e) employment claims whether in tort, contract or statute or otherwise;
- (f) any investigation relating to employment matters by the Equality and Human Rights Commission or other enforcement, regulatory or supervisory



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body and of implementing any requirements which may arise from such investigation;

and including without limitation any related liability, costs, loss, claims, demands, or expenses which arise under any legal obligation owed by the Authority to a Former Contractor or to a New Contractor (or owed by a New Contractor to a New Sub-contractor);

"Direction Letter"

means a NHS Pensions Direction or Determination (as appropriate) issued by the Secretary of State in exercise of the powers conferred by section 7 of the Superannuation (Miscellaneous Provisions) Act 1967 or by section 25 of the Public Service Pensions Act 2013 (as appropriate) and issued to the Contractor or a Sub-Contractor (as appropriate) relating to the terms of participation of the Contractor or Sub-Contractor in the NHSPS in respect of the NHSPS Eligible Employees;

"Employment Regulations"

means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) as amended or replaced;

"Excess Amount"

means any Pension Costs incurred by the Contractor or its Sub-Contractors in any Pension Period that exceed the Pension Base Cost;

"Fair Deal Employees"

means any of:

- (a) Transferring Former Contractor Employees;
- (b) employees who are not Transferring Former Contractor Employees but to whom the Employment Regulations apply on the Relevant Transfer Date to transfer their employment to the Contractor or a Sub-Contractor, and whose employment is not terminated in accordance with the provisions of paragraph 2.6 of Part B of Part 1 (Staff Transfer) of this Schedule 16 (TUPE, Employees and Pensions); and
- (c) where the Former Contractor becomes the Contractor, employees who at the Commencement Date or Relevant Transfer Date (as appropriate) are or become entitled to New Fair Deal protection in respect of any of the Statutory Schemes as notified by the Authority;

"Fair Deal Schemes"

means the relevant Statutory Scheme or a Broadly Comparable pension scheme;

"Former Contractor"

means a contractor supplying services to the Authority before the Relevant Transfer Date that are the same as or substantially similar to the Services (or any part of the Services) and shall



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	include any sub-contractor of such contractor (or any sub-contractor of any such sub-contractor);
"Fund"	NOT APPLICABLE;
"Fund Actuary"	means the actuary to a Fund appointed by the Administering Authority of that Fund;
"LGPS"	means the Local Government Pension Scheme as governed by the LGPS Regulations, and any other regulations (in each case as amended from time to time) which are from time to time applicable to the Local Government Pension Scheme;
"LGPS Admission Agreement"	means an admission agreement within the meaning in Schedule 1 of the Local Government Pension Scheme Regulations 2013;
"LGPS Admission Body"	means an admission body (within the meaning of Part 3 of Schedule 2 of the Local Government Pension Scheme Regulations 2013);
"LGPS Eligible Employees"	means any Fair Deal Employee who at the relevant time is an eligible employee as defined in the LGPS Admission Agreement or otherwise any Fair Deal Employees who immediately before the Relevant Transfer Date was a member of, or was entitled to become a member of, or but for their compulsory transfer of employment would have been entitled to be or become a member of, the LGPS or of a scheme Broadly Comparable to the LGPS;
"LGPS Regulations"	means the Local Government Pension Scheme Regulations 2013 (SI 2013/2356) and The Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014, and any other regulations (in each case as amended from time to time) which are from time to time applicable to the LGPS;
"New Contractor"	means: <ul style="list-style-type: none">(a) any third-party supplier appointed by the Authority to supply any services which are substantially similar to any of the Services in substitution for any of the Services following the expiry, termination or partial termination of the Contract; and/or(b) where the Authority carries out any such services on its own behalf, the Authority itself;
"New Fair Deal"	means the revised Fair Deal position set out in the HM Treasury guidance: "Fair Deal for staff pensions: staff transfer from central government" issued in October 2013 including:



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- (a) any amendments to that document immediately prior to the Relevant Transfer Date; and
- (b) any similar pension protection in accordance with the Part D, Annexes D1 to D3 inclusive to Part 1 (Staff Transfer) of this Schedule 16 (TUPE, Employees and Pensions) as notified to the Contractor by the Authority;

"New Sub-contractor"

means a sub-contractor of the New Contractor to whom Transferring Contractor Employees will transfer on a Service Transfer Date (or any sub-contractor of any such sub-contractor);

["NHS Body"

has the meaning given to it in section 275 of the National Health Service Act 2006 as amended by section 138(2)(c) of Schedule 4 to the Health and Social Care Act 2012;]

["NHSPS Eligible Employees"

means each of the Fair Deal Employees who at a Relevant Transfer Date was a member of, or was entitled to become a member of, or but for their compulsory transfer of employment would have been entitled to be or become a member of, the NHSPS as a result of either:

- (a) their employment with the Authority, an NHS Body or other employer which participates automatically in the NHSPS; or
- (b) their employment with a Former Contractor who provides access to the NHSPS pursuant to an NHS Pensions Direction or Determination (as appropriate) issued by the Secretary of State in exercise of the powers conferred by section 7 of the Superannuation (Miscellaneous Provisions) Act 1967 or by section 25 of the Public Service Pensions Act 2013 (as appropriate) in respect of their employment with that Former Contractor (on the basis that they are entitled to protection under New Fair Deal and were permitted to re-join the NHSPS, having been formerly in employment with the Authority, an NHS Body or other employer who participated automatically in the NHSPS in connection with the Services, prior to being employed by the Former Contractor),

and, in each case, being continuously engaged for more than fifty per cent (50%) of their employed time in the delivery of services (the same as or similar to the Services).

For the avoidance of doubt, an individual who is in or entitled to become a member of the NHSPS as a result of being engaged in the Services and being covered by an "open" Direction Letter or other NHSPS "access" facility but who has never been employed directly by an NHS Body (or other body which



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	participates automatically in the NHSPS) is not an NHSPS Eligible Employee;]
["NHS Pensions"	means NHS Pensions as the administrators of the NHSPS or such other body as may from time to time be responsible for relevant administrative functions of the NHSPS;]
["NHS Pension Scheme Arrears"	means any failure on the part of the Contractor or its Sub-Contractors (if any) to pay employer's contributions or deduct and pay across employee's contributions to the NHSPS or meet any other financial obligations under the NHSPS or any Direction Letter in respect of the NHSPS Eligible Employees;]
["NHS Pension Scheme Regulations"	means, as appropriate, any or all of the National Health Service Pension Scheme Regulations 1995 (SI 1995/300), the National Health Service Pension Scheme Regulations 2008 (SI 2008/653), the National Health Service Pension Scheme Regulations 2015 (2015/94) and any subsequent regulations made in respect of the NHSPS, each as amended from time to time;]
["NHS Premature Retirement Rights"	means any rights to which any Fair Deal Employee (had they remained in the employment of the Authority, an NHS Body or other employer which participates automatically in the NHSPS) would have been or are entitled under the NHS Pension Scheme Regulations, the NHS Compensation for Premature Retirement Regulations 2002 (SI 2002/1311), the NHS (Injury Benefits) Regulations 1995 (SI 1995/866) and section 45 of the General Whitley Council conditions of service, or any other legislative or contractual provision which replaces, amends, extends or consolidates the same from time to time;]
["NHSPS"	means the National Health Service Pension Scheme for England and Wales, established pursuant to the Superannuation Act 1972 and governed by subsequent regulations under that Act including the NHS Pension Scheme Regulations;]
"Notified Sub-Contractor"	means a Sub-Contractor identified in Part 1, Annex of this Schedule 16 (TUPE, Employees and Pensions) to whom Transferring Former Contractor Employees will transfer on a Relevant Transfer Date;
"Pension Base Cost"	NOT APPLICABLE;
"Pension Benefits"	means any benefits payable in respect of an individual (including but not limited to pensions related allowances and lump sums) relating to old age, invalidity or survivor's benefits provided under an occupational pension scheme;
"Pension Costs"	means the costs of complying with the Pension Requirements, but excluding any costs relating to:



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- (a) the provision of any bond or indemnity that the Contractor or its Sub-Contractors are required to provide under the terms of any LGPS Admission Agreement; and
- (b) the provision of advice from the actuary to the LGPS arising from the instruction from the Contractor or its Sub-Contractors in relation to the Pension Requirements;

which will be covered by the Contractor or Sub-Contractor, as appropriate;

"Pension Period"

NOT APPLICABLE;

"Pension Requirements"

means the terms and conditions set out in:

- (a) paragraph 2 (Right of Set Off) of Part D, Annex D3, and paragraph 4 (Discretionary Benefits) of Part D, Annex D3 to Part 1 (Staff Transfer) of this Schedule 16 (TUPE, Employees and Pensions); and
- (b) the LGPS Admission Agreement,

but in each case in respect of LGPS Eligible Employees only;

"Relevant Transfer"

means a transfer of employment to which the Employment Regulations applies;

"Relevant Transfer Date"

means, in relation to a Relevant Transfer, the date upon which the Relevant Transfer takes place or the Commencement Date where the Former Contractor and the Contractor remain the same legal entity;

"Replacement Sub-Contractor"

means any person who has entered or who will enter into a new Sub-Contract with the Contractor to replace an existing Sub-Contract;

"Retirement Benefits Scheme"

means a pension scheme registered under Chapter 2 of Part 4 of the Finance Act 2004;

"Service Transfer"

means any transfer of the Services (or any part of the Services), for whatever reason, from the Contractor or any sub-contractor to a New Contractor or a New Sub-contractor;

"Service Transfer Date"

means the date of a Service Transfer or, if more than one, the date of the relevant Service Transfer as the context requires;

"Staffing Information"

means in relation to all persons identified on the Contractor's Provisional Contractor Personnel List or Contractor's Final Contractor Personnel List, as the case may be, such information as the Authority may reasonably request (subject to all



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applicable provisions of the Data Protection Legislation), but including in an anonymised format:

- (a) their ages, dates of commencement of employment or engagement, gender and place of work;
- (b) details of whether they are employed, self employed contractors or consultants, agency workers or otherwise;
- (c) the % of time they spend engaged in the provision of the Services (or part thereof) transferring;
- (d) the identity of the employer or relevant contracting Party;
- (e) their relevant contractual notice periods and any other terms relating to termination of employment, including redundancy procedures, and redundancy payments;
- (f) their wages, salaries, bonuses and profit sharing arrangements as applicable;
- (g) details of other employment-related benefits, including (without limitation) medical insurance, life assurance, pension or other retirement benefit schemes, share option schemes and company car schedules applicable to them;
- (h) any outstanding or potential contractual, statutory or other liabilities in respect of such individuals (including in respect of personal injury claims);
- (i) details of any such individuals on long term sickness absence, parental leave, maternity leave or other authorised long term absence;
- (j) copies of all relevant documents and materials relating to such information, including copies of relevant contracts of employment (or relevant standard contracts if applied generally in respect of such employees); and
- (k) any other "employee liability information" as such term is defined in regulation 11 of the Employment Regulations;

"Statutory Schemes"

means the CSPA, NHSPA or LGPS;

"Termination Assistance Period"

has the meaning given to it in Schedule 19 (Exit Management);



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"Transferring Former Contractor Employees"

means in relation to a Former Contractor, those employees of the Former Contractor to whom the Employment Regulations will apply on the Relevant Transfer Date and whose names are provided to the Contractor on or prior to the Relevant Transfer Date; and

"Transferring Contractor Employees"

means those employees of the Contractor or any Sub-Contractor to whom the Employment Regulations will apply on the Service Transfer Date.

2. INTERPRETATION

Where a provision in this Schedule 16 (TUPE, Employees and Pensions) imposes an obligation on the Contractor to provide an indemnity, undertaking or warranty, the Contractor shall procure that each of its Sub-Contractors shall comply with such obligation and provide such indemnity, undertaking or warranty to the Authority, Former Contractor, New Contractor or New Sub-contractor, as the case may be.



**Ministry of
JUSTICE**

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PART A [NOT USED]



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PART B: TRANSFERRING FORMER CONTRACTOR EMPLOYEES AT COMMENCEMENT OF SERVICES

1. RELEVANT TRANSFERS

1.1 The Authority and the Contractor agree that:

- (a) the commencement of the provision of the Services or of any relevant part of the Services will be a Relevant Transfer in relation to the Transferring Former Contractor Employees;
- (b) as a result of the operation of the Employment Regulations, the contracts of employment between each Former Contractor and the Transferring Former Contractor Employees (except in relation to any terms disapplied through the operation of regulation 10(2) of the Employment Regulations) shall have effect on and from the Relevant Transfer Date as if originally made between the Contractor and/or Notified Sub-Contractor and each such Transferring Former Contractor Employee.

1.2 The Authority shall procure that the **Former Contractor** shall discharge all obligations in respect of all the Transferring Former Contractor Employees in respect of the period up to (but not including) the Relevant Transfer Date (including the payment of all remuneration, benefits, entitlements and outgoings, all wages, bonuses, commissions, payments of PAYE, national insurance contributions and pension contributions which in any case are attributable in whole or in part in respect of the period up to (but not including) the Relevant Transfer Date but excluding accrued but untaken holiday pay) and the Contractor shall make, and the Authority shall procure that the Former Contractor makes, any necessary apportionments in respect of any periodic payments (excluding untaken holiday pay).

2. FORMER CONTRACTOR INDEMNITIES

2.1 Subject to paragraphs 2.2 and 2.3 of this Part B, the Authority shall procure that a Former Contractor shall indemnify the Contractor and any Notified Sub-Contractor against any Employee Liabilities arising from or as a result of:

- (a) any act or omission by the Former Contractor in respect of any Transferring Former Contractor Employee or any appropriate employee representative (as defined in the Employment Regulations) of any Transferring Former Contractor Employee arising before the Relevant Transfer Date;
- (b) the breach or non-observance by the Former Contractor arising before the Relevant Transfer Date of:
 - (i) any collective agreement applicable to the Transferring Former Contractor Employees; and/or
 - (ii) any custom or practice in respect of any Transferring Former Contractor Employees which the Former Contractor is contractually bound to honour; and/or
- (c) any proceeding, claim or demand by HMRC or other statutory authority in respect of any financial obligation including, but not limited to, PAYE and primary and secondary national insurance contributions:



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- (i) in relation to any Transferring Former Contractor Employee, to the extent that the proceeding, claim or demand by HMRC or other statutory authority relates to financial obligations arising before the Relevant Transfer Date; and
 - (ii) in relation to any employee who is not a Transferring Former Contractor Employee and in respect of whom it is later alleged or determined that the Employment Regulations applied so as to transfer his/her employment from the Former Contractor to the Contractor and/or any Notified Sub-Contractor as appropriate, to the extent that the proceeding, claim or demand by HMRC or other statutory authority relates to financial obligations in respect of the period to (but excluding) the Relevant Transfer Date;
 - (d) a failure of the Former Contractor to discharge or procure the discharge of all wages, salaries and all other benefits and all PAYE tax deductions and national insurance contributions relating to the Transferring Former Contractor Employees in respect of the period to (but excluding) the Relevant Transfer Date;
 - (e) any claim made by or in respect of any person employed or formerly employed by the Former Contractor other than a Transferring Former Contractor Employee for whom it is alleged the Contractor and/or any Notified Sub-Contractor as appropriate may be liable by virtue of this Agreement and/or the Employment Regulations; and
 - (f) any claim made by or in respect of a Transferring Former Contractor Employee or any appropriate employee representative (as defined in the Employment Regulations) of any Transferring Former Contractor Employee relating to any act or omission of the Former Contractor in relation to its obligations under regulation 13 of the Employment Regulations, except to the extent that the liability arises from the failure by the Contractor or any Sub-Contractor to comply with regulation 13(4) of the Employment Regulations.
- 2.2 The indemnities in paragraph 2.1 of this Part B shall not apply to the extent that the Employee Liabilities arise or are attributable to an act or omission of the Contractor or any Sub-Contractor whether occurring or having its origin before, on or after the Relevant Transfer Date including, without limitation, any Employee Liabilities:
- (a) arising out of the resignation of any Transferring Former Contractor Employee before the Relevant Transfer Date on account of substantial detrimental changes to his/her working conditions proposed by the Contractor or any Sub-Contractor to occur in the period from (and including) the Relevant Transfer Date; or
 - (b) arising from the failure by the Contractor and/or any Sub-Contractor to comply with its obligations under the Employment Regulations.
- 2.3 The procurement obligations provided in paragraph 2.1 shall be subject to:
- (a) the Contractor and/or any Notified Sub-Contractor using all reasonable endeavours to mitigate the Employee Liabilities;
 - (b) the Contractor and/or any Notified Sub-Contractor complying with all relevant contractual and statutory obligations; and



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- (c) any claim in respect of the Former Contractor indemnities being notified to the Authority by the Contractor within 3 Months of the Relevant Transfer Date, after such time the procurement obligation provided in paragraph 2.1 of this Part B shall cease to be effective.
- 2.4 If any person who is not identified by the Authority as a Transferring Former Contractor Employee claims, or it is determined, that his/her contract of employment has been transferred from a Former Contractor to the Contractor and/or any Notified Sub-Contractor pursuant to the Employment Regulations then:
 - (a) the Contractor shall, or shall procure that the Notified Sub-Contractor shall, as soon as reasonably possible and in any event by no later than 5 days of becoming aware of that fact, give notice in writing to the Authority and, where required by the Authority, to the Former Contractor; and
 - (b) the Former Contractor may offer (or may procure that a third party may offer) employment to such person or take such other reasonable steps as the Former Contractor considers appropriate to deal with the matter.
- 2.5 If an offer referred to in paragraph 2.4(b) of this Part B is accepted, or if the situation has otherwise been resolved by the Former Contractor and/or the Authority, the Contractor shall, or shall procure that the Notified Sub-Contractor shall, immediately release the person from his/her employment or alleged employment.
- 2.6 If:
 - (a) no such offer of employment has been made;
 - (b) such offer has been made but not accepted; or
 - (c) the situation has not otherwise been resolved,

the Contractor and/or any Notified Sub-Contractor may within 10 days of becoming aware of the person's claim give notice to terminate the employment or alleged employment of such person.
- 2.7 Subject to the Contractor and/or any Notified Sub-Contractor acting in accordance with the provisions of paragraphs 2.4 to 2.6 of this Part B and, where possible, in accordance with all applicable proper employment procedures set out in Law, the Authority shall procure that a Former Contractor shall indemnify the Contractor and/or any Notified Sub-Contractor (as appropriate) against all Employee Liabilities arising out of the termination of employment pursuant to the provisions of paragraph 2.6 of this Part B provided that the Contractor takes, or shall procure that the Notified Sub-Contractor takes, all reasonable steps to minimise any such Employee Liabilities.
- 2.8 The procurement obligation in paragraph 2.7 of this Part B:
 - (a) shall not apply to:
 - (i) any claim for:
 - (A) discrimination, including on the grounds of sex, race, disability, age, gender reassignment, marriage or civil



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partnership, pregnancy or maternity or sexual orientation, religion or belief; or

(B) equal pay or compensation for less favourable treatment of part-time workers or fixed-term employees; and

(ii) in any case in relation to any alleged act or omission of the Contractor and/or any Sub-contractor;

(b) shall apply only where the notification referred to in paragraph 2.4(a) of this Part B is made by the Contractor and/or any Notified Sub-Contractor (as appropriate) to the Authority and, if applicable, the Former Contractor, within 6 Months of the Commencement Date.

2.9 If any such person as is described in paragraph 2.4 of this Part B is neither re-employed by the Former Contractor nor dismissed by the Contractor and/or any Notified Sub-Contractor within the time scales set out in paragraph 2.6 of this Part B, such person shall be treated as having transferred to the Contractor or Notified Sub-Contractor and the Contractor shall, or shall procure that the Notified Sub-Contractor shall, comply with such obligations as may be imposed upon it under the applicable Legislation.

3. CONTRACTOR INDEMNITIES AND OBLIGATIONS

3.1 Subject to paragraph 3.2 of this Part B, the Contractor shall indemnify the Authority and the Former Contractor against any Employee Liabilities arising from or as a result of:

- (a) any act or omission by the Contractor or any Sub-Contractor in respect of any Transferring Former Contractor Employee or any appropriate employee representative (as defined in the Employment Regulations) of any Transferring Former Contractor Employee whether occurring before, on or after the Relevant Transfer Date;
- (b) the breach or non-observance by the Contractor or any Sub-Contractor on or after the Relevant Transfer Date of:
- (c) any collective agreement applicable to the Transferring Former Contractor Employee; and/or
- (d) any custom or practice in respect of any Transferring Former Contractor Employees which the Contractor or any Sub-Contractor is contractually bound to honour;
- (e) any claim by any trade union or other body or person representing any Transferring Former Contractor Employees arising from or connected with any failure by the Contractor or a Sub-Contractor to comply with any legal obligation to such trade union, body or person arising on or after the Relevant Transfer Date;
- (f) any proposal by the Contractor or a Sub-Contractor prior to the Relevant Transfer Date to make changes to the terms and conditions of employment or working conditions of any Transferring Former Contractor Employees to their material detriment on or after their transfer to the Contractor or a Sub-Contractor (as the case may be) on the Relevant Transfer Date, or to change the terms and conditions of employment or working conditions of any person who would have



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been a Transferring Former Contractor Employee but for their resignation (or decision to treat their employment as terminated under regulation 4(9) of the Employment Regulations) before the Relevant Transfer Date as a result of or for a reason connected to such proposed changes;

- (g) any statement communicated to or action undertaken by the Contractor or a Sub-Contractor to, or in respect of, any Transferring Former Contractor Employee before the Relevant Transfer Date regarding the Relevant Transfer which has not been agreed in advance with the Authority and/or the Former Contractor in writing;
 - (h) any proceeding, claim or demand by HMRC or other statutory authority in respect of any financial obligation including, but not limited to, PAYE and primary and secondary national insurance contributions:
 - (i) in relation to any Transferring Former Contractor Employee, to the extent that the proceeding, claim or demand by HMRC or other statutory authority relates to financial obligations arising on or after the Relevant Transfer Date; and
 - (ii) in relation to any employee who is not a Transferring Former Contractor Employee, and in respect of whom it is later alleged or determined that the Employment Regulations applied so as to transfer his/her employment from the Former Contractor to the Contractor or a Sub-contractor, to the extent that the proceeding, claim or demand by the HMRC or other statutory authority relates to financial obligations arising on or after the Relevant Transfer Date;
 - (i) a failure of the Contractor or any Sub-contractor to discharge or procure the discharge of all wages, salaries and all other benefits and all PAYE tax deductions and national insurance contributions relating to the Transferring Former Contractor Employees in respect of the period from (and including) the Relevant Transfer Date;
 - (j) any claim made by or in respect of a Transferring Former Contractor Employee or any appropriate employee representative (as defined in the Employment Regulations) of any Transferring Former Contractor Employee relating to any act or omission of the Contractor or any Sub-contractor in relation to obligations under regulation 13 of the Employment Regulations, except to the extent that the liability arises from the Former Contractor's failure to comply with its obligations under regulation 13 of the Employment Regulations; and
 - (k) a failure by the Contractor or any Sub-Contractor to comply with its obligations under paragraph 2.9 of this Part B.
- 3.2 The indemnities in paragraph 3.1 of this Part B shall not apply to the extent that the Employee Liabilities arise or are attributable to an act or omission of the Former Contractor whether occurring or having its origin before, on or after the Relevant Transfer Date including, without limitation, any Employee Liabilities arising from the Former Contractor's failure to comply with its obligations under the Employment Regulations.
- 3.3 The Contractor shall comply, and shall procure that each Sub-Contractor shall comply, with all its obligations under the Employment Regulations (including without limitation its obligation



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to inform and consult in accordance with regulation 13 of the Employment Regulations) and shall perform and discharge, and shall procure that each Sub-Contractor shall perform and discharge, all its obligations in respect of all the Transferring Former Contractor Employees, on and from the Relevant Transfer Date (including the payment of all remuneration, benefits, entitlements and outgoings, all wages, accrued but untaken holiday pay, bonuses, commissions, payments of PAYE, national insurance contributions and pension contributions and any other sums due under the Admission Agreement which in any case are attributable in whole or in part to the period from (and including) the Relevant Transfer Date) and any necessary apportionments in respect of any periodic payments shall be made between the Contractor and the Former Contractor.

4. INFORMATION

The Contractor shall, and shall procure that each Sub-Contractor shall, promptly provide to the Authority and/or at the Authority's direction, the Former Contractor, in writing such information as is necessary to enable the Authority and/or the Former Contractor to carry out their respective duties under regulation 13 of the Employment Regulations. The Authority shall procure that the Former Contractor shall promptly provide to the Contractor and each Notified Sub-Contractor in writing such information as is necessary to enable the Contractor and each Notified Sub-Contractor to carry out their respective duties under regulation 13 of the Employment Regulations.

5. PRINCIPLES OF GOOD EMPLOYMENT PRACTICE

5.1 The Contractor shall, and shall procure that each Sub-Contractor shall, comply with any requirement notified to it by the Authority relating to pensions in respect of any Transferring Former Contractor Employee as set down in:

- (a) the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector of January 2000, revised 2013;
- (b) HM Treasury's guidance "Staff Transfers from Central Government: A Fair Deal for Staff Pensions of 1999;
- (c) HM Treasury's guidance: "Fair deal for staff pensions: procurement of Bulk Transfer Agreements and Related Issues" of June 2004; and/or
- (d) the New Fair Deal.

5.2 Any changes embodied in any statement of practice, paper or other guidance that replaces any of the documentation referred to in paragraph 5.1 of this Part B shall be agreed in accordance with Schedule 16 (Change Protocol).

6. PENSIONS

6.1 The Contractor shall, and shall procure that each Sub-Contractor shall, comply with:

- (a) the requirements of Part 1 of the Pensions Act 2008, section 258 of the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005 for all transferring staff; and
- (b) the provisions in PART D of Part 1 (Staff Transfer) of this Schedule 16 (TUPE, Employees and Pensions) if applicable.



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Contract for the Provision of Learning and Skills at HMP Berwyn

PART C [NOT USED]



Contract for the Provision of Learning and Skills at HMP Berwyn

PART D: PENSIONS

1. PARTICIPATION

- 1.1 In respect of all or any Fair Deal Employees each of Part D, Annex D1, Annex D2 and/or Annex D3 shall apply, as appropriate.
- 1.2 The Contractor undertakes to do all such things and execute any documents (including any relevant Admission Agreement and/or Direction Letter, if necessary) as may be required to enable the Contractor to participate in the appropriate Statutory Scheme in respect of the Fair Deal Employees and shall bear its own costs in such regard.
- 1.3 The Contractor undertakes:
- (a) to pay to the Statutory Schemes all such amounts as are due under the relevant Admission Agreement and/or Direction Letter or otherwise and shall deduct and pay to the Statutory Schemes such employee contributions as are required; and
 - (b) subject to paragraph 5 (Funding) of Annex D3 to Part D (Pensions) of this Schedule 16 (TUPE, Employees and Pensions), to be fully responsible for all other costs, contributions, payments and other amounts relating to its participation in the Statutory Schemes, including for the avoidance of doubt any exit payments and the costs of providing any bond, indemnity or guarantee required in relation to such participation.

2. PROVISION OF INFORMATION

- 2.1 The Contractor undertakes to the Authority:
- (a) to provide all information which the Authority may reasonably request concerning matters referred to in this Part D as expeditiously as possible; and
 - (b) not to issue any announcements to any Fair Deal Employee prior to the Relevant Transfer Date concerning the matters stated in this Part D without the consent in writing of the Authority (such consent not to be unreasonably withheld or delayed).

3. INDEMNITIES

- 3.1 The Contractor undertakes to the Authority to indemnify and keep indemnified NHS Pensions, the Authority and/or any New Contractor and/or any Replacement Sub-Contractor and/or any New Sub-Contractor on demand from and against all and any Losses whatsoever arising out of or in connection with any liability towards all and any Fair Deal Employees arising in respect of service on or after the Relevant Transfer Date which arise from any breach by the Contractor of this Part D, and/or the CSPA Admission Agreement and/or the Direction Letter and/or the LGPS Admission Agreement or relates to the payment of benefits under and/or participation in an occupational pension scheme (within the meaning provided for in section 1 of the Pension Schemes Act 1993) or the Fair Deal Schemes.
- 3.2 The Contractor hereby indemnifies the NHS Pensions, the Authority and/or any New Contractor and/or Replacement Sub-Contractor and/or any New Sub-Contractor from and against all Losses suffered or incurred by it or them which arise from claims by Fair Deal Employees of the Contractor and/or of any Sub-Contractor or by any trade unions, elected



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employee representatives or staff associations in respect of all or any such Fair Deal Employees which Losses:

- (a) 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 Contract; or
- (b) arise out of the failure of the Contractor and/or any relevant Sub-Contractor to comply with the provisions of this Part D before the date of termination or expiry of this Contract.

3.3 The indemnities in this Part D and its Annexes:

- (a) shall survive termination of this Contract; and
- (b) shall not be subject to any of the caps of liability contained in clause G1 (Liability, Indemnity and Insurance).

4. DISPUTES

4.1 The Dispute Resolution Procedure will not apply to this Part D and any dispute the Authority and/or the Contractor or between their respective actuaries or the Fund Actuary about any of the actuarial matters referred to in this Part D and its Annexes shall in the absence of agreement between the Authority and/or the Contractor be referred to an independent Actuary:

- (a) who will act as an expert and not as an arbitrator;
- (b) whose decision will be final and binding on the Authority and/or the Contractor; and
- (c) whose expenses shall be borne equally by the Authority and/or the Contractor unless the independent Actuary shall otherwise direct.

5. THIRD PARTY RIGHTS

5.1 The Parties agree that, in respect of clause I5 (Rights of Third Parties), the Contracts (Rights of Third Parties) Act 1999 applies to this Part D to the extent necessary to ensure that the NHS Pensions, New Contractor, any Replacement Sub-Contractor, any New Sub-Contractor and/or any Fair Deal Employee will have the right to enforce any obligation owed to him or her or it by the Contractor under this Part D, in his or her or its own right under section 1(1) of the Contracts (Rights of Third Parties) Act 1999.

5.2 Further, the Contractor must ensure that the Contracts (Rights of Third Parties) Act 1999 will apply to any Sub-Contract to the extent necessary to ensure that the NHS Pensions, New Contractor, any Replacement Sub-Contractor, any New Sub-Contractor and/or any Fair Deal Employee will have the right to enforce any obligation owed to them by the Sub-Contractor in his or her or its own right under section 1(1) of the Contracts (Rights of Third Parties) Act 1999.



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6. TRANSFER TO ANOTHER EMPLOYER/ SUB- CONTRACTORS

6.1 Save on expiry or termination of this Contract, if the employment of any Fair Deal Employee transfers to another employer (by way of a transfer under the Employment Regulations) the Contractor shall and shall procure that any relevant Sub-Contractor shall:

- (a) consult with and inform those Fair Deal Employees of the pension provisions relating to that transfer; and
- (b) procure that the employer to which the Fair Deal Employees are transferred (the "**New Employer**") complies with the provisions of this Part D and its Annexes provided that references to the "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 "Fair Deal Employees" will become references to the Fair Deal Employees so transferred to the New Employer.

7. PENSION ISSUES ON EXPIRY OR TERMINATION

The provisions of PART E of this Schedule 16 (TUPE, Employees and Pensions) apply in relation to pension issues on expiry or termination of this Contract.

8. BROADLY COMPARABLE PENSION SCHEMES

8.1 If either:

- (a) the terms of any of paragraph 1.2 (Future Service Benefits) of Annex D1 to Part D (Pensions) of this Schedule 16 (TUPE, Employees and Pensions), paragraph 4.2 (Breach and Cancellation of any Direction Letter(s) and Right of Set Off) of Annex D2 to Part D (Pensions) of this Schedule 16 (TUPE, Employees and Pensions) and/or paragraph 3 (Contractor ceases to be an LGPS Admission Body) of Annex D3 to Part D (Pensions) of this Schedule 16 (TUPE, Employees and Pensions) apply; and/or
- (b) the Authority agrees, having considered the exceptional cases provided for in New Fair Deal, (such agreement not to be unreasonably withheld) that the Contractor (and/or its Sub-Contractors, if any) need not continue to provide the Fair Deal Employees, who continue to qualify for New Fair Deal protection, with access to the appropriate Statutory Scheme;

the Contractor must (and must, where relevant, procure that each of its Sub-Contractors will) ensure that, with effect from the Relevant Transfer Date or if later cessation of participation in the Statutory Scheme until the day before the Service Transfer Date, the relevant Fair Deal Employees will be eligible for membership of a pension scheme under which the benefits are Broadly Comparable to those provided under the relevant Statutory Scheme, and then on such terms as may be decided by the Authority.

8.2 Where the Contractor has set up a Broadly Comparable pension scheme or schemes pursuant to the provisions of paragraph 8.1 of this Part D, the Contractor shall (and shall procure that any of its Sub-Contractors shall):

- (a) supply to the Authority details of its (or its Sub-Contractor's) Broadly Comparable pension scheme and provide a full copy of the valid certificate of broad



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comparability covering all relevant Fair Deal Employees, as soon as it is able to do so and in any event no later than 28 days before the Relevant Transfer Date;

- (b) fully fund any such Broadly Comparable pension scheme in accordance with the funding requirements set by that Broadly Comparable pension scheme's Actuary or by the Government Actuary's Department for the period ending on the Service Transfer Date;
- (c) instruct any such Broadly Comparable pension scheme's Actuary to, and to provide all such co-operation and assistance in respect of any such Broadly Comparable pension scheme as the New Contractor and/or NHS Pension and/or CSPS and/or the relevant Administering Authority and/or the Authority may reasonably require, to enable the New Contractor to participate in the appropriate Statutory Scheme in respect of any Fair Deal Employee that remain eligible for New Fair Deal protection following a Service Transfer;
- (d) provide a replacement Broadly Comparable pension scheme with immediate effect for those Fair Deal Employees who are still employed by the Contractor and/or relevant Sub-Contractor and are still eligible for New Fair Deal protection in the event that the Contractor and/or Sub-Contractor's Broadly Comparable pension scheme is terminated;
- (e) allow and make all necessary arrangements to effect, in respect of any Fair Deal Employee that remains eligible for New Fair Deal protection, following a Service Transfer, the bulk transfer of past service from any such Broadly Comparable pension scheme into the relevant Statutory Scheme and as is relevant on a day for day service basis and to give effect to any transfer of accrued rights required as part of participation under New Fair Deal. For the avoidance of doubt, should the amount offered by the Broadly Comparable pension scheme be less than the amount required by the appropriate Statutory Scheme to fund day for day service ("**Shortfall**"), the Contractor or the Sub-Contractor (as agreed between them) must pay the Statutory Scheme, as required, provided that in the absence of any agreement between the Contractor and any Sub-Contractor, the Shortfall shall be paid by the Contractor; and
- (f) indemnify the Authority and/or NHS Pension and/or CSPS and/or the relevant Administering Authority and/or on demand for any failure to pay the Shortfall as required under paragraph 8.2(e) of this Part D.



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Part D, Annex D1: CSPA

1. FUTURE SERVICE BENEFITS

- 1.1 The Contractor shall procure that the Fair Deal Employees, shall be either admitted into, or offered continued membership of, the relevant section of the CSPA that they currently contribute to, or were eligible to join immediately prior to the Relevant Transfer Date or became eligible to join on the Relevant Transfer Date and the Contractor shall procure that the Fair Deal Employees continue to accrue benefits in accordance with the provisions governing the relevant section of the CSPA for service from (and including) the Relevant Transfer Date.
- 1.2 The Contractor undertakes that should it cease to participate in the CSPA for whatever reason at a time when it has CSPA Eligible Employees, that it will, at no extra cost to the Authority, provide to any Fair Deal Employee who immediately prior to such cessation of participation remained a CSPA Eligible Employee with access to a pension scheme which is Broadly Comparable to the CSPA on the date the CSPA Eligible Employees ceased to participate in the CSPA.



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Part D, Annex D2: NHSPS

1. MEMBERSHIP OF THE NHSPS

- 1.1 In accordance with New Fair Deal, the Contractor and/or any of its Sub-Contractors to which the employment of any NHSPS Eligible Employee compulsorily transfers as a result of the award of this Contract, if not an NHS Body or other employer which participates automatically in the NHSPS, must by or as soon as reasonably practicable after the Relevant Transfer Date, each secure a Direction Letter to enable the NHSPS Eligible Employees to retain either continuous active membership of or eligibility for, the NHSPS for so long as they remain employed in connection with the delivery of the Services under this Contract, and have a right to membership or eligibility of that scheme under the terms of the Direction Letter.
- 1.2 The Contractor must supply to the Authority by or as soon as reasonably practicable after the Relevant Transfer Date a complete copy of each Direction Letter.
- 1.3 The Contractor must ensure (and procure that each of its Sub-Contractors (if any) ensure) that all of its NHSPS Eligible Employees have a contractual right to continuous active membership of or eligibility for the NHSPS for so long as they have a right to membership or eligibility of that scheme under the terms of the Direction Letter.
- 1.4 The Contractor will (and will procure that its Sub-Contractors (if any) will) comply with the terms of the Direction Letter, the NHS Pension Scheme Regulations (including any terms which change as a result of changes in applicable Legislation) and any relevant policy issued by the Department of Health and Social Care (or its successor) in respect of the NHSPS Eligible Employees for so long as it remains bound by the terms of any such Direction Letter.
- 1.5 Where any employee omitted from the Direction Letter supplied in accordance with paragraph 1 of Part D, Annex D2 are subsequently found to be an NHSPS Eligible Employee, the Contractor will (and will procure that its Sub-Contractors (if any) will) treat that person as if they had been an NHSPS Eligible Employee from the Relevant Transfer Date so that their Pension Benefits and NHS Premature Retirement Rights are not adversely affected.
- 1.6 The Contractor will (and will procure that its Sub-Contractors (if any) will) as soon as reasonably practicable and at its (or its Sub-Contractor's) cost, obtain any guarantee, bond or indemnity that may from time to time be required by the Secretary of State for Health and Social Care (or his/her successor).

2. FUTURE SERVICE BENEFITS IN THE NHSPS

The Contractor will procure that with effect from the Relevant Transfer Date the NHSPS Eligible Employees shall be either eligible for or remain in continuous active membership of (as the case may be) the NHSPS for employment from (and including) the Relevant Transfer Date.

3. NHS PREMATURE RETIREMENT RIGHTS

From the Relevant Transfer Date until the Service Transfer Date, the Contractor must provide (and/or must ensure that its Sub-Contractors (if any) provide) NHS Premature Retirement Rights in respect of the NHSPS Eligible Employees that are identical to the benefits they would have received had they remained employees of the Authority, an NHS Body or other employer which participates automatically in the NHSPS.



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4. **BREACH AND CANCELLATION OF ANY DIRECTION LETTER(S) AND RIGHT OF SET-OFF**

- 4.1 The Contractor agrees that the Authority is entitled to make arrangements with NHS Pensions for the Authority to be notified if the Contractor (or its Sub-Contractor) breaches the terms of its Direction Letter. Notwithstanding the provisions of the foregoing, the Contractor shall notify the Authority in the event that it (or its Sub-Contractor) breaches the terms of its Direction Letter.
- 4.2 If the Authority is entitled to terminate the Contract or the Contractor (or its Sub-Contractor, if relevant) ceases to participate in the NHSPS for whatever other reason, the Authority may in its sole discretion, and instead of exercising its right to terminate this Contract where relevant, permit the Contractor (or any such Sub-Contractor, as appropriate) to offer Broadly Comparable Pension Benefits, on such terms as decided by the Authority. The provisions of paragraph 8 of Part D of Part 1 (Staff Transfer) of this Schedule 16 (TUPE, Employees and Pensions) shall apply in relation to any Broadly Comparable pension scheme established by the Contractor or its Sub-Contractors.
- 4.3 In addition to the Authority's right to terminate the Contract, if the Authority is notified by NHS Pensions of any NHS Pension Scheme Arrears, the Authority will be entitled to deduct all or part of those arrears from any amount due to be paid under this Contract or otherwise.

5. **COMPENSATION**

- 5.1 If the Contractor (or its Sub-Contractor, if relevant) is unable to provide the NHSPS Eligible Employees with either:

- (a) membership of the NHSPS (having used its best endeavours to secure a Direction Letter); or
- (b) access to a Broadly Comparable pension scheme,

the Authority may in its sole discretion permit the Contractor (or any of its Sub-Contractors) to compensate the NHSPS Eligible Employees in a manner that is Broadly Comparable or equivalent in cash terms, the Contractor (or Sub-Contractor as relevant) having consulted with a view to reaching agreement with any recognised trade union or, in the absence of such body, the NHSPS Eligible Employees. The Contractor must meet (or must procure that the relevant Sub-Contractor meets) the costs of the Authority determining whether the level of compensation offered is reasonable in the circumstances.

- 5.2 This flexibility for the Authority to allow compensation in place of Pension Benefits is in addition to and not instead of the Authority's right to terminate the Contract.

6. **CONTRACTOR INDEMNITIES**

- 6.1 The Contractor must indemnify and keep indemnified the Authority and any New Contractor against all Losses arising out of any claim by any NHSPS Eligible Employee that the provision of (or failure to provide) Pension Benefits and NHS Premature Retirement Rights from the Relevant Transfer Date, or the level of such benefit provided, constitutes a breach of his or her employment rights.
- 6.2 The Contractor must indemnify and keep indemnified the Authority, NHS Pensions and any New Contractor against all Losses arising out of the Contractor (or its Sub-Contractor)



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allowing anyone who is not an NHSPS Eligible Employee to join or claim membership of the NHSPS at any time during the Contract Period.

7. SUB-CONTRACTORS

- 7.1 If the Contractor enters into a Sub-Contract for the delivery of all or part or any component of the Services which will involve the transfer of employment of any NHSPS Eligible Employee it will impose obligations on its Sub-Contractor in identical terms as those imposed on the Contractor in relation to Pension Benefits and NHS Premature Retirement Rights by this Part D, Annex D2, including requiring that:
- (a) if the Contractor has secured a Direction Letter, the Sub-Contractor also secures a Direction Letter in respect of the NHSPS Eligible Employees for their future service with the Sub-Contractor as a condition of being awarded the Sub-Contract and the Contractor shall be responsible for ensuring that the Authority receives a complete copy of each such Sub-Contractor direction letter as soon as reasonably practicable; or
 - (b) if, in accordance with paragraph 3 (NHS Premature Retirement Rights) of Annex D2 to Part D (Pensions), the Contractor has offered the NHSPS Eligible Employees access to a pension scheme under which the benefits are Broadly Comparable to those provided under the NHSPS, the Sub-Contractor either secures a Direction Letter in respect of the NHSPS Eligible Employees or (with the prior consent of the Authority) provides NHSPS Eligible Employees with access to a scheme with Pension Benefits which are Broadly Comparable to those provided under the NHSPS whereupon the provisions of paragraph 8 of Part D of Part 1 (Staff Transfer) of this Schedule 16 (TUPE, Employees and Pensions) shall apply.
- 7.2 The Contractor shall procure that each Sub-Contractor provides indemnities to the Authority, NHS Pensions and/or any New Contractor and/or Replacement Sub-Contractor and/or any New Sub-Contractor that are identical to the indemnities set out in paragraph 3.1 of Part B of Part 1 (Staff Transfer) of this Schedule 16 (TUPE, Employees and Pensions). Where a Sub-Contractor fails to satisfy any claim made under such one or more indemnities, the Contractor will be liable for satisfying any such claim as if it had provided the indemnity itself.



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Part D, Annex D3: LGPS

1. **CONTRACTOR TO BECOME AN LGPS ADMISSION BODY**

- 1.1 Where the Contractor employs any LGPS Eligible Employees from a Relevant Transfer Date, the Contractor shall become an LGPS Admission Body and shall by or as soon as reasonably practicable after the Relevant Transfer Date enter into a LGPS Admission Agreement with the Administering Authority which will have effect from and including the Relevant Transfer Date.
- 1.2 The LGPS Admission Agreement must ensure that all LGPS Eligible Employees covered by that Agreement who were active LGPS members immediately before the Relevant Transfer Date are admitted to the LGPS with effect on and from the Relevant Transfer Date. Any LGPS Eligible Employees who were eligible to join the LGPS but were not active LGPS members immediately before the Relevant Transfer Date must retain the ability to join the LGPS after the Relevant Transfer Date if they wish to do so.
- 1.3 The Contractor shall provide any indemnity, bond or guarantee required by an Administering Authority in relation to an LGPS Admission Agreement.
- 1.4 The Contractor shall not automatically enroll or re-enroll for the purposes of the Pensions Act 2008 any LGPS Eligible Employees in any pension scheme other than the LGPS.

2. **RIGHT OF SET-OFF**

The Authority shall have a right to set off against any payments due to the Contractor under the Contract an amount equal to any overdue employer and employee contributions and other payments (and interest payable under the LGPS Regulations) due from the Contractor (or from any relevant Sub-Contractor) under an LGPS Admission Agreement and shall pay such amount to the relevant Fund.

3. **CONTRACTOR CEASES TO BE AN LGPS ADMISSION BODY**

If the Contractor employs any LGPS Eligible Employees from a Relevant Transfer Date and the Contractor either cannot or does not participate in the LGPS, the Contractor shall offer such LGPS Eligible Employee membership of a pension scheme Broadly Comparable to the LGPS.

4. **DISCRETIONARY BENEFITS**

Where the Contractor is an LGPS Admission Body, the Contractor shall award benefits to the LGPS Eligible Employees under the LGPS in circumstances where the LGPS Eligible Employees would have received such benefits had they still been employed by their previous employer. Where such benefits are of a discretionary nature, they shall be awarded on the basis of the previous employer's written policy in relation to such benefits at the time of the Relevant Transfer Date.

5. **FUNDING**

- 5.1 The Authority hereby undertakes that it shall procure that the funding of the accrued rights of LGPS Eligible Employees in the LGPS in respect of pensionable service up to the first Relevant Transfer Date under the Contract shall be calculated on the basis that the LGPS had assets equal to its liabilities, as at that Relevant Transfer Date, based on the LGPS' ongoing actuarial valuation basis.



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- 5.2 Subject to paragraph 5.3 of this Part D, Annex D3, any Excess Amount shall be the sole responsibility of the Authority and shall be dealt with as set out in paragraphs 5.4 to 5.7 of this Part D, Annex D3.
- 5.3 Nothing in paragraph 5.2 of this Part D, Annex D3 shall require the Authority to be responsible for any Excess Amount to the extent that such Excess Amount has arisen as a result of:
- (a) a decision or exercise of discretion by the Contractor or any Sub-Contractor which:
 - (i) increases the pensionable pay of LGPS Eligible Employees above the greater of:
 - (A) the increases assumed in the relevant actuarial valuations of the LGPS; and
 - (B) the increases the Contractor and/or any Sub-Contractor are contractually bound to provide on the Relevant Transfer Date;
 - (ii) otherwise increases the benefits payable to a LGPS Eligible Employee and in particular:
 - (iii) the immediate payment of benefits with:
 - (A) the Contractor's or Sub-Contractor's consent under Regulation 30 of the LGPS Regulations, including waiving any reduction of benefits under Regulation 30(8) of the LGPS Regulations or otherwise; or
 - (B) the Contractor or Sub-Contractors waiving any reduction of benefits on compassionate grounds under Schedule 2 of The Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014); and/or
 - (C) an award to additional pension under Regulation 31 of the LGPS Regulations;
 - (b) the early retirement of LGPS Eligible Employees due to dismissal or termination of employment under Regulation 30(7) of the LGPS Regulations;
 - (c) the early retirement of LGPS Eligible Employees under the provisions of regulations 35 to 39 of the LGPS Regulations;
 - (d) any contribution required by the Administering Authority towards the cost of the administration of the Fund relating to the Contractor that are not met through the Contractor's or Sub-Contractor's' payments under the applicable rates and adjustment certificate under regulation 62 of the LGPS Regulations, including without limitation an amount specified in a notice given by the Administering Authority under Regulation 70 of the LGPS Regulations and the costs of any reports and advice requested by the Contractor from an actuary appointed by the Administering Authority; and/or



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- (e) any interest payable under the LGPS Regulations or LGPS Administration Agreement.
- 5.4 Within 20 Working Days of the end of each Contract Year the Contractor shall notify the Authority in writing of any Excess Amount in the immediately preceding Contract Year together with a reasonable summary of how the Contractor has arrived at its calculation of such amount.
- 5.5 On receipt of the Contractor's calculation in accordance with paragraph 5.4 of this Part D, Annex D3 the Authority shall either:
 - (a) notify the Contractor in writing of acceptance of the Excess Amount;
 - (b) request further information/evidence; and/or
 - (c) request a meeting to discuss/clarify the evidence provided.
- 5.6 Where the pension adjustment notified under paragraph 5.4 of this Part D, Annex D3 is agreed following the receipt of further information/evidence or following a meeting, the Authority shall notify the Contractor in writing. In the event that the Contractor and the Authority are unable to agree the pension adjustment, they shall follow the Dispute Resolution Procedure.
- 5.7 Any Excess Amount agreed by the Authority shall be paid within timescales as agreed between Authority and Contractor. In respect of any Excess Amount the amount to be paid by the Authority shall be an amount equal to the Excess Amount (less an amount equal to any corporation tax relief which has been claimed in respect of the Excess Amount by the Contractor or its Sub-Contractors).



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PART E: EMPLOYMENT EXIT PROVISIONS

1. PRE-SERVICE TRANSFER OBLIGATIONS

1.1 The Contractor agrees that within 20 Working Days of the earliest of:

- (a) receipt of a notification from the Authority of a Service Transfer or intended Service Transfer;
- (b) receipt of the giving of notice of early termination or any Partial Termination of this Agreement;
- (c) the date which is 12 Months before the end of the Term; and
- (d) receipt of a written request of the Authority at any time, provided that (without limiting the Authority's ability during the Termination Assistance Period to make such requests at any frequency and at any time) the Authority shall only be entitled to make one such request in any 6 Month period during the Term,

it shall provide in a suitably anonymised format so as to comply with the Data Protection Legislation, the Contractor's Provisional Contractor Personnel List, together with the Staffing Information in relation to the Contractor's Provisional Contractor Personnel List and it shall provide an updated Contractor's Provisional Contractor Personnel List at such intervals as are reasonably requested by the Authority.

1.2 At least 20 Working Days prior to the Service Transfer Date, the Contractor shall provide to the Authority or at the direction of the Authority to any New Contractor and/or any New Sub-Contractor:

- (a) the Contractor's Final Contractor Personnel List, which shall identify which of the Staff are Transferring Contractor Employees; and
- (b) the Staffing Information in relation to the Contractor's Final Contractor Personnel List (insofar as such information has not previously been provided).

1.3 The Authority shall be permitted to use and disclose information provided by the Contractor under paragraphs 1.1 and 1.2 of this Part E for the purpose of informing any prospective New Contractor and/or New Sub-Contractor.

1.4 The Contractor warrants, for the benefit of the Authority, any New Contractor, and any New Sub-contractor that all information provided pursuant to paragraphs 1.1 and 1.2 of this Part E shall be true and accurate in all material respects at the time of providing the information.

1.5 From the date of the earliest event referred to in paragraphs 1.1(a), 1.1(b) and 1.1(c) of this Part E, the Contractor agrees, that it shall not, and agrees to procure that each Sub-Contractor shall not, assign any person to the provision of the Services who is not listed on the Contractor's Provisional Contractor Personnel List and shall not without the approval of the Authority (not to be unreasonably withheld or delayed):

- (a) replace or re-deploy any Staff listed on the Contractor Provisional Contractor Personnel List other than where any replacement is of equivalent grade, skills, experience and expertise and is employed on the same terms and conditions of employment as the person he/she replaces;



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- (b) make, promise, propose, permit or implement any material changes to the terms and conditions of employment of the Staff (including pensions and any payments connected with the termination of employment);
- (c) increase the proportion of working time spent on the Services (or the relevant part of the Services) by any of the Staff save for fulfilling assignments and projects previously scheduled and agreed;
- (d) introduce any new contractual or customary practice concerning the making of any lump sum payment on the termination of employment of any employees listed on the Contractor's Provisional Contractor Personnel List;
- (e) increase or reduce the total number of employees so engaged, or deploy any other person to perform the Services (or the relevant part of the Services); or
- (f) terminate or give notice to terminate the employment or contracts of any persons on the Contractor's Provisional Contractor Personnel List save by due disciplinary process,

and shall promptly notify, and procure that each Sub-Contractor shall promptly notify, the Authority or, at the direction of the Authority, any New Contractor and any New Sub-Contractor of any notice to terminate employment given by the Contractor or relevant Sub-Contractor or received from any persons listed on the Contractor's Provisional Contractor Personnel List regardless of when such notice takes effect.

1.6 During the Term, the Contractor shall provide, and shall procure that each Sub-Contractor shall provide, to the Authority any information the Authority may reasonably require relating to the manner in which the Services are organised, which shall include:

- (a) the numbers of individuals (which includes but is not limited to employees, workers, contractors, agents, agency workers) engaged in providing the Services;
- (b) the percentage of time spent by each individual engaged in providing the Services;
- (c) the extent to which each individual qualifies for membership of any of the Statutory Schemes or any Broadly Comparable scheme set up pursuant to the provisions of any of the Annexes to Part D of Part 1 (Staff Transfer) of this Schedule 16 (TUPE, Employees and Pensions) (as appropriate); and
- (d) a description of the nature of the work undertaken by each individual by location.

1.7 The Contractor shall provide, and shall procure that each Sub-Contractor shall provide, all reasonable cooperation and assistance to the Authority, any New Contractor and/or any New Sub-Contractor to support a future procurement process, timely and full provision of Staffing Information and consultation between employers and to ensure the smooth transfer of the Transferring Contractor Employees on the Service Transfer Date including providing sufficient information in advance of the Service Transfer Date to ensure that all necessary payroll arrangements can be made to enable the Transferring Contractor Employees to be paid as appropriate. Without prejudice to the generality of the foregoing, within 5 Working Days following the Service Transfer Date, the Contractor shall provide, and shall procure that each Sub-Contractor shall provide, to the Authority or, at the direction of the Authority, to any New Contractor and/or any New Sub-Contractor (as appropriate), in respect of each person on the Contractor's Final Contractor Personnel List who is a Transferring Contractor Employee:



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- (a) the most recent month's copy pay slip data;
- (b) details of cumulative pay for tax and pension purposes;
- (c) details of cumulative tax paid;
- (d) tax code;
- (e) details of any voluntary deductions from pay;
- (f) a copy of any personnel file and/or any other records regarding the service of the Transferring Contractor Employees;
- (g) all such data and information as may be required at law or as required by the trustee or manager of the relevant pension scheme/s in which the Contractor or any Sub-Contractor operates from time to time and in which the Transferring Contractor Employees have been members;
- (h) a complete copy of the information required to meet the minimum record keeping requirements under the Working Time Regulations 1998 and the National Minimum Wage Regulations 1998; and
- (i) bank/building society account details for payroll purposes.

2. EMPLOYMENT REGULATIONS EXIT PROVISIONS

- 2.1 The Authority and the Contractor acknowledge that subsequent to the commencement of the provision of the Services, the identity of the provider of the Services (or any part of the Services) may change (whether as a result of termination or Partial Termination of this Agreement or otherwise) resulting in the Services being undertaken by a New Contractor and/or a New Sub-Contractor. Such change in the identity of the Contractor and/or Sub-Contractor of such services may constitute a Relevant Transfer to which the Employment Regulations will apply. The Authority and the Contractor further agree that, as a result of the operation of the Employment Regulations, where a Relevant Transfer occurs, the contracts of employment between the Contractor and/or any Sub-Contractor and the Transferring Contractor Employees (except in relation to any contract terms disapplied through operation of regulation 10(2) of the Employment Regulations) will have effect on and from the Service Transfer Date as if originally made between the New Contractor and/or a New Sub-contractor (as the case may be) and each such Transferring Contractor Employee.
- 2.2 The Contractor shall, and shall procure that each Sub-Contractor shall, comply with all its obligations in respect of the Transferring Contractor Employees arising under the Employment Regulations in respect of the period up to (and including) the Service Transfer Date and shall perform and discharge, and procure that each Sub-Contractor shall perform and discharge, all its obligations in respect of all the Transferring Contractor Employees arising in respect of the period up to (and including) the Service Transfer Date (including the payment of all remuneration, benefits, entitlements and outgoings, all wages, accrued but untaken holiday pay, bonuses, commissions, payments of PAYE, national insurance contributions and pension contributions and all such sums due as a result of any Fair Deal Employees' participation in the Schemes which in any case are attributable in whole or in part to the period ending on (and including) the Service Transfer Date) and any necessary apportionments in respect of any periodic payments shall be made between: (i) the Contractor and/or the Sub-Contractor (as appropriate); and (ii) the New Contractor and/or New Sub-contractor.



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- 2.3 Subject to paragraph 2.4 of this Part E, the Contractor shall indemnify the Authority and any New Contractor and any New Sub-Contractor against any Employee Liabilities arising from or as a result of:
- (a) any act or omission of the Contractor or any Sub-Contractor in respect of any Transferring Contractor Employee or any appropriate employee representative (as defined in the Employment Regulations) of any Transferring Contractor Employee whether occurring before, on or after the Service Transfer Date;
 - (b) the breach or non-observance by the Contractor or any Sub-Contractor occurring on or before the Service Transfer Date of:
 - (i) any collective agreement applicable to the Transferring Contractor Employees; and/or
 - (ii) any other custom or practice with a trade union or staff association in respect of any Transferring Contractor Employees which the Contractor or any Sub-Contractor is contractually bound to honour;
 - (c) any claim by any trade union or other body or person representing any Transferring Contractor Employees arising from or connected with any failure by the Contractor or a Sub-Contractor to comply with any legal obligation to such trade union, body or person arising on or before the Service Transfer Date;
 - (d) any failure by the Contractor or any Sub-Contractor to comply with its obligations (including its obligations to maintain records) under the Working Time Regulations 1998, National Minimum Wage Act 1998 and any/all associated National Minimum Wage Regulations in the period prior to the Service Transfer Date in respect of any Transferring Contractor Employees or workers (current or past) including, but not limited to any failure to maintain adequate records which meet the minimum requirements for record-keeping and/or failure to deliver the same to the Authority, a New Contractor and/or New Sub-Contractor on request;
 - (e) the provision of inaccurate or incomplete information pursuant to paragraphs 1.1, 1.2, 1.6 and 1.7 of this Part E;
 - (f) any proceeding, claim or demand by HMRC or other statutory authority in respect of any financial obligation including, but not limited to, PAYE and primary and secondary national insurance contributions:
 - (i) in relation to any Transferring Contractor Employee, to the extent that the proceeding, claim or demand by HMRC or other statutory authority relates to financial obligations arising on and before the Service Transfer Date; and
 - (ii) in relation to any employee who is not identified in the Contractor's Final Contractor Personnel List, and in respect of whom it is later alleged or determined that the Employment Regulations applied so as to transfer his/her employment from the Contractor to the Authority and/or New Contractor and/or any New Sub-contractor, to the extent that the proceeding, claim or demand by HMRC or other statutory authority relates to financial obligations arising on or before the Service Transfer Date;



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- (g) a failure of the Contractor or any Sub-Contractor to discharge or procure the discharge of all wages, salaries and all other benefits and all PAYE tax deductions and national insurance contributions relating to the Transferring Contractor Employees in respect of the period up to (and including) the Service Transfer Date);
 - (h) any claim made by or in respect of any person employed or formerly employed by the Contractor or any Sub-Contractor other than a Transferring Contractor Employee identified in the Contractor's Final Contractor Personnel List for whom it is alleged the Authority and/or the New Contractor and/or any New Sub-Contractor may be liable by virtue of this Agreement and/or the Employment Regulations; and
 - (i) any claim made by or in respect of a Transferring Contractor Employee or any appropriate employee representative (as defined in the Employment Regulations) of any Transferring Contractor Employee relating to any act or omission of the Contractor or any Sub-Contractor in relation to its obligations under regulation 13 of the Employment Regulations, except to the extent that the liability arises from the failure by the Authority and/or New Contractor to comply with regulation 13(4) of the Employment Regulations.
- 2.4 The indemnities in paragraph 2.3 of this Part E shall not apply to the extent that the Employee Liabilities arise or are attributable to an act or omission of the New Contractor and/or any New Sub-Contractor whether occurring or having its origin before, on or after the Service Transfer Date, including any Employee Liabilities:
 - (a) arising out of the resignation of any Transferring Contractor Employee before the Service Transfer Date on account of substantial detrimental changes to his/her working conditions proposed by the New Contractor and/or any New Sub-Contractor to occur in the period on or after the Service Transfer Date); or
 - (b) arising from the New Contractor's failure, and/or New Sub-Contractor's failure, to comply with its obligations under the Employment Regulations.
- 2.5 If any person who is not identified in the Contractor's Final Contractor Personnel List claims, or it is determined in relation to any person who is not identified in the Contractor's Final Contractor Personnel List, that his/her contract of employment has been transferred from the Contractor or any Sub-Contractor to the New Contractor and/or New Sub-Contractor pursuant to the Employment Regulations, then:
 - (a) the Authority shall procure that the New Contractor shall, or any New Sub-Contractor shall, within 5 Working Days of becoming aware of that fact, give notice in writing to the Contractor; and
 - (b) the Contractor may offer (or may procure that a Sub-Contractor may offer) employment to such person within 15 Working Days of the notification by the New Contractor and/or any New Sub-Contractor or take such other reasonable steps as it considers appropriate to deal with the matter provided always that such steps are in compliance with the applicable Legislation.
- 2.6 If such offer is accepted, or if the situation has otherwise been resolved by the Contractor or a Sub-Contractor, the Authority shall procure that the New Contractor shall, or procure that



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the New Sub-contractor shall, immediately release or procure the release of the person from his/her employment or alleged employment.

2.7 If after the 15 Working Day period specified in paragraph 2.5(b) of this Part E has elapsed:

- (a) no such offer of employment has been made;
- (b) such offer has been made but not accepted; or
- (c) the situation has not otherwise been resolved

the Authority shall advise the New Contractor and/or New Sub-contractor, as appropriate that it may within 10 Working Days give notice to terminate the employment or alleged employment of such person.

2.8 Subject to the New Contractor and/or New Sub-Contractor acting in accordance with the provisions of paragraphs 2.5 to 2.7 of this Part E, and where possible, in accordance with all applicable proper employment procedures set out in applicable Legislation, the Contractor shall indemnify the New Contractor and/or New Sub-Contractor against all Employee Liabilities arising out of the termination of employment pursuant to the provisions of paragraph 2.7 of this Part E provided that the New Contractor takes, or shall procure that the New Sub-Contractor takes, all reasonable steps to minimise any such Employee Liabilities.

2.9 The indemnity in paragraph 2.8 of this Part E:

- (a) shall not apply to:
 - (i) any claim for:
 - (A) discrimination, including on the grounds of sex, race, disability, age, gender reassignment, marriage or civil partnership, pregnancy and maternity or sexual orientation, religion or belief; or
 - (B) equal pay or compensation for less favourable treatment of part-time workers or fixed-term employees,

in any case in relation to any alleged act or omission of the New Contractor and/or New Sub-contractor; or
 - (ii) any claim that the termination of employment was unfair because the New Contractor and/or New Sub-contractor neglected to follow a fair dismissal procedure; and
- (b) shall apply only where the notification referred to in paragraph 2.5(a) of this Part E is made by the New Contractor and/or New Sub-Contractor to the Contractor within 6 Months of the Service Transfer Date.

2.10 If any such person as is described in paragraph 2.5 of this Part E is neither re-employed by the Contractor or any Sub-Contractor nor dismissed by the New Contractor and/or New Sub-contractor within the time scales set out in paragraphs 2.5 to 2.7 of this Part E, such person shall be treated as a Transferring Contractor Employee.



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- 2.11 The Contractor shall comply, and shall procure that each Sub-Contractor shall comply, with all its obligations under the Employment Regulations and shall perform and discharge, and shall procure that each Sub-Contractor shall perform and discharge, all its obligations in respect of any person identified in the Contractor's Final Contractor Personnel List before and on the Service Transfer Date (including the payment of all remuneration, benefits, entitlements and outgoings, all wages, accrued but untaken holiday pay, bonuses, commissions, payments of PAYE, national insurance contributions and pension contributions and such sums due as a result of any Fair Deal Employees' participation in the Schemes and any requirement to set up a broadly comparable pension scheme which in any case are attributable in whole or in part in respect of the period up to (and including) the Service Transfer Date) and any necessary apportionments in respect of any periodic payments shall be made between:
- (a) the Contractor and/or any Sub-Contractor; and
 - (b) the New Contractor and/or the New Sub-Contractor.
- 2.12 The Contractor shall, and shall procure that each Sub-Contractor shall, promptly provide to the Authority and any New Contractor and/or New Sub-Contractor, in writing such information as is necessary to enable the Authority, the New Contractor and/or New Sub-Contractor to carry out their respective duties under regulation 13 of the Employment Regulations. The Authority shall procure that the New Contractor and/or any New Sub-Contractor, shall promptly provide to the Contractor and each Sub-Contractor in writing such information as is necessary to enable the Contractor and each Sub-Contractor to carry out their respective duties under regulation 13 of the Employment Regulations.
- 2.13 The Contractor shall, and shall procure that each Sub-Contractor shall, provide all reasonable assistance and documentation required by the Authority, a New Contractor and/or a New Sub-Contractor required by them in connection with any query, claim, dispute or proceedings arising after a Service Transfer Date but relating to a Transferring Contractor Employee
- 2.14 Subject to paragraph 2.15 of this Part E, the Authority shall procure that the New Contractor indemnifies the Contractor on its own behalf and on behalf of any New Sub-Contractor and its sub-contractors against any Employee Liabilities arising from or as a result of:
- (a) any act or omission of the New Contractor and/or New Sub-contractor in respect of any Transferring Contractor Employee identified in the Contractor's Final Contractor Personnel List or any appropriate employee representative (as defined in the Employment Regulations) of any such Transferring Contractor Employee;
 - (b) the breach or non-observance by the New Contractor and/or New Sub-Contractor on or after the Service Transfer Date of:
 - (i) any collective agreement applicable to the Transferring Contractor Employees identified in the Contractor's Final Contractor Personnel List; and/or
 - (ii) any custom or practice in respect of any Transferring Contractor Employees identified in the Contractor's Final Contractor Personnel List which the New Contractor and/or New Sub-Contractor is contractually bound to honour;
 - (c) any claim by any trade union or other body or person representing any Transferring Contractor Employees identified in the Contractor's Final Contractor Personnel



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List arising from or connected with any failure by the New Contractor and/or New Sub-Contractor to comply with any legal obligation to such trade union, body or person arising on or after the Service Transfer Date;

- (d) any proposal by the New Contractor and/or New Sub-Contractor to change the terms and conditions of employment or working conditions of any Transferring Contractor Employees identified in the Contractor's Final Contractor Personnel List on or after their transfer to the New Contractor or New Sub-Contractor (as the case may be) on the Service Transfer Date, or to change the terms and conditions of employment or working conditions of any person identified in the Contractor's Final Contractor Personnel List who would have been a Transferring Contractor Employee but for their resignation (or decision to treat their employment as terminated under regulation 4(9) of the Employment Regulations) before the Service Transfer Date as a result of or for a reason connected to such proposed changes;
- (e) any statement communicated to or action undertaken by the New Contractor or New Sub-contractor to, or in respect of, any Transferring Contractor Employee identified in the Contractor's Final Contractor Personnel List on or before the Service Transfer Date regarding the Relevant Transfer which has not been agreed in advance with the Contractor in writing;
- (f) any proceeding, claim or demand by HMRC or other statutory authority in respect of any financial obligation including, but not limited to, PAYE and primary and secondary national insurance contributions:
 - (i) in relation to any Transferring Contractor Employee identified in the Contractor's Final Contractor Personnel List, to the extent that the proceeding, claim or demand by HMRC or other statutory authority relates to financial obligations arising after the Service Transfer Date; and
 - (ii) in relation to any employee who is not a Transferring Contractor Employee identified in the Contractor's Final Contractor Personnel List, and in respect of whom it is later alleged or determined that the Employment Regulations applied so as to transfer his/her employment from the Contractor or Sub-Contractor, to the New Contractor or New Sub-contractor to the extent that the proceeding, claim or demand by HMRC or other statutory authority relates to financial obligations arising after the Service Transfer Date;
- (g) a failure of the New Contractor or New Sub-contractor to discharge or procure the discharge of all wages, salaries and all other benefits and all PAYE tax deductions and national insurance contributions relating to the Transferring Contractor Employees identified in the Contractor's Final Contractor Personnel List in respect of the period from (and including) the Service Transfer Date; and
- (h) any claim made by or in respect of a Transferring Contractor Employee identified in the Contractor's Final Contractor Personnel List or any appropriate employee representative (as defined in the Employment Regulations) of any such Transferring Contractor Employee relating to any act or omission of the New Contractor or New Sub-contractor in relation to obligations under regulation 13 of the Employment Regulations.



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- 2.15 The indemnities in paragraph 2.14 of this Part E shall not apply to the extent that the Employee Liabilities arise or are attributable to an act or omission of the Contractor and/or any Sub-Contractor (as applicable) whether occurring or having its origin before, on or after the Service Transfer Date, including any Employee Liabilities arising from the failure by the Contractor and/or any Sub-Contractor (as applicable) to comply with its obligations under the Employment Regulations.
- 2.16 The parties agree that any Former Contractor, New Contractor, New Sub-contractor or Sub-Contractor shall be entitled to enforce the obligations owed to and the indemnities given to them under this Schedule pursuant to the Contracts (Rights of Third Parties) Act 1999.



PART 1, ANNEX: LIST OF NOTIFIED SUB-CONTRACTORS

As outlined in SCHEDULE 15 – SUB-CONTRACTING AND MARKET STEWARDSHIP