

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 39: CALCULATION OF PAYMENTS

DBFOM CONTRACT

INTRODUCTION

This clause deals with the mechanism for calculation of the unitary payments for an accommodation project. Other types of projects have different types of payment, and in some the payment comes from users, and not the Authority.

Calculation of the unitary payment should be derived from the outputs identified in the output specification. Relevant considerations are set out in the excerpt from SOPC3 guidance.

SOPC3 GUIDANCE

SOPC3 contains the following commentary regarding calculation of payments

10. PRICE AND PAYMENT MECHANISM

10.1 INTRODUCTION

10.1.1 *The payment mechanism is at the heart of the Contract, as it puts into financial effect the allocation of risk and responsibility between the Authority and the Contractor. It determines the payments the Authority makes to the Contractor and establishes the incentives for the Contractor to deliver exactly the Service required in a manner that gives value for money. It is vital that this Section is considered in conjunction with Sections 7 (Service Requirements and Availability) and 9 (Performance Monitoring) [of the SoPC3 Guidance].*

10.1.2 *This Section focuses primarily on projects in which payment is made by the Authority and depends on availability of the Service and performance of the available Service rather than on usage (see Section 10.2.3 which refers to projects where aggregate payment is dictated largely by demand).*

10.2 FEATURES OF THE PAYMENT MECHANISM

10.2.1 *In general terms, the key features of a payment mechanism must be:*

- *no payments should be made until the Service is available (but see Section 3.6.4) [of the SoPC3 Guidance];*
- *there should be a single Unitary Charge for the Service which is not made up of separate independent elements relating to availability or performance;*
- *the single Unitary Charge should only be paid to the extent that the Service is available (e.g. proportionate to the number of available places or units); and*
- *the payment mechanism should seek to make deductions for substandard performance so that the Contractor is worse off than if the required Service had been delivered, but deductions should reflect the severity of failure, so that no service should lead to no payment, but a minor failure should only cause at most a*

minor deduction except in the case of persistent failure where ratchet mechanisms may increase the level of deduction (see Section 9.11 (Consequences of Poor Performance) [of the SoPC3 Guidance]).

10.2.2 *The basis of PFI (i.e. the specification of outputs and services) requires that the Unitary Charge should not be made up of sub-elements which relate to delivery of any inputs (e.g. completion of stages of construction, cost of materials or labour). In particular, the payment mechanism should never contain a fixed element which the Contractor always receives irrespective of performance (e.g. which covers the Contractor's debt service obligations). The Senior Lenders should have confidence (taking into account, where relevant, the advice from their technical adviser) in the Contractor's (i.e. their borrower's) ability to perform and/or remedy defective performance.*

10.2.3 *The Unitary Charge may in some cases be determined by usage (or volume). Complete transfer of usage risk is only appropriate in cases in which the Contractor can forecast or influence future usage. This may be the case where the Contractor is satisfied with predictions of level of demand for the Service or there is significant third party revenue which the Contractor's performance can affect (either during the life of the Contract or scope for it following a termination). In many projects, demand or scope for generating significant third party revenue is not possible to predict and so it is unlikely to offer value for money to transfer any volume risk. A part of usage risk can, however, be transferred, but only in some Contracts. Transfer of a degree of usage risk does, of course, bring advantages of simplicity as customers "vote with their feet" on the availability and quality of the Service. Of course, some projects cannot transfer any usage risk (even where catering facilities are being provided) and transferring usage risk in inappropriate cases is likely to result in poor value for money.*

10.2.4 *The payment mechanism will often include provisions relating to changes in the general price level (i.e. as a result of inflation) during the Contract. The related issues are addressed in Section 14.2 (Indexation) [of the SoPC3 Guidance].*

10.2.5 *The Authority should pay for services on time and payment should not be unreasonably withheld. The Authority should also comply with Government policy on late payment (e.g. agreeing payment of interest if payment is late), so Contracts should take into account the relevant provisions of the Late Payments of Commercial Debt (Interest) Act 1998. The Authority should also take steps to ensure that its Contractors comply with best practice in this area. In accordance with Government policy the Contractor should pay his Sub- Contractors ordinarily within 30 days unless a different period is specified in the relevant subcontract.*

10.3 DIRECT FINANCIAL OR INDIRECT NON-FINANCIAL INCENTIVES

10.3.1 *If the Contractor fails to perform there can be both direct and indirect incentives to remedy the failure.*

10.3.2 *The direct approach involves immediate deductions from the Unitary Charge and depends on availability of the Service (see Section 7 (Service Requirements and Availability) [of the SoPC3 Guidance]). For example, if certain prison cells or classroom spaces do not meet the relevant availability definition, then a deduction is made from the Unitary Charge. The Contract should contain sufficient incentives for the Contractor to rectify the default itself. Unavailability for a prolonged period will trigger a termination event (see Section 20.2 (Termination on Contractor Default) [of the SoPC3 Guidance]).*

10.3.3 *The indirect approach depends on the level of performance of the available Service (see Section 9 (Performance Monitoring)) and involves substandard performance being addressed by the award of performance points which will vary according to the*

severity and regularity (if a ratchet mechanism is used) of the breach (see Section 9.11 (Consequences of Poor Performance)). When the Contractor accumulates a certain level of performance points, the consequence is a deduction from the Unitary Charge. Once performance deteriorates below a certain level (whether for a single failure or for persistent failure under a ratchet mechanism), or a certain number of performance points are accumulated, then a range of other incentives can be imposed, from formal warnings to, in extreme cases, eventual termination for a breach of the Contract.

10.3.4 A combination of deductions for unavailability and under-performance may be used to address failure by the Contractor. Care should be taken, however, to avoid unintended deductions of both types in respect of the same failure.

10.4 STRUCTURING THE PAYMENT MECHANISM

10.4.1 In practice, a variety of payment mechanism structures have been used across various sectors and project types (from availability based mechanisms to service based and usage based mechanisms). For many projects, Model A (referred to below) will most accurately reflect the Service that the Authority wishes to purchase (being places or units available, to a defined standard, for delivery of a public service) and is therefore the recommended approach.

- Model A – this follows the principles set out in Sections 7 (Service Requirements and Availability) and 9 (Performance Monitoring). The Unitary Charge is based on the number of available places or units – so only places or units that are available are paid for. The definition of available places or units incorporates ongoing services that are core to the requirements of the Authority to carry out its functions, and the performance points regime is only used to address levels of performance that do not impact on the availability of places and/or services that are outside the definition of the core Service. Substandard performance leads initially to “performance points” accruing and, only indirectly, to deductions from the Unitary Charge once a certain level of points has accrued.

10.4.2 Model B also provides a Unitary Charge structure, focussing on broad accommodation areas, rather than individual places, for the Service required:

- Model B – the Unitary Charge is based on a full provision of the overall accommodation requirement and the payment mechanism simply determines the deductions for unavailability and/or substandard performance. Availability is defined in terms of being usable and accessible and different deductions are made depending on which area is unavailable. For example, in an accommodation project, each section of the accommodation is divided into units and is given a weighting depending on its importance. For each failure to provide an available unit there is initially a payment deduction equal to the Unitary Charge multiplied by the relevant weighting. The deduction can be based on an escalating tariff so that subsequent days of unavailability of the same space may lead to progressively higher deductions. There are no separate payment streams for each of the non-core services, but as with Model A, substandard performance leads initially to performance points and to payment deductions once a certain level of points has accrued. As the definition of availability here may omit certain key service requirements of the Authority, it may also be appropriate for poor performance of key services to lead to direct payment deductions.

10.4.3 Structures where the Unitary Charge is in fact a combination of a separate availability payment and a separate performance-related facilities management payment are not appropriate as they move away from the basic principles set out in Section 10.2 (Features of the Payment Mechanism), i.e. that the Authority should enter into a single Contract involving a Unitary Charge for a range of services. In particular, availability payments which are completely separable from payments for the on-going services (in

terms of the build up of the Unitary Charges) do not sit comfortably with the aim of getting best value for money as the inter-relationship between the availability of accommodation and the provision of associated services is lost.

10.4.4 *For those projects relying on usage based payment mechanisms (such as some transport and water treatment projects) neither Model A nor Model B are appropriate approaches (for obvious reasons).*

10.5 FINANCE ABILITY

10.5.1 *A payment mechanism should not ring fence or guarantee the Contractor's finance charges. The relatively weak risk transfer created by such a structure will not usually give good value for money and the Authority will often be taking the risk of the interfaces between the service elements. The structure of the payment mechanism should meet the requirements of the Authority, the solution offered by the Contractor and then the financing should be structured to fit with this. Clearly an unfinanceable proposition should be avoided, but the Authority should not effectively accept all the risk of the financing. Experience has shown that Unitary Charge systems based on Model A are perfectly capable of being financed provided the payment mechanism is objective, reasonable rectification periods are included and deductions are appropriately weighted. Financiers will typically expect the reductions for availability payments, performance deductions or (with usage being an element of the payment) likely downside usage outturns to be accommodated within their financial model runs which show the sensitivity of the financing to various events (so that their assessment is that the risk of losing the whole payment is minimised).*

CORE CONTRACT DRAFTING

39 CALCULATION OF PAYMENTS

39.1 Authority Payments

The Authority shall pay to the PPP Co the amount or amounts specified in accordance with Part [●] of Schedule [●] (Payment Mechanism), which shall be payable in accordance with Clause 41 (Payments).

[CLAUSE 39 – SCHEDULE]

PAYMENT MECHANISM

PART 1

Definitions

For the purposes of this [Clause 39 - Schedule] the following words and expressions shall have the meanings set out respectively against each of them:

“Actual Satisfaction Index” means the actual composite measure of customer satisfaction as recorded in the detailed Customer Satisfaction Survey for the relevant Contract Year;

“Authority Unavailability Notice” has the meaning given in paragraph 22 of Part 9 of [Clause 39 - Schedule];

“Availability Area” means an area of the [Project Facility] as set out in Column 1 of Table Four;

“Availability Deductions or AD”, means the deductions, (if any) to be deducted from the Monthly Unitary Charge in the Payment Period following the occurrence of the relevant Availability Failure (calculated in accordance with

Part 4 of [Clause 39 - Schedule]);

“Availability Failure” means a failure (which continues after the expiry of the relevant Availability Remedy Period) to provide the Services in accordance with the Availability Standards;

“Availability Period” means the period as calculated with reference to paragraph 8 of Part 4 of this [Clause 39 - Schedule];

“Availability Points” means the points as set out in Column 4 of Table Four for the calculation of the Availability Deduction;

“Availability Points Affected” means the sum of the Availability Points for each Availability Area affected by an Availability Failure;

“Availability Remedy Periods” means those periods as set out in Table Six of Part 12 of this [Clause 39 – Schedule];

“Availability Standards” means the standards set out in paragraph 6 of Part 4 of [Clause 39 - Schedule]

“Available” means, in relation to any Availability Area, that the Availability Standards have been met or, where they are not met, the relevant Availability Remedy Period has not expired;

“Base Case Equity IRR” means [[●] %] of the real pre-tax standard rate of return for equity or amounts advanced under the Subordinated Funding Agreements as shown in the Financial Model

“Benchmark Survey” means the Customer Satisfaction Survey carried out by the Independent Surveyor, with knowledge of the [●] market, at the end of the second Contract Year in order to establish the Expected Satisfaction Index;

“Contract Year” means (for the purposes of this [Clause 39 - Schedule] only) in respect of the first Contract Year, the period commencing on the Services Commencement Date and ending on 31 December next following and, in respect of each subsequent Contract Year, the period of [●] ([●]) months commencing on the expiry of the preceding Contract Year (1 January) and ending on 31 December next following or, if earlier, the end of the Contract Period;

“Customer Satisfaction Deduction” means the amount deducted (if any) from the Unitary Charge for a Contract Year under paragraph 3 of Part 6 of [Clause 39 - Schedule];

“Customer Satisfaction Deduction Factor” means the factor attributable to each Customer Satisfaction Failure as calculated pursuant to paragraph 3 of Part 6 of [Clause 39 - Schedule];

“Customer Satisfaction Failure” means a failure to meet the Expected Satisfaction Index as determined pursuant to paragraph 4 of Part 6 of Schedule [Clause 39 – Schedule];

“Customer Satisfaction Survey” means the annual survey of Users undertaken in order to establish the Actual Satisfaction Index for each Contract Year subsequent to the second Contract Year;

“Deduction Period or DP” means, for the purpose of calculating either an Availability Deduction or a Performance Deduction, the number of Operational Days the relevant failure occurs starting from and including the Operational Day on which the Logged Failure Time occurs (the “First Day”) up to and including the Operational Day on which the Logged Remedy Time occurs (the “Last Day”) save that:

(a) the First Day shall not be included in the Deduction Period where the Logged Failure Time occurs after Core Periods on that Operational Day; and

(b) the Last Day shall not be included in the Deduction Period where the Logged Remedy Time occurs prior to

Core Periods on that Operational Day.

“Deduction” means an Availability Deduction, a Performance Deduction, a Customer Satisfaction Deduction, as the case may be;

“Delegates” means End Users as defined in Schedule [●] (O&M Requirements) of this Agreement;

“Efficiency Factor or Y” means that factor as specified in Table Three and used in the calculation of indexation in paragraph 1 of Part 3 of [Clause 39 - Schedule];

“Expected Satisfaction Index” means the reference customer satisfaction index set by the Benchmark Survey;

“Failure” means an Availability Failure, a Performance Failure, or a Customer Satisfaction Failure;

“Helpdesk” means the helpdesk facility established by the PPP Co pursuant to the Schedule [●] (O&M Requirements) of this Agreement;

“Independent Surveyor” means the person or firm appointed pursuant to paragraph 32 of Part 9 of [Clause 39 - Schedule];

“Inflation Factor or X” means that factor as specified in Table Three and set out in the calculation of indexation in paragraph 1 of Part 3 of [Clause 39 - Schedule];

“Legislation” means any and all constitutions, acts, statutes, law, by law, rules, codes, regulations, orders, standards and/or conditions having effect in Ireland or any relevant part thereof including any final judgement or order of any court of competent jurisdiction and further including, any enforceable community right within the meaning of Section 2 of the European Communities Act 1972 ;

“Logged Failure Time” means the date and time:

(a) shown in the Helpdesk records maintained by the PPP Co in accordance with the Schedule [●] (O&M Requirements) of this Agreement; or

(b) in the event that a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by the PPP Co or a caretaker to whom a failure is intimated; or

(c) in the event that a failure affecting Helpdesk occurs and the PPP Co cannot be contacted, the time which is shown in the [Project Facility]’s records maintained by the Authority,

as being the date and time at which a failure to provide Services in accordance with the Availability Standards or the Performance Parameters was intimated by email, fax or a telephone call to the Helpdesk by the Authority Representative, a staff member employed at the [Project Facility], any person authorised by the Authority to call the Helpdesk (as notified to the PPP Co from time to time), any Authority Employee in an emergency, the PPP Co, and/or any sub-contractor of the PPP Co and/or the Operator (of any tier);

“Logged Remedy Time” means the date and time which is shown in either:

(a) the Helpdesk records maintained by the PPP Co; or

(b) in the event that a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by the PPP Co,

as being the date and time of Remedy of the failure to provide the Services in accordance with the Availability Standards or the Performance Parameters;

“Minimum Availability Deduction” means €[●] (Indexed);

“Minimum Performance Deduction” means €[●] (Indexed);

“Monthly Unitary Charge or MUC” means the Unitary Charge in respect of each Payment Period which is calculated by dividing the Unitary Charge for the relevant Contract Year by the number of Payment Periods therein;

“Net Monthly Unitary Charge or NMUC” means the amount calculated in accordance with paragraph 5 of Part 2 of [Clause 39 - Schedule];

“Performance Deduction” means the deduction (if any) to be deducted from the Monthly Unitary Charge in the Payment Period following the occurrence of the relevant Performance Failure (as calculated in accordance with Part 5 of [Clause 39 - Schedule]);

“Performance Failure” means a failure which continues after the expiry of the relevant Remedy Period to provide the Services in accordance with the Performance Parameters;

“PPP Co Unavailability Notice” has the meaning given in paragraph 23 of Part 9 of [Clause 39 - Schedule];

“Review Date” means the [●] of each Contract Year;

“Senior Annual Debt Service Cover Ratio” means the ratio of the same name as set out in the term sheet from the Senior Debt Provider;

“Senior Loan Life Cover Ratio” means the ratio of the same name as set out in the term sheet from the Senior Debt Provider;

“Service Performance” means the measurement attributable to the Services pursuant to the calculation of the Performance Deduction in Part 5 of this [Clause 39 - Schedule];

“Service Weightings” means the weightings in percentage terms as set out in the table in paragraph 5 of Part 5 of this [Clause 39 - Schedule];

“Table Five” means the table set out in Part 12 of [Clause 39 - Schedule] labelled "Table Five";

“Table Four” means the table set out in Part 12 of [Clause 39 - Schedule] labelled "Table Four";

“Table One” means the table set out in Part 12 of [Clause 39 – Schedule] labelled "Table One";

“Table Seven” means the table set out in Part 12 of [Clause 39 – Schedule] labelled "Table Seven";

“Table Six” means the table set out in Part 12 of [Clause 39 - Schedule] labelled "Table Six";

“Table Three” means the table set out in Part 12 of [Clause 39 – Schedule] labelled "Table Three";

“Table Two” means the table set out in Part 12 of [Clause 39 - Schedule] labelled "Table Two";

“Total Availability Points” means the total of Column 5 in Table Four;

“Unavailable /Unavailability” means in relation to any Availability Area, the continuation after the expiry of the relevant Remedy Period of an Availability Failure affecting that Availability Area;

“Unitary Charge or UC” means, in respect of each Contract Year the amount calculated in accordance with Part 2 of [Clause 39 - Schedule];

“Unitary Charge Element” means each and any of the individual components of the Unitary Charge as set out in Table Seven;

“Unitary Charge Weighting” means the percentage weighting attributed to each Unitary Charge Element as set out in Table Seven;

“Utilities” means all utilities being sewage and foul water waste drainage, mains gas, water and heating oil;

“Whole [Project Facility] Unavailability Threshold or WNUT” means [●]% or more of the Total Availability Points for the [Project Facility] are Unavailable on a given Operational Day.

PART 2

General Provisions

Unitary Charge

1. The Unitary Charge for each Contract Year shall be the amount set out in Column 2 of Table One and shall be subject to:
 - 1.1 periodic review in accordance with the provisions of Part 3 of this [Clause 39 - Schedule];
 - 1.2 adjustment from time to time in accordance with the provisions of Part 4, Part 6 and Part 7 of this [Clause 39 – Schedule];
 - 1.3 adjustment from time to time in accordance with Clause [●] (Market Testing and Benchmarking), Clause 29 (Qualifying Change in Law)¹ and [Clause 34 – Schedule A] (Variations)²; and
 - 1.4 any other adjustment expressly provided for in this Agreement.
2. The provisions for the abatement of the Unitary Charge under this [Clause 39 - Schedule] are without prejudice to the rights of the Authority to exercise all other rights that are available to it under this Agreement.
3. The Unitary Charge for each Contract Year shall not be increased or reduced except in accordance with the express provisions of this Agreement.
4. The Unitary Charge shall only become payable in full after the Services Commencement Date. The Monthly Unitary Charge shall be equal to [●] of the Unitary Charge for a Contract Year, provided always that the relevant Contract Year comprises 12 (twelve) Payment Periods. In the first Contract Year and the last Contract Year, the Monthly Unitary Charge shall be equal to the Unitary Charge for such Contract Year, divided by the number of Payment Periods therein.

Comment: The monthly unitary charge is calculated by dividing the total unitary charge by twelve. Some public authorities prefer that a daily basis is used: ((total UC/365 or 366)*no. of days in particular month) because this is more accurate with regard to distribution of payments throughout any given year and for ease of calculation of any incomplete months. The drafting used for this in Northern Ireland education projects is as follows:

¹ See issue at Clause 29

² See issue at Clause 34

“Monthly Unitary Charge” means the Unitary Charge in respect of each Payment Period which is calculated by dividing the Unitary Charge for the relevant Contract Year by the number of days in that Contract Year to derive a daily unitary charge. The resultant daily unitary charge is then multiplied by the number of days in that month.

Net Monthly Unitary Charge

5. The Net Monthly Unitary Charge for the first Payment Period following the Services Commencement Date shall be equal to the full Monthly Unitary Charge. The Net Monthly Unitary Charge for each subsequent Payment Period shall be calculated in accordance with the formula below:

$$\text{NMUC} = \text{MUC} - \text{AD} - \text{PD} - \text{CSD} - [\bullet]$$

Where:

NMUC represents the Net Monthly Unitary Charge;

MUC represents the Monthly Unitary Charge for the relevant Payment Period;

AD represents the aggregate value of the Availability Deductions for the preceding Payment Period as determined in accordance with the provisions of Part 4 of this [Clause 39 - Schedule];

PD represents the aggregate value of the Performance Deductions for the preceding Payment Period as determined in accordance with the provisions of Part 5 of [Clause 39 - Schedule];

CSD represents the value of the Customer Satisfaction Deductions for the preceding Contract Year determined in accordance with the provision of Part 6 of this [Clause 39 - Schedule];

[•] represents the aggregate value of the [*project specific*] Deductions for the preceding Contract Year as determined in accordance with the provisions of Part 7 of this [Clause 39 - Schedule];

In respect of the final Payment Period, the Net Monthly Unitary Charge shall be calculated on the basis of the circumstances applying both in the penultimate Payment Period and in the final Payment Period. Any deductions not included in the final Net Monthly Unitary Charge shall be due and payable by the PPP Co to the Authority on the Termination Date or Expiry Date (as applicable).

Part 3: Indexation

1. *The Unitary Charge for each Contract Year shall be subject to indexation on each Review Date after the Services Commencement Date in accordance with the formula set out below:*

$$UC_n = UC_0(1+1/X((CPI_{pd} - CPI_{bd}/CPI_{bd})-Y))$$

Where:

UC_n represents the Unitary Charge to apply from the day following the Review Date up to the next following Review Date;

UC_0 represents the amount of the Unitary Charge immediately prior to the Review Date;

X represents the Inflation Factor as set out in Column 2 of Table Three;

Y represents the Efficiency Factor as set out in Column 2 of Table Three;

Comment: Both X and Y are figures tendered by the PPP Co in its tender. They introduce the concept that the whole unitary charge need not be indexed. Much of the unitary charge is used to repay the debt for the construction – that is fixed and needn't be indexed. "X" is the tenderer's calculation of the element of the unitary charge that will be inflation-sensitive. Y is a further deduction from the indexation – referred to as an efficiency "factor".

CPI_{pd} represents the number published by the Central Statistics Office (or any successor thereto) in respect of the Index and for the period ending on the Review Date in the applicable year; and

CPI_{bd} represents the number published by the Central Statistics Office in respect of the Index in the relevant base year and month (being the base index date).

2. On or prior to the Services Commencement Date and on or prior to each subsequent Review Date the PPP Co shall supply to the Authority a draft memorandum in the form of Table One containing the proposed amount of the Unitary Charge revised in accordance with the provisions of paragraph 1 of this Part 3 of [Clause 39 - Schedule].
3. The PPP Co and the Authority shall use reasonable endeavours to agree the revised Unitary Charge. If the PPP Co and the Authority are unable to agree the revised Unitary Charge within [●] ([●]) Working Days of the draft memorandum having been supplied to the Authority, then either Party may require the amount to be determined in accordance with the Dispute Resolution Procedure.
4. As soon as the revised Unitary Charge for the new Contract Year have been agreed by the PPP Co and the Authority, or determined in accordance with the Dispute Resolution Procedure, the Parties will forthwith execute a memorandum in the same form as Table One, containing the amount of the revised Unitary Charge for the new Contract Year.
5. With effect from the Services Commencement Date or the relevant Review Date (as appropriate) the information presented in the memorandum referred to in paragraph 2 shall be used in substitution for the information set out in Table One, or in substitution for any such previous memorandum, as appropriate.
6. If, at the Review Date, it is found that the Index has been rebased to a different year and/or that a change has occurred in the weightings and/or in the classification of the Index during the relevant Contract Year used in the application of the formula in paragraph 1 of this Part 3 of [Clause 39 – Schedule] or other relevant period, then:
 - 6.1 a revised base value of the Index (" $Index_o$ ") shall be calculated in accordance with paragraph 7 below (and for the purposes of paragraph 6.1, $Index_o$ shall be CPI_{bd}); and
 - 6.2 such revised value of $Index_o$ shall be used in the formula referred to in paragraph 1 above or other relevant calculation together with the rebased value of the Index (" $Index_n$ ") until further revised pursuant to this paragraph 6 (and for the purposes of paragraph 1, $Index_n$ shall be CPI_{pd}).
7. A revised value of CPI_{bd} , as required under the terms of paragraph 6, shall be calculated as follows:
 - 7.1 a conversion factor shall be calculated by dividing (i) the arithmetic total of the quarterly or monthly (as relevant) values of the Index based on the previous base year for that Index (and weightings and classification) by (ii) the arithmetic total of the quarterly or monthly (as relevant) values of the Index based on the new base year for that Index (and weightings and

classification). In both (i) and (ii) above, the quarters or months included in the calculation of such arithmetic total shall be all quarters or months (as relevant) for which values are published (or if not published made available by the same authority) up to the Review Date for both the previous base year (and weightings and classification) and the new base year (and weightings and classification)), but if the number of quarters for which values are published or made available for both such base years by the same authority is greater than [●] ([●]) or (as relevant) if the number of months for which values are published or made available for both such base years by the same authority is greater than [●] ([●]), then the number of quarters or months used in the calculation of the conversion factor shall be limited to the latest [●] ([●]) quarters or (as relevant) [●] ([●]) months prior to the Review Date;

7.2 the value for CPI_{bd} (or its successor as agreed or determined) which was used immediately prior to the Review Date shall then be divided by the conversion factor obtained pursuant to paragraph 7.1. to obtain a revised CPI_{bd} , which shall be used with the quarterly or monthly (as relevant) values of the Index which are based on the new base year for that Index (and weightings and classification).

PART 4

Unavailability

1. The provisions of this Part 4 of [Clause 39 - Schedule] are without prejudice to the provisions of Part [●] of the Agreement and the provisions of Part 5, Part 6 and Part 7 of this [Clause 39 – Schedule].
2. The Unitary Charge shall only be paid in full insofar as all of the [Project Facility] is Available for use during an Operational Day. Insofar as any Availability Area identified in Column 1 of Table Four is Unavailable, then the Unitary Charge shall, subject to the provisions set out within paragraph 13 of this Part 4 of [Clause 39 - Schedule], be reduced in accordance with the provisions of this Part 4 of [Clause 39 - Schedule].
3. Each grouping of Availability Areas is for the purposes of [Clause 39 - Schedule] known as an “Area Group”. The structure of [Clause 39 - Schedule] is so that the Unitary Charge is notionally allocated between each Area Group. The following table represents the allocation of the Unitary Charge Element for Availability between Area Groups for the [Project Facility].

Area Group	Weighted Area (%)
[●]	[●]
[●]	[●]
[●]	[●]
Total	100.0

4. Every Availability Area has been assessed as to its importance within the [Project Facility] and has been awarded an “**Availability Area Criticality**” between 1 and 5 in descending order of importance. For the purposes of this Part 4 of [Clause 39 - Schedule] each Availability Area is allocated Availability Points based on the relevant Availability Area Criticality and as set out in the following table;

Availability Area Criticality	Availability Points
[●]	[●]
[●]	[●]

5. A schedule of each Availability Area, its relevant Availability Area Criticality and Availability Points is included at Table Four.
6. For an Availability Area to be Available and not Unavailable each such Availability Area as specified in Column 1 of Table Four must be provided in full subject to the Availability Remedy Periods set out Table Six, without prejudice to the foregoing, for an Availability Area to be Available and not Unavailable:
 - 6.1 it must comply with Legislation including any Legislation to meet the Schedule [●] (O&M Requirements) of this Agreement;
 - 6.2 all gas and electricity conducting media, (including connections), and containers and associated metering equipment to be provided by the PPP Co as set out in the Schedule [●] (O&M Requirements) of this Agreement, must be functional and comply with Legislation;
 - 6.3 the relevant Availability Area must not be prevented from being used for its intended purpose by virtue of the internal fabric of the [Project Facility] failing to be designed and/or constructed in accordance with Good Industry Practice and/or the Schedule [●] (O&M Requirements) of this Agreement;
 - 6.4 any User lawfully using an Availability Area shall at all times be able to gain unimpeded physical access, (including ingress and egress) to and from the relevant Availability Area (whether internal or external), in a reasonable manner having regard to the intended use of the Availability Area and to the purpose for which such access is required;
 - 6.5 a continuous hot and cold water system and drainage must be provided in those parts of the [Project Facility] specified in the Schedule [●] (O&M Requirements) of this Agreement;
 - 6.6 all internal Availability Areas must be free from surface water and flood (however caused) and in respect of external Availability Areas all requirements in relation to drainage set out in the Schedule [●] (O&M Requirements) of this Agreement must be met; and
 - 6.7 in relation to internal Availability Areas, the Availability Area shall be free from noxious fumes and odours caused or generated by the PPP Co or the Operator which would not be generated if the Services were being provided in accordance with Good Industry Practice.

Availability Deduction

7. The aggregate of the Availability Deductions for each Payment Period shall be the aggregate of the results of applying the formula set out in paragraph 8 of this Part 4 of [Clause 39 - Schedule] below to each instance of Unavailability in the relevant Payment Period.
8. The Availability Deduction, for each instance of Unavailability, shall be the greater of the Minimum Availability Deduction and the result of the calculation below:

Where:

$$AD = (MUC \times UCW \times APA) \times (DP/TAP) \times (FM \text{ or } DM)$$

AD represents the Availability Deduction for the relevant Availability Failure;

MUC represents the Monthly Unitary Charge for the relevant Payment Period without any deductions;

UCW represents the Unitary Charge Weighting for Availability as set out in Table 7;

APA represents the Availability Points Affected for the specific Availability Failure expressed as a % of total points for the relevant Area Group as set out in Table Four. This is then multiplied by the % allocation of the Unitary Charge Weighting for Availability for the particular Area Group as set out in paragraph 3 of this Part 4 of [Clause 39 - Schedule];

DP represents the Deduction Period during the Payment Period for which the deduction is being calculated ;

TAP represents the Total Availability Periods in the Payment Period calculated based on Operational Days during Core Periods;

FM represents the appropriate Frequency Multiplier as set out in paragraph 8 of this Part 4 of [Clause 39 - Schedule]; and

DM represents the appropriate Duration Multiplier as set out in paragraph 8 of this Part 4 of [Clause 39 - Schedule].

9. Multipliers will be applied to the calculation of the Availability Deductions (for each Availability Area) from the Monthly Unitary Charge in respect of each instance of Unavailability to reflect the number of instances (frequency) of Unavailability, the duration (number of Operational Days) of the Unavailability calculated based on Availability Periods and the proportion of the relevant type of accommodation that was Unavailable.

Unavailability Frequency and Duration Multipliers			
Frequency (in the past 60 day period)	Multiplier	Duration(Operational Days)	Multiplier
1-3	[●]	1 – 2	[●]
4-11	[●]	3 – 4	[●]
12-15	[●]	5 – 7	[●]
16-19	[●]	8 – 10	[●]
20-23	[●]	11 – 14	[●]
24-27	[●]	15 – 20	[●]
28-31	[●]	21+	[●]
32-35	[●]		
36-39	[●]		
>40	[●]		

10. Where [●] or more Availability Failures occur during an Operational Day and the same Availability Area is affected, only one Availability Deduction shall apply in respect of that Availability Area at such time, being the Availability Deduction that produces the highest Availability Deduction.

Whole [Project Facility] Unavailability

11. If on the relevant Operational Day the Whole [Project Facility] Unavailability Threshold condition is met, then the Availability Points Affected shall be deemed to be the sum of the Total Availability Points for all of the Availability Areas in the [Project Facility] and an appropriate deduction shall be calculated using the formula set out in paragraph 8 of this Part 4 of [Clause 39 - Schedule].

Effect of Unavailability

12. The PPP Co shall promptly act to make Available any Availability Area that is Unavailable as soon as is reasonably practicable in accordance with Good Industry Practice taking account of all the relevant

circumstances

No Availability Deductions

13. No Availability Deductions shall be made under this Part 4 of [Clause 39 - Schedule] for any Availability Failure to the extent that the Availability Failure is directly caused by:
- 13.1 maintenance being carried out in accordance with the Planned Preventative Maintenance programme and within the relevant time periods set out in the Planned Preventative Maintenance programme; or
 - 13.2 the Authority exercising its rights of step-in under Clause 11.6 (Step In Rights) save to the extent that such step in is caused by the acts or omissions of the PPP Co or a PPP Co Related Party; or
 - 13.3 an Authority Default or an Authority Change (provided that any works carried out pursuant to an Authority Change do not extend beyond the time period agreed by the Parties for such Works pursuant to [Clause 34 – Schedule A] (Variations)); or
 - 13.4 any breach by the Authority of the express terms of this Agreement; or
 - 13.5 Where the Unavailability arises due to an Emergency that is not the fault of the PPP Co; or
 - 13.6 a failure in the supply of Utilities to the [Project Facility] which originates at a point in time where the risk in supply is held by the relevant utility provider, provided that:
 - 13.6.1 the utility failure is not due to the acts or omissions of the PPP Co or any PPP Co Related Party; and
 - 13.6.2 the PPP Co is unable to recover its loss under any of the insurance policies required by Clause 48 (Insurance).

Maximum Deduction

14. If the sum of all of the Deductions made under Part 4, Part 5, Part 6 and Part 7 of this [Clause 39 - Schedule] in a Payment Period is greater than the Monthly Unitary Charge, then the total Deduction shall be limited to the amount of the Monthly Unitary Charge.

PART 5

Service Performance

- 1. The provisions of this Part 5 of [Clause 39 - Schedule] are without prejudice to the provisions of Part [●] (Termination and Handback) of this Agreement and the provisions of Part 4, Part 6 and Part 7 of this [Clause 39 - Schedule].
- 2. The Unitary Charge shall only be paid in full insofar as the Services have been provided fully in accordance with Schedule [●] (O&M Requirements) of this Agreement. Insofar as the Services have not been provided fully in accordance with Schedule [●] (O&M Requirements) of this Agreement, then the

Unitary Charge shall, subject to the provisions set out within paragraph 12 of this Part 5 of [Clause 39 - Schedule], be reduced in accordance with the provisions set out in this Part 5 of [Clause 39 – Schedule].

3. Delivery of Service Performance for each Service will be measured by reference to the achievement of the Performance Parameters set out in Schedule [●] (O&M Requirements) of this Agreement.
4. Where the level of performance leads to the Unavailability of a given space then, from that point in time, the deduction from the Unitary Charge shall be made by reference to Availability rather than Service Performance unless these reflect a lower financial penalty.
5. For certain categories of Service Failure, Remedy Periods may be applicable (as set out in Schedule [●] (O&M Requirements) of this Agreement). During Remedy Periods no Performance Deductions will be made. If Performance Failures are not corrected during the Remedy Period then [●] percent ([●] %) of the relevant Performance Deduction will be made for the full period of under-performance, including the Remedy Period.
6. Each Service has been weighted based on the criticality of that Service to the overall operation of the [Project Facility]. The relevant Service Weightings are as follows:

Service	Service Weighting
[●]	[●] %
[●]	[●] %
[●]	[●] %
Total	100%

7. Each Performance Parameter in Schedule [●] (O&M Requirements) of this Agreement, has been given a criticality allocation of either A or B. These criticality allocations determine the number of Performance Points used for calculating a Performance Deduction.

Service Failure Category	Performance Points

8. Service Failures will be calculated in periods of an Operational Day, in accordance with the Schedule [●] (O&M Requirements) of this Agreement. The number of Performance Points attached to these Service Failures will be calculated based on the Service Failure Categories above. The Performance Points resulting from the calculation in this paragraph 8 will determine the appropriate threshold and percentage deduction in accordance with the table below:

Threshold for Deduction					
	Threshold 1	Threshold 2	Threshold 3	Threshold 4	Threshold 5
Performance Points	[●]	[●]-[●]	[●]-[●]	[●]-[●]	[●]+
Deduction %	[●]%	[●]%	[●]%	[●]%	[●]%

9. In any one Payment Period, should the total number of Performance Points attached to Service Failures in each individual service category exceed Threshold 1 above, the excess number of Performance Points shall cause a deduction based on Threshold 2 and so on.
10. In addition to the threshold deductions, should the same Service Failure occur for a period of Operational Days, a multiplier will be applied to the Performance Points calculation as per the table below.

Duration Multipliers	Multiplier
Duration (Operational Days)	
1 - [●]	[●]
[●]-[●]	[●]
[●]-[●]	[●]
[●]+	[●]

11. Deductions for failure to meet the Performance Parameter within each Service will be the greater of the Minimum Performance Deduction and the following formula

$$PD = (MUC \times ((\frac{PDP}{TP} \times TPD \times SW) \times UCW)) \times DM$$

Where:

PD represents the Performance Deduction for failure to meet the Performance Parameter in respect of a Service;

MUC represents the Monthly Unitary Charge for the relevant Payment Period without any deductions;

PDP represents the Performance Deduction Points relevant to the service not performed to the required Performance Parameter;

TP represents the Total Points available for the Service in the Payment Period;

TPD represents the Threshold Percentage Deduction based on the number of Service Failures in the Payment Period ;

SW represents the Service Weighting relevant to the particular Service;

UCW represents the Unitary Charge Weighting for Performance as set out in Table 7; and

DM represents the appropriate Duration Multiplier as set out in paragraph 9 of this Part 5.

No Performance Deductions

11. No Performance Deduction shall be made under this Part 5 of [Clause 39 - Schedule] for any Performance Failure to the extent that the Performance Failure is directly caused by:

11.1. maintenance being carried out in accordance with the Planned Preventative Maintenance programme and within the relevant time periods set out in the Planned Preventative

Maintenance programme; or

- 11.2. the Authority exercising its rights to step-in under Clause 11.6 (Step In Rights) save to the extent that such step-in is caused by the acts or omissions of the PPP Co or a PPP Co Related Party; or
- 11.3. an Authority Default or an Authority Change (provided that any works carried out pursuant to an Authority Change do not extend beyond the time period agreed by the Parties for such works pursuant to [Clause 34 – Schedule A] (Variations)); or
- 11.4. any breach by the Authority of the express terms of this Agreement; or
- 11.5. where the Unavailability arises due to an Emergency that is not the fault of the PPP Co; or
- 11.6. means a failure in the supply of Utilities to the [Project Facility] which originates at a point in time where the risk in supply is held by the relevant utility provider, provided that:
 - 11.6.1. the utility failure is not due to the acts or omissions of the PPP Co or any PPP Co Related Party; and
- 11.7. the PPP Co is unable to recover its loss under any of the insurance policies required by Clause 48 (Insurance).

PART 6

Customer Satisfaction

1. The provisions of this Part 6 of [Clause 39 – Schedule] are without prejudice to the provisions of Part [●] (Termination and Handback) of this Agreement and the provisions of Part 4, Part 5 and Part 7 of this [Clause 39 - Schedule].
2. The Unitary Charge for each Contract Year subsequent to the second Contract Year shall only be paid in full insofar as the Actual Satisfaction Index as measured by the Customer Satisfaction Survey is greater than or equal to the Expected Satisfaction Index defined by the Benchmark Survey. Insofar as the Actual Satisfaction Index as measured by the Customer Satisfaction Survey is less than the Expected Satisfaction Index set by the Benchmark Survey, then the Unitary Charge shall be reduced in accordance with the provisions set out in this Part 6 of [Clause 39 - Schedule].
3. Where a Customer Satisfaction Failure occurs in a Contract Year subsequent to the second Contract Year, the Customer Satisfaction Deduction attributable to that Customer Satisfaction Failure shall serve to reduce the Unitary Charge. The total Customer Satisfaction Deduction for a Contract Year shall be calculated in accordance with the formula set out below:

$$\text{CSD} = \text{UC} \times \text{UCW} \times \text{CSDF}$$

Where:

- | | |
|------------|--|
| CSD | represents the Customer Satisfaction Deduction for the Service as a whole for the relevant Contract Year; |
| UC | represents the Unitary Charge for the Service as a whole for the relevant Contract Year as set out in Table One; |

UCW represents the Unitary Charge Weighting for Customer Satisfaction as set out in Table 7; and

CSDF represents the Customer Satisfaction Deduction Factor for the relevant Contract Year as determined pursuant to the provisions of paragraph 4 of this Part 6 of [Clause 39 - Schedule].

4. Customer Satisfaction Surveys will be carried out in accordance with the provisions set out in paragraphs 29 to 35 of this Part 8 of [Clause 39 - Schedule].
5. Notwithstanding any of the other provisions set out in this Part 6 of [Clause 39 - Schedule]:
 - 5.1 a Customer Satisfaction Deduction shall not be made under this Part 6 of [Clause 39 - Schedule] for a Customer Satisfaction Failure that occurs within the first Contract Year or the second Contract Year; and
 - 5.2 the total Customer Satisfaction Deductions for any Contract Year thereafter shall not exceed [●] per cent ([●]%) of the Unitary Charge for that Contract Year.

PART 7

[NOT USED]

PART 8

[NOT USED]

PART 9

Monitoring and Reporting

General Monitoring and Reporting Obligations

1. The PPP Co shall, for the [Project Facility]:
 - 1.1. monitor the performance of each of the Services or procure that each of the Services is so monitored against the Schedule [●] (O&M Requirements) of this Agreement;
 - 1.2. maintain records in connection with any breaches of the Availability Standards, any breaches of the Performance Parameters and any Availability Failures and Performance Failures occurring in the [Project Facility]; and
 - 1.3. provide the information for the Performance and Payment Report to the Authority in respect of each Payment Period, containing the results of its monitoring of the provision of the Services in respect of that Payment Period.
2. The general principle underlying the monitoring system is one of self monitoring by the PPP Co together with the right for the Authority, without prejudice to the PPP Co's general obligation to monitor, to carry out its own monitoring in accordance with paragraphs 36 to 38 hereof, if and when it requires, in order to evaluate the PPP Co's monitoring and its attainment of the standards required of it in the Schedule [●] (O&M Requirements) of this Agreement.

Performance Monitoring

3. The parties shall in respect of each of the Services, no later than [●] ([●]) Working Days prior to the Services Commencement Date, agree a detailed monitoring and reporting procedure which shall:
 - 3.1. comply in all material respects with this Part 9 of [Clause 39 - Schedule]; and
 - 3.2. be based on methods and recording frequencies to be agreed.
4. The parties shall meet at regular intervals (and at least monthly) to discuss any breaches of the Availability Standards, breaches of the Performance Parameters, Performance Failures and Availability Failures occurring in the previous Payment Period to amend (if agreed) the monitoring and reporting procedures and to decide on any other matters relating to monitoring and reporting of the Services.
5. The PPP Co shall monitor its performance in providing the Services by reviewing all available information and records and preparing the Performance and Payment Reports. The PPP Co shall prepare such Performance and Payment Reports in good faith and in accordance with paragraph 2 of [Clause 23 – Schedule] (Reports & Records) of this Agreement and Good Industry Practice. Where and when required, the PPP Co shall ensure that different areas of the [Project Facility] are inspected at different times during each Payment Period, provided that the Authority shall be entitled to request that particular areas of the [Project Facility] are to be inspected in the next following Payment Period.

Records and Possession of Information

6. The PPP Co shall provide the Authority on a regular basis with up to date organisation charts. The Authority shall be notified as soon as reasonably possible of any amendment to an organisation chart supplied to it.
7. The PPP Co shall procure that each PPP Co Related Party keeps evidence of all relevant training and instruction of its employees together with relevant certificates and qualifications, and copies of the same shall be made available for inspection to the Authority on request.
8. The PPP Co shall keep a record of all accidents or incidents occurring to or witnessed by any employee of the PPP Co or any PPP Co Related Party (“Accident Report” as per paragraph 2.1.5 of [Clause 23 - Schedule] (Reports and Records) of this Agreement and shall as soon as possible following a request by the Authority provide a copy to the Authority.
9. The PPP Co shall, and shall use best endeavours to procure that each PPP Co Related Party shall, take part in any quality group or committee or other forum set up by the Authority whose task it is to enhance the quality of any of the Services provided within the [Project Facility] or to deal with related health and safety issues. The PPP Co shall, and shall use best endeavours to procure that each PPP Co Related Party shall, co-operate with such persons and committees and, wherever possible and practicable, take into account the suggestions and directions of such persons or Committee.

Monitoring Methodologies

10. For the purposes of this Part 9 of [Clause 39 – Schedule] the following methods of monitoring procedures shall be adopted:
 - 10.1. Physical measurement: that is the measurement of quantitative elements within individual specification standards which will include, amongst other things, time, temperature, quality, quantity, noise and vibration levels and bacterial contamination;
 - 10.2. Inspection: that is physical inspections of operational activities to determine the quality of performance of the Services and whereby aspects of the Services shall be marked against the

Schedule [●] (O&M Requirements) of this Agreement. All criteria and scoring shall be objective;

10.3. Logged Failure Time and Logged Remedy Time: that is the time when the Authority makes the request to the time when the PPP Co attends to the incident;

10.4. User feedback:

10.4.1 Complaints: that is providing a system pursuant to which the Authority and service users can make complaints or compliments. The Authority shall inform the PPP Co in writing of any complaints made concerning the provision of the Services from any relevant person. The PPP Co shall report to the Authority each Payment Period; and

10.4.2 Service user interview: that is direct contact with users of the Services through face to face or telephone interview to determine their perception rating of service quality;

10.4.3 Customer Satisfaction Surveys: the PPP Co shall be required to undertake Customer Satisfaction Surveys in accordance with the provisions set out in paragraphs 29 to 34 of this Part 9 of [Clause 39 – Schedule].

Helpdesk

11. Pursuant to paragraph 2.4.5 of Schedule [●] (O&M Requirements) of this Agreement, the PPP Co shall provide a Helpdesk facility which shall:

11.1. retain a current copy of, update and manage the asset register;

11.2. retain a current copy of, update and manage the Planned Preventative Maintenance programme;

11.3. record and manage all queries, notifications and complaints made by the Authority or any user of the Services;

11.4. record time and details of any failure to meet the Availability Standards and/or Performance Parameters; and

11.5. record time and details of the Remedy of any failure to meet the Availability Standards and/or Performance Parameters.

Reporting

12. The PPP Co shall procure that the PPP Co's Representative prepares and delivers to the Authority Representative the following documents:

12.1. a monthly performance review which shall identify the PPP Co's Related Parties' performance against each Performance Parameter in the Schedule [●] (O&M Requirements) of this Agreement such document to be within the Performance and Payment Report; and

12.2. a Performance and Payment Report in the form set out in Paragraph 14 below.

13. The PPP Co shall keep proper records and retain documents relating to the monitoring of the Services and keep a record of Logged Failure Times and Logged Remedy Times in respect of all notifications of breaches of Availability Standards, breaches of Performance Parameters, Availability Failures and

Performance Failures. The Authority shall at all reasonable times and with prior written notice have access to and the right to reproduce such records and documents for the purpose of auditing the monitoring of Services and co-ordinate such action as is necessary to rectify such breaches of Availability Standards, breaches of Performance Parameters, Availability Failures and Performance Failures.

Performance and Payment Report

14. The PPP Co shall deliver to the Authority a Performance and Payment Report which shall as a minimum include:
 - 14.1. the information recorded or logged by the Helpdesk pursuant to the Schedule [●] (O&M Requirements) of this Agreement and include the Logged Failure Time and Logged Remedy Time for each breach of the Availability Standards, breach of the Performance Parameters, Availability Failures and Performance Failures;
 - 14.2. a summary of the overall performance of the Services in the [Project Facility];
 - 14.3. a breakdown of the performance of the Services, service by service;
 - 14.4. graphs showing trends in the performance of the Services detailed in Paragraphs 14.2 and 14.3 for the relevant Payment Period and over the preceding [●] Payment Periods thereafter;
 - 14.5. details of all monitoring of the performance of the Services pursuant to Paragraph 10 of this Part 9 of [Clause 39 – Schedule] or any of them undertaken or to be undertaken by or on behalf of the PPP Co and/or the Operator including when they were undertaken or are to be undertaken, by whom and the results of them;
 - 14.6. where there have been deficiencies in the performance of the Services or any of them, details of the corrective actions taken or to be taken, by the PPP Co and/or the Operator to remedy the same.
 - 14.7. details of training undertaken or to be undertaken and a summary of any employment issues;
 - 14.8. record all accidents and health and safety incidents occurring to or witnessed by the Operator or the PPP Co;
 - 14.9. a summary of any changes agreed between the Parties pursuant to Clause 35 (Change in Law) which affect the Services;
 - 14.10. such other information as the Authority may reasonably require as part of a monthly report.

Monitoring of Performance parameters

15. The monitoring and reporting procedures set out in or derived under this Part 9 of [Clause 39 – Schedule] shall constitute the mechanism by which attainment of the standards of performance required for each of the Services is measured.
16. The Performance Parameters shall be monitored by methods and at frequencies that are to be agreed.

Notification of Breach of Availability Standards and/or Performance parameters

17. If either party believes that a breach of an Availability Standard and/or of a Performance Parameter has occurred it shall inform the Helpdesk immediately of the breach of an Availability Standard and/or of a Performance Parameter and the areas that are affected by the breach of an Availability Standard and/or Performance Parameter.
18. When the PPP Co has rectified the breach of an Availability Standard and/or of a Performance Parameter it shall immediately inform the Helpdesk and such time shall be logged as the Logged Remedy Time and the Helpdesk shall promptly notify the [Project Facility] Representative of such Remedy.
19. If the Authority disputes whether any breach of an Availability Standard and/or of a Performance Parameter has been remedied, the matter shall be resolved in accordance with the Disputes Resolution Procedure.

Notice of Unavailability

20. The monitoring and reporting procedure set out in this Part 9 of [Clause 39 - Schedule] and the Schedule [●] (O&M Requirements) of this Agreement shall constitute the mechanism by which a record of Unavailability is maintained.
21. The procedure for declaring Unavailability of the [Project Facility] shall be that set out in Paragraphs 22 to 24.

Notification of Unavailability

22. If the Authority believes that a breach of an Availability Standard has occurred in relation to an Availability Area or Area(s) (as applicable) then the Authority shall, as soon as reasonably practicable thereafter, give notice to the Helpdesk (an “**Authority Unavailability Notice**”), and provide the following information:
 - 22.1. the Availability Area(s) where the Authority considers a breach of the Availability Standard has occurred;
 - 22.2. the time (or estimated time) at which the breach of the Availability Standard started; and
 - 22.3. the reasons why the Authority believes the Availability Area is failing to meet the Availability Standards.
23. If the PPP Co determines that a breach of the Availability Standard(s) has occurred in relation to an Availability Area or Area(s) (as applicable) prior to the provision of the Authority Unavailability Notice, the PPP Co shall immediately serve a notice on the Authority (the “**PPP Co Unavailability Notice**”), which shall contain the information referred to in Paragraphs 22.1 to 22.3.
24. The Authority Unavailability Notice or, as the case may be, the PPP Co Unavailability Notice shall be given to the Helpdesk and the Authority (where applicable) as expeditiously as practicable in any of the following forms:

- 24.1. in any reasonable written form;
- 24.2. orally provided that basic written confirmation thereof is given before the end of the next Working Day; or
- 24.3. such electronic method of transmission as may have been previously agreed between the Parties.

Response to Notification of Unavailability

25. The PPP Co shall promptly investigate the facts and as soon as practicable thereafter respond to the Authority notifying it of the following:
 - 25.1. whether or not it agrees with the notification of the Authority given in accordance with paragraph 22 and, if not, the issues of disagreement;
 - 25.2. if the breach of the Availability Standard(s) is agreed, the steps that the PPP Co will take to ensure that the Availability Area meets the Availability Standards;
 - 25.3. the time it is expected to take before the Availability Area(s) will start to meet the Availability Standard(s); and
 - 25.4. details of any suitable alternative provision (if any) proposed at that time by the PPP Co.
26. The Authority and the PPP Co shall offer each other all reasonable co-operation with a view to minimising the period of time during which an Availability Area fails to meet the Availability Standard(s).
27. When the PPP Co has remedied the cause of the breach of the Availability Standard(s) in the relevant Availability Area(s), it shall immediately inform the Helpdesk and such time shall be logged as the Logged Remedy Time and the Helpdesk shall promptly notify the [Project Facility] Representative of such Remedy.
28. If the Authority disputes whether any breach of an Availability Standard has been remedied, the matter shall be resolved in accordance with the Dispute Resolution Procedure.

Customer Satisfaction Failures

29. A Customer Satisfaction Failure shall be deemed to have occurred if the PPP Co fails to achieve the Expected Satisfaction Index as established by the Benchmark Survey. A Customer Satisfaction Failure shall give rise to a Customer Satisfaction Deduction determined in accordance with the provisions of Part 6 of this [Clause 39 – Schedule].
30. Customer Satisfaction shall be measured for the first time at the end of the second Contract Year using the Benchmark Survey and for the avoidance of doubt no Customer Satisfaction Deduction shall apply to the Unitary Charge at the end of the first or second Contract Years.
31. The Benchmark Survey shall establish the Expected Satisfaction Index for each subsequent Contract Year. Thereafter customer satisfaction shall be measured annually and the Customer Satisfaction Deduction deducted from the Unitary Charge for the relevant Contract Year.
32. An Independent Surveyor appointed by the Authority during the first Contract Year shall carry out the

Benchmark Survey and all subsequent Customer Satisfaction Surveys. The Independent Surveyor so appointed shall measure customer satisfaction at a Service level on an annual basis. The Authority will meet the cost of the work of the Independent Surveyor. The Authority shall appoint a new Independent Surveyor in the event of insolvency with regard to the original Independent Surveyor.

33. The results of the Benchmark Survey will determine the Customer Satisfaction Deduction Factor (in percentage terms between 0%-100%) for use in the calculation of the Customer Satisfaction Deduction in paragraph 3 of Part 6 of this [Clause 39 – Schedule].
34. The Authority and the PPP Co shall each have the option to review and where necessary adjust the Expected Satisfaction Index once during the term of this Agreement. Where the Authority and the PPP Co are unable to agree the adjusted Expected Satisfaction Index, the matter shall be referred for determination under the Dispute Resolution Procedure.
35. For the avoidance of doubt, the Expected Satisfaction Index as established through the Benchmark Survey shall continue to apply until such time as an adjustment to the Expected Satisfaction Index is agreed by the Authority and the PPP Co or determined in accordance with the Dispute Resolution Procedure.

Authority Monitoring

36. The Authority (acting by itself or through the appointment of a nominated sub-PPP Co) may, at its own expense, carry out such monitoring and/or audit of the Services and the PPP Co's and/or the PPP Co's Representative monitoring (including through the use of joint monitoring) and quality assurance procedures as it may from time to time require.
37. The Authority may, in its absolute discretion, attend with the PPP Co whilst the PPP Co is carrying out its own monitoring and jointly monitor any aspect of the Services.
38. The Authority shall, on the PPP Co's reasonable request, on reasonable notice, and at the PPP Co's cost, attend and jointly monitor any aspect of any Service where the PPP Co believes that so to do would enhance the delivery or monitoring of the Service.

PART 10

Unitary Charge Adjustment

1. Where, in terms of the Agreement, an alteration of the Unitary Charge is expressly directed to be made pursuant to Part 10 of [Clause 39 – Schedule], the Unitary Charge shall be adjusted in the Financial Model to ensure that:
 - 1.1 The minimum Senior Loan Life Cover Ratio as calculated in the Financial Model as a result of the relevant adjustment is maintained at the level of such ratio in the Base Case in effect immediately before the relevant re-running of the Financial Model;
 - 1.2 The minimum Senior Annual Debt Service Cover Ratio as calculated in the Financial Model as a result of the relevant adjustment is maintained at the same level of such ratio in the Financial Model in effect immediately before the relevant re-running of the Financial Model;
 - 1.3 The Base Case Equity IRR as calculated in the Financial Model as a result of the relevant adjustment is maintained at the same level of such return in the Financial Model in effect immediately before the relevant re-running of the Financial Model.

2. On each and every occasion that the Financial Model is adjusted pursuant to this Part 10 of [Clause 39 – Schedule] there shall be delivered to the Authority a printed copy of the Financial Model (and associated workbook) as rerun as a result of the relevant adjustment together with one copy on computer disc (complete with all formulae and data) together also with a certificate in terms acceptable to the Authority (acting reasonably) from the auditors of such Financial Model.

PART 11

Refinancing

The following definitions shall have the following meanings unless the context requires otherwise:

Distribution means:

- (a) whether in cash or in kind, any:
 - (i) dividend or other distribution in respect of share capital;
 - (ii) reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
 - (iii) payments under the Junior Debt Documents (whether of principal, interest, breakage costs or otherwise);
 - (iv) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms;
 - (v) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms, or
- (b) the early release of any [Contingent Funding Liabilities], the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain;

“EEA” means from time to time the European Economic Area as created by the Agreement on European Economic Area 1992 or any successor or replacement body, association, entity or organisation which has assumed either or both the function and responsibilities of the European Economic Area;

“Equity IRR” means the projected blended rate of return to the Sponsors over the full Contract Period, having regard to Distributions made and projected to be made;

“Exempt Refinancing” means:

- (a) any Refinancing that was fully taken into account in the calculation of the Unitary Charge;
- (b) a change in taxation or change in accounting treatment;
- (c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:
 - (i) breach of representations and warranties or undertakings;
 - (ii) movement of monies between the Project Accounts in accordance with the Senior Credit Providers Agreement as at Financial Close;
 - (iii) late or non-provision of information, consents or licences;
 - (iv) amendments to Principle Sub-Contracts;
 - (v) approval of revised technical and economic assumptions for financial model runs (to the

extent required for forecasts under the Funding Agreements);

- (vi) restrictions imposed by the Senior Credit Providers on the dates at which the Senior Debt Amount can be advanced to the PPP Co under the Senior Credit Providers' Agreement and which are given as a result of any failure by the PPP Co to ensure that the Works are performed in accordance with the agreed Programme and which are notified in writing by the PPP Co or the Senior Credit Providers to the Authority prior to being given;
 - (vii) changes to milestones for drawdown set out in the Senior Credit Providers' Agreement and which are given as a result of any failure by the PPP Co to ensure that the Works are performed in accordance with the agreed Programme and which are notified in writing by the PPP Co or the Senior Credit Providers to the Authority prior to being given;
 - (viii) failure by the PPP Co to obtain any consent by statutory bodies required by the Senior Credit Providers' Agreement; or
 - (ix) voting by the Senior Credit Providers and the voting arrangements between the Senior Credit Providers in respect of the levels of approval required by them under the Senior Credit Providers' Agreement;
- (d) any amendment, variation or supplement of any agreement approved by the Authority as part of any Variation under this Agreement;
 - (e) any sale of shares in the PPP Co by the shareholders or securitisation of the existing rights and/or interests attaching to shares in the PPP Co; or
 - (f) any Qualifying Bank Transaction;

"Financial Close" shall have the meaning given to it in the Senior Credit Providers' Agreement;

"Insurance Undertaking" has the meaning given to it in the Insurance Act 1989.

"Net Present Value" means the aggregate of the discounted values, calculated as of the estimated date of a Refinancing, of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;

"Pre-Refinancing Equity IRR" means the nominal post-tax Equity IRR calculated immediately prior to a Refinancing;

"Project Accounts" means accounts referred to in and required to be established under the Senior Credit Providers' Agreement;

"Qualifying Bank" means a bank that is licensed pursuant to the Central Bank Act 1971 to carry on banking business in the State and to accept deposits in the State;

"Qualifying Bank Transaction" means:

- (a) the syndication by a Senior Credit Provider, in the ordinary course of its business, of any of its rights or interests in the Senior Credit Providers' Agreement;
- (b) the grant by a Senior Credit Provider of any rights of participation, or the disposition by a Senior Credit Provider of any of its rights or interests (other than as specified in paragraph (a) above), in respect of the Senior Credit Providers' Agreements in favour of (i) any other Senior Credit Provider (ii) any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the State or any other EEA member state (iii) a local authority or public authority in the State (iv) a trustee of a charitable trust which has (or has had at any time during the previous two years) assets of at least

[[•] ([•]) Euro] (or its equivalent in any other currency at the relevant time) (v) a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two years) at least [•] ([•]) members and assets under management of at least [[•] ([•])] Euro (or its equivalent in any other currency at the relevant time) (vi) an EEA or Swiss Insurance Undertaking (vii) a Regulated Collective Investment Scheme (viii) any Qualifying Institution or (ix) any other institution in respect of which the prior written consent of the Authority has been given;

(c) the grant by a Senior Credit Provider of any other form of benefit or interest in either the Senior Credit Providers' Agreement or the revenues or assets of the PPP Co, whether by way of security or otherwise, in favour of (i) any other Senior Credit Provider (ii) any institution specified in paragraphs (b)(ii) to (vii) above (iii) any Qualifying Institution or (iv) any other institution in respect of which the prior written consent of the Authority has been given.

“Qualifying Institution” means [];

“Qualifying Refinancing” means any Refinancing that will give rise to a Refinancing Gain that is not an Exempt Refinancing;

“Refinancing” means:

- (a) any amendment, variation, novation, supplement or replacement of any Funding Agreement;
- (b) the exercise of any right, or the grant of any waiver or consent, under any Funding Agreement;
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Funding Agreements or the creation or granting of any other form of benefit or interest in either the Funding Agreements or the contracts, revenues or assets of the PPP Co whether by way of security or otherwise; or
- (d) any other arrangement put in place by the PPP Co or another person which has an effect which is similar to any of (a)-(c) above or which has the effect of limiting the PPP Co's ability to carry out any of (a)-(c) above;

“Refinancing Gain” means an amount equal to the greater of zero and $[(A - B) - C]$, where:

- A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Contract following the Refinancing;
- B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Contract following the Refinancing; and
- C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR;

provided that any such amounts arising as a result of a Refinancing of the Junior Debt Documents shall be calculated separately from those amounts arising as a result of a Refinancing of the Senior Credit Providers' Agreements.

“Regulated Collective Investment Scheme” means a collective investment scheme established as an investment company, unit trust, common contractual fund or investment limited partnership which has been authorised by the Irish Financial Services Regulatory Authority pursuant to either the UCITS or Non-UCITS Notices, as appropriate;

“Relevant Person” means a Sponsor and any of its Associated Companies;

“Threshold Equity IRR” means []%.

1. The PPP Co shall obtain the Authority's prior written consent to any Qualifying Refinancing and both the Authority and the PPP Co shall at all times act in good faith with respect to any Refinancing.
2. The Authority shall be entitled to receive a [●]% share of any Refinancing Gain arising from a Qualifying Refinancing in relation to Senior Credit Providers' Agreements and a [●]% share of any Refinancing Gain arising from a Qualifying Refinancing in relation to Junior Debt Documents.
3. The Authority shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater than 50% share of any Refinancing Gain arising in relation to Senior Credit Providers' Agreements and/or a [●]% share of any Refinancing Gain arising in relation to Junior Debt Documents.
4. The PPP Co shall promptly provide the Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain used in connection with that Refinancing whether that Refinancing is a Qualifying Refinancing or not).
5. The Authority shall have the right to elect to receive its share of any Refinancing Gain as:
 - 5.1 a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;
 - 5.2 a reduction in the Unitary Charge over the remaining term of this Agreement; or
 - 5.3 a combination of any of the above; or
 - 5.4 in such other form agreed between the parties.
6. The Authority and the PPP Co will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Authority's share of the Refinancing Gain (taking into account how the Authority has elected to receive its share of the Refinancing Gain under Paragraph 5 above). If the parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Authority's share, the dispute shall be determined in accordance with Clause 56 (Dispute Resolution).
7. The Refinancing Gain shall be calculated after taking into account the reasonable and proper professional costs that each Party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Authority will be paid to the Authority by the PPP Co within [●] Working Days of any Qualifying Refinancing.

PART 12

Table One

- 1 The table below sets out the Unitary Charge referred to in Part 2 of this [Clause 39 – Schedule].

Column 1	Col 2
Unitary Charge or UC	
Monthly Unitary Charge or MUC= UC/12	

Drafting Note: Tenderers are required to complete the table set out above for each Tender submitted.

PART 12

Table Two

[NOT USED]

PART 12

Table Three

- The Inflation Factors and Efficiency Factors to be applied to the Unitary Charge, pursuant to Part 3 of this [Clause 39 – Schedule], are set out in the table below.

Column 1	Column 2
Item	All Contract Years
Inflation Factor (X)	
Efficiency Factor (Y)	

Drafting Note: Tenderers are required to complete the table set out above for each Tender submitted

PART 12

Table Four

- The table below sets out the number of Areas in the [Project Facility] together with the criticality and the Availability Points allocated to each Availability Area.

Column 1	Column 2	Column 3	Column 4	Column 5
Availability Area	Weighted Area (%)	Criticality	No. of points	Total Availability Points
[•]	[•]	[•]	[•]	
[•]	[•]	[•]	[•]	
[•]	[•]	[•]	[•]	
[•]	[•]	[•]	[•]	
Total Points				

Drafting Note: Tenderers shall note that the tables set out above are based on example schedules of accommodation prepared by the Authority and accordingly they will need to be amended to reflect the exact

accommodation solutions proposed by the Preferred Tenderer. Tenderers are not required to update the tables as part of their Tender submissions.

PART 12

Table five

[NOT USED]

PART 12

Table six

The table below sets out the Availability Remedy Periods for use in the calculation of the Availability Deduction in Part 4 of this [Clause 39 – Schedule].

Column 1	Column 2	Column3
Part 4 paragraph reference	Criteria	Remedy Period
5.1	Statutory compliance to meet the Schedule [●] (O&M Requirements) of this Agreement	[●]
5.2	All utilities as set out in the Schedule [●] (O&M Requirements) of this Agreement to be functional	[●]
5.3	Failure of internal fabric in line with Good Industry Practice	[●]
5.4	Impeded Physical Access-	[●]
5.5	Hot and cold water system and drainage- Toilets	[●]
5.6	surface water and flood and drainage requirements under the Schedule [●] (O&M Requirements) of this Agreement	[●]
5.7	air quality- Good Industry Practice	[●]

PART 12

Table seven

The table below sets out the Unitary Charge Weightings.

Unitary Charge Element	Weighting		
	Year 1	Year 2	Year 3-25
Availability	[●] %	[●] %	[●] %
Performance	[●] %	[●] %	[●] %
Customer Satisfaction	[●] %	[●] %	[●] %
[●]	[●] %	[●] %	[●] %

Proforma Invoice

PPP Co

VAT Registration Number []

INVOICE

Commissioners of Public Works

Date - []

Charges pursuant to our agreement dated [] 2005 for the delivery of services during [Payment Period][Year]

1. Unitary Charge
2. Availability Deductions (schedule 1 attached)
3. Performance Deductions (schedule 2 attached)
4. Customer Satisfaction Deductions (schedule 3 attached)
5. Any other charges or rebates (schedule attached)

Total Goods Value€[]

Value Added Tax€[]

TOTAL INVOICE VALUE DUE BY [DATE] €[]

ACCOMMODATION CONTRACT DRAFTING (Regarding Savings)

[●].3

[●].3.2 The Operator shall be liable to the Minister for, and without prejudice to its other rights and remedies, the Minister shall be entitled to deduct from the Unitary Payment any savings made in its operating costs and any additional revenues earned by the Operator as a consequence of and to the extent that it has failed to provide the Services or make the Facility Available in accordance with this Agreement.

Comment: This provision can be controversial. It is designed to protect the Authority against situations where the savings the PPP Co may earn from failing to provide the service to the required level exceed the payment mechanism deductions. This can also be achieved through a performance point or termination warning mechanism.

ADDITIONAL ACCOMMODATION CONTRACT DRAFTING

Comment: In the Core Contract, the hours and days when the facility must be available are set out at the outset of the contract. In the Accommodation Contract, each year the Authority will notify the PPP Co of the hours and days during which the facility must be available. There, the Authority specifies the actual calendar days when the facility must be available, and is then entitled to an additional bank of hours, which it can call upon during the year. The Authority cannot exceed a specific number of hours of availability. This is because the PPP Co has used the information on the number of hours when the facility must be available to price the unitary charge.

[●] No reduction shall be made under Part 4A for any Unavailability of an Availability Area.

[●].1 where [Accommodation users] have been relocated to any accommodation offered as an alternative (Alternative Accommodation) under paragraph [●] of this Part [●] and for so long as

such Alternative Accommodation is Available provided that reduction may be made if the Operator is in breach of its obligations under paragraph [●] of this Part [●], or if the duration for which the Facility and the relevant [Accommodation users] have been relocated to the Alternative Accommodation exceeds [●] ([●]) months or such longer period as the Minister may agree, or where the period exceeds that originally proposed under paragraph [●] of this Part [●];

[●].2 where the Minister has unreasonably refused Alternative Accommodation offered to him under paragraph [●] of this Part [●] and for so long as such Alternative Accommodation itself is Available and provided always the Operator is not in breach of its obligations under paragraph [●] of this Part [●];

[●].3 where the cause of the Unavailability is the direction, intervention, negligent act or omission or default of the Minister, the Minister's Contract Manager or to the extent that Unavailability commences or is prolonged by the direction, intervention, act or omission of the Minister, the Minister's Contract Manager save where the Unavailability could have been prevented by the proper performance of the Operator's obligations under this Agreement;

[●].4 Provided always that:

[●].4.1 notwithstanding the Minister's Contract Manager's right to open the buildings at the Facility he/she shall be under no obligation to do so, and the Availability Area shall be treated as Unavailable but Used in accordance with paragraph [●] of this Part [●] from such time as a [●] staff becomes aware that the Operator has not fulfilled its obligations in respect of opening the buildings at the Facility and [●] is in a position to open the buildings at the Facility;

[●].4.2 if works necessary to restore Availability to any Unavailable Availability Area(s) could be carried out without access to such Unavailable Availability Area(s) the Grace Period relevant to the Unavailable Area(s) shall commence pursuant to paragraph [●] of Part [●] (Monitoring and Reporting) of this Schedule [●];

[●].4.3 if access is necessary in order to carry out any works to restore Availability or to prevent Unavailability then the relevant Grace Period shall commence immediately upon the Operator being permitted access to such Availability Area;

[●].5 where the Unavailability is necessary to permit works to be undertaken in relation to the implementation of a Change in accordance with Schedule [●] (Change Procedure) and provided that such works do not (save to the extent that any delay is caused by a Compensation Event, a Relief Event or a Force Majeure Event) extend beyond the period stated for such works by the Operator under paragraph [●] of Part [●] (Qualifying Change in Law or Minister Change) of Schedule [●] (Change Procedure);

[.....]

[●].9 where the Availability Area is Unavailable on days other than

[●].9.1 [●] Days and/or

[●].9.2 periods within the Availability Bank;

[●].10 where the Unavailability is caused by a Compensation Event;

Comment: The Accommodation Contract contains additional items which identify circumstances when, if the facility is not available under the contract, the PPP Co will not be penalised as a result. This includes provision for the PPP Co to provide alternative accommodation.

[●].1 Where the Minister's Contract Manager decides to continue to use an Availability Area which is Unavailable (other than due to a Relief Event) the amount of the reduction of the Unitary Payment calculated pursuant to Part [●] (Unavailability Deductions Mechanism) of this Schedule [●], (Primary Reduction), shall be reduced to an amount which is the percentage of such Primary Reduction set out below:

[●].1.1 [●] per cent ([●]%) in respect of Unavailability occurring on the [●] ([●])[●] Day during which Unavailability commenced and in respect of Unavailability during each of the next following [●] ([●]) consecutive [●] Days thereafter;

[●].1.2 [●] per cent ([●]%) in respect of Unavailability occurring during each of the [●] ([●]) consecutive [●] Days next following those referred to in paragraph [●] of this part [●]; and

thereafter there will be no reduction of the Primary Reduction until Availability is restored;

[●].2 Where the Minister's Contract Manager decides to continue to use an Availability Area which is Unavailable due to a Relief Event, the amount of the Primary Reduction shall be reduced to [●] per cent ([●]%) of the Primary Reduction until the Availability is restored.

[●].3 Where the Unavailability is due solely to a default or defect in [●] the Minister's Contract Manager may decide that the relevant Availability Area shall continue to be used and the amount of the Primary Reduction shall be reduced to an amount which is the percentage of such Primary Reduction set out below:

[●].3.1 [●] per cent ([●]%) in respect of Unavailability occurring on the [●] ([●])[●] Day during which Unavailability commenced and in respect of Unavailability during each of the next following [●] ([●]) consecutive [●] Days thereafter;

[●].3.2 [●] per cent ([●]%) in respect of Unavailability occurring during each of the [●] ([●]) consecutive [●] Days next following those referred to in paragraph [●] of this Part [●];

[●].3.3 [●] per cent ([●]%) in respect of Unavailability occurring during each of the [●] ([●]) consecutive [●] Days next following those referred to in paragraph [●] of this Part [●];

[●].3.4 [●] per cent ([●]%) in respect of Unavailability occurring during each of the [●] ([●]) consecutive [●] Days next following those referred to in paragraph [●] of this Part [●]

and thereafter there will be no reduction in the Primary Reduction until Availability is restored;

[●].4 The Minister's Contract Manager must consider all relevant factors when deciding if the Availability Areas which are Unavailable should be used pursuant to paragraph [●], including the extent to which the default or defect in relation to the relevant piece of [●] having a material impact on the ability of [●] to [●] in the relevant Availability Area.

Comment: The Accommodation Contract contains a concept whereby the Authority may decide to use an area, even though it is not fully functioning or fully fit to be used. If the Authority does so, the level of the deduction is reduced to reflect this.

[●] The following provisions shall apply in respect of Alternative Accommodation:

[●].1 The Operator may at any time while the whole or any part of the Facility is Unavailable, (provided the Operator is not in breach of its obligations under paragraph [●] of this Part [●]), offer to the Minister Alternative Accommodation in respect of the Facility or that part of the Facility which is Unavailable by notice to the Minister's Contract Manager containing:

[●].1.1 details of the Alternative Accommodation and arrangements for inspection of it by the

Minister's Contract Manager;

[●].1.2 proposals for relocation to and from the Alternative Accommodation;

[●].1.3 details of the proposed duration for which such Alternative Accommodation is offered; and

[●].1.4 proposed terms upon which [●] will occupy the Alternative Accommodation, (which must be no more onerous to the Minister than those provided for in this Agreement and shall not impose any rental obligations on the Minister and shall not require any payment of any kind by the Minister (other than the Unitary Payment as such may be adjusted pursuant to this Schedule [●]), whether to the Operator or otherwise).

[●].2 The Minister's Contract Manager shall notify the Operator within [●] ([●]) Working Days of receiving proposals from the Operator under paragraph [●] of this Part [●] of their acceptance or refusal of the proposals contained in the notice under paragraph [●] of this Part [●] provided that the Minister's Contract Manager shall accept the Operator's proposals unless in the Minister's Contract Manager's reasonable opinion:

[●].2.1 the Alternative Accommodation could not be used by them to perform the functions and/or deliver the same outputs which are customarily performed or delivered in or from the Facility or the part thereof which is Unavailable;

[●].2.2 the Alternative Accommodation does not meet the standard of temporary accommodation (by reference to an acceptable standard of temporary accommodation) in the Republic of Ireland and the United Kingdom in which comparable [●] establishments deliver [●];

[●].2.3 the Alternative Accommodation could be used only with material disruption to the curriculum or other activities of the college;

[●].2.4 the Alternative Accommodation is not easily accessible or is only accessible at an increased cost to those who are intended to use it;

[●].2.5 the proposed duration for which such Alternative Accommodation is offered is unreasonable in the circumstances (and, in any event if the proposed duration exceeds [●] ([●]) months it shall be deemed to be unreasonable unless the Minister agrees otherwise);

[●].2.6 the Operator is in breach of its obligations under paragraph [●] of this Part [●]; or

[●].2.7 the Minister would as a result of accepting the Alternative Accommodation incur costs not recoverable under paragraph [●] of this part [●].

[●].3 The Operator shall reimburse the Minister in respect of all the Ministers and [●] staff's reasonable and proper costs of inspecting, considering and transferring to and from any Alternative Accommodation and any additional costs incurred by the Minister and/or the [●] staff arising from the use or occupation of the Alternative Accommodation including any increased costs of travel of any persons intended to use the Alternative Accommodation. The Minister may deduct any such sums from any payment otherwise due to the Operator or recover such sums as a debt due and owing from the Operator.

Comment: Whilst we would advocate giving the PPP Co this option, the deductions that are set out in the PPP contract are by reference to the size and capability of the rooms in the facility. It may, therefore, be difficult to calculate a robust deduction in respect of any failures of service in the alternative accommodation. The resulting level of uncertainty in relation to the payment flow will make the banks lending money to the project nervous, as they wish to be in a position to calculate "worst case scenarios" regarding the money that is paid to

the PPP Co, which is used to repay their construction loan.

CROSS REFERENCES

This clause is referred to in the following clauses of the Compendium:

- Clause 53 (Effect of Termination)

This clause is relevant to the following entries in the Risk Matrix:

- B10 (Inflation)
- C21 (Inflation)
- D18 (Cost Control)
- D19 (Inflation)
- E1 (User Charging)
- E2 (External Developments)
- E3 (Excessive Profits)
- E4 (Price Changes)
- F2 (Interest Rates Pre Financial Close)
- F3 (Interest Rates Post Financial Close)
- F4 (Foreign Exchange)