



Llywodraeth Cymru
Welsh Government

Revised Code of Practice on Workforce Matters

Procurement Advice Note (PAN) for the Public Sector in Wales

Contents

Section No.	Section Name	Page No.
1.	Introduction	3
	<i>(i) Points to Note</i>	
	<i>(ii) Issues Addressed</i>	
2.	What is the revised Code of Practice on Workforce Matters?	3
3.	Where does the Code apply?	4
4.	How should the Code be applied?	5
5.	How will the Code be enforced?	6
6.	Guidance and Tools	6
Appendix A.	The Code	7
Annex	The Alternative Dispute Resolution Process	11
Appendix B.	Model contract terms	13

1. Introduction

(i) POINTS TO NOTE – *please ensure you read this section first*

- *The information set out in this document is not legal advice and is not intended to be exhaustive – contracting parties should seek their own independent advice as appropriate. Please also note that the law is subject to constant change and advice should be sought in individual cases. This document reflects the position as at May 2014.*
- *The model Contract Terms and Conditions at Appendix B are for illustrative purposes only and contracting parties should take their own independent legal advice.*
- *This Procurement Advice Note (PAN) builds on, and is consistent with, the information available in the Procurement Route Planners (PRPs) on <http://prp.wales.gov.uk>. The note therefore assumes a certain level of knowledge of public procurement.*

(ii) Issues Addressed

This note has been produced by the Welsh Government to assist public sector organisations when transferring public sector staff to a third party as part of an outsourcing contract. This note includes a basic summary of the history and background to the Code of Practice on Workforce Matters and its content in its revised form. It includes the new Code at Appendix A and provides some model Contract Terms and Conditions at Appendix B for potential use in contracting with suppliers of services. This note will be of specific interest to staff involved in the procurement and in the contract management of outsourced services.

2. What is the revised Code of Practice on Workforce Matters?

The revised Code of Practice on Workforce Matters is an updated form of a set of previous and existing Codes, known as the “Two Tier Workforce Codes”, issued by the UK and Welsh Governments to deal with perceived disadvantages to:

1. public sector staff who were transferred to a third party, usually as a result of an outsourcing; and
2. staff recruited by the contractor to work alongside the transferred workforce.

The revised Code is designed to ensure that where public services are outsourced to a third party (including the private or third sector) and staff transfer:

- (a) TUPE will apply, and if TUPE does not strictly apply, the principles of TUPE will be followed unless there are exceptional reasons for not doing so; and
- (b) staff of the service provider (whether newly recruited or existing staff) undertaking work on that contract will be employed on terms and conditions which are no less favourable than those of transferred staff, with the exception of pension arrangements where reasonable pension provision must be made as indicated in the Code.

The revised Code also requires the contracting authority to monitor the implementation of the Code by service providers wherever it applies, and to provide an annual report to the Welsh Government.

The obligations within the Code are covered specifically in clauses 1.2 and 1.6 of the model terms and conditions. Some other outsourcing provisions are covered in the remaining model terms and conditions.

There have been two Codes in place in Wales in recent years; these broadly replicated the equivalent Codes issued in England. The 2003 Welsh Code which was issued under specific statutory authority for best value authorities (now improvement authorities) other than fire and rescue authorities, and the 2005 Welsh Code which was issued for the remainder of the public service (and which was reissued in 2008).

The UK Government removed the English Codes in 2010 and 2011, replacing them with a document entitled “Principles of Good Employment Practice”. These are voluntary principles and less rigorous than the previous UK and the existing Welsh Codes. The latter have remained in force in Wales since they were issued.

The new single broadly-applied Code reissues and updates the earlier Welsh Codes, with the core content remaining the same. Additional material includes the following:

- Where a service provider transfers staff originally employed by the public sector to a sub-contractor, the primary service provider will be responsible for the observance of the Code by the sub-contractor.
- The new Code defines a “New Joiner” as including both new employees to the service provider recruited for the purpose of the public service contract and existing employees of the service provider who are allocated to work on the contract covered by the terms of the Code.
- New monitoring and reporting mechanisms.
- Amendments to reflect pension auto-enrolment, the revised Fair Deal and the Welsh Authorities Staff Transfers (Direction) 2012.
- Alternative provision, in some instances, where the service provider is a public body.

This Advice Note is designed to help you develop suitable contract terms and conditions to support the application and enforcement of the Code.

3. Where does the Code apply?

The Code of Practice, included at Appendix A, will apply to:

- County and county borough councils
- Community councils
- National Park authorities
- Fire and rescue authorities
- Local Health Boards
- NHS trusts
- the governing bodies of maintained schools and federations of maintained schools

- the Arts Council for Wales
- the Care Council for Wales
- the Higher Education Funding Council for Wales
- the Local Democracy and Boundary Commission for Wales
- the National Library for Wales
- the National Museum for Wales
- the Natural Resources Body for Wales
- the Royal Commission on Ancient and Historic Monuments in Wales
- the Sports Council for Wales.

In all cases the public bodies must have regard to the Code of Practice on Workforce Matters in Public Sector Service Contracts, as set out in Appendix A.

4. How should the Code be applied?

The Code should be applied whenever public services are to be outsourced to a third party. Contracting exercises, including retendering (and where a contract is terminated and the work is transferred to another service provider other than through a tendering process) should be conducted on the basis that the TUPE Regulations 2006 will apply unless there are exceptional reasons why this should not be the case.

At the earliest possible stage in the contracting process the public body should state that staff will be eligible to transfer and this will normally have the effect of causing TUPE to apply. Legal advice may need to be sought to confirm the applicability of TUPE, but even where TUPE does not strictly apply the principles of TUPE should be followed and the staff should be treated no less favourably than they would have been had the Regulations applied. This includes compliance with the provisions of *A Fair Deal for Staff Pensions*, which was revised in 2013.

Where two or more public bodies enter into a contract with a service provider and there are two or more groups of transferring employees the contract should specify which group of employees' terms and conditions should be used for the "no less favourable" comparison.

The Code of Practice will also ensure that new joiners to the transferred-out workforce are offered terms and conditions which are no less favourable than those of the transferred staff. This does not apply to pensions, but new joiners must also be offered a reasonable pension provision as indicated in the Code.

Where a prime contractor transfers staff originally in the employ of a public sector organisation to a sub-contractor, the prime contractor will be responsible for the observance of the Code by the sub-contractor.

Practically, this means that the terms and conditions of contract, included within the Invitation to Tender documents, should incorporate the obligations within the Code of Practice and include provisions for resolving disputes. A set of model clauses for this purpose is provided at Appendix B.

5. How will the Code be enforced?

The Code states that the public service organisation will enforce any contract conditions placed on the service provider that have been put in place under the Code. This means that compliance with the Code must form part of contract management process.

The Welsh Government will monitor the application of the Code by requiring public bodies to report annually on the number of outsourcing contracts entered into and whether or not the Code was applied in each case, as well as information on any disputes arising from the Code. The details of this annual reporting arrangement are included within the Code at Appendix A (paragraphs 11 and following).

Concerns or complaints from transferred staff and New Joiners in relation to the Code will initially be put to the service provider for resolution. The contracting authority will be responsible for enforcing the terms of the contract, which should include a provision for resolving disputes in a fast and cost-effective manner designed to achieve a resolution to which all parties are committed. This is known as the Alternative Dispute Resolution process (ADR) and is described in the Annex to the Code (at Appendix A).

The obligation to comply with the Code needs to be imposed on the service provider through the contract terms. Under the Code the service provider is required to provide the contracting authority with the information needed to monitor compliance. This requirement is unchanged from previous versions of the Code. The Welsh Government's requirement that public service organisations report annually on their outsourcing activity and the application of the code (as described above) is a new requirement compared with the previous Codes.

6. Guidance and Tools

Below are some of the policy guidance documents and supporting tools that are available to you for use in your procurement activity:-

Selection and Award Criteria Guidance, Value Wales (2010)

<http://prp.wales.gov.uk/planners/general/planning/selectioncriteria/>

Employment Rights on the Transfer of an Undertaking. A guide to the 2006 TUPE Regulations (as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014) for employees, employers and representatives)

<https://www.gov.uk/government/publications/tupe-a-guide-to-the-2006-regulations>

A Fair Deal for Staff Pensions. Updated guidance 2013.

<https://www.gov.uk/staff-transfers-public-service-pension-schemes>

Should you require further information please contact:

Value Wales: vwpolicy@wales.gsi.gov.uk

Appendix A:

CODE OF PRACTICE ON WORKFORCE MATTERS IN PUBLIC SECTOR SERVICE CONTRACTS

Treatment of transferees

1 In its contracting-out of services, the public sector organisation will apply the principles set out in the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector (the Cabinet Office Statement) and the 2013 revised version of the annex to it, A Fair Deal for Staff Pensions¹. The service provider will be required to demonstrate its support for these principles and its willingness to work with the public sector organisation fully to implement them.

2 The intention of the Cabinet Office Statement is that staff will transfer and that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)² should apply, and that in circumstances where TUPE does not apply in strict legal terms, the principles of TUPE should be followed and the staff involved should be treated no less favourably than had TUPE applied.

3 The Fair Deal annex to the Cabinet Office Statement (prior to October 2013) required the terms of a business transfer specifically to protect the pensions of transferees. Transferring staff had to have continuing access to the local government pension scheme or be offered membership of a pension scheme which was broadly comparable to the public service pension scheme which they were leaving.

The 2013 Fair Deal describes its effect in this way (at paragraph 1.5) –

In future staff who are compulsorily transferred from the public sector will be offered continued access to a public service pension scheme rather than be offered a broadly comparable private pension scheme. In broad terms, all staff whose employment is compulsorily transferred from the public sector under TUPE, including subsequent TUPE transfers, to independent providers of public services will retain access to their current employer's pension arrangements.

For clarity, under this Code but subject to the next paragraph, the Fair Deal principles will apply not just to those transferring under TUPE but also (as mentioned in paragraph 1) to those who transfer where TUPE does not apply in strict legal terms.

4 The 2013 Fair Deal and this Code have no application to staff in so far as their pension provision is secured under the Welsh Authorities Staff Transfers (Pensions) Direction 2012

¹ The Cabinet Office Statement was first published in 2000 and then revised in 2007, largely to take account of changes to the TUPE Regulations. The Fair Deal guidance was published by HM Treasury in June 1999 as *A Fair Deal for Staff Pensions*. It was subsequently republished in January 2000 as an appendix to the Cabinet Office Statement of Practice. The Fair Deal was revised substantively in October 2013.

² S.I.2006/246.

(the 2012 Direction)³. The 2012 Direction only applies to staff of county and county borough councils, community councils, fire and rescue authorities and National Park authorities.

5 This Code of Practice (including the application of the Cabinet Office Statement and the accompanying Fair Deal guidance) also applies to transfers of a public service activity, whether permanently or not, and whether or not to a charity or another public service body.

In addition –

- for the purposes of this Code, the Cabinet Office Statement will be deemed to remain in effect even if it is withdrawn by the UK Government;
- the Code is to have effect during any extension of a contract to which this Code applies.

Treatment of new joiners to an outsourced workforce

6 Where the service provider arranges for staff to work on a public service contract alongside staff transferred from the public sector organisation, it will offer employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees. The service provider will also offer reasonable pension arrangements (as described at paragraph 10 below).

In this Code “new joiners” means all staff of the service provider, whether they are recruited for the purpose of the public service contract or whether they are existing or future staff of the service provider who are allocated to work on the public service contract beside transferees.

This provision is subject to paragraphs 9 and 10.

7 The principle underpinning the provisions of paragraph 6 is to consider employees’ terms and conditions (other than pensions arrangements which are dealt with in paragraph 11) in the round – as a ‘package’. This Code does not prevent service providers from offering new joiners a package of non-pension terms and conditions which differs from that of transferred staff, so long as the overall impact of the changes to this package meets the conditions in paragraph 6. The aim is to provide a flexible framework under which the provider can design a package best suited to the delivery of the service, but which will exclude changes which would undermine the integrated nature of the team or the quality of the workforce.

8 The service provider will consult representatives of a trade union where one is recognised, or other elected representatives of the employees where there is no recognised trade union, on the terms and conditions to be offered to such new joiners.

(References to ‘trade unions’ throughout this code should be read to refer to other elected representatives of the employees where there is no recognised trade union.)

The arrangements for consultation will involve a genuine dialogue. The precise nature of the arrangements for consultation is for agreement between the service provider and the recognised trade unions. The intention is that contractors and recognised trade unions

³ The Welsh Authorities Staff Transfers (Direction) 2012 was given by the Welsh Ministers on 4 March 2012 (effective from 6 March 2012).

should be able to agree on a particular package of terms and conditions, in keeping with the terms of this Code, to be offered to new joiners.

9 It is recognised that complications may arise where two or more public bodies enter into a contract with a service provider and there are two or more groups of transferring employees. To provide clarity, the contract should specify which group of employees' terms and conditions should be used for the "no less favourable" comparison.

10. Where the service provider itself is a public body within the scope of this Code and new joiners are employed on the same terms and conditions as that body's other staff, the provision about new joiners does not apply (and accordingly the "no less favourable comparison" is not required).

Pension arrangements for new joiners to an outsourced workforce

11 The service provider will be required to offer new joiners one of the following pension provision arrangements:

- membership of the local government pension scheme, where the employer has admitted body status within the scheme and makes the requisite contributions;
- membership of the relevant public services pension scheme where, under the 2013 Fair Deal, the employer has entered into a participation agreement as mentioned in the Fair Deal and makes the requisite contributions;
- membership of a pension scheme which meets the auto-enrolment standards under the Pensions Act 2008 (whether or not the Act requires the service provider to offer membership to the new joiner).

When a contract to which this Code applies is terminated and the work is given to another contractor, the new service provider will be required to offer one of these pensions options to any staff who transfer to it and who had prior to the transfer a right under the Code to one of these pension options.

Monitoring arrangements

12 The service provider will be required to provide the public sector organisation (throughout the term of the contract and any extension) with information as requested to enable the public sector organisation to monitor compliance with the conditions set out in this Code by the service provider and, where appropriate, its sub-contractors. This information will include the terms and conditions for transferred staff and the terms and conditions for the service provider's, and sub-contractors', employees allocated to work on the contract.

13 Such requests for information will be restricted to that required for the purpose of monitoring compliance; will be designed to place the minimum burden on the service provider commensurate with this, and will respect commercial confidentiality. The service provider and the public sector organisation will also support a review of the impact of the Code, drawn up in consultation with representatives of the public sector organisations, contractors, trade unions and will provide information as requested for this purpose. Such requests will follow the same principles of proportionality and confidentiality.

14 Public service organisations will report annually to the Welsh Ministers setting out:

- the number of outsourcing contracts entered into;
- the number of outsourcing contracts entered into where the Code would apply;
- the number of outsourcing contracts entered into where the provisions of the Code were included in the contract;
- the number of outsourcing contracts entered into where the provisions of the Code were not included in the contract and the reasons why;
- information on the implementation of the Code by service providers; and
- information on any disputes entered into via the Alternative Dispute Resolution process.

Enforcement

15 The public sector organisation will enforce the obligations on the service provider created under the application of this Code. Employees and recognised trade unions should, in the first instance, seek to resolve any complaints they have about how the obligations under this Code are being met, directly with the service provider. Where it appears to the public sector organisation that the service provider is not meeting its obligations, or where an employee of the service provider or a recognised trade union writes to the public sector organisation to say that it has been unable to resolve a complaint directly with the service provider, the public sector organisation will first seek an explanation from the service provider. If the service provider's response satisfies the public sector organisation that the Code is being followed, the public sector organisation will inform any complainant of this. If the response does not satisfy the public sector organisation it will ask the service provider to take immediate action to remedy this. If, following such a request, the service provider still appears to the public sector organisation not to be complying with the Code, the public sector organisation will seek to enforce the terms of the contract, which will incorporate this Code.

16 The contract is to include a provision for resolving disputes about the application of this Code in a fast, efficient and cost effective way as an alternative to litigation, and which is designed to achieve a resolution to which all the parties are committed. The service provider, public sector organisation and recognised trade unions or other staff representatives, are all to have access to this 'Alternative Dispute Resolution' (ADR) process (the Annex to this Code sets out the ADR procedure).

17 Employees or trade unions who need to seek advice in cases where they consider that the public sector organisation has failed to meet its responsibilities under paragraph 15, should contact the Welsh Government.

Sub-contractors

18 This Code sets out procedures for handling matters between the public sector organisation and a primary service provider. Where the primary service provider transfers staff originally in the employ of the public sector organisation to a sub-contractor, the primary service provider will be responsible for the observance of this Code by the sub-contractor.

Operation of the Code

19 The Welsh Government will monitor the operation of the Code, following consultation with relevant employers and trade unions.

Welsh Government 2014

ANNEX :

Code of Practice on Workforce Matters: Alternative Dispute Resolution (ADR) Procedure

Introduction

This Annex sets out a procedure for resolving disputes arising from the application of the Code of Practice on Workforce Matters. The procedure should be a last resort and all parties will make their best efforts to resolve problems by agreement. The ADR procedure should be fast, efficient and cost-effective.

The need to exhaust local procedures

The parties must exhaust all normal local procedures as required by paragraph 8 and paragraph 15 of the Code before invoking the ADR procedure provided for in paragraph 16.

Who is responsible for resolving disputes?

The ADR procedure will be under the supervision of an independent person appointed from an approved list supplied by ACAS . If the parties so agree, they may appoint two “wing members” with an employer and trade union background to assist the independent person.

The dispute resolution process

Disputes will be resolved using the following three-stage procedure.

Stage 1: The independent person

The independent person will be invited to answer three questions:

i) Is this a dispute about the application of the Code?

If the answer is no, the matter can proceed no further. If yes, then the independent person will move to question (ii).

ii) Have the parties exhausted local procedures?

If the answer is no, then the parties will be invited to make further local efforts to resolve the dispute. If yes, then the independent person will conduct an independent assessment, by answering question (iii) and giving reasons for the answer.

(iii) Do the terms and conditions of employment on offer to new joiners comply with the Code?

If the answer is yes, then the matter is deemed to be concluded and the contractor can continue to offer the same package of conditions to new joiners. If the answer is no, then the dispute will proceed to Stage 2.

Time limit: Twenty working days.

Stage 2: Discussions with a view to reaching an agreement on compliant terms and conditions

Stage 2 begins with the parties being invited to seek to resolve the matter through further discussions. The independent person will make themselves available to the parties to facilitate the process. The parties also have the option of establishing other arrangements for mediation. If the parties can reach an agreement consistent with the Code then the matter is closed and the new package of conditions of employment will be applied both to new starters and to those employed during the dispute. If no agreement can be reached within the allotted time then the dispute will proceed to Stage 3.

Time limit: Ten working days, with the possibility that this might be extended by the agreement of the parties and with the consent of the independent person.

Stage 3: Final reference to the independent person

The independent person invites the parties to make final submissions. If the independent person then believes it would be worthwhile, the parties may be given a short period of further discussion. If there is no value in giving the parties more time - or if during any discussion the parties were unable to agree on how to bring the matter to a successful conclusion - then the independent person will proceed to a final binding arbitration. Having heard the evidence and reached a conclusion the independent person will impose a revised package of terms and conditions applicable to each of the affected employees.

Time limit: Ten working days

MODEL CONTRACT TERMS AND CONDITIONS

THIS AGREEMENT is made on

2014

BETWEEN

(1) [**Name of Authority**] of [Address] (the **Authority**); and

(2) [**Contractor Limited**] (company registered number:) whose registered office is at [Address] (the **Contractor**)

each one a **Party** and together the **Parties**

Definitions and Interpretation

⁴Administering Authority

has the meaning given to it in Schedule 1 of the Local Government Pension Scheme Regulations 2013 (SI No. 2356)

Admission Agreement

has the meaning given to it in Schedule 1 of the Local Government Pension Scheme Regulations 2013 (SI No. 2356)

Admission Body

has the meaning given to it in Schedule 1 of the Local Government Pension Scheme Regulations 2013 (SI No. 2356)

Appropriate Pension Provision

in respect of Eligible Employees, either:

- (a) membership, continued membership or continued eligibility for membership of their Legacy Scheme; or
- (b) membership or eligibility for membership of a pension scheme, which is certified by the Government Actuary's Department (GAD) as being broadly comparable to the terms of their Legacy Scheme;

Assigned Employees

has the meaning given to it in clause 1.7 (Retendering);

Authority Existing Employee

in relation to any service equivalent to any of the Services, all those persons employed by the Authority under a contract of employment (but excluding any person engaged by the Authority as an independent contractor or persons employed by any sub-contractor engaged by the Authority) who are wholly or substantially engaged in the provision of that service as at the Service Transfer Date;

Authority

the contracting authority or public sector body in Wales to whom the Code of Practice is addressed;

⁴ This definition will not be needed where the Authority is also the Administering Authority.

Cessation Date

any date on which the Contractor ceases to be an Admission Body or ceases to be eligible to participate in a Legacy Scheme other than the LGPS other than as a result of the termination or expiry of this Agreement or because it ceases to employ any Eligible Employees;

Code

the Code of Practice on Workforce Matters in Public Sector Service Contracts 2014;

Code Obligations

the express obligations of the Contractor in clause 1.6 (Compliance with Code Obligations);

Direct Losses

all damages, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an indemnity basis), proceedings, demands and charges whether arising under statute, contract or at common law;

Effective Date

the date(s) on which the Services (or any part of the Services), transfer from the Authority [or any Third Party Employer] to the Service Provider or Sub-Contractor, and a reference to the Effective Date shall be deemed to be the date on which the employees in question transferred or will transfer to the Service Provider or Sub-Contractor;

Eligible Employees

LGPS Eligible Employees and Non-LGPS Eligible Employees;

Employee Liability Information

the employee liability information to be provided pursuant to Regulation 11 of TUPE;

Future Service Provider

shall have the meaning given in clause 1.4.4 (Indemnities);

Legacy Scheme

the pension scheme of which the Eligible Employees are members, or are eligible for membership of, or are in a waiting period to become a member of, prior to the Relevant Transfer;

LGPS

the Local Government Pension Scheme established pursuant to regulations made in exercise of powers under sections 7 and 12 of the Superannuation Act 1972 (as amended from time to time);

LGPS Eligible Employee

- (a) Transferring Employees who are active members of (or are eligible to join) the LGPS on the date of a Relevant Transfer including the Effective Date; and/or
- (b) Third Party Employees who are former employees of the Authority and who were active members of (or who were eligible to join) the LGPS on the date of a previous Relevant Transfer of the Services;

New Joiner

all staff of the Contractor and/or any Sub-Contractor, whether they are recruited for the purpose of the public service contract or whether they are existing or future staff of the service provider, who are allocated to work on the public service contract alongside the Transferring Employees;

Non-LGPS Eligible Employee

- (a) Transferring Employees who are active members of (or are eligible to join) a Legacy Scheme other than the LGPS on the date of a Relevant Transfer including the Effective Date; and/or
- (b) Third Party Employees who are former employees of the Authority and who were active members of (or who were eligible to join) a Legacy Scheme other than the LGPS on the date of a previous Relevant Transfer of the Services;

Participating Authority

any organisation which is required under the provisions governing any Legacy Scheme to supervise the administration of all or part of such Scheme;

⁵Participation Agreement

means an agreement between a Participating Authority and the Contractor or any Sub-Contractor that named individuals, or all or any specified class of the Contractor's or Sub-contractor's employees, may be members of a Legacy Scheme other than the LGPS;

Pay

the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which a Transferring Employee receives either directly or indirectly in respect of his or her employment with the Authority;

Relevant Employees

the employees who are the subject of a Relevant Transfer;

Relevant Transfer

a relevant transfer for the purposes of TUPE;

Returning Employees

has the meaning given to it in clause 1.7 (Retendering) and clause 1.8.2 (Termination of Agreement);

Service Transfer Date

the transfer on a date agreed by the Parties to the Contractor of responsibility for provision of (or procuring the provision by Sub-Contractors of) the Services in accordance with this Agreement [NOTE – if likely to be more than one transfer date – define "Relevant Service Transfer Date" – "the transfer on one or more dates agreed by the Parties (each a "Relevant Service Transfer Date") to the Contractor of responsibility for provision of (or procuring the provision by Sub-Contractors of) the Services in accordance with this Agreement];

Services

the Services that the Contractor is required to provide under this Agreement;

[Specified Group of Transferring Employees

the group or category of employees described at Appendix • to this Agreement;]

Third Party Employees

Employees of Third Party Employers whose contracts of employment transfer with effect from the Effective Date to the Contractor or a Sub-Contractor by virtue of the application of TUPE;

Third Party Employer

A service provider engaged by the Authority to provide Services to the Authority before the Effective Date and whose employees will transfer to the Contractor on the Effective Date;

⁵ The terms relating to the ability of third-party employers to participate in public sector pension schemes other than the LGPS have not yet been finalised and various references, including "Non-LGPS Eligible Employees", "Participating Authority", "Participation Agreement" and clause 2.3 may need to be changed once the precise terms are known.

Transferring Employee

an employee of the Authority (excluding, without limitation, any person engaged by the Authority as an independent contractor or persons employed by any sub-contractor engaged by the Authority) whose contract of employment becomes, by virtue of the application of TUPE in relation to what is done for the purposes of carrying out this Agreement between the Authority and the Contractor, a contract of employment with someone other than the Authority;

TUPE

the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI No. 246) as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment)(Amendment) Regulations 2014 (SI No. 16).

TUPE AND EMPLOYEES

Relevant Transfers

The Authority and the Contractor agree that the following events:

1.1.1 the Service Transfer Date; and

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

shall constitute a Relevant Transfer and that the contracts of employment (together with any collective agreement) of any Relevant Employees shall have effect (subject to Regulation 4(7) of TUPE) thereafter as if originally made between those employees and the new provider except insofar as such contracts relate to any benefits for old age, invalidity or survivors under any occupational pension scheme [(save as required under sections 257 and 258 of the Pensions Act 2004)]. On the occasion of a Relevant Transfer (save on expiry or termination of this Agreement) the Contractor shall procure that the former and the new Sub-Contractor shall both comply with their obligations under TUPE.

The Authority shall comply with its obligations under TUPE in respect of each Relevant Transfer pursuant to this Agreement and the Contractor shall comply and shall procure that each Sub-Contractor shall comply with its obligations (including without limitation the obligation under Regulation 13(4) of TUPE) in respect of each Relevant Transfer pursuant to this Agreement and each of the Authority and the Contractor shall indemnify the other against any Direct Losses sustained as a result of any breach of this clause 1.1 by the Party in default.

1.2 Offer of Employment

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

if it is believed that TUPE will not apply to a person, not less than ten (10) Business Days before the Service Transfer Date; or

if it is believed that TUPE applies to a person but it is subsequently decided that TUPE does not so apply, as soon as is practicable and in any event no later than ten (10) Business Days after that decision is known to the Contractor.

- 1.2.2 Where any such offer as referred to in clause 1.2.1 is accepted, the Authority shall comply with the terms of clause 1.3.1 and shall indemnify and keep indemnified in full the Contractor on the same terms and conditions as those set out in clauses 1.4.1, 1.4.2 and 1.4.3 of this Agreement as if there had been a Relevant Transfer in respect of each and every Authority Existing Employee who has accepted any such offer.
- 1.2.3 Where any such offer as referred to in clause 1.2.1 is accepted, the Contractor shall act and shall procure that each relevant Sub-Contractor shall act in all respects as if TUPE had applied to each and every Authority Existing Employee who has accepted any such offer and shall comply with clause 2 (Pensions) of this Agreement in respect of each and every such employee who was immediately before the Service Transfer Date an Authority Existing Employee.
- 1.2.4 Where any offer as referred to in clause 1.2.1 is not accepted and TUPE does not apply, the relevant Authority Existing Employee shall remain an employee of the Authority.

1.3 Emoluments and Outgoings

- 1.3.1 The Authority shall be responsible for all remuneration, benefits, entitlements and outgoings in respect of the Transferring Employees, and any other person who transfers to the Contractor (or any relevant Sub-Contractor) pursuant to clause 1.2, including without limitation all wages, holiday pay, bonuses, commissions, payments of PAYE, National Insurance Contributions, pension contributions and otherwise, up to the Service Transfer Date.
- 1.3.2 The Contractor shall be responsible or shall procure that any relevant Sub-Contractor is responsible for all remuneration, benefits, entitlements and outgoings in respect of the Relevant Employees and any other person who either transfers to the Contractor (or any relevant Sub-Contractor) pursuant to clause 1.2 or who is or will be employed or engaged by the Contractor or any Sub-Contractor in connection with the provision of any of the Services, including without limitation all wages, holiday pay, bonuses, commission, payment of PAYE, National Insurance Contributions, pension contributions and otherwise, from and including the Service Transfer Date.

1.4 Indemnities

- 1.4.1 The Authority shall indemnify and keep indemnified in full the Contractor (for itself and for the benefit of each relevant Sub-Contractor) against all Direct Losses incurred by the Contractor or any relevant Sub-Contractor in connection with or as a result of:
 - (a) a breach by the Authority of its obligations under clause 1.3.1; and

- (b) subject to clause 1.4.4 any claim or demand by any Transferring Employee that arises from any act, fault or omission of the Authority in relation to any such employee prior to the date of the Relevant Transfer (save where such act, fault or omission arises as a result of the Contractor's or any relevant Sub-Contractor's failure to comply with Regulation 13 of TUPE) and any such claim is not in connection with the Relevant Transfer.
- 1.4.2 Where any liability in relation to any Transferring Employee, in respect of his or her employment by the Authority or its termination which transfers in whole or part in accordance with TUPE and/or the Directive arises partly as a result of any act or omission occurring on or before the Service Transfer Date and partly as a result of any act or omission occurring after the Service Transfer Date, the Authority shall indemnify and keep indemnified in full the Contractor or the relevant Sub-Contractor against only such part of the Direct Losses sustained by the Contractor or any Sub-Contractor in consequence of the liability as is reasonably attributable to the act or omission occurring before the Service Transfer Date.
- 1.4.3 The indemnities contained in clause 1.4.1 shall apply as if references in those clauses to any Transferring Employee also included a reference to any Relevant Employee and references to any act, fault or omission of the Authority also included a reference to the relevant Third Party Contractor employer of the Relevant Employee prior to the Service Transfer Date to the extent that the Authority recovers any sum in respect of the subject matter of those indemnities from such Third Party Contractor under any indemnity or other legal entitlement it has against such Third Party Contractor. The Authority will use all reasonable endeavours to recover any such sums under any such entitlement as is mentioned in this clause 1.4.3.
- 1.4.4 The Contractor shall indemnify and keep indemnified in full the Authority, and at the Authority's request each and every service provider who shall provide any service equivalent to any of the Services immediately after expiry or earlier termination of this Agreement (a Future Service Provider) against:
 - (a) all Direct Losses incurred by the Authority or any Future Service Provider in connection with or as a result of any claim or demand against the Authority or any Future Service Provider by (i) any person who is or has been employed or engaged by the Contractor or any Sub-Contractor in connection with the provision of any of the Services or (ii) any trade union or staff association or employee representative in respect of any such person, in either case where such claim arises as a result of any act, fault or omission of the Contractor and/or any Sub-Contractor after the Service Transfer Date;
 - (b) all Direct Losses incurred by the Authority or any Future Service Provider in connection with or as a result of a breach by the Contractor of its obligations under clause 1.3.2; and
 - (c) all Direct Losses incurred by the Authority or any Future Service Provider in connection with or as a result of any claim by any Relevant Employee, trade union or staff association or employee representative (whether or not recognised by the Contractor and/or the relevant Sub-Contractor in respect of all or any of the Relevant Employees) arising from or connected with any failure by the Contractor and/or any Sub-Contractor to comply with any legal obligation to such trade union, staff association or other employee representative whether under Regulation 13 of TUPE, under the Directive or otherwise and, whether any such claim arises or has its origin before or after the date of the Service Transfer Date.

1.4.5 The Contractor shall indemnify and keep indemnified in full the Authority, against all Direct Losses incurred by the Authority in connection with or as a result of:

- (a) any claim by any Relevant Employee that any proposed or actual substantial change by the Contractor or any Sub-Contractor to the Relevant Employees' working conditions or any proposed measures of the Contractor or the relevant Sub-Contractor are to that employee's detriment whether such claim arises before or after the Service Transfer Date; and
- (b) any claim arising out of any misrepresentation or mis-statement whether negligent or otherwise made by the Contractor or Sub-Contractor to the Relevant Employees or their representatives whether before on or after the Service Transfer Date and whether liability for any such claim arises before on or after the Service Transfer Date.

1.4.6 The indemnities in clauses 1.4.4 and 1.4.5 shall not apply in respect of any sum for which the Authority is to indemnify the Contractor or a relevant Sub-Contractor pursuant to clause 1.4.1 or to the extent that the claim arises from a wrongful act or omission of the Authority or any Future Service Provider.

1.5 Provision of Details and Indemnity

The Contractor shall as soon as reasonably practicable and in any event within five (5) Business Days following a written request by the Authority provide to the Authority details of any measures which the Contractor or any Sub-Contractor envisages it or they will take in relation to any employees who are or who will be the subject of a Relevant Transfer, and if there are no measures, confirmation of that fact, and shall indemnify the Authority against all Direct Losses resulting from any failure by the Contractor to comply with this obligation.

1.6 Compliance with Code Obligations

1.6.1 The Authority and the Contractor shall (and the Contractor shall procure that any Sub-Contractor shall) have regard to the Code in interpreting and applying the Code Obligations.

1.6.2 In addition to its obligations pursuant to clause 1.2 and subject to clause 1.6.4, the Contractor shall procure that any New Joiners shall be employed on terms and conditions of employment which are:

- (a) overall fair and reasonable and no less favourable than those of the Transferring Employees [(or, where employees transfer from more than one Authority, the Specified Group of Transferring Employees)] engaged in the provision of the Services who are working alongside and holding the same or a similar position to that of the New Joiners; or
- (b) the same as the Contractor's existing staff, where those terms and conditions of employment are the subject of national agreement.

1.6.3 The Contractor shall, and shall procure that any relevant Sub-Contractor shall, consult with the recognised trade unions and where there is no recognised trade union any other employee representative body on the terms to be offered to the New Joiners pursuant to clause 1.6.2.

- 1.6.4 In addition to its obligations under clause 1.6.2, the Contractor shall procure that the New Joiners are offered either:
- (a) membership of the LGPS where the Contractor has entered into an Admission Agreement; or
 - (b) membership of the relevant Legacy Scheme other than the LGPS where, under the 2013 Fair Deal⁶, the employer has entered into a Participation Agreement as set out in the Fair Deal; or
 - (c) membership of a pension scheme which meets the auto-enrolment standards under the Pensions Act 2008 (whether or not the Act requires the service provider to offer membership to the New Joiner).
- 1.6.5 During the term of this Agreement, the Contractor shall provide or procure that the Authority is provided with such accurate and complete information as requested by the Authority as soon as reasonably practicable, including the terms and conditions of employment of the Transferring Employees and the New Joiners, where this is required to monitor the Contractor's compliance with its Code Obligations.
- 1.6.6 The Contractor shall and shall procure that any relevant Sub-Contractor shall support the Welsh Government sponsored review and monitoring programme on the impact of the Code⁷ and provide the Authority as requested with such accurate and complete information as soon as reasonably practicable in order to assist the Authority in doing this.
- 1.6.7 The Authority and the Contractor shall in the first instance seek to resolve by discussions between them any complaints from any employee or any recognised trade union in relation to compliance by the Contractor and any Sub-Contractor with its Code Obligations.
- 1.6.8 Where it appears to the Authority or the Contractor that it is not possible to resolve the matter by continuing discussions between them pursuant to clause 1.6.7 or where an employee of the Contractor or any recognised trade union writes to the Authority to confirm that it has been unable to resolve its complaint directly with the Contractor or any Sub-Contractor in relation to the Contractor's Code Obligations:
- (a) the Authority shall first write to the Contractor to seek an explanation for the alleged failure by the Contractor to comply with its Code Obligations. The Contractor shall or shall procure that the relevant Sub-Contractor provide such an explanation in writing within five (5) Business Days of receipt of the request from the Authority;
 - (b) if the response provided by the Contractor or any Sub-Contractor satisfies the Authority that the Code Obligations have been met, then the Authority will inform the complainant of this;
 - (c) in the event that the Authority is not satisfied with the response provided by the Contractor or any Sub-Contractor the Authority shall write to the

⁶ A Fair Deal for Staff Pensions (October 2013) – Appendix to the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector

⁷ The details of the reporting requirements faced by public bodies are included within the Code in Appendix A.

Contractor to require the Contractor to take immediate action to resolve this dispute; and

- (d) if, following such a request by the Authority the Contractor still appears to the Authority not to be complying with its Code Obligations, the Authority shall seek to enforce the terms of this clause 1.6.

1.6.9 The Authority, the Contractor (or any Sub-Contractor) and any recognised trade unions and/or other staff representatives shall have access to the Alternative Dispute Resolution process set out in the Annex to the Code⁸ as a means of resolving any disputes arising from the application of the Code.

1.7 Retendering

1.7.1 The Contractor shall (and shall procure that any Sub-Contractor shall) within the period of twelve (12) months immediately preceding the expiry of this Agreement or following the service of a notice or as a consequence of the Authority notifying the Contractor of its intention to retender this Agreement:

- (a) on receiving a written request from the Authority provide in respect of any person engaged or employed by the Contractor or any Sub-Contractor in the provision of the Services (the “**Assigned Employees**”) full and accurate details regarding the identity, number, age, sex, length of service, job title, grade and terms and conditions of employment of and other matters affecting each of those Assigned Employees who it is expected, if they remain in the employment of the Contractor or of any Sub-Contractor as the case may be until immediately before the Termination Date, would be Returning Employees (the “**Retendering Information**”);
- (b) provide the Retendering Information promptly and at no cost to the Authority;
- (c) notify the Authority forthwith in writing of any material changes to the Retendering Information promptly as and when such changes arise;
- (d) be precluded from making any material increase or decrease in the numbers of Assigned Employees other than in the ordinary course of business and with the Authority's prior written consent (such consent not to be unreasonably withheld or delayed);
- (e) be precluded from making any increase in the remuneration or other change in the terms and conditions of the Assigned Employees other than in the ordinary course of business and with the Authority's prior written consent (such consent not to be unreasonably withheld or delayed); and
- (f) be precluded from transferring any of the Assigned Employees to another part of its business or moving other employees from elsewhere in its or their business who have not previously been employed or engaged in providing the Services to provide the Services save with the Authority's prior written consent (such consent not be unreasonably withheld or delayed).

⁸ At Appendix A.

1.7.2 The Contractor shall indemnify and shall keep indemnified in full the Authority and at the Authority's request any Future Service Provider against all Direct Losses arising from any claim by any party as a result of the Contractor or Sub-Contractor failing to provide or promptly to provide the Authority and/or any Future Service Provider where requested by the Authority with any Retendering Information and/or Employee Liability Information or to provide full Retendering Information and/or Employee Liability Information or as a result of any material inaccuracy in or omission from the Retendering Information and/or Employee Liability Information provided that this indemnity shall not apply to the extent that such information was originally provided to the Contractor by the Authority and was materially inaccurate or incomplete when originally provided.

1.8 Termination of Agreement

1.8.1 On the expiry or earlier termination of this Agreement, the Authority and the Contractor agree that it is their intention that TUPE shall apply in respect of the provision thereafter of any service equivalent to a Service but the position shall be determined in accordance with the law at the date of expiry or termination as the case may be and this clause is without prejudice to such determination.

1.8.2 For the purposes of this clause 1.8 Returning Employees shall mean those employees wholly or mainly engaged in the provision of the Services as the case may be as immediately before the expiry or termination of this Agreement whose employment transfers to the Authority or a Future Service Provider pursuant to TUPE. Upon expiry or earlier termination of this Agreement for whatever reason (such date being termed the Return Date), the provisions of this clause 1.8 will apply:

- (a) the Contractor shall or shall procure that all wages, salaries and other benefits of the Returning Employees and other employees or former employees of the Contractor or the Sub-Contractors (who had been engaged in the provision of the Services) and all PAYE tax deductions and National Insurance Contributions relating thereto in respect of the employment of the Returning Employees and such other employees or former employees of the Contractor or Sub-Contractors up to the Return Date are satisfied;
- (b) the Authority shall ensure or shall procure that all wages, salaries and other benefits of the Returning Employees (who had been engaged in the provision of the Services) and all PAYE tax deductions and National Insurance Contributions relating thereto in respect of the employment of the Returning Employees on and after the Return Date are satisfied;
- (c) without prejudice to clause 1.8.2(a), the Contractor shall:
 - (i) remain (and procure that Sub-Contractors shall remain) (as relevant) responsible for all the Contractor's or Sub-Contractor's employees (other than the Returning Employees) on or after the time of expiry or termination of this Agreement and shall indemnify the Authority and any Future Service Provider against all Direct Losses incurred by the Authority or any Future Service Provider resulting from any claim whatsoever whether arising before on or after the Return Date by or on behalf of any of the Contractor's or Sub-Contractor's employees who do not constitute the Returning Employees; and

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

1.8.3 The Authority shall be entitled to assign the benefit of the indemnities set out in clause 1.8.2 to any Future Service Provider.

1.8.4 The Authority shall indemnify the Contractor (for itself and for the benefit of each relevant Sub-Contractor) in respect of those employees who constitute Returning Employees against all Direct Losses incurred by the Contractor or any relevant Sub-Contractor in connection with or as a result of any failure by the Authority or any Future Service Provider to comply with its or their obligations under Regulation 13 of TUPE and/or Article 6 of the Directive as if such legislation applied, even if it does not in fact so apply save to the extent that any such failure arises as a result of any act or omission of the Contractor or any relevant Sub-Contractor.

1.9 Offer of Employment on Expiry or Termination

1.9.1 If TUPE does not apply on the expiry or earlier termination of this Agreement, the Authority shall procure that each Future Service Provider (including the Authority) shall offer employment to the persons employed by the Contractor or a Sub-Contractor in the provision of the Services immediately before the Return Date.

1.9.2 If an offer of employment is made in accordance with clause 1.9.1, the employment shall be on the same terms and conditions (except for entitlement to membership of an occupational pension scheme, which shall be dealt with in accordance with clause 2 (Pensions)) as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the Authority or Future Service Provider may at its absolute discretion not offer such terms and conditions if there has been any change to the terms and conditions of the persons concerned in breach of clause 1.7.

1.9.3 Where any such offer as referred to in clause 1.9.1 is accepted, the Contractor shall indemnify and keep indemnified in full the Authority and/or any Future Service Provider on the same terms and conditions as those set out in clause 1.4 of this Agreement as if there had been a Relevant Transfer in respect of each and every employee who has accepted any such offer and for the purposes of this clause 1 each and every such employee shall be treated as if they were a Returning Employee.

1.9.4 Where any offer as referred to in clause 1.9.1 is not accepted and TUPE does not apply, the relevant employee shall remain an employee of the Contractor or Sub-Contractor as appropriate.

1.10 Sub-Contractors

In the event that the Contractor enters into any Sub-Contract in connection with this Agreement, it shall impose obligations on its Sub-Contractors in the same terms as those imposed on it pursuant to this clause 1 and to clause 2 (Pensions) and shall procure that the Sub-Contractor complies with such terms. The Contractor shall indemnify and keep the Authority indemnified in full against all Direct Losses, incurred by the Authority or any Future Service Provider as a result of or in connection with any failure on the part of the Contractor to comply with this clause and/or the Sub-Contractor's failure to comply with such terms.

PENSIONS

Contractor to secure Appropriate Pension Provision

The Contractor shall or shall procure that any relevant Sub-Contractor shall ensure that all Eligible Employees are offered Appropriate Pension Provision with effect from the Effective Date up to and including the date of the termination or expiry of this Agreement.

Contractor Becoming an Admission Body within LGPS

Where the Contractor or a Sub-Contractor employs any LGPS Eligible Employees from a Service Transfer Date the provisions of this clause 2.2 shall apply, save where the Authority accepts that exceptional circumstances exist where there are special reasons which mean that it would not be appropriate for the provisions of this clause 2.2 to apply, in which case the provisions of clause 2.5 shall apply instead.

2.2.1 The Contractor shall offer such LGPS Eligible Employees membership of the LGPS and shall procure that it and/or each relevant Sub-Contractor shall become an Admission Body. The Contractor shall before the Service Transfer Date execute and procure that each relevant Sub-Contractor executes an Admission Agreement, which will have effect from and including the Service Transfer Date.

2.2.2 The Authority shall before the Service Transfer Date execute each of the Admission Agreements referred to in clause 2.2.1 [and shall use reasonable endeavours to ensure that the Administering Authority executes each such Partner Admission Agreement before the Service Transfer Date⁹].

2.2.3 Without prejudice to the generality of this clause 2.2, the Contractor hereby indemnifies the Authority and/or any Future Service Provider and, in each case, their sub-contractors on demand from and against all Direct Losses suffered or incurred by it or them which arise from any breach by the Contractor or any Sub-Contractor of the terms of any Admission Agreement to the extent that such liability arises before or as a result of the termination or expiry of this Agreement (howsoever caused).

2.2.4 Without prejudice to the generality of the requirements of this clause 2.2, the Contractor shall procure that it and each relevant Sub-Contractor shall as soon as

⁹ The wording in square brackets will not be required where the Authority is also the Administering Authority.

reasonably practicable obtain any indemnity or bond required in accordance with the Admission Agreements.

- 2.2.5 The Authority shall have a right to set off against any payments due to the Contractor under this Agreement an amount equal to any overdue employer and employee contributions and other payments (and interest payable) due from the Contractor or from any relevant Sub-Contractor (as applicable) under the Admission Agreement.

2.3 Contractor Participating in other Legacy Scheme

Where the Contractor or a Sub-Contractor employs any Non-LGPS Eligible Employees from a Service Transfer Date the provisions of this clause 2.3 shall apply, save where the Authority accepts that exceptional circumstances exist where there are special reasons which mean that it would not be appropriate for the provisions of this clause 2.3 to apply, in which case the provisions of clause 2.5 shall apply instead.

- 2.3.1 The Contractor shall offer such Non-LGPS Eligible Employees membership of the applicable Legacy Scheme and shall procure that it and/or each relevant Sub-Contractor shall enter into an appropriate Participation Agreement in respect of such membership. The Contractor shall before the Service Transfer Date execute and procure that each relevant Sub-Contractor executes any appropriate Participation Agreement, which will have effect from and including the Service Transfer Date.

- 2.3.2 The Authority shall, where appropriate, before the Service Transfer Date execute each of the Participation Agreements referred to in clause 2.3.1 [and shall, where required, use reasonable endeavours to ensure that any Participating Authority executes each such Participation Agreement before the Service Transfer Date¹⁰].

- 2.3.3 Without prejudice to the generality of this clause 2.3, the Contractor hereby indemnifies the Authority and/or any Future Service Provider and, in each case, their sub-contractors on demand from and against all Direct Losses suffered or incurred by it or them which arise from any breach by the Contractor or any Sub-Contractor of the terms of any Participation Agreement to the extent that such liability arises before or as a result of the termination or expiry of this Agreement (howsoever caused).

- 2.3.4 Without prejudice to the generality of the requirements of this clause 2.3, the Contractor shall procure that it and each relevant Sub-Contractor shall as soon as reasonably practicable obtain any indemnity or bond required in accordance with any Participation Agreement.

- 2.3.5 The Authority shall have a right to set off against any payments due to the Contractor under this Agreement an amount equal to any overdue employer and employee contributions and other payments (and interest payable) due from the Contractor or from any relevant Sub-Contractor (as applicable) under any Participation Agreement.

2.4 Contractor Ceases to be an Admission Body

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

- 2.4.1 exceptional circumstances exist where there are special reasons for not providing LGPS Eligible Employees membership of the LGPS and/or Non-LGPS Eligible Employees membership of the applicable Legacy Scheme; or

¹⁰ The wording in square brackets will not be required where the Authority is also the Administering Authority.

- 2.4.3 if for any reason after the Service Transfer Date the Contractor or any relevant Sub-Contractor ceases to be an Admission Body or ceases to be able to participate in any applicable Legacy Scheme other than the LGPS other than on the date of termination or expiry of this Agreement or because it ceases to employ any Eligible Employees;

then the provisions of clauses 2.2 and/or 2.3 shall not apply (without prejudice to any rights of the Authority under those clauses) and the provisions of clause 2.5 (Contractor Scheme) shall apply.

2.5 Contractor Scheme

Where this clause 2.5 applies pursuant to clause 2.4, the following shall apply:

- 2.5.1 the Contractor shall or shall procure that any relevant Sub-Contractor shall not later than the Service Transfer Date or the Cessation Date (as the case may be) nominate to the Authority in writing the occupational pension scheme or schemes which it proposes shall be the Contractor Scheme for the purposes of this clause 2.5. Such pension scheme or schemes must be:
- 2.5.1.1 established within three (3) months of the Service Transfer Date or Cessation Date (as the case may be);
 - 2.5.1.2 reasonably acceptable to the Authority (such acceptance not to be unreasonably withheld or delayed);
 - 2.5.1.3 a registered pension scheme for the purposes of Part 4 of the Finance Act 2004; and
 - 2.5.1.4 certified by the Government Actuary's Department or an actuary nominated by the Authority in accordance with relevant guidance produced by the Government Actuary's Department as providing benefits which are the same as, broadly comparable to or better than those benefits provided by the applicable Legacy Scheme;
- 2.5.2 the Contractor undertakes to the Authority (for the benefit of the Authority itself and for the Authority as agent and trustee for the benefit of the Eligible Employees) that it shall and shall procure that any relevant Sub-Contractor shall procure that:
- 2.5.2.1 the Eligible Employees shall by three (3) months before the Service Transfer Date or the Cessation Date (as the case may be) be offered membership of the Contractor Scheme with effect from and including the Service Transfer Date or Cessation Date (as the case may be);
 - 2.5.2.2 the Contractor Scheme shall provide benefits in respect of the Eligible Employees' periods of service on and after the Service Transfer Date or Cessation Date (as the case may be) which the Government Actuary's Department or an actuary nominated by the Authority in accordance with relevant guidance produced by the Government Actuary's Department shall certify to be the same as, broadly comparable to or better than the benefits which the Eligible Employees were entitled to under the applicable Legacy Scheme at the Service Transfer Date or the Cessation Date (as the case may be);
 - 2.5.2.3 if the Contractor Scheme is terminated, a replacement pension scheme shall be provided with immediate effect for those Eligible Employees who are still employed by the Contractor or relevant Sub-Contractor. The replacement

scheme must comply with this clause 2.5 as if it were the Contractor Scheme;

2.5.2.4 before the Service Transfer Date or Cessation Date (as the case may be) the trustees of the Contractor Scheme shall undertake by deed to the Authority and to any Administering Authority or Participating Authority as may be required by the provisions governing any Legacy Scheme that they shall co-operate with the provisions of clauses 2.5, 2.6 and [Schedule 23] to the extent applicable to them; and

2.5.2.5 where the Contractor Scheme has not been established at the Service Transfer Date or Cessation Date (as the case may be), the Eligible Employees shall be provided with benefits in respect of death-in-service which are no less favourable than the death-in-service benefits provided by the Legacy Scheme immediately before the Service Transfer Date or Cessation Date (as the case may be). Such benefits will continue to be provided until death-in-service benefits are provided by the Contractor Scheme; and

2.5.3 The Authority's actuary shall determine the terms for any bulk transfers from a Legacy Scheme to the Contractor's Scheme following the Service Transfer Date and any subsequent bulk transfers on termination or expiry of this Agreement.

2.6 Undertaking from the Contractor

The Contractor undertakes to the Authority (for the benefit of the Authority itself and for the Authority as agent and trustee for the benefit of the Eligible Employees) that:

2.6.1 all information which the Authority or any Administering Authority or Participating Authority or their respective professional advisers may reasonably request from the Contractor or any relevant Sub-Contractor for the administration of the Legacy Scheme or concerning any other matters raised in clause 2.5 or this clause 2.6 shall be supplied to them as expeditiously as possible;

2.6.2 it shall not and shall procure that any relevant Sub-Contractor shall not, without the consent in writing of the Authority or any other person as may be required by the provisions governing any Legacy Scheme (which shall only be given subject to the payment by the Contractor or the relevant Sub-Contractor of such reasonable costs as the Authority or any Administering Authority or Participating Authority may require) consent to instigate, encourage or assist any event which could impose on the Legacy Scheme or on the Authority a cost in respect of any Eligible Employee greater than the cost which would have been payable in respect of that Eligible Employee had that consent, instigation, encouragement or assistance not been given;

2.6.3 until the Service Transfer Date, it shall not and shall procure that any relevant Sub-Contractor shall not issue any announcements (whether in writing or not) to the Eligible Employees concerning the matters stated in clauses 2.2 or 2.3 without the consent in writing of the Authority and any Administering Authority or Participating Authority (not to be unreasonably withheld or delayed);

2.6.4 it shall not and shall procure that any relevant Sub-Contractor shall not take or omit to take any action which would materially affect the benefits under any Legacy Scheme or under the Contractor Scheme of any Eligible Employees who are or will be employed wholly or partially in connection with the Services without the prior written agreement of the Authority or any other person as may be required by the provisions governing any Legacy Scheme (not to be unreasonably withheld or delayed)

provided that the Contractor and/or such Sub-Contractor will be so entitled without the requirement of consent to give effect to any pre-existing contractual obligations to any Eligible Employees; and

- 2.6.5 it shall and shall procure that any relevant Sub-Contractor shall offer any of its Eligible Employees who cease to be engaged in the provision of the Services and thereby cease to be eligible for membership of a Legacy Scheme membership of the Contractor Scheme as soon as reasonably practicable after ceasing to be so engaged unless such an Eligible Employee has voluntarily ceased to be engaged in the provision of the Services.

2.7 Discretionary Benefits

- 2.7.1 Where the Contractor or a Sub-Contractor participates in a Legacy Scheme, the Contractor shall and/or shall procure that any relevant Sub-Contractor shall award benefits (where permitted) to the Eligible Employees under the Legacy Scheme in circumstances where the Eligible Employees would have received such benefits had they still been employed by the Authority; and
- 2.7.2 Where the award of benefits in clause 2.7.1 is not permitted under the Legacy Scheme or the Contractor and/or a Sub-Contractor does not participate in the applicable Legacy Scheme, the Contractor shall and/or shall procure that any Sub-Contractor shall award benefits to the Eligible Employees which are identical to the benefits the Eligible Employees would have received under the Legacy Scheme in circumstances where the Eligible Employees would have received such benefits had they still been employed by the Authority.
- 2.7.3 Under clause 2.7.1 and 2.7.2, where such benefits are of a discretionary nature, they shall be awarded on the basis of the Authority's written policy in relation to such benefits at the time of the Service Transfer Date (which the Authority shall provide upon request). Where the payment of such benefits is not, for whatever reason, possible, the Contractor shall and/or shall procure that any relevant Sub-Contractor shall compensate the Eligible Employees in a manner which is broadly comparable or equivalent in cash terms.

2.8 Claims from Eligible Employees or Trade Unions

The Contractor hereby indemnifies the Authority and/or any Future Service Provider and, in each case, their sub-contractors from and against all Direct Losses suffered or incurred by it or them which arise from claims by Eligible Employees of the Contractor and/or of any Sub-Contractor or by any trade unions, elected employee representatives or staff associations in respect of all or any such Eligible Employees which losses:

- 2.8.1 relate to pension rights in respect of periods of employment on and after the Service Transfer Date until the date of termination or expiry of this Agreement; or
- 2.8.2 arise out of the failure of the Contractor and/or any relevant Sub-Contractor to comply with the provisions of this clause 2 before the date of termination or expiry of this Agreement.

2.9 Liability for Costs

The costs of the Authority necessarily and reasonably incurred in connection with the Partner Admission Agreement and/or of obtaining the necessary certification of comparability in accordance with clause 2.5 shall be borne by the Contractor.

2.10 Transfer to another Employer

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

- 2.10.1 consult with and inform those Eligible Employees of the pension provisions relating to that transfer; and
- 2.10.2 procure that the employer to which the Eligible Employees are transferred (the New Employer) complies with the provisions of this clause 2 provided that references to the "Sub-Contractor" will become references to the New Employer, references to "Service Transfer Date" will become references to the date of the transfer to the New Employer and references to "Eligible Employees" will become references to the Eligible Employees so transferred to the New Employer.

2.11 Pension Issues on Expiry or Termination

The Contractor shall and shall procure that any relevant Sub-Contractor shall:

- 2.11.1 maintain such documents and information as will be reasonably required to manage the pension aspects of any onward transfer of any person engaged or employed by the Contractor or any Sub-Contractor in the provision of the Services on the expiry or termination of this Agreement (including without limitation identification of the Eligible Employees);
- 2.11.2 promptly provide to the Authority such documents and information mentioned in clause 2.11.1 which the Authority may reasonably request in advance of the expiry or termination of this Agreement; and
- 2.11.3 fully co-operate (and procure that the trustees of the Contractor's Scheme shall fully co-operate) with the reasonable requests of the Authority relating to any administrative tasks necessary to deal with the pension aspects of any onward transfer of any person engaged or employed by the Contractor or any Sub-Contractor in the provision of the Services on the expiry or termination of this Agreement.