

DATED

2015

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BARNSELY METROPOLITAN BOROUGH COUNCIL

and

EVERY CHILD MATTERS ACADEMY TRUST

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SCHOOL AGREEMENT

relating to High View Primary Learning Centre

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## SCHOOL AGREEMENT

**DATE**

2015

### **PARTIES**

- (1) BARNSELY METROPOLITAN BOROUGH COUNCIL of Town Hall, Church Street, Barnsley S70 2TA (the "**Authority**"); and
- (2) EVERY CHILD MATTERS ACADEMY TRUST (incorporated and registered in England and Wales under company registration number 09700223), the registered office of which is at High View Primary Learning Centre, Newsome Avenue, Wombwell, Barnsley, South Yorkshire S73 8QS (the "**Company**").

Each one a "**Party**" and together "**Parties**".

### **BACKGROUND**

- (A) The Company is a company incorporated in England and Wales, limited by guarantee with a charitable object.
- (B) The Existing School is in an area in respect of which the Authority is the local education authority pursuant to Section 12 of the Education Act 1996.
- (C) The Authority has entered into the PFI Project Documents with a view, amongst other things, to procuring accommodation and related services at the Existing School.
- (D) The Authority is proposing to enter into the Academy Contracts with a view to the Company operating the Academy from the Site of the Existing School.
- (E) The Company and the Authority have agreed to the terms and conditions set out within this Agreement.
- (F) The Company agrees that it is in the interests of the Company that it should enter into this Agreement which, amongst other matters, commits the Company to pay to the Authority a proportion of its budget and confirms to the Authority that some matters concerning the provision of the Services under the PFI Project Agreement at the Existing School and subsequently the Academy shall be managed by the Authority in liaison with the Company as provided for in this Agreement and the Principal Agreement.

**IT IS AGREED AS FOLLOWS:**

**1. DEFINITIONS AND INTERPRETATION**

**1.1 Definitions**

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

**"1954 Act"**

means the Landlord and Tenant Act 1954;

**"Academy"**

means the academy ("High View Primary Learning Centre ") to be operated by the Company from the Commencement Date on the Site, which expression shall include the Site and the School Facilities on the Site;

**"Academy Contracts"**

means this Agreement, the Principal Agreement, the PFI Project Agreement Deed of Variation and the Commercial Transfer Agreement;

**"Academy Direct Losses"**

means all damages, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an indemnity basis) proceedings, demands and charges whether arising under statute, contract or at common law provided always that this shall not include Indirect Losses;

**"Additional School Period"**

means those periods during which the Contractor is required to make Available the Site (or part thereof) and the School Facilities for any additional use by the Academy, over and above that included within the Base Unitary Charge and as priced by the Contractor at the Marginal Cost of providing the Services and agreed by the Authority as detailed in paragraph 4.1.2 of Part 3 of Schedule 1 and clause 28.9 of the PFI Project Agreement;

**"Adjusted School Budget"**

shall have the meaning ascribed to it in Schedule 2;

**"Affordability Gap"**

shall have the meaning given to "AG" in Schedule 2 of this Agreement;

**"Agreement"**

means this Agreement and any Schedules annexed hereto;

**"Approved Purposes"**

means in relation to Intellectual Property Rights procured under the PFI Project Agreement, the purpose as set out in clause 62.1 of the PFI Project Agreement;

**"Articles of Association"**

means the articles of association of the Company as may be amended from time to time;

**"Authority Related Party"**

means:

- (a) an officer, servant, agent, employee, contractor, or sub-contractor of the Authority acting in the course of his office or employment (as appropriate) at the Site; or
- (b) any person visiting or using the Site at the invitation (whether expressed or implied) of the Authority

but excluding the Contractor and any Contractor Related Parties and the Company and any Company Related Parties;

**"Authority's Representative"**

means the representative appointed by the Authority pursuant to clause 7.1;

**"Available"**

as defined within Schedule 6 (Payment Mechanism) of the PFI Project Agreement;

**"Business Day"**

means a day (other than a Saturday or Sunday) on which banks are open for domestic business in the City of London;

**"Catering Deductions"**

as set out in Schedule 6 (Payment Mechanism) to the PFI Project Agreement;

**"Catering Services"**

shall mean the catering services to be provided by the Contractor in accordance with the PFI Project Agreement;

**"Collateral Warranty"**

means the collateral warranties provided for the benefit of the Authority from each of the Building Contractor, FM Contractor and the Professional Team in accordance with clause 4 of the PFI Project Agreement;

**"Commencement Date"**

means 1 October 2015;

**"Commercial Transfer Agreement"**

means the agreement between the Authority, the Governing Body of the Existing School and the Company known as the commercial transfer agreement entered into on or about the date of this Agreement;

**"Community Use"**

means the use of the Site and the School Facilities by the community by or at the invitation of the Company or Authority within or outside of the School Day;

**"Community Use Allocated Hours"**

means those hours as agreed between the Parties that the Site and/or the School Facilities will be available for Community Use;

**"Company Asset"**

means, without limitation, any items or equipment and/or chattels brought onto the Site by the Company or Company Related Parties which if brought on to the Site after the Commencement Date shall be asset tagged by the Company or Company Related Party for ease of identification;

**"Company Related Party"**

means:

- (a) an officer, agent or employee of the Company acting in the course of his office or employment, including, without limitation, any director of the Company or any member of the local governing body of the Academy;
- (b) in relation to the Academy during the School Day any student of the Academy or any person visiting the Academy at the invitation (whether expressed or implied) of the Company; and
- (c) in relation to the Academy during any period of Community Use any person using the Academy for that purpose at the invitation (whether expressed or implied) of the Company;
- (d) any contractors and their officers, employees and agents involved in the operation and/or maintenance of works or services at the Site procured by the Company,

but excluding in each case the Authority, any Authority Related Parties, the Contractor and any Contractor Related Parties;

**"Company Representative"**

means the representative appointed by the Company pursuant to clause 7.2;

**"Contractor"**

shall mean Modern Schools (Barnsley) Limited (company registered number 5259225) or any other successor contractor appointed in accordance with the PFI Project Agreement;

**"Dedicated Schools Grant" or "DSG"**

has the meaning given to it in the Principal Agreement;

**"Deduction"**

shall mean any deduction from the Unitary Charge pursuant to Schedule 6 (Payment Mechanism);

**"DfE"**

means the Department for Education;

**"Dispute Resolution Procedure"**

means the procedure for resolution of disputes as set out in clause 23 (Dispute Resolution);

**"Earmarked Annual Grant"**

has the meaning given to it in the Funding Agreement between the Company and the DfE;

**"Educational Services"**

shall mean those educational learning and curriculum based provisions which the Company shall undertake to provide at the Academy during the School Day or at such other times as the Company deems both necessary and appropriate;

**"Existing School"**

means High View Primary Learning Centre;

**"Expiry Date"**

has the meaning given to it in the PFI Project Agreement;

**"Financial Year"**

means 1 April to 31 March;

**"Free School Meals"**

means meals provided by the Authority to eligible persons in accordance with the provisions of the Education Act 1996 and the School Standards and Framework Act 1998;

**"Funder Direct Agreement"**

means the direct agreement dated 4 May 2005 and made between the Authority and the Contractor and Dexia Credit Local, London Branch;

**"Funding Agreement"**

means the agreement titled "Supplemental Agreement" entered into by the Company and the DfE dated on or around the date of this Agreement relating to the funding of the Academy supplemental to an agreement between the Company and the Secretary of State for Education dated on or around the date of this Agreement and any agreement in writing which supersedes, replaces, amends, varies those agreements;

**"General Annual Grant"**

as defined within the Funding Agreement;



**"Indexation Percentage" or "IP"**

shall have the meaning ascribed to it in paragraph 2.2 of Schedule 2 (Calculation of the School Contribution);

**"Indirect Losses"**

means loss of profits, loss of use, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature but excluding any of the same that relates to loss of revenue in each case arising under this Agreement or under the PFI Project Agreement or loss of revenue in respect of Third Party Use;

**"Information"**

means all information, materials, documents and data relating to the Project including:

- (e) the design or construction of the Existing School (including the construction proposals and the Construction Programme), the operation and maintenance of the Existing School and/or the Academy or other matters in connection with the Existing School under the PFI Project Agreement;
- (f) all property matters referred to or otherwise identified in this Agreement; and
- (g) all changes and updates of any such information, material, document and data;

**"Information Protocol"**

means the obligations on the parties to provide and share information contained in Schedule 5 to this Agreement;

**"Intellectual Property Rights"**

means any patents, trademarks, service marks, copyright, database rights, moral rights, rights in a design, know-how, confidential information and all or any other intellectual or industrial property rights, whether or not registered or capable of registration and whether subsisting in the United Kingdom or in any other part of the world, together with all or any goodwill relating or attached thereto which is created, brought into existence, acquired, used or intended to be used by the Company in relation to the Academy;

**"Invoicing Procedure"**

as set out within Schedule 7 to this Agreement;

**"Lease"**

means the lease referred to in clause 8 and in the form set out in Schedule 4 to this Agreement;

**"Legislation"**

means:

- (h) any Act of Parliament;

- (i) any subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978;
  - (j) any exercise of the Royal Prerogative; and
  - (k) any enforceable community right within the meaning of Section 2 of the European Communities Act 1972;
- in each case in the United Kingdom;

**"Maintenance Programme"**

has the meaning given to it in the PFI Project Agreement;

**"Meal of the Day"**

means the number of schools meals required by the Academy on each day (which for the avoidance of doubt shall include the number of Free School Meals, paid pupil meals and adult meals);

**"Non Core Sessions"**

means those periods during which the Contractor is required to make Available the Site (or part thereof) and the School Facilities (or part thereof) as included in the Base Unitary Charge in accordance with clause 28 and paragraph 4.1.2 of Part 3 of Schedule 1 of the PFI Project Agreement;

**"Normal Payment Matters"**

shall have the meaning ascribed to it in the Principal Agreement;

**"Payment Date"**

means five (5) Business Days before the Unitary Charge becomes due and owing by the Authority to the Contractor in each Contract Month in accordance with Schedule 6 of the PFI Project Agreement;

**"PFI Contractor Assets"**

means those assets as defined in the PFI Project Agreement provided by the Contractor to the Authority in accordance with the PFI Project Agreement;

**"Principal Agreement"**

means the agreement between the Authority, DFE and the Company known as the principal agreement dated on or about the date of this Agreement;

**"Project"**

means the provision of Works and Services by the Contractor to the Authority in relation to each of the schools as contemplated in the PFI Project Agreement;

**"PFI Project Agreement"**

is the Agreement dated 4 May 2005 between the Authority and the Contractor relating to the provision of the works and services at the Existing School (and subsequently the Academy) made under a Private Finance Initiative arrangement;

**"PFI Project Agreement Deed of Variation"**

means the deed dated on or about the date of this Agreement between the Authority and the Contractor to vary the terms of the PFI Project Agreement to reflect the closure of the Existing School as a community school and the opening of the Academy on the Commencement Date;

**"PFI Project Documents"**

means the PFI Project Agreement and the Funder Direct Agreement;

**"PFI Project Document Losses"**

means losses (including any third party claims), liabilities, claims, actions, proceedings, demands, compensation, legal remedies, awards, costs, charges or expenses or loss of revenue suffered or incurred by the Company arising from a breach by the Contractor or Contractor Related Party of the PFI Project Agreement or any other liability attributable to the Contractor or a Contractor Related Party under the PFI Project Agreement or the negligence or wilful misconduct of the Contractor or a Contractor Related Party including, without limitation to the generality of the foregoing, any losses which may be incurred or suffered by or claims made against the Company as a result of personal injury including (without limitation) injury resulting in death;

**"PFI Project Document Losses suffered by the Authority"**

means losses (including any third party claims), liabilities, claims, actions, proceedings, demands, compensation, legal remedies, awards, costs, charges or expenses or loss of revenue suffered or incurred by the Contractor or a Contractor Related Party to the extent that the Authority is obliged to pay such amounts to the Contractor under the terms of the PFI Project Agreement;

**"Related Party"**

means any Company Related Party, Authority Related Party, or Contractor Related Party as the case may be;

**"Relevant Proportion" or "RP"**

means from the Commencement Date and for the Financial Year 2015 to 2016, one hundred and forty seven thousand five hundred and forty pounds (£147,540) or as adjusted in accordance with clause 12 and Schedule 2 until the earlier to occur of the Termination Date or the Expiry Date;

**"Reporting Failure Deductions"**

as defined in clause 1.1 and set out in Schedule 6 (Payment Mechanism) to the PFI Project Agreement;

**"Required Period"**

in relation to the Academy, a School Day and Non Core Sessions;

**"Schedule of Programmed Maintenance"**

means the Maintenance Programme provided by the Contractor to the Authority, pursuant to clause 23.4 of the PFI Project Agreement;

**"School Contribution"**

shall mean the aggregate of the Relevant Proportion, Affordability Gap and Utility Costs payable by the Company to the Authority in accordance with Schedule 2 (Calculation of the School Contribution);

**"School Day"**

means 0700 to 1800 each Monday to Friday during a Term excluding for the avoidance of doubt any day falling within a half-term holiday;

**"School Facilities"**

means the buildings and other facilities to be provided, maintained and serviced in accordance with the PFI Project Agreement located on and consisting of that part of the Site;

**"School Liaison Procedure"**

means the procedure set out in Schedule 1 to this Agreement;

**"Services"**

means the services to be delivered by the Contractor to the Authority pursuant to the PFI Project Agreement;

**"Site"**

means the area edged red on the Site Plan;

**"Site Plan"**

means the Plan for the Site set out in Schedule 4 of this Agreement;

**"Small Works"**

means any change to the School Facilities requirements requested by the Authority having an individual cost not exceeding one thousand pounds (£1,000) (indexed) or as otherwise agreed from time to time, except for any request which if implemented would increase the likelihood of the Contractor failing to meet the Authority's Requirements at Schedule 1 to the PFI Project Agreement or materially and adversely affect the Authority's ability to perform its obligations under this Agreement;

**"Small Works Handbook"**

shall mean the procedures for requesting Small Works (or as amended or updated from time to time in accordance with clause 53.14.1 of the Project Agreement);

**"Term"**

means any of the terms which the Company notifies to the Authority in accordance with clause 20.2 of this Agreement;

**"Termination Date"**

the date of early termination of the PFI Project Agreement in accordance with its terms or the date of early termination of this Agreement in accordance with its terms, whichever the earlier;

**"Third Party Use"**

means the use of the School Facilities other than by the Company, Company Related Parties, the Authority or Authority Related Parties during the Required Period or Additional School Periods and other than for Community Use;

**"Unavailability"**

as defined in Schedule 6 (Payment Mechanism) of the PFI Project Agreement;

**"Utility Costs"**

shall have the meaning given to "UC" in Schedule 2 of this Agreement;

**"Utility Services"**

shall mean the provision of natural gas, electricity, water supplies and sewerage to the Site;

**"VAT"**

means value added tax at the prevailing rate at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994;

**"Works"**

means the works delivered by the Contractor to the Authority, pursuant to the PFI Project Agreement.

**1.2 Interpretation**

In this Agreement, unless the context otherwise requires:

- 1.2.1 capitalised terms defined in the PFI Project Agreement, as the context requires (unless otherwise defined in this Agreement), have the same meaning in this Agreement;
- 1.2.2 headings and sub-headings are for ease of reference only and shall not be taken into account in the interpretation or construction of this Agreement;
- 1.2.3 all references to clauses and Schedules are references to the clauses of and Schedules to this Agreement, unless otherwise stated;
- 1.2.4 the Schedules form part of this Agreement;
- 1.2.5 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or other instrument, as amended, supplemented, substituted, novated or assigned from time to time;

- 1.2.6 all references to any statutory provision shall include reference to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- 1.2.7 words importing the singular include the plural and vice versa;
- 1.2.8 words importing a gender include all genders;
- 1.2.9 person includes an individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency or unincorporated body of persons or association;
- 1.2.10 the words "include" and "including" are to be construed without limitation;
- 1.2.11 references to sub-contractors shall be to sub-contractors of any tier;
- 1.2.12 a requirement not to unreasonably withhold consent includes a requirement not to unreasonably delay the giving or withholding of that consent;
- 1.2.13 in relation to the Parties, references to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both functions and responsibilities of such public organisation. References to other persons shall include their successors and assignees;
- 1.2.14 in the event that the provisions of this Agreement are inconsistent with the terms of the Principal Agreement, the terms of the Principal Agreement prevail to the extent of any inconsistency.
- 1.3 For the avoidance of doubt, the terms of this Agreement operate as between the Authority and the Company and are not intended to effect an assignment, novation or other transfer by the Authority to the Company of any of the rights and obligations of the Authority under the PFI Project Agreement.

## **2. COMMENCEMENT AND DURATION**

- 2.1 This Agreement shall come into force on the Commencement Date and, subject to clause 27 (Termination) and clause 2.2 shall continue in force until the earliest to occur of the Termination Date and the Expiry Date.
- 2.2 The termination of this Agreement howsoever arising is without prejudice to the rights, duties and liabilities of the parties accrued prior to termination. Clauses of this Agreement which expressly or by implication have effect after termination will continue to be enforceable notwithstanding termination.

## **3. CONSENT, PFI PROJECT DOCUMENTS AND ACADEMY CONTRACTS**

### **3.1 Entering into the PFI Project Documents**

Without prejudice to the rights and obligations of the parties under or in connection with this Agreement, the Company acknowledges that the Authority has entered into the PFI Project Documents.

### **3.2 Compliance with Programme and PFI Project Documents**

3.2.1 The Company shall not (and shall procure that the Company Related Parties shall not):

- (a) take any action; or
- (b) fail to take any action,

which would cause the Authority to be in breach of its obligations under the PFI Project Documents or the Academy Contracts and the Company shall not (insofar as it is reasonably within its power) permit anything to occur which would cause the Authority to be in breach of its obligations under the PFI Project Documents or the Academy Contracts. Subject to clause 3.2.2, the Company shall reimburse the Authority for all PFI Project Document Losses suffered by the Authority as a result of this clause 3.2.1.

3.2.2 The Parties shall at all times take all reasonable steps to minimise and mitigate any loss for which they are entitled to bring a claim (including, but not limited to any indemnity) pursuant to this Agreement and to take all reasonable steps to minimise and mitigate any effects or circumstances and/or events adversely affecting the performance of their obligations under this Agreement which would otherwise entitle that Party to relief and/or to claim compensation hereunder.

### **3.3 Performance of the Authority's Obligations**

The Authority owes obligations to the Contractor under the PFI Project Documents. To the extent that these obligations relate to the Academy, the Authority undertakes to perform its obligations in a timely manner and acting reasonably and to consult with the Company and to take due regard of any comments made by the Company.

### **3.4 Amendments to PFI Project Documents**

3.4.1 Save as set out in clause 3.4.2 the Authority shall notify the DfE and the Company of any proposed changes to the PFI Project Documents that:

- (a) may materially affect the operation of the Academy; and/or
  - (b) may result in additional costs for the Company,
- ("Proposed Material Changes").

3.4.2 Any proposal for Authority Changes or Contractor Changes under clause 53 of the PFI Project Agreement shall be dealt with in accordance with clause 26 and shall not constitute a Proposed Material Change.

3.4.3 The Authority shall consult with the Company and shall have due regard to any representations made by the Company in respect of the Proposed Material Changes.

3.4.4 The Authority shall act reasonably in light of the Company's representations when deciding whether or not to continue the Proposed Material Change.

3.4.5 The Authority shall as soon as reasonably practicable following any amendment described in clause 3.4.1 and/or described in clause 3.4.2 provide to the Company copies of each of the amended PFI Project Documents.

### **3.5 Copies of PFI Project Documents**

The Authority has provided the Company with a copy of each of the PFI Project Documents and the Company confirms that it has conducted its own analysis of the Information supplied to the Company, or any of its nominees and advisers before the date of this Agreement.

### 3.6 **Due Diligence**

Neither the Authority nor any of its agents, servants or advisors shall be liable to the Company, whether in contract, tort or otherwise and whether or not arising out of any negligence on the part of the Authority (or any of its agents, servants, or advisers) in respect of any inadequacy of any kind whatsoever in the Information and except as provided in clause 6.3 and Schedule 3 the Authority gives no warranty or undertaking that the Information represents all the information in its possession or power relevant or material to the Project, nor in respect of any failure to disclose or make available to the Company any information, documents or data or to keep the Information up-to-date or to inform the Company of any inaccuracy, error, omission, unfitness for purpose, defects or inadequacy in the Information.

### 3.7 **Information Sharing and Access**

The Parties and their representatives shall co-operate to share Information and allow such access to the Academy and its records as may be required to ensure the effective operation of the Academy and as required by the Authority to discharge a statutory duty or function and without limitation:

- 3.7.1 the parties shall comply with the Information Protocol;
- 3.7.2 under the terms of the PFI Project Documents the Authority is required to provide certain information to the Contractor which is in the possession or control of the Company. The Company will provide such information to the Authority within such time periods as the Authority may reasonably require. Without limitation to the foregoing, the Company shall notify the Authority promptly, in writing, when it becomes aware of any of the following events;
- 3.7.3 plans to erect any new structures on the Site (other than pursuant to the PFI Project Documents);
- 3.7.4 any application for planning consent for the Site;
- 3.7.5 not used; and
- 3.7.6 any contract for the purchase, lease or licence of any ICT, including software or equipment for ICT services proposed to be entered into by the Company which impacts on the Services at the Academy.

The Parties agree that where and to the extent that the Authority or the Company fails to supply or make available to the other (the "Uninformed Party") any information provided in accordance with this clause 3.7 or pursuant to the Information Protocol (an "Information Default") and this affects the Uninformed Party's ability to comply with any obligations provided in, or discharge any liability in connection with this Agreement, or gives rise to an additional or operates to increase any existing liability for the Uninformed Party under this Agreement the Uninformed Party shall (subject to it taking all reasonable steps to mitigate the effects of such Information Default) be relieved of any such obligation and/or liability to the extent that reasonably reflects the impact of the relevant Information Default.



#### **4. ENFORCEMENT OF THE PFI PROJECT AGREEMENT**

4.1 Where, in relation to the Site:

- 4.1.1 there is a breach of the PFI Project Agreement by the Contractor;
- 4.1.2 there is an act or omission of the Contractor which entitles the Authority to make a claim under the PFI Project Agreement;
- 4.1.3 there is damage to the Site that is the liability of the Contractor under the PFI Project Agreement;
- 4.1.4 a dispute arises under clause 23.1 of this Agreement; and
- 4.1.5 the Company is a co-insured party under a Required Insurance and wishes to pursue a claim against insurers under a relevant Required Insurance,

the Authority and the Company shall promptly liaise to consider whether and upon what basis the Authority should exercise any of the rights available to it under the PFI Project Documents in respect of such a breach, act or omission, or whether and upon what basis the Company would intend to exercise its right to make a claim against the relevant Required Insurance (as the case may be) provided that, with the exception of any claims which may prejudice the operation of clause 58 of the PFI Project Agreement, nothing in this clause 4 shall be construed as preventing the Company from making a claim under a relevant Required Insurance where it is a co-insured party.

4.2 If the Authority and the Company cannot reach agreement on an issue raised pursuant to clause 4.1, DfE shall adjudicate promptly on that issue, taking into account:

- 4.2.1 any time period required to take action in accordance with the PFI Project Agreement and relevant circumstances;
- 4.2.2 the views of both parties; and
- 4.2.3 any matter reasonably deemed relevant by DfE.

4.3 In the event that it is agreed by the parties or determined by DfE that:

- 4.3.1 the Authority should exercise its rights and remedies in respect of the relevant breach, act or omission, the Authority shall promptly use its best endeavours to do so; or
- 4.3.2 the relevant party shall pursue a claim against an insurer under a Required Insurance, the relevant party shall (subject to any existing claim arrangements) endeavour to pursue such a claim.

#### **4.4 Contractor Compliance**

- 4.4.1 The Authority shall use all reasonable endeavours to procure compliance by the Contractor with its obligations under the PFI Project Agreement for the benefit of the Academy and the Company.
- 4.4.2 Where in this Agreement the Authority purports to limit its liability to the Company to the equivalent benefit it receives under the PFI Project Agreement, such limitation shall be subject always to the Authority complying with clause 4.4.1.
- 4.4.3 In its monitoring of the Contractor, the Authority shall have regard (so far as it is able and reasonably practicable to do so) to any matter that the Company (acting reasonably) considers should be enforced against the Contractor, pursuant to the PFI Project

Agreement, provided that the Company shall notify the Authority of any such matters as soon as reasonably practicable.

#### **4.5 Payment of claims following Contractor Default**

4.5.1 Subject to clause 4.5.2 the Authority shall use all reasonable endeavours to recover and shall promptly pay to the Company any amounts it recovers under the PFI Project Documents (including the Required Insurances) following a Contractor Default to the extent they relate to the Academy (or the Academy's interests noted against any Required Insurances).

4.5.2 Where the losses as referred to in clause 4.5.1 are suffered by the Company and the Authority arising from the same matter and the amount recovered does not cover the total losses incurred, the Authority shall only be liable to the Company under clause 4.5.1 for a proportionate amount of the amounts recovered, taking into account the parties' respective claims. The Authority shall not be liable to the Company under this clause 4.5 for any amounts in excess of those recovered pursuant to the PFI Project Documents.

4.6 The Authority will hold for the benefit of the Company and will, where permitted to do so by the PFI Project Documents and if so required by the Company, use its reasonable endeavours to enforce, in accordance with the terms thereof each Collateral Warranty given by the Building Contractor, FM Contractor and members of the Professional Team to the extent that the protections afforded by each such Collateral Warranty relate to the Academy. The Company will indemnify the Authority for the proportion of the costs incurred by the Authority of taking such action which relates to the proportion of the benefit of enforcement of such Collateral Warranty accruing to the Company.

4.7 The Company shall be entitled in any action or proceedings brought by the Authority in connection with this Agreement to rely on any right in defence of liability available to the Authority in the PFI Project Agreement and to raise an equivalent right in defence of liability (save for set off and counterclaim) as would be available to the Authority in the PFI Project Agreement and to raise an equivalent right in defence of liability (save for set off and counterclaim) as would be available in connection with a similar course of action by the Contractor against the Authority pursuant to the PFI Project Agreement.

4.8 In the event of an Emergency to which clause 25 of the PFI Project Agreement applies, upon the request of the Company, the Authority will instruct the Contractor to use its best endeavours to procure that such additional or alternative services (of a similar nature to the Services) shall be undertaken by the Contractor to ensure that the Emergency is dealt with and normal operation of the Academy resumes as soon as reasonably practicable and the Company will bear and pay any costs properly and duly payable by the Authority to the Contractor under clause 25 of the PFI Project Agreement in those circumstances.

#### **5. COMPENSATION EVENTS AND RELIEF EVENTS**

5.1 If either party has reason to believe that a Compensation Event has arisen whether the same is also a breach of this Agreement or otherwise or that a Relief Event has arisen or the Authority is notified by the Contractor that circumstances constituting a Compensation Event, whether the same is also a breach of this Agreement, or otherwise, or that a Relief Event has or may have arisen in either case having or with the potential to have an impact on the Academy, then the parties shall promptly consult regarding circumstances that give rise to

the claim or potential claim and shall discuss whether there has been or may have been a Compensation Event or Relief Event and shall meet frequently thereafter to review information received from the Contractor in connection with the circumstances that give rise to any claim made by the Contractor with a view to considering the evidence provided.

- 5.2 In the event that a claim is made by the Contractor to which clause 5.1 applies, the Authority shall take due account of all information provided by the Company where the Company may be in whole or in part responsible for the circumstances that give rise to the Compensation Event and the Authority shall use all its reasonable endeavours to resist such claim and require mitigation of the claim where it reasonably ought to do so.

## **6. COMPANY ACKNOWLEDGEMENT, UNDERTAKINGS AND WARRANTIES**

6.1 The Company:

6.1.1 warrants and represents to the Authority that the information set out in Schedule 3 Part 1 (Warranties by the Company) is true and accurate in all respects; and

6.1.2 acknowledges that the Contractor shall be entitled to provide the Services described in the PFI Project Agreement at the Academy.

### **6.2 Authority Consents**

The parties agree that in relation to the PFI Project Agreement:

6.2.1 the Authority shall not give any consent, approval or authorisation of matters concerning the Academy without the prior operation of the procedures set out in this clause 6.2;

6.2.2 the Authority shall inform the Company of the decision it requires by when and shall provide any relevant information at its disposal to inform such a decision, following which the Company will ensure that the Company gives any consent, approval or other necessary response in accordance with the timescales within which the Authority has advised the Company it is required to act; and

6.2.3 where the Company:

(a) does not respond to the Authority in accordance with clause 6.2.2, the Authority has discharged all obligations under this clause 6.2 in respect of the relevant consent, approval or authorisation and shall be entitled to give such consent, approval or authorisation; or

(b) does not give consent, the Company will provide full written details of its objections to the Authority within such time period as the Authority has advised it is required to act to enable the Authority to comply with its obligations under the PFI Project Documents.

6.2.4 Without prejudice to clause 26.3.4, the Company shall not be required to give any consent or approval sought by the Authority under clause 6 or otherwise and the Company may withhold or give such consent or approval in its absolute discretion, save where the Authority can demonstrate that the failure to give such consent or approval would have a material adverse effect in the context of all of the schools, subject to the PFI Project Agreement.

- 6.2.5 Subject to clause 6.2.4, the Authority shall not give any consent or approval to which this clause 6 applies if the Company shall in accordance with this clause 6 have notified the Authority that it is withholding its consent or approval.
- 6.3 The Authority warrants and represents that at the date of this Agreement the information set out in Schedule 3 Part 2 is correct in all material respects.
- 6.4 Nothing in this Agreement shall be construed as a fetter or restriction on the exercise of the Authority's statutory functions and/or related rights including but not limited to planning, education or highways functions.
- 6.5 The Company shall not knowingly take any action or fail to take any action or (insofar as it is reasonably within its power) permit to occur any action which would cause the Authority to be in breach of its statutory functions.

## **7. REPRESENTATIVES**

- 7.1 The Authority shall, from time to time, appoint a representative to exercise the functions and powers of the Authority in relation to the performance of this Agreement notifying the Company and DfE promptly of the identity of the relevant person. The Authority shall be entitled, from time to time, to amend the identity of its appointed representative by notice, in writing, to the Company and DfE.
- 7.2 The Company shall, from time to time, appoint a representative to exercise the functions and powers of the Company in relation to this Agreement, notifying the Authority and DfE promptly of the identity of the relevant person. The Company shall be entitled from time to time to amend the identity of its appointed representative by notice, in writing, to the Authority and the DfE.

## **8. GRANT OF LEASE**

- 8.1 The Authority shall, subject to clause 8.2, and subject to Schedule 4 (Lease), grant and the Company shall accept a lease of the Site, pursuant to the terms set out in Schedule 4 (Lease) of this Agreement as from the Commencement Date.
- 8.2 Clause 8.1 shall not apply where the Company before the Commencement Date has ceased to be responsible for the operation of the Site.
- 8.3 The Authority, as landlord, has served on the Company, as the tenant, a notice in relation to the Lease in the form set out in Schedule 7 to the Regulatory Reform Business Tenancies (England and Wales) Order 2003 ("the Order").
- 8.4 The Company (or a person duly authorised by the Company) has made a statutory declaration in the form or substantially in the form set out in paragraph 8 of Schedule 2 to the Order.
- 8.5 The Authority and the Company agree that the provisions of Section 24 to 28 of the 1954 Act be excluded in relation to the Lease.
- 8.6 The Company is not entitled to any compensation under Section 37 of the 1954 Act when the Lease ends.

- 8.7 The Company acknowledges that the Lease remains subject to the Ancillary Rights granted to the Contractor under the PFI Project Agreement and acknowledges that the Authority, the Contractor and each of their employees, servants, agents and sub-contractors have sufficient authority to enter the Site from time to time for the purpose of carrying out their obligations under the PFI Project Documents and the Company shall not withhold such access.
- 8.8 The Company shall procure that in occupying the Site there shall be no act or omission by the Company, or Company Related Parties, which shall give rise to a right for any person to obtain title to or any rights or interests over the Site or any part of it and/or cause any material disruption to the provision of the Services.
- 8.9 In accordance with clause 3.3 (Repair and Upkeep) of the Lease at Schedule 4 to this Agreement; during the period of the PFI Project Agreement the Authority will require the Contractor to perform the FM Services in relation to the repair and upkeep of the Site and Facilities in accordance with the Service Requirements of Schedule 1 to the PFI Project Agreement and as a consequence for the period of the PFI Project Agreement the Company shall not be responsible for such functions.

## **9. COMPANY ASSETS**

- 9.1 The Company is entitled to use its own equipment and assets so as to facilitate the provision of Educational Services by the Company at the Academy.
- 9.2 The Company acknowledges that Company Assets are and shall remain the responsibility of the Company and the Services provided by the Contractor do not (unless otherwise agreed in writing by the Authority after receiving consent from the Contractor) extend to any of the Company Assets.
- 9.3 The Company is responsible for any costs incurred by the Company in relation to the Company Assets.
- 9.4 For the avoidance of doubt the Existing School and any fixtures, fittings or equipment provided under the PFI Project Documents or in respect of which the Authority is the legal or beneficial owner shall, unless transferred in accordance with clause 9.5 below, remain owned by the Authority.
- 9.5 Immediately upon termination or expiry of the PFI Project Agreement (howsoever arising) the Authority shall transfer or procure the transfer to the Company of the PFI Contractor Assets (at no cost to the Company) and the Authority owned equipment referred to in clause 9.4 above.

## **10. FIRE REGULATIONS**

- 10.1 The Company and the Authority shall each act reasonably and in good faith to procure that an up-to-date fire folder is maintained for the Academy in accordance with the Government guidance referring to the Regulatory Reform (Fire Safety) Order 2005. In particular, the Company shall:
- 10.1.1 prepare risk assessments for emergency events including fires;

- 10.1.2 prepare and communicate the evacuation procedures including instructions to staff and pupils at the school on the correct action when discovering a fire and on the correct action when the fire alarm is sounded;
- 10.1.3 prepare notices and signs reinforcing the evacuation procedures; and
- 10.1.4 ensure and maintain discipline of occupants of the Academy to prevent fires and deliberate and/or accidental activation of the system.
- 10.1.5 ensure all staff and occupants of the Site undertake all necessary training in relation to fire awareness and appropriate fire drills are carried out on a regular basis in collaboration with the Contractor and contractor procedures.

## **11. PROGRAMMED MAINTENANCE**

- 11.1 Where the Contractor proposes to carry out the Maintenance Programme which may impact on the Educational Services at the Academy, the Authority will not authorise the carrying out of such maintenance by the Contractor without prior consultation with a Company Representative (and the Authority shall have due regard to any representations made). Where the Maintenance Programme would, if implemented, have a material and adverse effect on the Educational Services at the Academy, the Authority will not authorise the carrying out of such maintenance without the prior consent of the Company.
- 11.2 The Authority shall provide the Company with a copy of the Maintenance Programme (insofar as it relates to the Academy) in each year of this Agreement. The Authority shall act reasonably and shall take the Company's comments on the Maintenance Programme into account when making submissions to the Contractor. Without prejudice to the generality of the foregoing:
  - 11.2.1 the Company shall be entitled to raise comments on the Maintenance Programme and the Authority shall act reasonably and shall take the Company's comments on the Maintenance Programme into account when making submissions to the Contractor for variations to be made to the Maintenance Programme under the Review Procedure; and
  - 11.2.2 where the Maintenance Programme contains proposals which would, if implemented, have a material and adverse effect on the Educational Services at the Academy the Authority shall make submissions to the Contractor for variations to be made to the Maintenance Programme, as reasonably requested by the Company;
  - 11.2.3 if the Company requests variations to be made to the Maintenance Programme pursuant to clause 11.2.2. above then the Company shall be liable for any additional costs arising directly from any such variation (as the case may be).

## **12. PAYMENT OF SCHOOL CONTRIBUTION**

### **12.1 Contribution**

- 12.1.1 In consideration for the provision of the services to the Academy, the Company shall with effect from the Commencement Date pay to the Authority the Relevant Proportion (as adjusted from time to time in accordance with clause 12.7) in accordance with the Invoicing Procedure.

12.1.2 The Company undertakes to pay to the Authority, in addition to the Relevant Proportion due under clause 12.1.1, any sum received by it from the Secretary of State for Education or his agent in respect of the Affordability Gap, whether received as part of the General Annual Grant or as an Earmarked Annual Grant, in accordance with Schedule 2 (Calculation of the School Contribution).

## 12.2 **VAT**

If any supply made or referred to in this Agreement is or becomes chargeable to VAT, then the person receiving the supply, (the "Recipient") shall in addition pay the person making the supply (the "Supplier"), the amount of that VAT against receipt by the Recipient from the Supplier of a proper VAT invoice in respect of that supply.

## 12.3 **Adjustment for Part Years**

Where:

12.3.1 this Agreement commences part-way through the accounting year (being each year commencing 1 April or as otherwise agreed); or

12.3.2 this Agreement and/or the PFI Project Agreement is terminated or expires part-way through the accounting year;

then:

- (i) the amount to be paid by the Company in relation to the School Contribution in respect of that year will be adjusted pro rata by reference to the number of days in that year in which services are provided under the PFI Project Agreement, as the case may be, compared to the number of days in that year and, in the case of clause 12.3.2, the Authority shall re-pay the Company any excess paid to the Authority by the Company within twenty (20) business days of such termination; or
- (ii) if this Agreement terminates or expires pursuant to clause 12.3.2 above, then any amounts relating to the School Contribution still properly and duly payable by the Company to the Authority at that date shall be paid to the Authority in accordance with the Invoicing Procedure.

12.4 Not Used

## 12.5 **Utilities**

12.5.1 The Company acknowledges that prior to the Commencement Date the Authority has been responsible, under the PFI Project Agreement, for the provision of Utility Services to the Existing School. This responsibility shall remain with the Authority until either the Expiry Date or earlier termination of the PFI Project Agreement and shall include:

- (a) managing the Utility Service and the associated purchasing agreements;
- (b) paying for the consumption (including all standing charges) of each utility in accordance with the individual purchasing agreements;
- (c) identifying and negotiating the purchasing arrangements in relation to each Utility Service on the basis of the most economically advantageous terms reasonably available in the market;

- (d) maintaining all meters (excluding any sub-meters installed by the Contractor in accordance with the PFI Project Agreement) and any related equipment required in connection with the Utility Services; and
- (e) reconnecting any Utility Service failure.

12.5.2 The Company shall be responsible for:

- (a) reimbursing the Authority in relation to the Utility Costs (to the extent that they relate to the Academy) in accordance with Schedule 2 (Calculation of the School Contribution);
- (b) payment of any remaining utilities consumed at the Site which shall include ICT, ICT Services, internet service provision, voice and data, telephone and line rental.

12.5.3 For the avoidance of doubt, from the Expiry Date or earlier termination of the PFI Project Agreement, the Authority shall cease to be responsible for the provision of all Utility Services and the Company shall thereafter become responsible for procuring and maintaining the supply of all utilities consumed on the Site as necessary to operate the Academy and the Site.

12.5.4 The Authority shall require the Company to assist in:

- (a) minimising its Utility Costs by monitoring and reviewing the utility usage at the School; and
- (b) reducing or recycling the various categories of waste generated at the Site.

## 12.6 **Interest on Late Payment**

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

## 12.7 **Adjustment of the School Contribution**

12.7.1 Subject to clause 12.7.2, the School Contribution shall be adjusted:

- (a) in accordance with Schedule 2;
- (b) on the occurrence of the circumstances referred to in clause 16.5; and/or
- (c) on the occurrence of the circumstances referred to in clause 18 (Benchmarking and Market Testing); and/or
- (d) on the occurrence of the circumstances referred to in clause 26.2,

and as specifically provided for elsewhere in this Agreement.

12.7.2 Where the School Contribution is to be adjusted in accordance with the terms of this Agreement, the adjustment shall be proportionate having regard to all relevant matters, including but not limited to:

- (a) any change to the Unitary Charge;
- (b) the proportion of the Unitary Charge represented by the School Contribution;
- (c) the effect on the Academy and the Company;
- (d) the effect on the Authority,



and shall be reasonable in all the circumstances.

## **12.8 Catering**

- 12.8.1 The Company will place its Meal of the Day order in accordance with Schedule 6 to this Agreement.
- 12.8.2 The Company shall pay the Authority, for the relevant contract month, for the number of meals in accordance with Schedule 6.
- 12.8.3 During the subsistence of the PFI Project Agreement, the Company shall provide to those pupils at the Academy, from time to time entitled to free meals, such Free School Meals as a maintained school is required under legislation from time to time in force to provide. It is acknowledged that the Authority has delegated the provision of such meals to the Contractor under the terms of the PFI Project Agreement.

## **13. PERFORMANCE REGIME**

### **13.1 Deductions**

The Authority is entitled under the PFI Project Documents to, inter alia, make Deductions. The provisions of this clause 13 shall apply to the administration of and accounting for such Deductions in respect of the Academy.

### **13.2 Reporting**

The Company shall procure that the Principal of the Academy (or a person authorised by the Company) shall in relation to the Academy:

- 13.2.1 use the Helpdesk established under the PFI Project Agreement, as the case may be, to report any failures eligible for Deductions;
- 13.2.2 promptly report any apparent Unavailability of any Areas to the Helpdesk, in relation to the PFI Project Agreement and to the Authority's Representative;
- 13.2.3 promptly review any report of the performance of the Contractor provided by the Contractor and/or Authority and promptly notify any inaccuracies relating to the Academy to the Authority's Representative; and
- 13.2.4 promptly report and notify to the Authority's Representative any acts or omissions of the Contractor which the Company believes may reasonably constitute a breach by the Contractor of the PFI Project Agreement.

### **13.3 Attribution of Deductions**

- 13.1.1 The Authority agrees that 50% of any Deductions (as agreed or determined pursuant to the PFI Project Agreement) which relate solely in relation to the Academy shall be credited to the Company as a proportional reduction of monthly instalments of the Relevant Proportion pursuant to Schedule 2 (Calculation of the School Contribution).

## **14. SURVEYS**

- 14.1 The Authority and the Company shall liaise throughout the term of this Agreement on matters relating to the condition of the buildings and any other structures, cabling, services and of grounds which comprise the Site.
- 14.2 The Authority in exercising its rights to survey the Site and buildings on the Site under the PFI Project Agreement shall liaise with the Company Representative and shall have regard to the views of the Company in setting times for a surveyor to assist the Authority in undertaking any such surveys.
- 14.3 If the Company requires the Authority to pursue such surveys which may not be in accordance with the PFI Project Agreement, then the Company shall be fully and solely responsible for any costs as a consequence of such a requirement, including as appropriate the reasonable cost of the Authority Officer's time in performing such a service.
- 14.4 The Company shall provide the Authority with access to the Site in order to exercise its rights to survey the Site and/or School Facilities in accordance with the PFI Project Agreement subject to the Authority using reasonable endeavours to minimise any disruption caused to the provision of the Educational Services at the Academy.

## **15. INDEMNITIES**

Where any Party (the "Indemnified Party") wishes to make a claim under this Agreement against the other (the "Indemnifying Party") whether in relation to a claim made against it by a third party (a "Third Party Claim") or otherwise, then any and all claims by the Indemnified Party shall be made in accordance with clause 4 (Normal Payment Matters) of the Principal Agreement.

## **16. INSURANCE**

- 16.1 The Company acknowledges that it is responsible for procuring and maintaining insurances which:
- 16.1.1 cover the risk of any and all damages, losses, claims, actions, costs, expenses, proceedings, demands, charges, physical loss, theft and/or indirect loss to the Company or to the Company Assets (but, for the avoidance of doubt, not in respect of the Site); and
- 16.1.2 are otherwise required by Legislation in relation to risks relevant to the operation of the Academy and the provision of Educational Services at the Academy.
- 16.2 **Company Insurance Requirements**

The Company shall not take any action or fail to take any reasonable action or (insofar as it is reasonably within its power) permit anything to occur in relation to it which would entitle any insurer to refuse to pay any claim under any Required Insurance to which it is an insured, a co-insured or an additionally insured person or noted on the policy.

### 16.3 **Authority Insurance Obligations**

The Authority shall use all reasonable endeavours to procure due compliance by the Contractor of its obligations under clause 57 (Insurance) of the PFI Project Agreement to procure the existence of insurances and shall, in particular, procure that such insurances:

- 16.3.1 where requested by the Company, name the Company as co-insured; and
- 16.3.2 where the Company is co-insured, include within the terms of such insurances non-nitiation protection and a waiver of subrogation rights; and
- 16.3.3 are in terms that comply with the other provisions of clause 65 (Insurance) of the PFI Project Agreement,

and shall exercise its rights and/or remedies under the PFI Project Agreement to such end.

### 16.4 **Evidence of Policies**

The Authority shall provide to the Company on reasonable notice:

- 16.4.1 copies of the material damage insurance policy relating to the Site;
- 16.4.2 evidence that the premiums payable under the insurances as referred to in clause 16.3 have been paid and that the insurances are in full force and effect; and
- 16.4.3 without prejudice to clause 16.3, the Authority shall forward to the Company copies of any renewal policy received from the Contractor, pursuant to clause 57.5 of the PFI Project Agreement.

### 16.5 **Sharing of Insurance Risk**

- 16.5.1 If pursuant to the Insurance Review Procedure under the Insurance Premium Risk Sharing Mechanism at Part 5 of Schedule 14 of the PFI Project Agreement, it is agreed or determined that the Authority is responsible for the meeting of costs of insurance policy premium variations and further to review by the parties of the insurance cost report provided by the Contractor pursuant to paragraph 2.3 of Part 5 of Schedule 14 of the PFI Project Agreement it is agreed or determined pursuant to clause 23 of this Agreement that all or part of the Authority's liability to meet such costs has arisen solely due to the claims history at the Academy:

- (a) the Authority shall forthwith notify the Company of the same;
- (b) the Authority shall make an appropriate adjustment to the Relevant Proportion to ensure that the Authority is left in no better or worse position than before the premium variation occurred within ten (10) Business Days of receipt of notice; and
- (c) on the next immediate and subsequent Payment Date, payments of the Relevant Proportion shall be adjusted so as to ensure the Authority is in no better and no worse position than before the premium variation occurred.

- 16.5.2 If pursuant to the Insurance Review Procedure under the Insurance Premium Risk Sharing Mechanism at Part 5 of Schedule 14 of the PFI Project Agreement it is agreed or determined that the Authority is to receive the benefit of any insurance policy premium variations and further to review by the parties of the insurance cost report provided by the Contractor pursuant to paragraph 2.3 of Part 5 of Schedule 14 of the PFI Project Agreement, it is agreed or determined pursuant to clause 23 of this Agreement that all or part of the cost benefit relates to the Academy:

- (a) the Authority shall forthwith notify the Company of the same;
- (b) the Authority shall make an appropriate adjustment of the Relevant Proportion to reflect that part of the decrease attributed to the Company within ten (10) Business Days of receipt of notice; and
- (c) on the next immediate and subsequent Payment Date, payments of the Relevant Proportion shall be adjusted to reflect that part of the decrease attributed to the Company in accordance with clause 16.5.2.

## **17. DAMAGE AND VANDALISM**

### **17.1 Reporting of Damage**

Under the terms of clause 56.4 (Accidental Damage and Vandalism) of the PFI Project Agreement, the Contractor has agreed that it shall as soon as practicable inform the Company on the discovery of any damage to any part of the Site or any furniture, fittings and equipment within the Academy. The Company shall co-operate with the Contractor at all times in the performance by the Contractor of its obligations to identify and report any damage, whether accidental or Deliberate Damage.

### **17.2 Authority Damage to the School Facilities**

17.2.1 The Authority shall as soon as being notified by the Contractor that Deliberate Damage to the School Facilities has occurred in accordance with clause 56.4.2 of the PFI Project Agreement, notify the Company of the Contractor's opinion of:

- (a) the nature and extent of such Deliberate Damage;
- (b) when such Deliberate Damage occurred;
- (c) (to the extent possible) the party responsible for such Deliberate Damage;
- (d) the likely estimated cost of making good such Deliberate Damage ("the Estimated Repair Cost"); and
- (e) which of the Company or the Contractor is responsible for meeting the Estimated Repair Cost.

17.2.2 In order to facilitate the Contractor's responsibility to report any Deliberate Damage on a timely basis (which in turn will facilitate the correct allocation of responsibility under the PFI Project Agreement as between the Authority and the Contractor), the Company shall notify the Authority of its opinion of those matters referred to in clause 17.2.1 and shall procure that the Company Representative and the Principal co-operate with the Contractor in agreeing whether or not any damage is Deliberate Damage (for which the Authority is responsible under clause 56.4.1 of the PFI Project Agreement) and that the Contractor, is kept informed of the Principal's alternate.

17.2.3 Without prejudice to the obligations of the Contractor under the PFI Project Agreement to repair, maintain and replace the School Facilities, the Company shall (except to the extent covered by any relevant Required Insurances) be responsible for Deliberate Damage that occurs during the Required Periods, Additional School Periods and periods during which Community Use is being undertaken howsoever and by whomsoever caused save to the extent Deliberate Damage to the School Facilities is caused by the Contractor or a Contractor Related Party or the Authority or an Authority Related Party.

- 17.2.4 The Company shall reimburse the Authority for any damages, costs, claims, liabilities and/or expenses properly incurred by the Authority, the Contractor or any Contractor Related Party arising from such Deliberate Damage that the Company is liable for pursuant to clause 17.2.3 within ten (10) Business Days of receipt of an invoice for the same from the Authority.
- 17.2.5 If, pursuant to clause 56.4.3 of the PFI Project Agreement, it is agreed or determined that the Authority is responsible for meeting the costs of any Authority Share claimed by the Contractor and further to a review by the parties of any supporting documentation provided by the Contractor, it is agreed or determined pursuant to clause 23 of this Agreement that all or part of the Authority's liability to meet the Authority Share has arisen due to the claims history at the Academy then:
- (a) the Authority shall apportion the Authority Share across those PFI Schools that have been responsible for triggering the Authority Share, such apportionment to occur by reference to the values of the claims made in respect of those PFI Schools within the previous Contract Year; and
  - (b) to the extent that this includes the Academy, then the Authority shall notify the Company of the apportionment and the amount attributable to the Academy ("the Academy Share"); and
  - (c) the Company shall pay an amount equal to the Academy Share in accordance with clause 17.2.6 below.
- 17.2.6 Any sums payable by the Company to the Authority pursuant to clause 17.2.5 above shall be payable at the same time as the next and subsequent monthly instalment payments of the Relevant Proportion in accordance with the Invoicing Procedure.

## **18. BENCHMARKING AND MARKET TESTING**

- 18.1 In exercising its rights pursuant to clause 27 (Market Testing and Benchmarking) of the PFI Project Agreement, the Authority shall consult with the Company Representative on all matters affecting the Academy which arise pursuant to any benchmarking or market testing exercise shall, insofar as is compatible with the programme for the undertaking of the benchmarking exercise and any subsequent market testing be referred to the School Liaison Procedure for consideration.
- 18.2 Where, as a result of the benchmarking and market testing procedures referred to in clause 18.1, there is an adjustment to the Unitary Charge, the Relevant Proportion paid by the Company shall be adjusted, to take account of the outcome of the benchmarking and market testing procedures so that any such adjustment of the Relevant Proportion coincides with an adjustment to the Unitary Charge pursuant to clauses 27.1.4 or 27.5 of the PFI Project Agreement and leaves the Authority in a no better no worse position than before the benchmarking and market testing procedures were undertaken in accordance with the PFI Project Agreement provided that any adjustment made to the Relevant Proportion shall be no greater (if the Relevant Proportion is increased), or lesser (if the Relevant Proportion is reduced) than the average percentage adjustment which is made to the payment which is equivalent to the Relevant Proportion for the other Schools following the completion of such benchmarking and market testing procedures at the Schools other than the Academy in accordance with the PFI Project Agreement.

## 19. CONSULTATION AND LIAISON

The Authority shall convene a meeting of the School Liaison Committee in accordance with the procedures provided for in Schedule 1 (Liaison Procedure).

## 20. USE AND CONTROL OF THE SCHOOL

20.1 The Company acknowledges that pursuant to the PFI Project Agreement and this Agreement:

20.1.1 the School Day, Core Sessions and Non Core Sessions are currently included within the Unitary Charge. Any changes to the School Day, Core Sessions and/or Non Core Sessions shall require the Company to propose an Authority Change pursuant to clause 26.2 of this Agreement;

20.1.2 Additional School Periods may be requested by the Company, in which case the Authority shall make such request to the Contractor on behalf of the Company and the Company shall pay to the Authority any Marginal Cost associated with such request as claimed by the Contractor pursuant to the PFI Project Agreement;

20.1.3 the Company's use of the School Facilities for Community Use is subject to any existing arrangements for Third Party Use as at the date of this Agreement; and

20.1.4 the Company acknowledges that Community Use of the School Facilities will either coincide with the School Day or be booked for use as Additional School Periods. Community Use outside of the School Day or Non Core Session shall be deemed an Additional School Period and shall subject to a Marginal Cost to the Company in accordance with clause 20.1.2 above.

### 20.2 Request for School Periods

No later than 1 March in each year, the Company shall notify the Authority of the dates for the Terms, which may be more or less than three (3) in number (including any half-term holidays) for the following period of 1 September to 31 August. The Company acknowledges the importance to the Authority of the dates for and length of Terms and half-term holidays. Should the Company wish to have less than or more than three Terms in an Academic Year or if the Company wishes to have an aggregate yearly duration in excess of 195 days it shall propose a Company Change pursuant to clause 26.2 of this Agreement and the Authority shall then propose an Authority Change pursuant to the PFI Project Agreement. For the purposes of the year ending 31 August 2015 the terms will be as follows:

Autumn Term: 1 September 2015 – 18 December 2015

Spring Term: 4 January 2016 – 18 March 2016

Summer Term: 4 April 2016 – 19 July 2016

Any costs incurred by the Authority in relation to any changes proposed by the Company under this clause 20.2 which requires the Authority to propose an Authority Change pursuant to the PFI Project Agreement shall be borne by the Company in accordance with clause 26.3 (Payment for Changes).

## **21. AUTHORITY INDEMNITY**

### **21.1 Indemnity for Acts or Omissions of the Contractor**

The Authority shall be responsible for and shall release and indemnify the Company in respect of all PFI Project Document Losses suffered or incurred by the Company or any servant, agent or representative of the Company to the extent that either:

- 21.1.1 the Authority recovers such PFI Project Document Losses from the Contractor; or
- 21.1.2 the Authority would have been entitled to recover such PFI Project Document Losses save for failures by the Authority to perform its obligations under this Agreement (whichever is the largest amount).

### **21.2 Indemnity for Acts or Omissions of the Authority and Authority Related Parties**

The Authority shall, subject to clause 21.4 (Authority not Responsible) be responsible for and shall release and indemnify the Company or any Company Related Party on demand from and against all liability for Academy Direct Losses arising from:

- 21.2.1 death or personal injury;
- 21.2.2 loss of or damage to property (including property belonging to the Company or for which it is responsible), but excluding the land, buildings, plant, equipment and other assets which are the responsibility of the Contractor to provide under the PFI Project Agreement and which form part of the Academy; and
- 21.2.3 third party action, claims and/or demands (other than which are the subject of the indemnity in clause 21.3) brought against the Company or any Company Related Party,

which may arise out of or in consequence of the performance or non-performance by the Authority of its obligations under this Agreement, or the presence on Site of the Authority or any Authority Related Party.

- 21.3 The Authority shall, subject to clause 21.4 (Authority not Responsible), be responsible for, and shall release and indemnify the Company or any Company Related Party on demand from and against all liability for Academy Direct Losses and Indirect Losses arising from third party actions, claims or demands, as described in clause 21.2.3, brought against the Company or any Company Related Party for breach of statutory duty which may arise out of, or in consequence of a breach by the Authority of its obligations under this Agreement to the extent that there are no other remedies available to the Company under this Agreement.

### **21.4 Authority not Responsible**

The Authority shall not be responsible or obliged to indemnify the Company:

- 21.4.1 for any matter referred to in clause 21.2 or 21.3 that arises as a direct result of the Authority acting on a written notice issued by the Company;
- 21.4.2 for any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Company or any Company Related Party (other than to the extent such negligence or wilful misconduct would not have occurred but for a breach by the Authority of its obligations under this Agreement) or by the breach of the Company of its obligations under this Agreement; or

21.4.3 to the extent that any costs and expense related to any injury, loss or damage is the responsibility of the Company pursuant to clause 17 (Damage and Vandalism).

## 21.5 **Authority Compensation**

Without prejudice to any rights of the Company at common law or in equity, where the Company suffers or incurs Academy Direct Losses or Indirect Losses in connection with a breach of the PFI Project Agreement by the Authority or an Authority Related Party and/or this Agreement or any other liability under the PFI Project Agreement attributable to the Authority or the Authority Related Party or the negligence or wilful misconduct of the Authority or an Authority Related Party, and the indemnities contained in clauses 21.1 to 21.4 (inclusive) do not apply, the Authority shall compensate the Company for all such Academy Direct Losses and Indirect Losses.

## 22. **THIRD PARTY USE AND COMMUNITY USE**

22.1 The Company acknowledges that pursuant to clause 28.4 of the PFI Project Agreement, outside of the School Day, the Contractor is entitled at its discretion to require the Site and any facilities on the Site (other than Company Assets, equipment or consumables owned by the Company or for which it is responsible, which are not provided under the PFI Project Agreement) for the purpose of Third Party Use subject to the provisos set out in clause 28.4 of the PFI Project Agreement. The Contractor shall be entitled to charge for and be paid for, and be paid by, each person undertaking Third Party Use, such fee to be determined by the Contractor for the use made of the School Facilities.

22.2 The Company further acknowledges that all income received from Third Party Use shall be divided between the Authority and the Contractor in accordance with clause 28.7.1 of the PFI Project Agreement. The Authority shall be entitled to retain its share of the Divisible Income unless the Company has initiated such Third Party Use, in which case the Company shall be entitled to receive the Authority's share of any resulting Divisible Income.

22.3 The Authority hereby agrees with the Company that where the Company reasonably believes that the Third Party Use is not compatible with the use of the Academy for a school, the Authority shall at the request of the Company exercise its powers to regulate the use of the Academy under clause 28.5 of the PFI Project Agreement.

22.4 Where the Parties are unable to agree such terms of use under clause 22.3 above, the matter shall be dealt with in accordance with the Dispute Resolutions Procedure at clause 23 of this Agreement.

22.5 The Company shall use its reasonable endeavours to assist the Authority where in accordance with the PFI Project Agreement the Contractor and the Authority seek to agree the Divisible Income generated from the use of the School Facilities through Third Party Use.

22.6 The Company may arrange Community Use in accordance with the terms of the PFI Project Agreement and to the extent that any income is generated from that Community Use, then that shall be retained by the Company.



## **23. DISPUTE RESOLUTION**

- 23.1 Where the Company does not believe that the Contractor is undertaking its obligations in accordance with the PFI Project Agreement insofar as they relate to the Academy, the Company may (acting reasonably) request the Authority to consider in accordance with clause 4 (Enforcement of the PFI Project Agreement) of this Agreement whether to submit such a dispute to the Dispute Resolution Procedure contained in the PFI Project Agreement on behalf of the Company. The Authority shall act reasonably when considering any such request.
- 23.2 If a dispute arises in relation to any aspect of this Agreement, the Company and the Authority shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter. If the Authority and the Company fail to resolve the dispute within ten (10) Business Days of the initial consultation between them then either may refer the matter to be resolved by a person nominated by or on behalf of DfE. DfE shall act reasonably in making such nomination, including ensuring the impartiality of the nominee regardless of whether there may be any financial benefit to DfE dependant on the nominee's decision. Subject to a decision made by a person nominated by or on behalf of DfE under this clause, each party shall in relation to the PFI Project Agreement bear their own costs arising from a dispute pursuant to this clause 23.2.
- 23.3 Should a dispute arise which the Authority would not otherwise pursue other than at the Company's request, the Company shall reimburse the Authority in relation to all reasonable and proper costs incurred by the Authority in submitting the matter to the relevant adjudicator pursuant to the PFI Project Agreement.

## **24. EMPLOYEES**

- 24.1 Without prejudice to clause 4 (Enforcement of the PFI Project Agreement), the Authority undertakes to duly enforce the provisions of clause 31 (Employees – General) of the PFI Project Agreement for the benefit of the Company where requested to do so by the Company (acting reasonably).
- 24.2 In the event that the Company becomes aware of a breach by the Contractor of any obligation under clause 31 (Employees - General) of the PFI Project Agreement, the Company shall give notice (including reasonable particulars of the alleged breach) to the Authority and the Authority undertakes to promptly take up such matter with the Contractor enforcing the terms of the relevant clause to the maximum extent practicable in the circumstances.
- 24.3 Where the Company reasonably believes that any person employed at the Academy (whether in connection with the Works or Services or otherwise) should be removed pursuant to the power available to the Authority under clause 31.4 of the PFI Project Agreement, the Company shall be entitled to serve written notice on the Authority requiring the Authority to exercise its power to procure removal of that person from the Site and the Authority shall promptly do so.
- 24.4 If the Company declines to give reasons for the refusal to admit, or the removal of any person from the Site pursuant to clause 24.3 above, then the Company shall indemnify the Authority and keep the Authority indemnified from and against any claims made by the Contractor pursuant to the indemnity at clause 31.5 of the PFI Project Agreement.

## **25. EMPLOYEE TRANSFERS**

The parties shall co-operate and consult with relevant employees as required under TUPE in connection with the Project and obligations in the Academy Contracts.

## **26. EXERCISE OF AUTHORITY CHANGE AND CHANGE MECHANISM**

### **26.1 Changes not proposed by the Company**

Where there is any proposal for an Authority Change or a Contractor Change ("Change") under the PFI Project Agreement that is not proposed by the Company:

- 26.1.1 the Authority shall notify the Company and the DfE of all the relevant information in relation to the proposed Change, including without limitation, the Authority's opinion, the available options, the decision required and the time periods for both parties to respond; and
- 26.1.2 the Authority shall not agree to any proposed Change which is reasonably likely to have an adverse effect upon the provision of the Services at the Academy or a material adverse financial impact on the Academy, without the prior consent of:
  - (a) the Company (which shall not be unreasonably withheld or delayed); or
  - (b) DfE, in the event that either:
    - (i) the Company has not provided its consent under clause 26.1.2.(a); or
    - (ii) the proposed Change would have a material adverse financial impact on the Academy.

### **26.2 Changes Proposed by the Company**

- 26.2.1 The Company may at its own cost, acting reasonably request the Authority to request an Authority Change on behalf of the Company pursuant to the PFI Project Agreement and shall provide the Authority and DfE with all relevant information in relation to the proposed Authority Change including all matters set out in clause 53.2 of the PFI Project Agreement following which the Company shall ensure that it adheres to the processes for implementing an Authority Change pursuant to clause 53.1 of the PFI Project Agreement and shall be liable for any consequential costs of the Authority as a result of not adhering to such process.
- 26.2.2 The Authority may decline to submit an Authority Notice of Change to the Contractor, where if to put forward such a proposed Authority Change to the Contractor would:
  - (a) be prejudicial to the Project as a whole or another school within the Project;
  - (b) be in breach of the requirements for Authority Changes set out in clause 53.1 of the Project Agreement;
  - (c) result in material additional costs or increased liabilities for the Authority in a manner not compensated for by either the Company and/or DFE; and/or
  - (d) not be in the format of an Authority Notice of Change as required by clause 53.2 of the Project Agreement.

26.2.3 Where the Authority does not decline the Company's proposed Authority Change pursuant to clause 26.2.2:

- (a) the Authority shall submit an Authority Notice of Change to the Contractor as soon as practicable and keep the Company informed as to any information regarding the proposed Authority Change received from the Contractor as well as any revisions, estimates and/or amendments to that proposed Authority Change. The Company shall reimburse the Authority in relation to its reasonable costs of progressing the Authority Change Notice provided that the Authority has given the Company an estimate of such costs prior to incurring them and the Company has approved them;
- (b) the Company shall at its own cost provide all assistance to the Authority, including; procuring additional information to assist the proposed Authority Change; details of proposals for provision of funding for capital expenditure required to implement the Authority Change and attending relevant discussions with the Contractor in seeking to agree the contents of the Estimate provided by the Contractor in accordance with clause 53.4 of the Project Agreement;
- (c) the Authority shall promptly provide the Company with a copy of the Estimate relevant to the Authority Change (including any revisions to such Estimate), an estimate of any costs that the Authority will require the Company to reimburse under clause 26.2.3(a) and a copy of the proposed notice confirming the Authority Change;
- (d) the Company shall provide written notice to the Authority either confirming the relevant Estimate or requesting the Authority withdraw the relevant Authority Notice of Change within at least ten (10) Business Days before the Authority is required to advise the Contractor that either the contents of the relevant Estimate are agreed by the Authority or the Authority Notice of Change is withdrawn in accordance with clause 53.7 of the Project Agreement;
- (e) subject to always clause 26.3.3, the Authority shall not confirm with the Contractor any Estimate in relation to an Authority Notice of Change requested by the Company under this clause 26.2, without the prior written consent of the Company (not to be unreasonably withheld or delayed); and
- (f) subject always to clause 26.3.4 the Authority shall not withdraw an Authority Notice of Change requested by the Company under this clause 26.2, without the prior written consent of the Company (not to be unreasonably withheld or delayed).

### 26.3 **Payment for Changes**

Where any Change is likely to lead to an adjustment of the Unitary Charge or any payments from the Authority to the Contractor of a lump sum:

26.3.1 where pursuant to clause 26.2, there is an increase in payments from the Authority to the Contractor or the payment to the Contractor of a lump sum arising from the implementation of an Authority Notice of Change requested by the Company, the Company shall bear the entire increase or reimburse the full amount of the lump sum to the Authority to the extent related to the Company's request;

26.3.2 where pursuant to clause 26.1, there is an increase in payments from the Authority to the Contractor or the payment to the Contractor of a lump sum arising from the implementation of a Change under the Project Agreement, the Company shall, unless

agreed otherwise in writing between the parties, pay to the Authority such proportion of the Authority's increased liability which relates to the Academy through either:

- (a) payment of a lump sum payable by the Authority to the Contractor in relation to the Change in accordance with Schedule 7 (Invoicing Procedure); or
- (b) an adjustment to the Relevant Proportion,

so as to ensure the Authority is left in no better and no worse position than if the Change had not been implemented.

26.3.3 Where there is a decrease in payments from the Authority to the Contractor arising from the implementation of the Change, a proportionate adjustment to the Relevant Proportion to reflect such decrease shall apply as soon as reasonably practicable following the implementation of the relevant Authority Change so as to ensure the Authority is left in no better or worse position than if the Change had not been implemented.

26.3.4 Notwithstanding clause 26.1 and clause 26.2, if the Company does not confirm the Estimate (as modified) within a sufficient period of time to allow the Authority to comply with the provisions of clause 53.8 of the PFI Project Agreement then the Authority Notice of Change shall be deemed to have been withdrawn.

26.3.5 Where either the Authority Notice of Change is withdrawn pursuant to clause 26.2.3(d) above or is deemed to have been withdrawn pursuant to clause 26.3.34 above, then the Company will bear and pay any costs properly and duly payable by the Authority to the Contractor pursuant to clause 53.8 of the PFI Project Agreement.

#### 26.4 **Cost Transparency**

26.4.1 Upon receipt of the Contractor's Estimate in relation to a change requested pursuant to clause 26.2, the Company shall ensure it has obtained the relevant pricing information from the Contractor for the Change requested and where there are any additional FM service costs or lifecycle costs, the Company must ensure that it has the requisite finance in place to cover any such ongoing cost as appropriate. The Company shall in any event ensure that it is able to pay for any Changes it proposes in relation to both capital expenditure and any future operational expenditure which the proposed Change gives rise to.

26.4.2 Subject to clauses 26.4.4 and 26.4.5 below, the Company shall be liable to pay all reasonable costs incurred by the Authority and the Contractor where any Change requested pursuant to clause 26.2 above necessitates any amendment or variation to the PFI Project Documents or financial modelling. Such costs may include but shall not be limited to any external advisor costs required by the Authority, the Contractor and related funder costs and internal officer charges for time incurred by the Authority's officers in carrying out any work on behalf of the Academy. In the event that any change requires external advisors to carry out any change to the PFI Project Documents on behalf of either the Contractor or the Authority, the Company shall be responsible for any such costs.

26.4.3 Subject to clauses 26.4.4 and 26.4.5 below, if the Authority is required to undertake any additional performance monitoring and/or contract management obligations as a result of that Change requested by the Company pursuant to clause 26.2 above which is not already covered by way of an increase to the Relevant Proportion, the Authority shall be entitled to charge the Company for the cost of any such additional contractual obligations.

- 26.4.4 Where the Authority anticipates that it will incur costs which it will seek to recover from the Company under clause 26.4.2 or 26.4.3 it shall provide the Company with an estimate of such costs prior to incurring them (and shall update such estimate from time to time as necessary).
- 26.4.5 The Authority shall not be entitled to recover compensation or to make a claim under clause 26.4 in respect of any loss that it has incurred to the extent that it has already been compensated in respect of that loss pursuant to clause 26.3 or any other provisions of this Agreement.

## **26A. CHANGE IN LAW**

- 26A.1 The Authority shall promptly notify the Company and the DFE where it becomes aware of any Qualifying Change in Law which may affect the Academy or any part of it and provide all relevant details, to the extent available.
- 26A.2 The Authority shall promptly provide to the Company any information which it receives in relation to a Qualifying Change in Law.
- 26A.3 The Authority shall consult with the Company in respect of any Qualifying Change in Law and have regard to any representations made by the Company.
- 26A.4 Where a Qualifying Change in Law has a potential financial impact for the Company (by means of an increased Relevant Proportion or otherwise), following notification under clause 26A.1, the Authority and the Company shall convene a meeting to discuss the appropriate course of action. In considering the appropriate course of action, the Authority and the Company shall act reasonably having regard to the nature of the Qualifying Change in Law, the terms of the PFI Project Agreement in relation to how such risk shall be managed and the Authority and the Company shall have regard to sources of funding available to them to make payments arising from the Qualifying Change in Law.
- 26A.5 Where it is determined that a Qualifying Change in Law gives rise to an ability for the Company to access grant funding or other contributions to the payment of the costs associated with the Qualifying Change in Law then the Company shall use all reasonable endeavours to obtain such grant funding or other contributions to the payment of the associated costs and the Authority shall use its reasonable assistance to assist the Company where such assistance is necessary in securing such grant funding and to the extent that the Company does receive such grant funding or other contributions, then the Company shall bear the associated costs incurred as a result of such Qualifying Change in Law.
- 26A.6 In the event that the Authority and the Company agree under clause 26A.4 that a proportion of the costs arising from the Qualifying Change in Law which are incurred by the Authority under the PFI Project Agreement should be paid by the Company, then the Company shall pay the agreed proportion through either:
- 26A.6.1 a contribution to the payment of a lump sum payable by the Authority to the PFI Contractor; or
- 26A.6.2 an adjustment to the Relevant Proportion,
- so as to ensure that the Authority is left in no better and no worse position than if the Qualifying Change in Law had not occurred.

26A.7 Where there is a decrease in payments from the Authority to the Contractor arising from the implementation of any Qualifying Change in Law, a proportionate adjustment to the Relevant Proportion to reflect such decrease shall apply as soon as reasonably practicable following the implementation of the relevant Qualifying Change in Law so as to ensure the Authority is left in no better and no worse position than if the Qualifying Change in Law had not been implemented.

## **26B SMALL WORKS**

26B.1 Where the Company require Small Works changes to be carried out at or to the Academy they shall follow the change procedures set out within the Small Works Handbook.

26B.2 The Contractor's Small Works and Authority Notification Handbook will be reviewed and updated periodically and provided to the Company by the Authority or the Provider (as the case may be) within 10 Business Days of either the Authority or the Provider receiving a revised copy of the Small Works Handbook.

26B.3 Following completion of Small Works, the Authority will seek confirmation from the Company that the works have been completed satisfactorily before entering into the Invoice Procedures (as set out within Schedule 7) with the Contractor on behalf of the Company.

26B.4 In all circumstances, the Company must ensure that it has obtained the relevant pricing information from the Contractor for the change requested and where there are any additional FM service costs or lifecycle costs the Company must ensure that they have the requisite finance in place to cover any such on-going cost as appropriate.

## **27. TERMINATION**

### **27.1 Occurrence**

This Agreement shall terminate on the earlier of the:

27.1.1 expiry or termination of the PFI Project Agreement; or

27.1.2 closure of the Academy; or

27.1.3 termination of the Funding Agreement save where this Agreement is to be or has been novated to a suitable replacement sponsor pursuant to the terms of the Principal Agreement; or

27.1.4 termination of the Lease pursuant to clause 5.4 and 6.7 thereof.

## **28. ASSIGNMENT, NOVATION OR TRANSFER OF RIGHTS**

28.1 In the event that the Authority novates, assigns or otherwise transfers its rights and obligations under the PFI Project Agreement to another person then the Authority will novate this Agreement and the Lease to that party.

28.2 Notwithstanding clause 28.1 above this Agreement and the Lease may be novated in accordance with the terms of the Principal Agreement.

28.3 Subject to clause 28.1 and 28.2 no party shall otherwise novate, assign or transfer its rights or obligations under this Agreement without the prior written consent of the other party.

## **29. GOVERNING LAW**

- 29.1 This Agreement and any non-contractual obligation arising out of it is subject to the laws of England and Wales.
- 29.2 Except as provided in this Agreement, the parties agree that any dispute between the parties shall be subject to the exclusive jurisdiction of the courts of England and Wales.

## **30. THIRD PARTY RIGHTS**

- 30.1 No term of this Agreement is intended to give any entitlement as against any party to any person who is not a party to this Agreement.
- 30.2 No term of this Agreement may be enforced by any person other than a party to this Agreement under the Contracts (Rights of Third Parties) Act 1999.

## **31. MISCELLANEOUS PROVISIONS**

### **31.1 Provisions to remain in force**

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

### **31.2 Entire Agreement**

This Agreement and the documents referred to in this Agreement contain all of the terms which the parties have agreed in relation to the subject matter of this Agreement.

### **31.3 Waiver**

No term or provision of this Agreement shall be considered as waived by a party to this Agreement unless a waiver is given in writing by that party. No waiver shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and only to the extent) expressly stated in that waiver.

### **31.4 Counterparts**

This Agreement may be executed and delivered in any number of counterparts, each of which so executed will be an original but together will constitute one and be the same instrument.

### **31.5 Intellectual Property Rights**

- 31.5.1 The Authority shall upon request by the Company and where permitted to do so in accordance with the PFI Project Agreement grant to the Company a sub-licence in respect of Intellectual Property Rights licensed to the Authority to enable the Company to perform its obligations under this Agreement and further where necessary to assist the Authority to achieve in complying with its obligations under the PFI Project Agreement.
- 31.5.2 The Company hereby grants to the Authority a non-exclusive irrevocable and royalty free licence (carrying a right to grant sub-licences) to use for the duration of the Agreement

solely for the purposes of discharging the Authority's obligations in relation to the School Facilities and/or the Site under the PFI Project Agreement, any Intellectual Property Rights which are or may become vested in the Company.

31.5.3 Where a claim or proceeding is made or brought against the Authority or an Authority Related Party which arises out of:

(a) the infringement of any Intellectual Property Rights licensed to the Company by or on behalf of the Authority pursuant to this clause, then, where and to the extent that such infringement has arisen out of the use of any such Intellectual Property Rights by or on behalf of the Company otherwise than in accordance with the terms of this Agreement; and/or

(b) the modification, adoption or transformation of any Intellectual Property Rights, the Company shall compensate the Authority at all times from and against all such claims and proceedings.

31.5.4 Where a claim or proceeding is made or brought against the Company or a Company Related Party which arises out of:

(a) the infringement of any Intellectual Property Rights licensed to the Authority by or on behalf of the Company pursuant to this clause, then, where and to the extent that such infringement has arisen out of the use of any such Intellectual Property Rights by or on behalf of the Authority otherwise than in accordance with the terms of this Agreement; and/or

(b) the modification, adoption or transformation of any Intellectual Property Rights,

the Authority shall compensate the Company at all times from and against all such claims and proceedings.

### 31.6 **Confidentiality**

Neither the Company nor the Authority shall publish or cause to be published or communicate to any third party unless required to do so by law any matters relating to this Agreement except with the prior written consent of the other (such consent not to be unreasonably withheld or delayed).

### 31.7 **Freedom of Information**

31.7.1 The Parties agree that they will each co-operate to the extent they are legally able to do so to enable any party receiving a request for information under the Freedom of Information Act 2000 to respond to that request promptly and within the statutory timescales.

31.7.2 This co-operation shall include but not be limited to finding, retrieving and supplying information held, directing requests to other person as appropriate and responding to any requests by the party receiving a request for comments or other assistance.

31.7.3 The Parties shall each bear their own costs in dealing with requests for information under the Freedom of Information Act 2000 or other subordinate legislation unless payment for providing the information is received from the requesting third party and in such circumstances the fees shall be divided proportionately between the parties.



**31.8 Data Protection Act 1998**

The Parties shall comply with their duties and responsibilities under the Data Protection Act 1998 in the performance of this Agreement and shall not unlawfully process or disclose information which is protected under that Act.

**32. FURTHER ASSURANCE**

Each Party shall do all things and execute all further documents necessary to give full effect to this Agreement.

**33. AMENDMENTS**

This Agreement may not be varied except by an agreement in writing signed by duly authorised representatives of the Parties.

**34. NO AGENCY**

34.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Parties.

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

**35. NO DOUBLE RECOVERY**

Notwithstanding any other provisions of this Agreement, no Party shall be entitled to recover compensation or to make a claim under this Agreement in respect of any loss that it has incurred to the extent that it has already been compensated in respect of that loss pursuant to this Agreement or otherwise.

**36. SEVERABILITY**

If any provision of this Agreement shall be declared invalid, unenforceable, illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability or legality of the remaining provisions of this Agreement.

**37. FORM OF NOTICES**

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

If to the Authority: Strategy, Service & Contracts Delivery Manager  
Barnsley MBC  
Corporate Services Department

Strategy Property and Procurement  
Corporate Mailroom  
P O Box 634  
Barnsley  
S70 9GG

If to the Company: Mrs Geraldine Wilson  
High View Primary Learning Centre  
Newsome Avenue  
Wombwell  
Barnsley  
S73 8QS

### 37.2 **Communication with Representatives**

Where the information or documentation is to be provided or submitted to the Authority's Representative or Company Representative it shall be provided or submitted by sending the same by first class post or by hand leaving the same at:

If to the Authority: Strategy, Service & Contracts Delivery Manager  
Barnsley MBC  
Corporate Services Department  
Strategy Property and Procurement  
Corporate Mailroom  
P O Box 634  
Barnsley  
S70 9GG

If to the Company: Mrs Geraldine Wilson  
High View Primary Learning Centre  
Newsome Avenue  
Wombwell  
Barnsley  
S73 8QS

### 37.3 **Service**

37.3.1 Notices given by post shall be effective upon the earlier of actual receipt or two (2) Business Days after mailing.

37.3.2 Notices delivered by hand directly to the intended recipient shall be effective upon delivery.

### 37.4 **Change of Address**

Any party to this Agreement (and any Representative) may change its nominated address or facsimile number prior written notice to the other parties.

### 37.5 **Accrued Rights**

The Parties agree that this Agreement may be extended if at any time it becomes apparent to either Party that any of their obligations or rights accruing to any of them in respect of this Agreement will not have been carried out or completed by the termination of the PFI Project Agreement.

In witness whereof the Parties have executed this Agreement as a Deed.

## Schedule 1

### Liaison Procedure

#### 1. PROJECT LIAISON GROUP

- 1.1 The Authority and the Contractor within the PFI Project Agreement are required to establish and maintain throughout the Contract Period a Project Liaison Group (the Project Liaison Group), consisting of:
- 1.1.1 three representative members from the Authority,
  - 1.1.2 three representative members from the Contractor,
  - 1.1.3 a rotating chairman (the Chairman),

and where a majority of the Project Liaison Group so determines, additional members "Ad-hoc Members" may be requested to attend who are properly qualified to participate in discussions relating to any particular matter which may arise from time to time, these "Ad-hoc" members shall have no voting rights, but shall have the functions described below.

- 1.2 The Contractor and the Authority agree that during the Service Period the Contractor shall procure the attendance of the FM Contractor during such parts of meetings of the Project Liaison Group as the parties shall agree. The Contractor shall ensure that the FM Contractor is able to present the monthly or other such reports as set out within the PFI Project Agreement as required by the Project Liaison Group to assist in any decisions which are required to be made by the Project Liaison Group.
- 1.3 Each party will have the right to make reasonable objections to the other party's proposed members or the Chairman but not so as to frustrate the rotation of the chairmanship.
- 1.4 Should the Authority and the Contractor agree that the best interests of the Project would be served by the removal of one or more members of the Project Liaison Group, they may so direct in writing in advance of the meeting from which the member is to be excluded the notice should confirm the basis for such an exclusion and if appropriate how long that exclusion should last for and the Authority or the Contractor, as the case may be, will put forward to the Authority and Contractor the name of a substitute member of the Project Liaison Group to ensure that the Project Liaison Group when it sits is quorate.
- 1.5 The substitute member shall with the consent of the other Party, such consent not to be unreasonably withheld or delayed, become a member of the Project Liaison Group as from the date of its next meeting until such time that the previously excluded member if applicable is returned to post.
- 1.6 On the date of the School's conversion to an Academy, the Authority shall propose to the members of the Project Liaison Group that a member of the Company be invited to attend the Project Liaison Group meetings as a "Special Ad-hoc" member and be entitled to discuss issues relevant to the PFI Project Agreement in so far as they relate to the interests of the Academy and the Educational Services for which the Company is responsible and be entitled to put before the Authority and Contractor any suggestions in relation to the areas for

which it is responsible and which have been discussed within the School Liaison meeting with the Authority prior to the Project Liaison Group meeting

- 1.7 In the event of the proposal for such a "Special Ad-hoc" member not achieving a majority vote (the Authority having exercised all its voting powers in favour of the proposal) the Authority shall not be held responsible but will represent the Company's interests at that meeting and present any reports as appropriate and previously discussed during the School Liaison Group meetings.
- 1.8 The Project Liaison Group shall always have the discretion when discussing issues raised by the Company to request that the "Special Ad-hoc" member absent himself for those discussions held between the Authority and Contractor.
- 1.9 In any event the "Special Ad-hoc" member is only entitled to attend on matters of particular importance to the School Liaison Group all other items on the Project Liaison Group shall be dealt with as between the Authority and the Contractor without the attendance of the "Special Ad-hoc" member.

## **2. FUNCTIONS**

The functions of the Project Liaison Group shall be:

- 2.1 to provide a means for the joint review of all aspects of the performance of the PFI Project Agreement;
- 2.2 to provide a forum for joint strategic discussion and consideration of all aspects with regard to the PFI Project Agreement including ensuring the appropriate dissemination of information and consideration of the views of all the stakeholders connected with the Project; and
- 2.3 consideration of issues relating to:
  - 2.3.1 Necessary Consents;
  - 2.3.2 provision of the Services, Performance Monitoring; and
  - 2.3.3 Authority Changes, Contractor Changes and Company/Academy Changes.

## **3. ROLE**

- 3.1 The role of the Project Liaison Group is to review the functions as set out in paragraph 2 above and to make recommendations as appropriate to either of the Authority and the Contractor.
- 3.2 The Authority, the Contractor shall give due regard to any discussions raised within this forum and where it is necessary in accordance with the terms of the PFI Project Agreement to implement any of discussions raised then the terms of the PFI Project Agreement must be invoked.
- 3.3 In the event that either the Authority or the Contractor disagree with any of the decisions then they may object to the implementation of the decision but they shall put their objections to the other Parties in writing to enable the reasons to be fully explored and if appropriate

moved forward to the Dispute Resolution Procedure set out within the PFI Project Agreement.

- 3.4 Neither the Project Liaison Group itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of the PFI Project Agreement or to make any decision binding on the Parties.
- 3.5 The Authority, the Contractor shall not rely on any act or omission of the Project Liaison Group, or any members of the Project Liaison Group acting in that capacity, so as to give rise to any waiver or personal bar in respect of any right, benefit or obligation of the Authority or of the Contractor under this Agreement.
- 3.6 No discussion, review, proposal or recommendation by the Project Liaison Group shall relieve the Authority or the Contractor of any liability or vary any such liability or any right or benefit.

#### **4. REPRESENTATIVES**

- 4.1 The Authority and the Contractor may appoint their representatives on the Project Liaison Group and remove those representatives and appoint replacements, by written notice delivered to the other at any time.
- 4.2 A representative on the Project Liaison Group may appoint and remove an alternate (who may be another representative of that party) in the same manner. If a representative is unavailable (and the other parties' representative may rely on the alternate's statement that the representative is unavailable) his alternate shall have the same rights and powers as the representative.

#### **5. PRACTICES AND PROCEDURES**

Subject to the provisions of this Schedule, the members of the Project Liaison Group may adopt such procedures and practices for the conduct of the activities of the Project Liaison Group as they consider appropriate, from time to time, provided that the quorum for a meeting of the Project Liaison Group shall be four (4) (with at least two (2) representatives of the Authority and two (2) representatives of the Contractor present).

#### **6. RECOMMENDATIONS**

Recommendations and other decisions of the Project Liaison Group must have the affirmative vote of all those voting on the matter, which must include not less than one (1) representative of the Authority and not less than one (1) representative of the Contractor.

#### **7. VOTING**

Each member of the Project Liaison Group shall have one (1) vote.

## **8. CHAIRMAN**

The Chairman of the Project Liaison Group shall be nominated by the Authority and by the Contractor alternately every six (6) months during the Contract Period (commencing with the Authority). The Chairman shall be in addition to each party's representatives on the Project Liaison Group. The Chairman shall not have a vote.

## **9. FREQUENCY OF MEETINGS**

The Project Liaison Group shall meet at least once every quarter.

## **10. CONVENING OF MEETINGS**

Any member of the Project Liaison Group may convene a meeting of the Project Liaison Group at any time.

## **11. NOTICES OF MEETINGS**

Not less than ten (10) Business Days notice (identifying the agenda items to be discussed at the meeting) shall be given to convene a meeting of the Project Liaison Group, except that in emergencies, a meeting may be called at any time on such notice as may be reasonable in the circumstances.

## **12. ATTENDANCE AT MEETINGS**

Meetings of the Project Liaison Group should normally involve the attendance (in person or by alternates) of representatives at the meeting. Where the representatives of the Project Liaison Group consider it appropriate (by affirmative vote of all those voting on the matter which must include not less than one (1) representative of the Authority and one (1) representative of the Contractor) meetings may also be held by telephone or another form of telecommunication by which each participant can hear and speak to all other participants at the same time.

## **13. MINUTES**

13.1 Minutes of all decisions (including those made by telephone or other telecommunication form) and meetings of the Project Liaison Group shall be kept by the Contractor and copies circulated promptly to the Authority and the Contractor, normally within ten (10) Business Days of the making of the decision or the holding of the meeting. A full set of minutes shall be kept by the Contractor and shall be open to inspection by the Authority or the Contractor at any time, upon request.

13.2 In its role as PFI Project Agreement Contract Manager, the Authority if requested to do so by the Company shall provide to the Company copies of any Minutes it receives from the Contractor where the Company has made any representations or presentations as a "Special Ad-hoc" member to the Project Liaison Group meetings. The Authority retains the discretion to be able to redact parts of the minutes where the information is not relevant to the issues of the "Special Ad-hoc" member.

- 13.3 Any additional copies of Minutes or historic copies of any document, where the Authority will incur a charge or cost in obtaining or copying and redacting as appropriate any such additional documents such additional costs and fees shall be the responsibility of the Company.

#### **14. THE SCHOOLS LIAISON GROUP**

The Authority does not intend to have individual groups and meetings with all schools linked to the PFI Project Agreement and instead shall hold one meeting with representatives from all schools and, thereafter, one representative from that forum feeding into the Project Liaison Group. The benefit of this is that any recurring or cross cutting issues across all schools can be easily identified and issues discussed in the round and addressed if possible as a collective, rather than having three (3) discussions on the same issue and at six (6) monthly intervals as notified by the Authority.

##### **14.1 The School Liaison Group (FM meetings)**

Throughout the contract period regular meetings will take place to discuss day to day service level issues including but not limited to:

- 14.1.1 Catering;
- 14.1.2 Cleaning;
- 14.1.3 Caretaking;
- 14.1.4 Energy and Waste;
- 14.1.5 Building Maintenance;
- 14.1.6 Grounds Maintenance;
- 14.1.7 Health and Safety;
- 14.1.8 School related issues from Project Liaison Group Meeting;
- 14.1.9 Changes.

##### **14.2 Attendees**

As a minimum the meeting would need an Authority Representative/Academy Trust Representative and Company Representative from across all of the Schools as appropriate.

From time to time on an ad-hoc basis with prior agreement between parties a third party may be invited to offer advice on a specific issue.

#### **15. SCHOOL PROJECT MANAGEMENT MEETING**

- 15.1 From time to time it may be necessary for the Authority to call a meeting to discuss a "Relevant Event" or major service issues that affects all schools e.g. change in law, benchmarking, market testing etc.
- 15.2 Attendees – Authority and Company/School representative (Head Teacher or senior nominated person), should the school or Company require any additional attendees prior approval required from the Authority.

## Schedule 2

### Calculation of the School Contribution

#### 1. INTRODUCTION

The School Contribution payable by the Company to the Authority shall be calculated in accordance with this Schedule 2.

#### 2. CALCULATION OF THE SCHOOL CONTRIBUTION

2.1 The School Contribution for the Financial Year 2015 to 2016 shall be calculated as follows:

$RP + AG + UC$

where:

RP = one hundred and forty seven thousand five hundred and forty pounds (£147,540);

AG = two hundred and twelve thousand nine hundred and seven pounds (£212,907);

UC = twelve thousand eight hundred and four pounds (£12,804)

or as adjusted in accordance with clause 12.7 (Adjustment of the School Contribution).

2.2 Subject to paragraph 2.3 below, for the consecutive Financial Years, until the expiry or early termination of this Agreement, the School Contribution shall be calculated as follows:

$[RP + AG + UC] \times IP$

AG = means the Affordability Gap as calculated in accordance with Schedule 2 of the Principal Agreement;

RP = shall mean the previous year's figure for the Relevant Proportion;

UC = shall mean the previous year's figure for the Utility Costs;

IP = means the annual Indexation Percentage comprised of RPIx;

RPIx will be calculated based on the published year on year % rate in March each year (for April to March financial year). However for school budget planning purposes, the RPIx for November will initially be applied with the following year's applicable RPIx adjusted for the difference between the November and March rate.

or as adjusted in accordance with clause 12.7 (Adjustment of the School Contribution).

2.3 The Parties hereby acknowledge that:

2.3.1 AG is only payable under this Agreement for so long as the pupil number baseline of the Authority's allocation of DSG (as defined in the Principal Agreement) includes pupils attending the Academy ("the recoument model").



- 2.3.2 Where the pupil number baseline of the Authority's allocation of DSG excludes pupils attending the Academy ("no recoupment model"), AG shall be calculated and payable in accordance with the Principal Agreement. Where the no recoupment model applies, AG shall cease to be payable under this Agreement.

### **3. FURTHER PROVISIONS**

- 3.1 For the avoidance of doubt, RP (as set out above) represents the identified funding within the Adjusted School Budget, which has been calculated and derived from specific factors within the schools funding formula relating to repairs and maintenance, ground maintenance, free school meals and a proportion of the Age Weight Pupil Unit funding.
- 3.2 AG (as set out above) equates to the PFI factor within the School's funding formula and represents the Company's share or proportion of the Affordability Gap (which is delegated through the school's budget). This Affordability Gap has been shared across all Schools in the PFI Project Agreement, based on pupil on roll numbers as per the applicable school census count.
- 3.3 UC (as set out above) represents identified funding (using 2012/13 as the baseline position) derived from the Age Weighted Pupil funding within the adjusted schools budget delegated to the school.

### **4. PAYMENT**

The Company shall pay the School Contribution in accordance with Schedule 7 (Invoicing Procedure).

## **Schedule 3**

### **Part 1**

#### **Warranties by the Company**

#### **5. INCORPORATION**

The Company is duly incorporated under the law of England and Wales and has the corporate power to own its assets and to carry on its activities as they are now being conducted.

#### **6. COMPANY POWERS**

6.1 The Company:

6.1.1 has the power to enter into and to exercise its rights and perform its obligations under this Agreement; and

6.1.2 has taken all necessary action to authorise the execution of and the performance by it of its obligations under this Agreement.

6.2 The Company is not subject to any other statutory or contractual obligation, compliance with which will or is likely to, have a material adverse effect on the ability of the Company to perform its obligations under this Agreement, the Funding Agreement or the Principal Agreement.

6.3 This Agreement constitutes or will when executed constitute legal, valid, binding and enforceable obligations on the Company.

6.4 Every consent and approval required by the Company in connection with the execution, delivery, validity or enforceability of this Agreement or the performance by the Company of its obligations under this Agreement have been obtained or made and is in full force and effect and there has been no fault in the observance of the conditions or restrictions (if any) imposed or in connection with any of the same.

#### **7. NO LITIGATION**

No claim is presently being asserted and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of the knowledge of the Company, pending or threatened against the Company or any of its assets which will or might have a material adverse effect on the ability of the Company to perform its obligations under this Agreement.

#### **8. SOLVENCY OF THE COMPANY**

8.1 No proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Company threatened) for its winding-up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator or similar officer in relation to any of the Company's assets or revenues.

- 8.2 The Company undertakes to inform the Authority as soon as reasonably practicable of any proposed meetings of creditors which relate to the Company's business.
- 8.3 Each of the warranties given in this Part 1 are given as at the Commencement Date and are not deemed to be repeated or confirmed after such date.

## Part 2

### Warranties by the Authority

1. The Acceptance Certificates were issued under clause 20.5 of the PFI Project Agreement on 24 July 2006.
2. The copies of the documents issued to the Company and/or its advisers listed in Part 3 of this Schedule are complete and accurate copies of the documents in question.
3. There have been no changes or amendments to the PFI Project Agreement other than the deed of variation dated 27 February 2007 and the changes made pursuant to the Authority Notices of Change listed in Part 4 of this Schedule.
4. There have been no changes to the parties to the FM Agreement.
5. There are not now, nor have there been any disputes referred to adjudication pursuant to clause 60 of the PFI Project Agreement.

## Part 3

### Documents

The Project Agreement and Schedules dated 4 May 2005.

The Deed of Variation dated 27 February 2007.

## Part 4

### Authority Notices of Change

**Schedule 4**

Form of Lease

## Schedule 5

### Information Protocol

1. The parties recognise the benefit of co-operation and sharing of Information as part of a prudent risk management strategy. Each party shall notify the other parties of relevant timescales (contractual and non-contractual) to which they are bound or committed, and shall use reasonable endeavours to facilitate exchange of Information in good time to meet such timescales.
2. The Authority shall provide to DFE and the Company (in each case solely in respect of matters affecting the Site):
  - 2.1 promptly upon becoming aware of the same, details of any actual or potential claim made or potentially to be made against the Authority under the PFI Project Documents which the Authority may seek to recover from the Company or DFE;
  - 2.2 on reasonable request, details of claims that the Authority is progressing under the PFI Project Documents (irrespective of whether the claims are being made at the request of the Company or DFE);
  - 2.3 any notice of termination served on the Authority pursuant to the PFI Project Documents;
  - 2.4 service of any notice by the Authority under a Project Document purporting to terminate that agreement;
  - 2.5 details of any matter which may lead to an increase in the Relevant Proportion including indexation, any benchmarking/market testing, any insurance costs review and any Change in Law; and
  - 2.6 such other information as DFE or Company may reasonably require.
3. The Authority shall provide to the Company (in each case solely in respect of matters affecting the Site):
  - 3.1 copies of insurance certificates obtained from the Contractor and copies of insurance reports provided by the Contractor as part of the insurance premia sharing mechanism under the Project Agreement;
  - 3.2 copies of performance reports received from the Contractor pursuant to the relevant payment mechanisms;
  - 3.3 quarterly (or more regular by agreement of the parties) reports on instances of Authority Damage, together with details of the costs associated with the same and the proposed or agreed responsibility for such costs;
  - 3.4 copies of any survey reports obtained by the Authority having exercised its rights to require surveys pursuant to the PFI Project Documents;
  - 3.5 copies of planned maintenance programmes provided to the Authority by the Contractor pursuant to the PFI Project Documents;

- 3.6 notice of any intention on the part of the Authority to exercise its step in rights pursuant to the PFI Project Documents;
- 3.7 copies of reports and details of any information given to the Authority by the Contractor under clauses 32 and 35.4 of the PFI Project Agreement.
4. The Company shall provide to the Authority and to DFE, promptly upon becoming aware of the same, details of any actual or potential claim made or potentially to be made against the Authority under the PFI Project Documents.
5. The Company shall provide to the Authority:
  - 5.1 details of any breaches of the PFI Project Documents by the Contractor not addressed by the relevant payment mechanisms of which it is aware;
  - 5.2 details of any grounds to exercise rights or remedies in favour of the Authority under the PFI Project Documents of which it is aware;
  - 5.3 details of any instances of damage to the Site, the School Facilities of which it is aware, together with details of any contact with the Contractor it has in respect of the same.
6. A party providing information pursuant to this Schedule 5 may require payment of its reasonable costs in providing such information where, acting reasonably, it believes it is appropriate to do so given the nature or volume of the information or requests for information, or any other relevant factors.

## Schedule 6

### Catering

- A. The Authority shall procure that the Contractor provides the Catering Service in accordance with Schedule 1, Part 3 - 4.4 (Catering Service) of the PFI Project Agreement.
- B. The Company (acting as the Authority's Representative) will use reasonable endeavours to notify the Contractor before 10 am of each day as to its Meal of the Day for that day, in accordance with Schedule 1, Part 3 of the PFI Project Agreement.
- C. The scheme to be used by the Company to notify the Contractor shall be in accordance with clause 7.5 (Method of Payment and Collection) of Schedule 6 (PFI Payment Mechanism) of the PFI Project Agreement.
- D. The Company will submit a record of the Meal of the Day to the Authority on a weekly basis. This may be done via the Contractors weekly meal order sheet, a copy of which is sent from the Contractor to the Authority for verification of the catering charges); to enable the invoice to be calculated as outlined below.
- E. The Authority will issue the catering invoice to the Company for the relevant Contract Month (month t) for the number of meals ordered by the Company or the number provided by the Contractor (whichever is the greater). The invoice to be calculated as per Schedule 6, paragraph 7 of the PFI Payment Mechanism, minus the Free School Meals element of the Relevant Proportion as detailed in Schedule 2 to this Agreement. The invoice will be payable within thirty (30) days as outlined in paragraph 0 of Schedule 7.
- F. The Company will be responsible for any bad debt incurred for non payment of appropriately charged for meals, including pupil meals not covered under the Free School Meals scheme and any adult meals including staff and visitors.
- G. Meal prices/charges shall be made as follows:
  - a. The Company shall be charged by the Authority for adult meals as follows: the Meal of the Day ("MoD") price as defined in Schedule 6, paragraph 7.2 (The Pricing of School Meals) of the Payment Mechanism, plus VAT.
  - b. The Company will be charged for "paid for" pupil meals as follows: the standard pupil meal price as set by the Authority, subject to Cabinet approval from time to time.

where the Company choose to charge an alternative price to the standard meal price set by the Authority, the Authority will charge the Company the price they choose to charge, or the standard pupil meal price as set by the Authority whichever is the greater; up to the MoD price charged by the Authority to the Contractor.

## **Schedule 7**

### Invoicing Procedure

#### **1. INVOICING OF THE SCHOOL CONTRIBUTION**

- 1.1 The Authority will issue in April of each year an invoice to the Company to cover the School Contribution which will be payable by the Company to the Authority in twelve (12) equal monthly instalments on the Payment Dates.
- 1.2 For part years (expected at the end and the beginning of the Agreement) clause 12.3 shall apply and the invoice will be calculated and pro-rated over the relevant period and again payable in instalments in accordance with the payment instructions as set out within the invoice.

#### **2. INVOICING OF CATERING AND MEAL ORDERS**

- 2.1 The Authority will issue the catering invoice calculated in accordance with Schedule 6 of this Agreement on Month t -1 payable within thirty (30) days of receipt of such catering invoice. To avoid delay in payment to the Contractor under the PFI arrangements for the Catering Services provided, any minor discrepancies in the amounts owed and subsequently paid by the Company for the Catering Services will be discussed and resolved (and when applicable either credited or debited from subsequent catering invoices).

#### **3. CHANGES AND ADDITIONAL SERVICES**

- 3.1 Following receipt of any invoice from the Contractor for (i) damage for which the Company is responsible under this Agreement, or (ii) Changes or additional services etc required or requested by the Company pursuant to clause 26 of this Agreement which are over and above those items covered by the Relevant Proportion, the Authority will as soon as reasonably possible raise a relevant invoice (subject always to there being no double counting), which shall be paid by the Company within thirty (30) days of receipt of such invoice.



Executed as a deed but not delivered )  
until the date hereof by the affixing of the )  
common seal of BARNSELY METROPOLITAN )  
BOROUGH COUNCIL in the presence of: )

Authorised Officer

Executed as a deed by and on behalf of )  
EVERY CHILD MATTERS ACADEMY TRUST )  
acting by: )

Director

In the presence of:

Signature of witness .....

Name (in BLOCK CAPITALS)  
.....

Occupation .....

Address.....  
.....